

major purpose” of the entity is “the nomination or election of a candidate” or candidates, in the jurisdiction. See 424 U.S. at 79, followed in *McConnell*, 540 U.S. at 170 n.64, and *MCFL*, 479 U.S. at 252 n.6, 262; *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503, 505 n.5 (7th Cir. 1998); *Colorado Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1153-54 (10th Cir. 2007) (“CRLC”) (noting that *McConnell* did not change the test (citations omitted)); *NCRL III*, 525 F.3d at 287-90.²⁷

These two tests address whether a *definition* through which government imposes political-committee burdens is constitutional. *Brownsburg*, 137 F.3d at 505 n.5 (holding that *Buckley* limits a political-committee *definition* to entities passing the major-purpose test); *Unity08 v. FEC*, 596 F.3d 861, 867 (D.C. Cir. 2010) (noting that the tests limit a political-committee *definition* (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392, 395-96 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981))); *NCRL III*, 525 F.3d at 288-89 (considering whether a political-committee *definition* has the major-purpose test); *CRLC*, 498 F.3d at 1139 (holding a political-committee *definition* unconstitutional because it lacks the major-purpose test); *id.* at 1154-55 (applying the major-purpose test to a political-committee

²⁷ While *McKee* cited the plaintiff as saying the Supreme Court had not applied the major-purpose test to state law, 723 F. Supp.2d at 264, the court did not acknowledge the rest of the sentence: “yet other courts, including this Court, have.” *Id.*, D.Ct. Doc. 140 at 14 (citing D.Ct. Doc. 115 at 18 (citing, in turn, *Volle v. Webster*, 69 F. Supp.2d 171, 174-77 (D. Me. 1999) (“general registration and disclosure requirements can now apply only to organizations that are under the control of a candidate or whose ‘major purpose’ is the nomination or election of a candidate” (citing, in turn, *Buckley*, 424 U.S. at 78))).

definition);²⁸ see also *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 997-98, 1008-09, 1011-12 (9th Cir. 2010) (“*HLW*”) (considering a political-committee definition, stating incorrectly that the plaintiff also challenged the political-committee disclosure requirements,²⁹ and applying a major-purpose test), *cert. denied*, 562 U.S. ____, 131 S.Ct. ____ (U.S. Feb. 22, 2011).³⁰

Furthermore, government may not cleverly draft or revise its law to impose burdens such as (1) registration and termination requirements, (2) recordkeeping requirements, or (3) extensive reporting requirements³¹ on entities *in a capacity other than as a political committee* when the entities do not pass the proper “under the control of a candidate” or major-purpose test. See *National Right to Work Legal Def. & Educ. Found., Inc. v. Herbert*, 581 F. Supp.2d 1132, 1152-54 (D. Utah 2008)

²⁸ See also *NMYO*, 611 F.3d at 676 (“the issue ... is solely whether NMYO and SWAP may be classified as political committees”).

²⁹ See *HLW*, No. 1:08-cv-00590-JCC, VERIFIED COMPL. FOR DECLARATORY & INJUNCTIVE RELIEF at 10-12 (Count 1) (W.D. Wash. April 16, 2008), available at <http://jamesmadisoncenter.org/Main/WA/Complaint.pdf>.

³⁰ With varying degrees of precision, other circuits have quoted *Buckley* or *MCFL* and recognized the major-purpose test. See, e.g., *FEC v. EMILY's List*, 581 F.3d 1, 16 n.15 (D.C. Cir. 2009); *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 348, 350-51 (4th Cir. 2009) (“*RTAO*”), *cert. granted and judgment vacated*, 559 U.S. ____, 130 S.Ct. 2371 (2010); *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1101 n.16 (9th Cir. 2003) (“*CPLC I*”); *Akins v. FEC*, 146 F.3d 1049, 1050 (D.C. Cir. 1998) (Silberman, J., concurring); *FEC v. Survival Educ. Fund*, 65 F.3d 285, 295 (2d Cir. 1995); *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir. 1982); see also *United States v. National Comm. for Impeachment*, 469 F.2d 1135, 1141-42 (2d Cir. 1972) (pre-dating *Buckley* and *MCFL*).

³¹ *Supra* Part F.

(political-issues committee). Such entities have a First Amendment right to be free of these burdens. See *MCFL*, 479 U.S. at 254-56; *Buckley*, 424 U.S. at 79; *NCRL III*, 525 F.3d at 286; *CRLC*, 498 F.3d at 1153-54; see generally *Citizens United*, 130 S.Ct. at 897-98.³² Government may not abrogate this right through clever drafting or revision. It “cannot foreclose the exercise of constitutional rights by mere labels.” *Button*, 371 U.S. at 429, followed in *Colorado Republican I*, 518 U.S. at 622.

Determining whether an entity is “under the control of a candidate” or candidates for state or local office in Wisconsin is straightforward. See *NMYO*, 611 F.3d at 677 (citing *Buckley*, 424 U.S. at 79); *Unity08*, 596 F.3d at 867; *Machinists Non-Partisan Political League*, 655 F.2d at 394-96; *FEC v. Florida for Kennedy Comm.*, 681 F.2d 1281, 1287 (11th Cir. 1982).

Determining whether an entity passes the major-purpose test is also straightforward. See *CRLC*, 498 F.3d at 1152. The test asks what *the* major purpose of an entity is, not whether something is *a* major purpose. *MCFL*, 479 U.S. at 252 n.6, 262; *Buckley*, 424 U.S. at 79; *NCRL III*, 525 F.3d at 287-89, 302-04. And “major” is the root of “majority,” which means more than half. Thus, an entity can have only one major purpose. See *MCFL*, 479 U.S. at 252 n.6 (referring to “the major purpose” of an entity and “its organizational purpose,” not purposes).

³² A Ninth Circuit panel missed this point and lumped full-fledged political-committee disclosure requirements and other disclosure requirements into one overbreadth analysis. This panel contradicted a previous Ninth Circuit panel. A subsequent Ninth Circuit panel compounded the confusion. *Infra* Part G.

The law provides two methods to determine whether an entity passes the major-purpose test. Either suffices. The first method to determine an entity's major purpose considers how the entity has *articulated* its mission in its organizational documents, *see MCFL*, 479 U.S. at 241-42, 252 n.6, or in public statements, *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996), and the second method considers whether, in *carrying out* its mission, the entity spends the majority of its money on contributions to candidates or on independent expenditures³³ for candidates, *CRLC*, 498 F.3d at 1152, *followed in NMYO*, 611 F.3d at 678; *NCRL III*, 525 F.3d at 289, in the jurisdiction in question.

³³ Meaning express advocacy as defined in *Buckley* and not coordinated with a candidate, the candidate's agents, the candidate's committee, or a party, which is the standard under the Constitution. *See* 424 U.S. at 39-51, 74-81; *McConnell*, 540 U.S. at 219-23; *Brownsburg*, 137 F.3d at 505. The phrase "independent spending" in *CRLC*, 498 F.3d at 1152 (citing/quoting *MCFL*, 479 U.S. at 252 n.6, 262), refers to express advocacy as defined in *Buckley*. *See MCFL*, 479 U.S. at 249.

A word of caution: In assessing independent expenditures, one looks to express advocacy as defined in *Buckley*, 424 U.S. at 44 & n.52, 80, not the "functional equivalent" of express advocacy. Speech that is the "functional equivalent" of express advocacy is speech that passes the appeal-to-vote test, *WRTL II*, 551 U.S. at 469-70, which applied *only* to electioneering communications as defined in FECA, *id.* at 474 n.7, which by definition are not express advocacy.

By definition, express advocacy and electioneering communications as defined in FECA are mutually exclusive. They do not overlap. Indeed, they *cannot* overlap. *Buckley* limits the FECA expenditure and independent-expenditure definitions to express advocacy – with express advocacy being a subset of "expenditure" and "independent expenditure." 424 U.S. at 44 & n.52, 80. And under FECA, neither expenditures nor independent expenditures are electioneering communications. 2 U.S.C. § 434.f.3.B.ii; *see NCRL III*, 525 F.3d at 282 (stating that electioneering communications are "beyond" express advocacy); *see also McConnell*, 540 U.S. at 189 (stating that the electioneering-communication definition is not limited to express advocacy).

Section 1.91 defines entities as organizations, and thereby imposes full-fledged political-committee-like burdens on them, regardless of whether they are under the control of, or have the major purpose of nominating or electing, a candidate or candidates for state or local office in Wisconsin.³⁴

In fact, an entity can be a Wisconsin organization by spending less – far less – than half its money on contributions to or independent expenditures for candidates for state or local office in Wisconsin. An entity, no matter how large its budget, becomes an organization by receiving contributions for, incurring obligations for, or making, disbursements exceeding \$25 in a calendar year. GAB § 1.91.1.h. This is an insubstantial amount. *See Buckley*, 424 U.S. at 79 & n.105

³⁴ For less-restrictive means than defining entities as political committees, see *infra* Part F. Contrary to a district court’s denial of a temporary restraining order, there is nothing “pernicious” here. *National Org. for Marriage v. McKee*, 666 F. Supp.2d 193, 210 n.96 (D. Me. 2009). Although the major-purpose test may allow an entity that is active in many jurisdictions not to be a political committee in any jurisdiction, *see id.*, this follows from the twin principles that (1) each jurisdiction may regulate its own elections and (2) an entity may have only one major purpose. *See supra* Parts C, F. Besides, the fact that it is unconstitutional to define an entity as a political committee does not mean it is unconstitutional to regulate any political speech the entity does. *See infra* Part F. Moreover, the Constitution does not limit such regulation to “one-time reporting.” 666 F. Supp.2d at 208. Reporting may occur during reporting periods when regulable political speech occurs, however many times that is. One difference between such reporting and full-fledged political-committee reporting is that the former occurs when regulable speech occurs, while the latter occurs during all reporting periods. *Compare* 2 U.S.C. § 434.c.1-2, 434.g (2002) (independent-expenditure reports) *and id.* § 434.f.1 (electioneering-communications reports) *with id.* § 434.a.2-4 (political-committee reports); 11 C.F.R. § 109.10.b (2003). Another difference is what government may require reports include. *Compare* 2 U.S.C. § 434.c.1-2, 434.g *and id.* § 434.f.2 *with id.* § 434.a, b, e. And that is just reporting requirements. *See, e.g., id.* §§ 432 (2004), 433 (1980).

(applying the “under the control of a candidate” and major-purpose tests to a political-committee definition with a \$1000 threshold); *NMYO*, 611 F.3d at 678-79 (striking down a \$500 threshold); *CRLC*, 498 F.3d at 1154 (striking down Colorado’s major-purpose test as applied to CRLC’s speech, because \$200 was insubstantial compared to CRLC’s overall budget (quoting and affirming *Colorado Right to Life Committee, Inc. v. Davidson*, 395 F. Supp.2d 1001, 1021 (D. Colo. 2005))); *Volle v. Webster*, 69 F. Supp.2d 171, 174-77 (D. Me. 1999) (striking down a \$50 threshold as applied to the speech of an individual and his business).

Therefore, Wisconsin’s organization definition is unconstitutionally overbroad.³⁵

³⁵ Whether the organization *disclosure requirements* are unconstitutional is another matter.

It is true that *SpeechNow.org v. FEC* – which is confusing, *see infra* Part G – considers political-committee disclosure requirements. 599 F.3d 686, 696-98 (D.C. Cir.) (*en banc*), *cert. denied*, 562 U.S. ____, 131 S.Ct. 553 (2010). However, under current Supreme Court case law, *see MCFL*, 479 U.S. at 262, *quoted in CRLC*, 498 F.3d at 1152, the political-committee definition *is* constitutional as applied to SpeechNow’s speech, because SpeechNow *passes* the major-purpose test: It *has* the major purpose of nominating or electing candidates in the jurisdiction in question. *See SpeechNow*, No. 1:08-cv-00248, COMPL. ¶¶ 7, 47 (D.D.C. Feb. 14, 2008), *available at* http://www.fec.gov/law/litigation/speechnow_complaint.pdf. Thus, *SpeechNow* properly reaches the political-committee disclosure requirements.

McKee misses this point. *See* 723 F. Supp.2d at 263.

A subsequent Tenth Circuit panel correctly considers political-committee disclosure requirements when the plaintiffs challenge *only* political-committee disclosure requirements, not a political-committee definition. *See Sampson v. Buescher*, 625 F.3d 1247, 1253, 1255 (10th Cir. 2010).

If Wisconsin wanted to regulate, for example, spending for political speech by persons it may *not* define as political committees under *Buckley*, 424 U.S. at 74-79, then it could, subject to further inquiry, *see, e.g., Citizens United*, 130 S.Ct. at 915-16 (giving an example of when disclosure is unconstitutional), use the less-restrictive means, *id.* at 915 (citing *MCFL*, 479 U.S. at 262), of requiring burdensome yet non-“onerous” disclosure, *id.* at 898; *WRTL II*, 551 U.S. at 477 n.9 (citing *MCFL*, 479 U.S. at 253-55), of (1) express advocacy as defined in *Buckley*, 424 U.S. at 44 & n.52, 80, *i.e.*, independent expenditures as defined in *Buckley*, *id.* at 39-51, 74-81, *vis-à-vis* state or local office in Wisconsin or (2) electioneering communications as defined in FECA having a clearly identified candidate for state or local office in Wisconsin. *See Citizens United*, 130 S.Ct. at 914-16 (electioneering communications as defined in FECA); *MCFL*, 479 U.S. at 262 (express advocacy (citing 2 U.S.C. § 434.c)); *Buckley*, 424 U.S. at 80-81 (express advocacy).³⁶ Wisconsin does not *have to* do this though. No jurisdiction *has to* regulate absolutely, positively everything that it may regulate. But whatever course Wisconsin chooses, it may impose political-committee burdens *only* on entities it may define as full-fledged political committees – or, here, organizations.

G. Overbreadth: The Organization Disclosure Requirements

Full-fledged political-committee *disclosure requirements* apply only if the *definition* through which the jurisdiction imposes political-committee burdens is

³⁶ Government must base disclosure on the nature of the speech, not the nature of the speaker. *See NCRL III*, 525 F.3d at 290.

constitutional in the first place. So when the definition is unconstitutional – as Wisconsin’s organization definition is – the requirements are unnecessary to consider in concluding that Section 1.91 as whole is unconstitutionally overbroad.³⁷

³⁷ Moreover, government may impose greater disclosure burdens on entities it may define as political committees under *Buckley*, 424 U.S. at 74-79, than it may impose on other entities. *Supra* Part F.

Therefore, it would be incorrect to lump full-fledged political-committee disclosure requirements and other disclosure requirements into one overbreadth analysis. It is possible, for example, for it to be unconstitutional to (1) define an entity as a full-fledged political committee even when it is constitutional to (2) regulate the entity’s speech by less-restrictive means. *See, e.g., Citizens United*, 130 S.Ct. at 897-98, 914-16 (noting the burdens of being a full-fledged political committee, and later upholding disclosure requirements for electioneering communications as defined in FECA by an entity that is *not* a political committee); *MCFL*, 479 U.S. at 254-55, 262 (noting the burdens of being a full-fledged political committee, and later upholding reporting requirements for express advocacy as defined in *Buckley* by an entity that is *not* a political committee); *Buckley*, 424 U.S. at 74-81 (establishing the tests for when government may define entities as full-fledged political committees and later upholding reporting requirements for express advocacy as defined in *Buckley* by persons government may *not* define as political committees).

Not distinguishing (1) from (2) is among a *pre-Citizens United* Ninth Circuit panel’s mistakes in *Alaska Right to Life Committee v. Miles*, 441 F.3d 773, 786-94 (9th Cir.) (“*ARLC*”), *cert. denied*, 549 U.S. 886 (2006). By not following the major-purpose test, *see id.*, *ARLC* contradicts Ninth Circuit precedent that does follow the test, *see CPLC I*, 328 F.3d at 1101 n.16 (quoting *MCFL*, 479 U.S. at 252-53), albeit without “precision[.]” *Supra* Part F.

ARLC even holds full-fledged political-committee disclosure is not “onerous[.]” because Alaska law has no limits on contributions received, has no political-committee spending limits, does not have reporting requirements limiting political committees’ fundraising ability, and does not require “structural changes” in entities. 441 F.3d at 791. However, this contradicts *MCFL*, 479 U.S. at 254-55. *Supra* Part F. And Supreme Court decisions since *ARLC* hold political-committee status is not only “burdensome[.]” *Citizens United*, 130 S.Ct. at 897, but also “onerous[.]” *id.* at 898; *WRTL II*, 551 U.S. at 477 n.9 (citing *MCFL*, 479 U.S. at 253-55), even when it requires “only” – so to speak – (1) registration, including treasurer

designation, (2) recordkeeping, or (3) extensive reporting. See *Citizens United*, 130 S.Ct. at 897-98.

Furthering the *ARLC* confusion *pre-Citizens United*, another Ninth Circuit panel – while rejecting full-fledged political-committee burdens, *California Pro-Life Council v. Randolph*, 507 F.3d 1172, 1187-89 (9th Cir. 2007) (“*CPLC II*”) – says government may impose disclosure requirements “irrespective of the major purpose of an organization[.]” *Id.* at 1180 n.11 (citing *ARLC*, 441 F.3d at 786). This is incomplete and misleading. Government may impose “onerous” political-committee disclosure requirements under particular circumstances; government may impose other disclosure requirements under other particular circumstances. The two analyses differ.

Even if *ARLC* and *CPLC II* were good law before *Citizens United*, they do not survive *Citizens United*, especially in combination with *WRTL II* and *MCFL*.

Although a *post-Citizens United* Ninth Circuit panel does not lump political-committee disclosure requirements and other disclosure requirements into one overbreadth analysis, see *HLW*, 624 F.3d at 1011-12, 1016-18, it incorrectly addresses a political-committee definition and political-committee disclosure requirements together. It also stretches the major-purpose test beyond what the Supreme Court and other circuits have established. See *id.* at 1011-12. It similarly goes beyond what the Supreme Court and other circuits have established in allowing government to regulate speech by entities that government may *not* define as political committees under *Buckley*. Compare *id.* at 1016-18 with *infra* Part F.

The District of Columbia Circuit’s *SpeechNow.org* opinion, 599 F.3d at 697-98, also contradicts *MCFL*, *WRTL II*, and *Citizens United*.

Although *SpeechNow* does not lump full-fledged political-committee disclosure requirements and other disclosure requirements into one overbreadth analysis, *SpeechNow* can still be confusing, because it addresses both kinds of disclosure simultaneously. See *id.* at 696-97. It can also be confusing, because it addresses the political-committee definition *after, not before*, addressing political-committee disclosure requirements. See *id.* at 697-98. These may mislead the reader into either lumping the two types of disclosure into one overbreadth analysis or considering a political-committee definition and political-committee disclosure requirements in the wrong order.

Apart from that, *SpeechNow* in effect upholds the political-committee definition as applied to *SpeechNow*’s speech by saying that defining an entity as a political committee is not that much more burdensome than just requiring reporting of

In fact, Wisconsin law is like state law that the Tenth Circuit has struck down: It unconstitutionally imposes full-fledged political-committee burdens. It has no less-restrictive means. Further consideration is unnecessary to determine that Section 1.91 as whole is unconstitutionally overbroad. See *NMYO*, 611 F.3d at 676-79 (considering only political-committee status and not going further, as the district court had).

Nevertheless, some aspects of the Section 1.91 disclosure requirements are unconstitutionally overbroad even for entities that Wisconsin may define as political committees – or, here, organizations.

First, the requirement to file an oath for independent disbursements, GAB § 1.91.7, is unconstitutional, because the government’s interest does not reflect the burden on the speech under *Davis v. FEC*, 554 U.S. 724, 744 (2008) (citing *Buckley*, 424 U.S. at 68). Although the GAB calls this a “voluntary” oath, GAB 1.42.1-4 (1994), the law requires filing an oath that independent disbursements are independent when the organization desires to make independent disbursements exceeding \$25 in a calendar year. The organization must (1) file the oath with its

independent expenditures properly understood. *Id.* This is incorrect as a matter of statutory law. Compare 2 U.S.C. §§ 432, 433, 434 with *id.* § 434.c, g; see also *SpeechNow*, 599 F.3d at 691-92 (listing political-committee burdens). It is also incorrect as a matter of constitutional law. In this respect, *SpeechNow* – like *ARLC* and *CPLC II* – contradicts *MCFL*, 479 U.S. at 254-55. *Supra* Part F. It also contradicts Supreme Court decisions holding political-committee status is not only “burdensome[.]” *Citizens United*, 130 S.Ct. at 897, but also “onerous[.]” *id.* at 898; *WRTL II*, 551 U.S. at 477 n.9 (citing *MCFL*, 479 U.S. at 253-55), even when it requires “only” (1) registration, including treasurer designation, (2) recordkeeping, or (3) extensive reporting. See *Citizens United*, 130 S.Ct. at 897-98.

registration statement before making any disbursement, (2) refile the oath for each calendar year by January 31, WIS. STAT. § 11.06.7.a, b, which may well be long before an organization does its speech – and is often long before an organization even plans its speech – and then (3) amend “the oath whenever there is a change in the candidate or candidates to whom it applies.” *Id.* § 11.06.7.b. In other words, organizations must guess at the beginning of the year which candidates they will mention in what Wisconsin calls “independent disbursements,” and then continually update their guess whenever their plans change. This oath requirement is especially burdensome, given how quickly and frequently political-speech plans arise and change. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969) (Harlan, J., concurring). The burden is especially great on small organizations. *Cf. WRTL II*, 551 U.S. at 477 n.9 (referring to political-committee burdens on small nonprofit corporations (citing *MCFL*, 479 U.S. at 253-55)).

Second, Section 1.91.8 requires organizations to comply with, *inter alia*, political-committee reporting thresholds in WIS. STAT. § 11.06.1.a, b, d, g, h. The reporting thresholds are either \$20, *id.* § 11.06.1.a, d, g, h, or \$100. *Id.* § 11.06.1.b.

Having to:

- Report contributors’ names and addresses for all contributions exceeding \$20. *Id.* § a.
- Report contributors’ occupations and employers for all contributions exceeding \$100 in a calendar year. *Id.* § b.
- Itemize other income exceeding \$20. *Id.* § d.

- Itemize disbursements exceeding \$20 with the names and addresses of persons receiving disbursements, plus the date and purpose of the disbursements. *Id.* § g, and
- Itemize obligations exceeding \$20 and give the names and addresses of persons or business where WRTL-SPAC incurred the obligations, plus the date and purpose of the obligations, *id.* § h,

is a severe burden, especially on small organizations. See *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1033 (9th Cir. 2009) (referring *pre-Citizens United* to tailoring); *id.* at 1036 (Noonan, J., concurring) (“How do the names of small contributors affect anyone else’s vote? Does any voter exclaim, ‘Hank Jones gave \$76 to this cause. I must be against it!’”). The “value of this financial information to the voters declines drastically as the value of the expenditure or contribution sinks to a negligible level.” *Id.* at 1033 (controlling opinion) (emphasis omitted).

This is especially so since Wisconsin does not index its \$20 or \$100 reporting thresholds for inflation, which means their real value declines every year. See *Randall v. Sorrell*, 548 U.S. 230, 261 (2006).

H. Amending Section 1.91

Wisconsin can amend Section 1.91 to make it constitutional.

On the one hand, if Wisconsin wants to continue to impose full-fledged political-committee-like burdens on organizations, then Wisconsin should use non-vague language and limit its organization definition to entities that are under the

control of, or have the major purpose of nominating or electing, candidates for state or local office in Wisconsin, with "the major purpose" defined as noted above.³⁸

On the other hand, if Wisconsin wants to regulate speech by organizations it may *not* define as political committees – or, here, organizations – then it should use non-vague language, drop the full-fledged political-committee burdens,³⁹ and regulate only the spending for political speech that Supreme Court case law has established Wisconsin may, subject to further inquiry, regulate *via* less restrictive, non-onerous means: (1) Express advocacy as defined in *Buckley*, *i.e.*, independent expenditures as defined in *Buckley*, *vis-à-vis* state or local office in Wisconsin, or (2) electioneering communications as defined in FECA having a clearly identified candidate for state or local office in Wisconsin, *see, e.g.*, 2 U.S.C. § 434.c, g; *id.* § 434.f,⁴⁰ without requiring reports within 24 hours of speech or contracts to engage in speech. *See Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1197 (10th Cir. 2000) (striking down a 24 hour reporting requirement).⁴¹

³⁸ *Supra* Part F.

³⁹ *Supra* Part A.

⁴⁰ *Supra* Part F.

⁴¹ *North Carolina Right to Life Comm. Fund for Indep. Political Expenditures v. Leake* rejects a challenge to a 24 hour reporting requirement by saying *McConnell* upholds one. 524 F.3d 427, 439 (4th Cir.) ("*NCRL-FIPE*") (citing *McConnell*, 540 U.S. at 195-96), *cert. denied*, ___ U.S. ___, 129 S.Ct. 490 (2008). However, the *McConnell* plaintiffs did not challenge 24 hour reporting. While they challenged a law with 24 hour reporting, they challenged it for other reasons. *See* 540 U.S. at 195. Thus, *McConnell* does not apply, and *NCRL-FIPE* is incorrect.

In either event, Wisconsin should drop the Section 1.91.7 requirement to file oaths for independent disbursements, set Section 1.91.8⁴² reporting thresholds at constitutional levels, and automatically adjust them for inflation. Reporting thresholds should not be so low that even the smallest donors run the risk of "threats, harassments, or reprisals if their names were disclosed." *Citizens United*, 130 S.Ct. at 916 (citing *McConnell*, 540 U.S. at 198). Nor should reporting thresholds be so low that even the least expensive political speech cannot be anonymous for those speakers that – unlike WRTL – wish to engage in anonymous speech. *Cf. McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 355 (1995).

Reporting thresholds from law addressed or challenged in previous Supreme Court opinions might provide guidance for what might be constitutional now, when the previous thresholds are adjusted for inflation. *See Randall*, 548 U.S. at 261. For example:

- As for the threshold for defining an entity as a political committee, *Buckley* addresses a law with a \$1000 threshold without addressing the constitutionality of the threshold itself. *See* 424 U.S. at 62, 82-83. Adjusted for inflation since 1976, this threshold is \$3889.44 in 2011.⁴³

- As for entities that it is constitutional for government to define as political committees under *Buckley*, 424 U.S. at 74-79, *Buckley* approves a \$100 reporting

⁴² The constitutional law that applies to Section 1.91.7 and 1.91.8 has implications for Wisconsin law beyond Section 1.91, yet Section 1.91 is what at issue here.

⁴³ *See* http://www.bls.gov/data/inflation_calculator.htm.

threshold for contributions that political committees receive. *Id.* at 82-83. *Buckley* also addresses a law with a \$100 reporting threshold for political-committee spending without addressing the constitutionality of the threshold itself. *See id.* at 82-83, 158. Adjusted for inflation since 1976, these thresholds are \$388.94 in 2011.

- As for independent expenditures properly understood, *see id.* at 39-51, 74-81; *McConnell*, 540 U.S. at 219-23; *Brownsburg*, 137 F.3d at 505,⁴⁴ *Buckley* approves a \$100 reporting threshold. 424 U.S. at 74-76. Again, adjusted for inflation since 1976, this is \$388.94 in 2011.

- As for electioneering communications as defined in FECA, *McConnell* approves an aggregate \$10,000 reporting threshold for spending for such electioneering communications, and a \$1000 reporting threshold for contributions to persons making such electioneering communications. 540 U.S. at 194-202. Adjusted for inflation since 2003, these are \$11,968.64 and \$1,196.86, respectively, in 2011.

WRTL appreciates the opportunity to testify today and remains available to consider providing whatever further assistance the Election and Campaign Reform Committee may feel it needs.

Thank you for your consideration.

⁴⁴ *Supra* Part F.



State of Wisconsin
2011 - 2012 LEGISLATURE



LRB-2254/1

JTK:nwn:rs

2011 ASSEMBLY BILL 196

June 28, 2011 - Introduced by JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES. Referred to Committee on Election and Campaign Reform.

- 1 AN ACT *to amend* 5.05 (1) (f); and *to create* 11.211 of the statutes; relating to:
2 prohibiting the promulgation of certain rules concerning campaign financing
3 by the Government Accountability Board.

Analysis by the Legislative Reference Bureau

Currently, under the campaign finance law, with limited exceptions, an individual who or committee that makes disbursements (expenditures for political purposes) must register with the appropriate filing officer or agency. With limited exceptions, a registrant is required to file regular and special reports containing specified information pertaining to financial activity. The law also regulates the extent to which corporations and cooperatives, including unincorporated cooperative associations, may make disbursements.

Currently, the Government Accountability Board (GAB) may promulgate rules interpreting or implementing specific statutes regulating the conduct of elections or election campaigns or ensuring the proper administration of these statutes. This bill prohibits GAB from promulgating any rule: 1) affecting the authority of a corporation or cooperative, whether or not incorporated, to make any disbursement independently of a candidate who is supported or opposed or any agent or authorized committee of such a candidate; or 2) imposing any registration, reporting, filing, accounting, treasury, or fee payment requirement or any attribution requirement in making communications upon any person, including any organization, apart from the requirements imposed under the campaign finance law.



State of Wisconsin
2011 - 2012 LEGISLATURE



LRB-2253/1
JTK:nwn:rs

2011 SENATE BILL 139

June 30, 2011 - Introduced by JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES. Referred to Committee on Transportation and Elections.

- 1 AN ACT *to amend* 5.05 (1) (f); and *to create* 11.211 of the statutes; **relating to:**
2 prohibiting the promulgation of certain rules concerning campaign financing
3 by the Government Accountability Board.

Analysis by the Legislative Reference Bureau

Currently, under the campaign finance law, with limited exceptions, an individual who or committee that makes disbursements (expenditures for political purposes) must register with the appropriate filing officer or agency. With limited exceptions, a registrant is required to file regular and special reports containing specified information pertaining to financial activity. The law also regulates the extent to which corporations and cooperatives, including unincorporated cooperative associations, may make disbursements.

Currently, the Government Accountability Board (GAB) may promulgate rules interpreting or implementing specific statutes regulating the conduct of elections or election campaigns or ensuring the proper administration of these statutes. This bill prohibits GAB from promulgating any rule: 1) affecting the authority of a corporation or cooperative, whether or not incorporated, to make any disbursement independently of a candidate who is supported or opposed or any agent or authorized committee of such a candidate; or 2) imposing any registration, reporting, filing, accounting, treasury, or fee payment requirement or any attribution requirement in making communications upon any person, including any organization, apart from the requirements imposed under the campaign finance law.



JOINT COMMITTEE FOR THE REVIEW OF ADMINISTRATIVE RULES

COMMITTEE CO-CHAIRS: SENATOR LEAH VUKMIR AND REPRESENTATIVE JIM OTT

Clearinghouse Rule 10-087

**Report to the Legislature
Clearinghouse Rule 10-087
The Joint Committee for Review of Administrative Rules**
Produced pursuant to 227.26(2)(g), Stats.

Clearinghouse Rule 10-087, promulgated by the Government Accountability Board (GAB), creates rules for organizations making independent disbursements.

Description of Problem

At the request of Representative Jim Ott, the Joint Committee for Review of Administrative Rules (JCRAR) held a public hearing on Clearinghouse 10-087 relating to independent disbursements on April 27, 2011. On January 21, 2010, the US Supreme Court ruled in *Citizens United v. FEC* that organizations including corporations were allowed to engage in independent expenditures, but allowed states to have disclosure and disclaimer requirements. The GAB prepared Clearinghouse Rule 10-087 to address the implications of the Citizens United court case.

Arguments in Favor of Suspension

- *There are two issues that are being dealt with by this rule. The first is placing proper registration requirements on corporations which were not questioned during the public hearing or executive session. The other is the expansion of the term organization to include any individual. Under this rule, any person spending more than \$25 for a political purpose would have to register with the GAB at a cost of \$100. This requirement would have grave first amendment ramifications.*
- *A person that makes a handful of buttons or a couple signs should not be treated the same as a political action committee spending millions of dollars to sway an election.*
- *The Citizens United case did not authorize the government to place registration burdens on all individuals as the GAB rule attempts.*
- *Questions were raised as to the authority of the GAB to issue this rule without an action of the legislature.*

Arguments Against Suspension

- *Under the Citizens United case, the state is authorized to regulate independent expenditures for corporations and that is what this rule is trying to accomplish. Suspending the rule would restrict the GAB's ability to register corporate election activities.*
- *Without the promulgation of this rule, Wisconsin statutes would require that any corporation wishing to make an independent disbursement would have to first establish a committee which is in direct conflict with the Citizens United case.*
- *The general public has a right to know of anyone that is making an independent disbursement of \$25 or more.*

Action by Joint Committee for Review of Administrative Rules

On June 2, 2011, the Joint Committee for Review of Administrative Rules held an executive session on Clearinghouse Rule 10-087. The committee passed the following motion on a 6-4 vote (YES: Vukmir, Ott, Leibham, Grothman, LeMahieu, Meyer; NO: Taylor, Risser, Hebl, Kessler):

"That the Joint Committee for Review of Administrative Rules objects to Clearinghouse Rule 10-087, pursuant to s. 227.19 (5) (d), Stats., on the grounds that the proposed rule imposes an undue hardship as stated in s. 227.19 (4) (d) 6., Stats."

On June 23, 2011, the Joint Committee for Review of Administrative Rules voted 6-4 (YES: Vukmir, Ott, Leibham, Grothman, LeMahieu, Meyer; NO: Hebl, Taylor, Risser, Kessler) to introduce LRB 2253 and LRB 2254, which limits the GAB's ability to regulate registration, reporting, filing or accounting activities of a corporation or individual that is independent of a candidate. The bills were introduced as Senate Bill 139 and Assembly Bill 196.

Passage of one of the bills in support of the JCRAR suspension would remove the GAB's ability to regulate independent expenditures of corporations and individuals.

State of Wisconsin\Government Accountability Board



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JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel

June 1, 2011

Members, Joint Committee for the Review
of Administrative Rules

State Capitol
Madison, WI
By Hand

Dear Senators and Representatives:

I am writing to address what I perceive as some misconceptions about proposed GAB 1.91 which the Board is seeking to promulgate as a permanent rule (Clearinghouse Rule 10-087). By long-standing statute, corporations have been prohibited from making political contributions or independent expenditures in campaigns. In the *Citizens United* case, the United States Supreme Court ruled that corporations could not be prohibited from making independent expenditures but could be subject to disclosure requirements.

Under current Wisconsin statutes, a corporation making an independent expenditure is subject, by operation of law, to all the registration and reporting requirements that the statutes impose on all political committees. This is because a corporation making an independent expenditure meets the definition of such a committee. As Attorney General Van Hollen has said:

"Committees" or "political committees" are defined to include "any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a 'committee' does not include a political 'group ...'" Wis. Stat. § 11.01(4). Absent an indication of contrary legislative intent, the word "person," as used in Wisconsin law, "includes all partnerships, associations and bodies politic or corporate." Wis. Stat. § 990.01(26). A corporation is, therefore, a "person" within the meaning of Wis. Stat. § 11.12(1)(a). Because a corporation is a person by virtue of Wis. Stat. § 990.01(26), it also, therefore, meets the statutory definition of a committee. Thus, it is my opinion that Wis. Stat. § 11.12(1)(a) applies to corporations.

* * *

The registration requirements in Wis. Stat. § 11.05(1) expressly apply, among other things, to "every committee other than a personal campaign committee which ... makes disbursements in a calendar year in an aggregate amount in excess of \$25" Other provisions in Wis. Stat. ch. 11 provide how registration is to occur and what must be reported. Likewise, the filing requirements in Wis. Stat. § 11.06(7) expressly apply, among other things, to "[e]very committee, other than a personal campaign committee, which ... desires to make disbursements during any calendar year, which are to be used to advocate the election or defeat of any clearly

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identified candidate or candidates in any election" Because, as already discussed, a corporation is within the statutory definition of a committee, it follows that, like other committees, corporations may register and file under Wis. Stat. §§ 11.05 and 11.06(7)

OAG-05-10.

The purpose of GAB 1.91 is basically to exempt corporations from reporting requirements that appear overbroad in the case of corporations. The rule does not impose any requirement that the statutes do not already impose. The rule requires a corporation only to disclose transfers from its corporate treasury and contributions to the corporation made for a political purpose that it uses for independent expenditures. Without the rule, a corporation would have to disclose all the sources of its income including its customers (if it is a for-profit corporation) and its paid membership list (if it is a not-for-profit). It requires establishment of a separate checking account to make clear which corporate funds are being used for a political purpose so that, if an audit is required, the GAB will not have to audit the entire books of a corporation. For these reasons, we respectfully ask that the Committee endorse GAB 1.91.

Sincerely,

Kevin J. Kennedy
Director and General Counsel

State of Wisconsin\Government Accountability Board

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JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel



July 12, 2011

Members, Assembly Committee on Elections and Campaign Finance Reform
State Capitol
Madison, WI
By Hand

Dear Representatives:

I am writing to address 2011 Assembly Bill 196 that has been referred to your committee. This bill was introduced by the Joint Committee on the Review of Administrative Rules in response to proposed GAB 1.91 (Clearinghouse Rule 10-087). I believe there are a number of misconceptions about the intent and effect of that rule.

Assembly Bill 196 would restrict the Government Accountability Board (G.A.B.) from promulgating any rule: 1) affecting the authority of a corporation or cooperative, whether or not incorporated, to make any disbursement independently of a candidate who is supported or opposed or any agent or authorized committee of such a candidate; or 2) imposing any registration, reporting, filing, accounting, treasury, or fee payment requirement or any attribution requirement in making communications upon any person, including any organization, apart from the requirements imposed under the campaign finance law. The proposed rule did neither.

By long-standing statute, corporations have been prohibited from making political contributions or independent expenditures in campaigns. In the *Citizens United* case, the United States Supreme Court ruled that corporations could not be prohibited from making independent expenditures but could be subject to disclosure requirements. The rule does not affect this new ability in the least. The Court upheld imposing reporting requirements on corporations making independent expenditures in the same case.

But, under current Wisconsin statutes, a corporation making an independent expenditure is subject, by operation of law, to all the registration and reporting requirements that the statutes impose on all political committees. This is because a corporation making an independent expenditure meets the definition of such a committee. As Attorney General Van Hollen advised in a formal opinion to the G.A.B.:

"Committees" or "political committees" are defined to include "any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a 'committee' does not include a political 'group ...'" Wis. Stat. § 11.01(4). Absent an indication of contrary legislative intent, the word "person," as used in Wisconsin law, "includes all partnerships, associations and bodies politic or corporate." Wis. Stat. §

990.01(26). A corporation is, therefore, a "person" within the meaning of Wis. Stat. § 11.12(1)(a). Because a corporation is a person by virtue of Wis. Stat. § 990.01(26), it also, therefore, meets the statutory definition of a committee. Thus, it is my opinion that Wis. Stat. § 11.12(1)(a) applies to corporations.

* * *

The registration requirements in Wis. Stat. § 11.05(1) expressly apply, among other things, to "every committee other than a personal campaign committee which ... makes disbursements in a calendar year in an aggregate amount in excess of \$25" Other provisions in Wis. Stat. ch. 11 provide how registration is to occur and what must be reported. Likewise, the filing requirements in Wis. Stat. § 11.06(7) expressly apply, among other things, to "[e]very committee, other than a personal campaign committee, which ... desires to make disbursements during any calendar year, which are to be used to advocate the election or defeat of any clearly identified candidate or candidates in any election" Because, as already discussed, a corporation is within the statutory definition of a committee, it follows that, like other committees, corporations may register and file under Wis. Stat. §§ 11.05 and 11.06(7).

OAG-05-10.

The proposed rule does not impose any reporting requirements not imposed by statute. To the contrary, the purpose of GAB 1.91 is basically to *exempt* corporations from reporting requirements that appear overbroad in the case of corporations. The rule does not impose any requirement that the statutes do not already impose. The rule requires a corporation only to disclose transfers from its corporate treasury and contributions to the corporation made for a political purpose that it uses for independent expenditures, along with reporting the actual independent expenditures themselves. Absent the proposed rule, and based on the Attorney General's opinion, the statutes would require a corporation to disclose all the sources of its income including its customers (if it is a for-profit corporation) and its paid membership list (if it is a not-for-profit). The rule only requires establishment of a separate checking account to make clear which corporate funds are being used for a political purpose so that, if an audit is required, the GAB will not have to audit the entire books of a corporation.

For these reasons, we respectfully ask that the Committee examine more closely the need to recommend passage of Assembly Bill 196 and its real effect on the proposed rule. We encourage the Committee to consider modifying the legislation to track proposed GAB 1.91. This would exempt corporations from onerous reporting requirements under current law, while promoting the disclosure championed in *Citizens United* and current Wisconsin statutes.

Sincerely,

Kevin J. Kennedy
Director and General Counsel



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

HAND DEL

EXHIBIT
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GOVERNMENT
ACCOUNTABILITY BOARD

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J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

August 9, 2010

OAG-05-10

Mr. Kevin J. Kennedy
Director and General Counsel
Government Accountability Board
212 East Washington Avenue, 3rd Fl.
Madison, WI 53703

Dear Mr. Kennedy:

Questions Presented

¶1. In light of the recent United States Supreme Court decision in *Citizens United v. FEC*, ___ U.S. ___, 130 S. Ct. 876 (2010), and on behalf of the Government Accountability Board, you have requested my opinion concerning the enforceability of Wis. Stat. ch. 11 generally, and the constitutionality of Wis. Stat. § 11.38(1)(a)1., specifically. In *Citizens United*, the United States Supreme Court invalidated a federal ban on corporate independent expenditures under the First Amendment to the United States Constitution.

Short Answer

¶2. Having carefully reviewed the *Citizens United* decision and having compared the federal statute at issue in that case with Wis. Stat. § 11.38(1)(a)1., it is my opinion that the reasoning and conclusion of *Citizens United* are clearly applicable and that any ban on corporate independent expenditures under Wisconsin law violates the guarantees of freedom of speech and association under the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment. The *Citizens United* decision, however, does not appear to have any direct and immediate impact on the validity of those portions of Wis. Stat. § 11.38 which do not involve corporate independent expenditures. In addition, I conclude that no other statutory provision bars corporate independent expenditures because corporations are not prevented by statute from registering and reporting information required by Wis. Stat. ch. 11. Finally, I conclude *Citizens United* does not directly invalidate Wisconsin's registration, reporting, and disclaimer requirements.

The Role Of Attorney General Opinions In Addressing Constitutional Issues

¶3. In 65 Op. Att'y Gen. 145 (1976), this office was asked to determine the extent to which provisions of Wis. Stat. ch. 11 had been invalidated by *Buckley v. Valeo*, 424 U.S. 1 (1976), in which the U.S. Supreme Court had held that certain provisions of the Federal Election

Campaign Act were unconstitutional. My predecessor concluded that, although most of Wis. Stat. ch. 11 was unaffected, some portions of that chapter—in particular, the limits on candidate expenditures—were unconstitutional under the *Buckley* decision, while other provisions required a narrow interpretation in order to avoid unconstitutionality. 65 Op. Att’y Gen. at 146.

¶4. In issuing that 1976 opinion, this office considered the alternative of awaiting (or even commencing) court litigation to specifically test the constitutionality of the various provisions in Wis. Stat. ch. 11 that had been thrown into doubt by *Buckley*. My predecessor rejected that option as unduly time-consuming, costly, and burdensome—both for persons subject to the state laws in question and for those charged with enforcing those laws. *Id.* at 146-47. I agree with my predecessor that where, as here, a decision of the U.S. Supreme Court directly impacts the validity of a state law, an opinion from this office on the scope of that impact is appropriate. *See also* 67 Op. Att’y Gen. 211 (1978) (concluding Wis. Stat. § 11.38 ban on corporate spending on referendum questions is unconstitutional in light of *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)); OAG 4-07 (concluding Wis. Stat. § 118.51(7)(a) prohibition on school transfers that would increase racial imbalance is unconstitutional in light of *Parents Inv. in Comm. Sch. v. Seattle School*, 551 U.S. 701 (2007)).

¶5. In addressing the constitutional validity of the state campaign financing law in light of *Citizens United*, I apply the standard used in my predecessor’s prior opinion, which focused on whether “the reasoning and the conclusions reached” in the Supreme Court decision “are clearly applicable” to state law. 67 Op. Att’y Gen. at 214. This standard is demanding and narrow. In addition to its holding, *Citizens United* provides direction on, but ultimately leaves unanswered, significant questions regarding the appropriate scope of acceptable governmental regulation, through campaign financing regulations, of the exercise of fundamental First Amendment freedoms. It is beyond the scope of this opinion to answer each of these unanswered questions as applied to Wisconsin law. That *Citizens United* may not directly apply to portions of Wisconsin’s campaign financing law is not to say that they are free of constitutional doubt. Regulations in this area, by their nature, affect First Amendment interests. *See Buckley*, 424 U.S. at 23 (“[C]ontribution and expenditure limitations both implicate fundamental First Amendment interests”). In a free society, these interests should not be disregarded in the lawmaking and regulatory process.

The Impact of *Citizens United* on Wis. Stat. § 11.38

¶6. The *Citizens United* case involved a non-profit corporation that had produced and sought to distribute a 90-minute film about then-Senator Hillary Clinton at a time when she was a candidate in the Democratic Party’s 2008 Presidential primary elections. *Citizens United*, 130 S. Ct. at 887. A question arose as to whether the corporation’s plan to distribute the film through a video-on-demand system was prohibited by 2 U.S.C. § 441b which, among other things, made it unlawful for any corporation to make expenditures: (1) for communications expressly advocating the election or defeat of a candidate for federal office; or (2) for “electioneering communications,” defined as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a

primary or 60 days of a general election.” *Citizens United*, 130 S. Ct. at 887 (quoting 2 U.S.C. § 434(f)(3)(A)). The corporation sought declaratory and injunctive relief against the Federal Election Commission on that question. *Id.* at 888.

¶7. If the film was not “express advocacy or its functional equivalent,” decisions prior to *Citizens United* held that 2 U.S.C. § 441b’s prohibitions on corporate speech could not be constitutionally applied. *Federal Elections Com’n v. Wisconsin Right to Life*, 551 U.S. 449, 481 (2007) (Opinion of Roberts, C.J.).¹ The *Citizens United* Court determined that the film was the functional equivalent of express advocacy and that the case, therefore, could not be resolved without examining the constitutionality of the prohibitions on corporate expenditures contained in 2 U.S.C. § 441b. *Citizens United*, 130 S. Ct. at 890-92.

¶8. The United States Supreme Court determined that the federal prohibition on corporate independent expenditures was a ban on core political speech protected by the First Amendment and, as such, subject to strict constitutional scrutiny. *Id.* at 898. The Court then considered and rejected each of the various governmental interests that had been offered in support of the ban, concluding that no sufficient interest justified the prohibition of political speech on the basis of the speaker’s corporate identity. *Id.* at 913. Accordingly the Court held that the restrictions on corporate independent expenditures in 2 U.S.C. § 441b were invalid and could not be applied to the film in question. *Citizens United*, 130 S. Ct. at 913.

¶9. You have asked what impact the *Citizens United* holding has on the validity of Wis. Stat. § 11.38(1)(a)1. which provides:

No foreign or domestic corporation, or association organized under ch. 185 or 193, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

¶10. That provision, on its face, sets forth a general prohibition against any independent “disbursement” by a foreign corporation, a domestic corporation (normally organized as a business corporation under Wis. Stat. ch. 180 or as a nonstock corporation under Wis. Stat. ch. 181), or an association organized as a cooperative under Wis. Stat. ch. 185 or 193. The term “disbursement” in turn, has been given a broad statutory definition that includes:

A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value; except a loan of money by a commercial lending institution made by the institution in accordance with applicable laws and regulations in the

¹In *Wisconsin Right to Life*, it was undisputed that a corporation’s advertisements, which clearly identified a candidate and were targeted to the relevant electorate during the pertinent time period, were within the scope of a federal statutory ban on certain electioneering communications. *Wisconsin Right to Life*, 551 U.S. at 464. The controlling opinion of the Court held that the First Amendment did not allow the ads to be banned because the ads were not “express advocacy” or its functional equivalent and the government had not identified any interest sufficiently compelling to justify burdening that speech. *Wisconsin Right to Life*, 551 U.S. at 481.

ordinary course of business, made for political purposes. In this subdivision, "anything of value" means a thing of merchantable value.

Wis. Stat. § 11.01(7)(a)1. In addition, the phrase "for political purposes," is statutorily defined, in part, as follows:

An act is for "political purposes" when it is done for the purpose of influencing the election or nomination for election of any individual to state or local office, for the purpose of influencing the recall from or retention in office of an individual holding a state or local office, for the purpose of payment of expenses incurred as a result of a recount at an election, or for the purpose of influencing a particular vote at a referendum.

Wis. Stat. § 11.01(16).

¶11. Under the above definitions, it is clear that Wis. Stat. § 11.38(1)(a)1., prohibits, among other things, any monetary expenditure by a corporation that is made for the purpose of influencing the election or nomination of a candidate for state or local office.

¶12. Wisconsin's prohibition on corporate expenditures for political purposes thus appears to be closely analogous, in legally material respects, to the federal prohibition on corporate independent expenditures that was invalidated in *Citizens United*. First, the two provisions are substantively similar in the types of speech to which they apply. The Wisconsin law prohibits corporate expenditures for the purpose of influencing the election or nomination of a political candidate, while the federal law prohibited corporate expenditures for communications expressly advocating the election or defeat of a political candidate or for certain communications that refer to a clearly identified candidate and are made within specified time periods.² Any differences in the substantive scope of the two prohibitions are not of a sort that would shield the Wisconsin law from the impact of *Citizens United*.

¶13. Second, the Wisconsin and federal provisions both share the particular feature that was found to be constitutionally objectionable in *Citizens United*. The *Citizens United* Court expressly and strongly reaffirmed its holding in many earlier cases that corporate speech is protected by the First Amendment. *Citizens United*, 130 S. Ct. at 899-900. The Court derived that holding from the general principle that the First Amendment prohibits "restrictions distinguishing among different speakers, allowing speech by some but not others." *Id.* at 898. The Court was clear that government may not take the right to speak away from some speakers and give it to others, thereby depriving the public of the opportunity to determine for itself which speakers and which speech are worthy of consideration. *Id.* at 899. This principle, the Court reasoned, applies not only to individual speakers, but also to associations of individuals, including corporations. *Id.* at 899-900.

²This office has also in the past found the prohibition on corporate disbursements under Wis. Stat. § 11.38 to be similar to the prohibition on corporate expenditures under 18 U.S.C. § 610 (which was the predecessor version of 2 U.S.C. § 441b). See 65 Op. Att'y Gen. 10, 12 n.5 and 13 (1976); 65 Op. Att'y Gen. at 158.

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¶14. From these principles, the Court reached the broad conclusion that "the Government may not suppress political speech on the basis of the speaker's corporate identity." *Id.* at 913. What the Supreme Court found to be constitutionally objectionable in 2 U.S.C. § 441b was the fact that it purported to prohibit political speech by certain speakers based on their corporate identity. Applying the Court's reasoning here, it is clear that Wis. Stat. § 11.38(1)(a)1., similarly prohibits political speech based on the corporate identity of the speaker. The Wisconsin prohibition is thus squarely within the scope of the holding in *Citizens United*.

¶15. This conclusion is consistent with the previous opinion of this office in 67 Op. Att'y Gen. 211. At that time, Wis. Stat. § 11.38(1)(a)1., included a prohibition on corporate spending in referendum elections. My predecessor found that prohibition to be unconstitutional under *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), in which the U.S. Supreme Court had held that a Massachusetts law limiting corporate expenditures aimed at influencing referendum votes violated the First and Fourteenth Amendments to the United States Constitution. In reaching that conclusion, my predecessor found that Wis. Stat. § 11.38 was similar to the Massachusetts law at issue in *Bellotti* which, among other things, broadly prohibited corporations from making expenditures for the purpose of promoting or preventing the election of a candidate or influencing the vote on a question submitted to the electorate. 67 Op. Att'y Gen. at 212-13. Accordingly, my predecessor concluded that the reasoning and conclusions in *Bellotti* with regard to the Massachusetts prohibition were "clearly applicable" to the comparable prohibition in Wis. Stat. § 11.38(1)(a)1.

¶16. In *Citizens United*, the United States Supreme Court extended the reasoning and conclusions of *Bellotti* to broadly invalidate prohibitions on any independent political expenditures by corporations. *See, e.g., Citizens United*, 130 S. Ct. at 898-900, 902-03, 913. It follows, under the same logic that this office applied in 67 Op. Att'y Gen. 211, that the reasoning and conclusions in *Citizens United* are likewise clearly applicable to the general prohibition on corporate independent expenditures in Wis. Stat. § 11.38(1)(a)1.

¶17. It does not follow, however, that *Citizens United* has invalidated Wis. Stat. § 11.38(1)(a)1., in its entirety. On the contrary, the federal law at issue in *Citizens United*, like the state law at issue here, included a ban on corporate political *contributions*, in addition to the ban on corporate political *expenditures*. *See* 2 U.S.C. § 441b(a). The Supreme Court, however, did not strike down, or even question, the ban to the extent it applied to direct contributions. Rather, the Court emphasized that the *Citizens United* case was about expenditures, not about contributions, and made it clear that it was not disturbing the principle, recognized in *Buckley*, that political expenditures receive greater protection under the First Amendment than do political contributions. *See Citizens United*, 130 S. Ct. at 908-10. Ultimately, the Court invalidated the prohibition on corporate independent expenditures without affecting other aspects of 2 U.S.C. § 441b. *Citizens United* thus provides no direct or immediate basis for questioning the validity of any part of Wis. Stat. § 11.38(1)(a)1., other than the corporate expenditure prohibition.

¶18. Principles of severability support the same conclusion. Under Wisconsin law, statutory provisions are presumed to be severable and, if a particular provision is found to be

invalid, "such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application." Wis. Stat. § 990.001(11). In applying that mandate, the Wisconsin Supreme Court has held that an invalid provision must be severed unless doing so "would produce a result inconsistent with the manifest intent of the legislature." *Burlington Northern v. Superior*, 131 Wis. 2d 564, 580, 388 N.W.2d 916 (1986) (quoting Wis. Stat. § 990.001). This office has, in the past, taken the position that the legislative purpose of the contribution restrictions in Wis. Stat. ch. 11 "is largely capable of being achieved by the contribution limits alone, without concurrent expenditure limits." 65 Op. Att'y Gen. 237, 241, (1976). I find no reason to depart from that view. Accordingly, it is my opinion that it would be consistent with legislative intent to invalidate Wis. Stat. § 11.38(1)(a)1. only to the extent it prohibits corporate political expenditures, without affecting the contribution restrictions also contained in that provision. Any prohibition on corporate independent expenditures is thus severable from the remainder of Wis. Stat. § 11.38(1)(a)1.

¶19. Your letter of inquiry suggests that the corporate expenditure prohibition in Wis. Stat. § 11.38(1)(a)1., can be severed from the remainder of that provision by the simple expedient of interpreting and applying the provision as if the terms "or disbursement" and "independently" had been stricken from it. I respectfully disagree with that suggestion. The practical impact of Wis. Stat. § 11.38(1)(a)1., is determined not only by the specific words of that provision, but also by the way in which those words interact with other, related statutory provisions.

¶20. For example, the definition of "contribution" in Wis. Stat. § 11.01(6) includes a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of influencing the election or nomination of a political candidate, without reference to the identity of the recipient of the gift, subscription, loan, advance, or deposit of money or thing of value. Under the federal provisions at issue in *Citizens United*, however, an "expenditure" includes a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value made for the purpose of influencing an election. See 2 U.S.C. §§ 431(9)(A)(i) and 441b(2). Under these overlapping state and federal definitions, it is possible that a corporation could make a gift, loan, advance or deposit of money or some other thing of value that might be considered both a "contribution," within the meaning of Wis. Stat. § 11.01(6), and an "expenditure," within the meaning of 2 U.S.C. §§ 431(9)(A)(i) and 441b(2).

¶21. The significance of this overlap between Wisconsin's definition of "contribution" and federal law's definition of "expenditure" is more than statutory. It is of constitutional significance. As most recently reiterated in the *Citizens United* decision, *Buckley* and its progeny make clear that expenditures are entitled to the highest degree of constitutional protection. *Citizens United*, 130 S. Ct. at 908-10. This is because "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. In contrast, *Buckley* held that contributions deserve a somewhat lower degree of constitutional protection because "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20 (emphasis added). In other words, the

constitutional difference between a transfer of value that is an expenditure and a transfer of value that is a contribution is determined by the identity of the recipient of that transfer.

¶22. Because Wis. Stat. § 11.01(6) defines “contribution” without reference to the identity of the recipient, that definition does not reflect the constitutional distinction between a contribution and an expenditure. Put differently, some “contributions” as defined in Wisconsin law could also be “expenditures” within the meaning of *Buckley* and *Citizens United* and, as such, are entitled to a higher degree of constitutional protection than *Buckley* and progeny afford to “contributions” made to a candidate or a political committee.³

¶23. Therefore, even if the terms “or disbursement” and “independently” were stricken from Wis. Stat. § 11.38(1)(a)1., as you suggest, the remaining prohibition on corporate “contributions”—as that term is defined in Wis. Stat. § 11.01(6)—still could apply to some corporate actions that would be constitutionally protected “expenditures” under *Citizens United*. The impact of *Citizens United* on Wis. Stat. § 11.38(1)(a)1., thus cannot be fully captured simply by striking certain words or phrases from that provision.⁴

¶24. The constitutionality of a restriction on an “expenditure” or a “contribution” thus depends on the nature of the conduct restricted, not on the particular statutory language used to describe that conduct. Accordingly, the United States Supreme Court, in *Citizens United*, invalidated the restrictions on corporate independent expenditures contained in 2 U.S.C. § 441b without specifying any particular words or phrases to be excised from that statute. See *Citizens United*, 130 S. Ct. at 913. Here, similarly, I conclude that, under the reasoning of *Citizens United*, the prohibition on corporate independent expenditures contained in Wis. Stat.

³Precision in the use of terminology is important with respect to the term “political committee” as well. In *Buckley*, political committees were discussed with reference to the permissibility of limits on their direct contributions to candidates. 424 U.S. at 35. As underscored in *Citizens United*, such direct contributions to a candidate by a political committee are subject to a lesser degree of constitutional scrutiny than would be applied to other political expenditures by the committee. 130 S. Ct. at 909 (distinguishing contribution cases from expenditure cases, stating that *Federal Election Com’n v. Nat. Right to Work Comm.*, 459 U.S. 197 (1982) “decided no more than that a restriction on a corporation’s ability to solicit funds for its segregated PAC, which made direct contributions to candidates, did not violate the First Amendment. *NRWC* thus involved contribution limits, which, unlike limits on independent expenditures, have been an accepted means to prevent *quid pro quo* corruption.”)(internal citations omitted).

⁴Unlike the statutory definition of “contribution” in Wis. Stat. § 11.01(6), Wis. Admin. Code § GAB 1.28(1)(c) (2010) defines “contributions for political purposes” in terms of the identity of the recipient. This regulatory definition, however, does not avoid the potential constitutional difficulty discussed above because “contributions for political purposes” are not limited to direct contributions to candidates and their committees. For example, a contribution to an individual who does not contribute to candidates but who engages in independent political speech would qualify under the rule’s definition of “contributions for political purposes.” See Wis. Admin. Code § GAB 1.28(1)(c). Such a contribution could be an “expenditure” within the meaning of *Buckley* and *Citizens United*, while also falling within the definition of “contributions for political purposes” in Wis. Admin. Code § GAB 1.28(1)(c).

§ 11.38(1)(a)1., is invalid, without need to interpret that provision as if any particular words or phrases had been stricken from it.

¶25. Finally, I note that Wis. Stat. § 11.38(1)(b) provides that “[n]o political party, committee, group, candidate or individual may accept any contribution or disbursement made to or on behalf of such individual or entity which is prohibited by this section.” For the reasons discussed above, the prohibition contained in Wis. Stat. § 11.38(1)(a) on corporate political expenditures—as that concept is discussed in *Citizens United* and in the present opinion—is constitutionally invalid. The prohibition contained in Wis. Stat. § 11.38(1)(b) on the acceptance of such corporate independent expenditures is thus similarly invalid. As previously noted, however, *Citizens United* did not address the constitutionality of statutory prohibitions on corporate contributions, as distinguished from corporate expenditures. Accordingly, nothing in *Citizens United* precludes Wis. Stat. § 11.38(1)(a) and (b) from continuing to be enforced with respect to both making and accepting of corporate political “contributions”—not as the term is defined in Wis. Stat. § 11.01(6), but as it is understood in the sense that the Supreme Court used when it approved contribution limits in *Buckley*. See 424 U.S. at 20-22; see also *Citizens United*, 130 S.Ct. at 908-10 (distinguishing precedent upholding limits on contributions from precedents finding limits on expenditures unconstitutional).⁵

The Impact of *Citizens United* on Wis. Stat. § 11.12(1)(a)

¶26. While your inquiry is principally directed at the constitutionality of Wis. Stat. § 11.38, your letter also seeks guidance on the implications of *Citizens United* on the constitutional enforcement of Wis. Stat. ch. 11.

¶27. The fatal feature of the federal campaign finance law challenged in *Citizens United* is that it prohibited corporations and unions from making independent expenditures from their general treasuries. Notably, however, it is not the only statutory subsection that potentially prohibits expenditures protected by the First Amendment.

¶28. Wisconsin Stat. § 11.12(1)(a) provides:

No contribution may be made or received and no disbursement may be made or obligation incurred by a person or committee, except within the amount authorized under s. 11.05 (1) and (2), in support of or in opposition to any specific candidate or candidates in an election, other than through the campaign treasurer of the candidate or the candidate's opponent, or by or through an individual or committee registered under s. 11.05 and filing a statement under s. 11.06 (7).

⁵In 65 Op. Atty. Gen. 10 (1976) and 65 Op. Att’y Gen. 145, my predecessor issued opinions construing the scope of permissible prohibitions on corporate contributions and disbursements under Wis. Stat. § 11.38. These opinions were modified by 67 Op. Att’y Gen. at 214. *Citizens United* supersedes any contrary statements in earlier opinions of this office, and those opinions are further modified to the extent they are inconsistent with this opinion.

¶29. Among other things, this subsection bans a corporation from engaging in independent expenditures unless those expenditures are by or through a registered committee who has filed the appropriate statement. *Citizens United* makes clear these expenditures may come from a corporation's general treasury. 130 S. Ct. at 913. Thus, Wisconsin statutes must provide a mechanism by which a corporation may register under Wis. Stat. § 11.05 and file a statement under Wis. Stat. § 11.06(7) or the registration and filing requirements would be, for all practical purposes, a ban. In that case, Wis. Stat. § 11.12(1)(a) could not be constitutionally applied because application would ban First Amendment activities. However, such a mechanism for corporate registration and filing exists.

¶30. "Committees" or "political committees" are defined to include "any person other than an individual and any combination of 2 or more persons, permanent or temporary, which makes or accepts contributions or makes disbursements, whether or not engaged in activities which are exclusively political, except that a 'committee' does not include a political 'group . . .'" Wis. Stat. § 11.01(4). Absent an indication of contrary legislative intent, the word "person," as used in Wisconsin law, "includes all partnerships, associations and bodies politic or corporate." Wis. Stat. § 990.01(26). A corporation is, therefore, a "person" within the meaning of Wis. Stat. § 11.12(1)(a). Because a corporation is a person by virtue of Wis. Stat. § 990.01(26), it also, therefore, meets the statutory definition of a committee. Thus, it is my opinion that Wis. Stat. § 11.12(1)(a) applies to corporations.

¶31. Because Wis. Stat. § 11.12(1)(a) applies to corporations, Wisconsin law must also permit corporations to register and file under Wis. Stat. §§ 11.05 and 11.06(7), so that they may exercise their constitutional right to engage in political speech. The registration requirements in Wis. Stat. § 11.05(1) expressly apply, among other things, to "every committee other than a personal campaign committee which . . . makes disbursements in a calendar year in an aggregate amount in excess of \$25 . . ." Other provisions in Wis. Stat. ch. 11 provide how registration is to occur and what must be reported. Likewise, the filing requirements in Wis. Stat. § 11.06(7) expressly apply, among other things, to "[e]very committee, other than a personal campaign committee, which . . . desires to make disbursements during any calendar year, which are to be used to advocate the election or defeat of any clearly identified candidate or candidates in any election . . ." Because, as already discussed, a corporation is within the statutory definition of a committee, it follows that, like other committees, corporations may register and file under Wis. Stat. §§ 11.05 and 11.06(7).⁶ Thus, there is a statutory mechanism for corporate registration and reporting. Put another way, Wisconsin statutes are not constructed in a fashion that prevents a corporation from registering.

¶32. In addition to this plain reading of the statutes, the Government Accountability Board has issued an emergency rule to "ensure the proper administration of the campaign finance statutes and properly address the application of *Citizens United v. FEC*." Notice of Order of the Government Accountability Board, EmR 1016, ¶ 3 of Analysis (May 20, 2010) (available at http://www.legis.state.wi.us/erules/gab001_EmR1016.pdf) (last visited, July 30, 2010). The Rule

⁶Any corporation may also be a "group" as defined by Wis. Stat. § 11.01(10), and required to register by Wis. Stat. § 11.23. See also Wis. Stat. § 11.05(1)(a).

interprets Wis. Stat. §§ 11.05, 11.06 and other relevant sections to facilitate a corporation's registration and filing requirements under Wis. Stat. §§ 11.05 and 11.06. See Wis. Admin. Code §§ GAB 1.91(3) - (8).

¶33. Thus, both the statutes and the administrative code provide a mechanism for corporate reporting. Therefore, Wis. Stat. § 11.12(1)(a) is not a ban on a corporation's constitutionally protected political advocacy unless the underlying reporting and disclosure rules are themselves unconstitutional. Cf. *Citizens United*, 130 S. Ct. at 897-98 (prohibition on corporate "electioneering communications" not alleviated by ability of corporation to create federal political action committee, given that the political action committee is a separate entity and is subject to onerous registration and reporting requirements that have the effect of chilling speech).

Direct Impact of *Citizens United* on Reporting, Disclaimer, And Disclosure Provisions

¶34. In *Citizens United*, the Court specifically upheld the application of federal disclosure and disclaimer requirements to the "Hillary" movie and three advertisements for the movie. 130 S. Ct. at 913-16. Those disclosure provisions mandate that a person file a statement with the Federal Elections Commission within 24 hours of making a disbursement "for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of \$10,000 during any calendar year" 2 U.S.C. § 434(f)(1). Disbursements in excess of \$200 are required to be itemized, and individual contributors to the communication must be listed with a name and address only if the individual contributed over \$1,000 during the year. 2 U.S.C. § 434(f)(2). Moreover, the communication must be "publicly distributed," 11 C.F.R. § 100.29(a)(2), defined as "broadcast, cable, or satellite communication" that can be received by 50,000 people in the relevant district or state. See 2 U.S.C. § 434(f)(3)(A)(i); 11 C.F.R. § 100.29(3). Compare with *Citizens United*, 130 S. Ct. at 897-98 (discussing federal PAC requirements); *Federal Election Com'n v. Mass. Citizens for Life*, 479 U.S. 238, 253-56 (1986) (discussing same, holding requirements may not be applied to certain incorporated groups); Wis. Stat. §§ 11.05, 11.06, 11.12, 11.14, 11.19, 11.20, 11.513 (setting forth Wisconsin's disclosure requirements).

¶35. In upholding those disclosure requirements as constitutional, the Court rejected the argument that disclosure and disclaimer "must be confined to speech that is the functional equivalent of express advocacy." *Citizens United*, 130 S. Ct. at 915. This holding in *Citizens United* supersedes any contrary statements in earlier opinions of this office, including the discussion in 65 Op. Att'y Gen. 145 of the scope of activities that may be constitutionally regulated under Wis. Stat. ch. 11.

¶36. After *Citizens United*, therefore, the distinction between express advocacy and issue advocacy, standing alone, is not constitutionally determinative. Accordingly, to the extent that Wis. Admin. Code § GAB 1.28 or Wis. Admin. Code § GAB 1.91 impose registration, reporting, or disclaimer requirements on independent expenditures that are not express advocacy

or its functional equivalent, *Citizens United* does not clearly indicate the rules are unconstitutional. To the contrary, *Citizens United* recognizes that the Constitution does not categorically limit disclosure and disclaimer regulations to only express advocacy or its functional equivalent. Any *potential* conflict created by the rules are with the statutes,⁷ not the Constitution. While this is no less of a serious concern for those who may be subject to the new rules, examining the statutory validity of these rules is beyond the scope of this opinion.

¶37. It does not follow, however, that every disclosure or disclaimer regulation (whether applied to express advocacy or issue advocacy) is constitutional. The *Citizens United* Court acknowledged that “as-applied challenges [to disclosure regulations] would be available if a group could show a reasonable probability that disclos[ure] [of] its contributors’ names [will] subject them to threats, harassment, or reprisals from either Government officials or private parties.” 130 S. Ct. at 914 (internal quotations omitted).

¶38. More generally, the *Citizens United* Court acknowledged that disclaimer and disclosure requirements “may burden the ability to speak,” and thus such requirements are subjected “to ‘exacting scrutiny,’ which requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” 130 S. Ct. at 914 (quoting *Buckley*, 424 U.S. at 64, 66). Finally, because intentionally violating the campaign financing law is subject to criminal penalties, *see* Wis. Stat. §§ 11.61(1)(a)-(c), consideration must be given to whether a statutory provision is unconstitutionally vague. *Buckley*, 424 U.S. at 40-41; *cf.* *Citizens United*, 130 S. Ct. at 895-96 (noting that complex speech regulations backed by criminal penalties force speakers to seek governmental permission before speaking, and analogizing the process to prior restraints).

¶39. Nonetheless, because *Citizens United* did not address the constitutionality of disclosure and disclaimer provisions similar to Wisconsin’s provisions, the “reasoning and conclusions” of the decision are not “clearly applicable” to those provisions. 67 Op. Att’y Gen. at 214. Any further discussion of the constitutionality of the Wisconsin disclosure and disclaimer requirements is thus beyond the scope of this opinion.

⁷The term “expressly advocate” is used in the definition of “political purposes,” Wis. Stat. § 11.01(16)(a)1. “Expressly advocate” is also used or incorporated independently of the definition of “political purposes” in statutes limiting who must register, what disbursements must be reported, and what communications are subject to disclaimer rules. *See, e.g.*, Wis. Stat. §§ 11.05(11), 11.06(2), 11.30(2).

¶40. Finally, it should be mentioned, particularly in light of mixed messages that accompanied post-*Citizens United* rulemaking,⁸ that *Citizens United* does not change Wisconsin law. While a United States Supreme Court opinion may provide guidance as to the constitutionally permissible scope of regulation, a United States Supreme Court opinion does not authorize regulatory activity. Only the Wisconsin Legislature, through its lawmaking powers, can change Wisconsin law or expand the scope of an agency's regulatory authority.

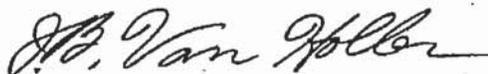
Conclusion

¶41. In 65 Op. Att'y Gen. 145, this office determined that the State Elections Board (the predecessor agency of the Government Accountability Board) had the authority to decline to enforce those portions of Wis. Stat. ch. 11 that were unconstitutional and to interpret and apply other parts of Wis. Stat. ch. 11 so as to avoid unconstitutionality. *Id.* at 156-58. In addition, this office urged that Wis. Stat. ch. 11 be amended to make it consistent with the *Buckley* decision. *Id.* at 147.

¶42. In the present situation, it is my understanding that the Government Accountability Board has already suspended its enforcement of the corporate expenditure prohibition in Wis. Stat. § 11.38(1)(a)1. I agree with that enforcement decision and would advise all district attorneys, in exercising their concurrent enforcement powers under Wis. Stat. ch. 11, to likewise interpret and apply Wis. Stat. § 11.38(1)(a)1. and (b) in a manner consistent with the views set forth in this opinion. I would also encourage the Wisconsin Legislature to amend Wis. Stat. § 11.38 to make it consistent with the *Citizens United* decision.

¶43. No other aspect of Wisconsin law is directly affected by the clear application of *Citizens United*.

Sincerely,



J.B. VAN HOLLEN
Attorney General

JBVH:RPT:KMS:TCB:rk

⁸Compare Notice of Order of the Government Accountability Board, EmR 1016, ¶ 3 of Analysis (May 20, 2010), ¶3 of Analysis ("*Citizens United* ... strengthened the ability of the government to require disclosure and disclaimer of independent expenditures.") with *id.* ¶ 5 of Analysis ("[T]his proposed rule requires organizations to disclose only those donations 'made for' political purposes."). Nothing in the text of Wis. Admin. Code § GAB 1.91 directly contradicts the conclusions stated above.

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JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: August 2, 2011

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy, Legal Counsel
Wisconsin Government Accountability Board

Prepared by: Jonathan Becker, Administrator
Ethics and Accountability Division

SUBJECT: Ethics and Accountability Division Program Activity

Campaign Finance Update

Richard Bohringer, Nate Judnic, Tracey Porter and Dennis Morvak,
Campaign Finance Auditors

2011 July Continuing Reports

Materials for the 2011 July Continuing report were sent to all candidates, PACs, parties, conduits, sponsoring organizations, recall committees, and independent expenditure registrants. For most committees, this report covers campaign finance activity from January 1 through June 30, 2011 and was due on or before July 20, 2011. 1,451 committees were required to file a campaign finance report. As of July 22, we have received 1,134 campaign finance reports. Of those reports received, 787 were filed electronically by the committees in the Campaign Finance Information System, 118 excel files were submitted for conversion by staff, and 229 paper reports were received.

Staff will follow-up with committees that have not filed campaign finance reports yet for the July Continuing 2011 report period. The non-filers include 107 candidates, 36 political parties, 91 PACs, 2 recall committees, 45 corporations, 5 independent expenditure registrants, and 31 conduits. Staff sent the first email notice of late report on July 25. Phone calls and email attempts to follow-up with committees will continue. An update on the non-filers will be given to the Board at the next meeting.

Special Pre-Primary and Pre-Election Reports – Senate Dists. 2, 8, 10, 14, 18, 32 & Assm 48

Materials for the Special Pre-Primary filing were sent to those candidates and committees participating in the Special Primary and Assembly District 48 elections. This report covers campaign finance activity from January 1 through June 27, 2011 and was due on or before July 5, 2011. Committees were given the option to report all activity through June 30 on the July Continuing report and to file that report by July 5 instead of submitting a Pre-Primary and a separate July Continuing report covering only 3 days. 65 pre-primary reports were filed with the G.A.B.; 25 of those reports were filed by candidates. All candidates required to file a Special Pre-Primary report have filed.

Materials for the Special Pre-Election filing were sent out to those candidates and committees participating in the Special election.. This report covers campaign finance activity from July 1 through July 25, 2011 and is due on or before August 1, 2011.

Special Pre-Primary and Pre-Election Reports – Senate Dists. 12, 22, & 30

. Materials for the Special Pre-Primary filing were sent to those candidates and committees participating in the Special Primary and elections. This report covers campaign finance activity from July 1 through July 4, 2011 and was due on or before July 11, 2011. 20 pre-primary reports were filed with the G.A.B.; 8 of those reports were filed by candidates. All candidates required to file a Special Pre-Primary report have filed.

Materials for the Special Pre-Election filing were sent out to those candidates and committees participating in the Special election. This report covers campaign finance activity from July 5 through August 1, 2011 and is due on or before August 8, 2011.

Lobbying Update

Tracey Porter, Ethics and Accountability Specialist

Statement of Lobbying Activities and Expenditures Reports

Lobbying principal organizations and lobbyists registered and licensed as of January 1, 2011 in this legislative session are required to complete and file a six month Statement of Lobbying Activities and Expenditures report covering lobbying activity and expenditures from January through June, 2011. These reports are due on or before August 1, 2011. Filing notices were sent on July 8 to all lobbyists and lobbying organizations required to file, and email reminders will be sent throughout the month of July to those that have not filed. Staff continues to process matters that are the subject of lobbying communications reported by principal organizations as required by Chapter 13, *Wisconsin Statutes*.

Lobbying Registration and Reporting Information

Government Accountability Board staff continues to process 2011-2012 lobbying registrations, licenses and authorizations. Processing performance and revenue statistics related to this session’s registration is provided in the table below.

2011-2012 Legislative Session: Lobbying Registration by the Numbers (Data Current as of July 22, 2011)			
	Number	Cost	Revenue Generated
Organizations Registered	701	\$375	\$262,875
Lobbyists Licenses Issued (Single)	590	\$350	\$206,500
Lobbyists Licenses Issued (Multiple)	119	\$650	\$77,350
Lobbyists Authorizations Issued	1495	\$125	\$186,875

Lobbying principals are required to report lobbying activity for the period January 1 through June 30, 2011. Those reports are due by August 1. To date, we have discovered that a number of organizations either failed to register or to authorize lobbyists. We will be seeking forfeitures from these individuals and organizations.

New Lobbying Website Project Update

A significant amount of time has been allocated to develop the new lobbying application. Phase One, the public search feature, was completed in May and ready for public comment. Staff invited 26 members of the lobbying community, members of the Joint Committee on Finance, and members of the Joint Committee on Information Policy and Technology to participate in a Focus Group presentation and discussion on the functionality of the public search feature of the new lobbying database on May 19, 2011. There were 4 attendees.

Phase Two, the FOCUS subscription feature, is now complete and ready for public comment. Staff invited 26 members of the lobbying community and approximately 100 FOCUS subscribers to participate in a Focus Group presentation and discussion on the functionality of the FOCUS subscription service on July 22, 2011. Only one participant attended. Work will continue throughout the summer months on the project, with release of the application scheduled for early 2012.

Financial Disclosure Update

Cindy Kreckow, Ethics and Lobbying Support Specialist

Statements of Economic Interests – Annual Filing

The Government Accountability Board Ethics and Accountability staff mailed more than 2,000 pre-printed Statements of Economic Interests to state public officials required to file a statement with the Board under Chapter 19, *Wisconsin Statutes*. This includes incumbent state judges who were up for re-election in the spring of 2011 as well as reserve judges who are required to file a statement within 21 days of taking a case. Those officials not up for re-election in the spring had their statements mailed to them over the course of eight weeks, beginning January 24, 2011. Statements were due on or before May 2nd. With the 2011 changes in administration, there was some confusion on the part of officials who left their positions effective January 3rd, as well as those whose nominations were withdrawn by Governor Walker in late January. Many filers in both of those groups did not think they were required to file a 2011 statement. Cindy followed up with everyone affected from the date the statements were statutorily due until mid-July, when all issues were finally resolved. All 2011 statements are now accounted for and staff concurred in these cases that a late filing penalty was not warranted. Data entry and processing into the online index continues to occur only as time permits given budget restraints and staff shortage. Higher profile statements including Legislators, Supreme Court Justices, Court of Appeals Judges, and District Attorneys have all been entered with the exception of a few that have very large attachments. Municipal Judges are currently being entered into the online index and additional prioritizing will occur throughout the data entry process.

Quarterly Transaction Reports

Quarterly financial disclosure statements for the April – June reporting period were sent to 47 State Investment Board members and employees on July 1, 2011. These statements are to be completed and returned to the G.A.B. no later than August 1, 2011. Copies of all quarterly financial disclosure reports as well as statements of economic interests for employees and members of the Investment Board will be referred to the Legislative Audit Bureau.

Semi-Annual Legislative Liaison Reports

State agency legislative liaison reports for the January – June, 2011 reporting period were sent to 105 agencies who are required to file them on June 30th. The reports are due no later than August 1st.

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JUDGE THOMAS H. BARLAND
Chair

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the August 2, 2011 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy
Director and General Counsel
Wisconsin Government Accountability Board

Prepared by Elections Division Staff. Presented by:
Nathaniel E. Robinson
Elections Division Administrator

SUBJECT: Elections Division Update

Election Administration Update

Introduction

Since the Government Accountability Board's May 17, 2011, meeting the Elections Division has focused on the following tasks:

1. Statewide Recount for the Office of Justice of the Supreme Court

On May 31, 2011, the Kloppenburg Campaign announced that they would not appeal the final statewide recount decision for the Supreme Court contest, thereby officially putting the recount to rest. Justice Prosser gained 371 votes at the recount and Ms. Kloppenburg received an additional 683 votes. Justice David T. Prosser was certified as the winner.

2. Special Elections

Assembly Districts 60, 83 and 94:

On February 22, 2011, Governor Walker called elections to fill the vacancies in Assembly Districts 60, 83 and 94, caused by the resignations of Mark Gottlieb, Scott L. Gunderson and Michael D. Huebsch respectively. Two districts, 60 and 94, required primaries which were conducted in four counties on Tuesday, April 5, 2011. No primary was required for the office of Representative to the Assembly District 83. The candidates certified to the May 3, 2011 special election ballot were:

➤ District 60

- Duey Stroebel (Republican)
- Rick Aaron (Democrat)

- District 83
 - Dave Craig (Republican)
 - James Brownlow (Democrat)
- District 94
 - John Lautz (Republican)
 - Steve Doyle (Democrat)

The special election for Assembly Districts 60, 83 and 94 was conducted on May 3, 2011. The deadline for G.A.B. to receive the Special Election canvasses from the counties was Friday, May 13, 2011. All canvasses were received well before the statutory deadline, allowing staff to certify the election on May 12, 2011. The special election canvass was signed by Judge Nichol. (No petitions for recount were filed.) Certificates of Election were mailed to the winning candidates immediately following the signing of the canvass statements. The winners were Duey Stroebel in District 60, Dave Craig in District 83 and Steve Doyle in District 94.

Assembly District 48:

On May 24, 2011, Governor Walker called an election to fill the vacancy in Assembly District 48, caused by the resignation of Joseph T. Parisi. Six candidates (all Democratic candidates) qualified for the ballot, triggering a Democratic primary conducted on Tuesday, July 12, 2011. Candidate certified to the Democratic primary ballot were:

- Vicky Selkove
- Bethany Ordaz
- Chris Taylor
- Fred Arnold
- Andy Heidt
- Dave De Felice

Since no other party candidates or independent candidates qualified for the ballot, the winner of the Democratic primary will appear on the ballot at the special election scheduled for August 9, along with a write-in line.

3. Recalls

Assembly Districts 2, 8, 10, 14, 18 and 32:

On June 3, 2011, the Government Accountability Board ordered recall elections in Assembly Districts 2, 8, 10, 14, 18 and 32. Fifteen Democratic candidates and one independent candidate registered for the recall elections in these districts. The six Republican incumbents are candidates automatically. Democratic Primaries were required in all six districts. The recall primaries were conducted on Tuesday, July 12, 2011, with the recall elections scheduled for August 9, 2011.

Senate District	Candidates Registered	Candidates on Primary Ballot	Candidates on Election Ballot
2	1 Rep (Inc.)		1 Rep (Inc.)
	3 Dem	2 Dem	Winner of Dem Primary
8	1 Rep (Inc.)		1 Rep (Inc.)
	3 Dem	2 Dem	Winner of Dem Primary
10	1 Rep (Inc.)		1 Rep (Inc.)

	2 Dem	2 Dem	Winner of Dem Primary
	1 Ind		
14	1 Rep (Inc.)		1 Rep (Inc.)
	3 Dem	2 Dem	Winner of Dem Primary
18	1 Rep (Inc.)		1 Rep (Inc.)
	3 Dem	2 Dem	Winner of Dem Primary
32	1 Rep (Inc.)		1 Rep (Inc.)
	2 Dem	2 Dem	Winner of Dem Primary

Assembly Districts 12, 22 and 30:

On June 10, 2011, the Government Accountability Board ordered recall elections in Assembly Districts 12, 22 and 30. Six Republican candidates (2 in each district) registered for the recall elections. One Democratic candidate registered in District 30. The three Democratic incumbents are candidates automatically. Republican Primaries were required in districts 12 and 22. One Republican candidate in District 30 was denied ballot access due to insufficient signatures, leaving one Republican candidate and one Democratic candidate. Therefore, no primary was required in District 30. The recall primaries in District 12 and 22, and the recall election in District 30 were conducted on Tuesday, July 19, 2011. The recall elections for Districts 12 and 22 are scheduled for August 16, 2011.

District	Candidates Registered	Candidates on Primary Ballot	Candidates on Election Ballot
12	2 Rep	2 Rep	Winner of Rep Primary
	1 Dem (Inc.)		1 Dem (Inc.)
22	2 Rep	2 Rep	Winner of Rep Primary
	1 Dem (Inc.)		1 Dem (Inc.)
30	2 Rep		1 Rep
	1 Dem		1 Dem (Inc.)
	1 Dem (Inc.)		

4. Extended Operating Hours to Support Clerk Partners and Voter Customers

As has been the practice for over 3 years, G.A.B. has offered extended operating hours to local election partners and voter customers in order to provide more effective election support. For the July 12th, 2011 and July 19th, 2011 elections, staff continued the practice of providing extended hours of services and technical support to our valued clerk customers and to the public before, during and immediately after any election. Staff's extended operating hours for both elections were as follows:

July 12, 2011 Special Primary and Recall Primaries

- Monday, July 11, 2011: 6:30 a.m. until 6:00 p.m.
- **Tuesday, July 12, 2011:** **6:30 a.m. until 9:00 p.m.**
- Wednesday, July 13, 2011: 6:30 a.m. until 6:00 p.m.

July 19, 2011 Recall Primaries and Recall Election

- Monday, July 18, 2011: 6:30 a.m. until 6:00 p.m.
- **Tuesday, July 19, 2011** **6:30 a.m. until 9:00 p.m.**
- Wednesday, July 20, 2011 6:30 a.m. until 6:00 p.m.

During the extended hours of operations, staff maintains an Election Activity Log of all calls relating to elections issues. A preliminary review of these data is being analyzed and the details will be posted on the G.A.B. website.

5. The New Voter Photo ID Law

The Governor signed the Voter Photo ID law on May 25, 2011; it was published on June 9, 2011; and, the provisions impacting the 2011 Summer Elections went into effect on June 10, 2011. Wisconsin Act 32, s.9118(1Q) and Act 23 under the 2011-2013 biennial budget Act (Act 32) required the G.A.B. to submit a proposal to the Joint Committee on Finance (JCF) under the Legislature's 14-day passive review process on the agency's plans to spend \$1.9 million dollars for public information and outreach voter ID implementation initiatives.

All 16 members of the JCF were visited for the purpose of discussing the proposed spending Plan, sharing G.A.B.'s philosophy behind the Plan, answering their questions and soliciting their input. The 14-day passive review process concluded on Thursday, July 14, 2011. On Friday, July 15, 2011, the JCF issued its approval letter stating that no objectives from JCF members had been raised. A copy of the G.A.B. approved Plan is attached.

6. MOVE Act: Status of Wisconsin's Compliance with the Military and Overseas Voter Empowerment MOVE Act

The Government Accountability Board staff has worked with legislative leaders regarding the need to adjust the election timeline for the September Partisan Primary, special elections, and Presidential Preference so that Wisconsin will be able to comply with the 45-day ballot preparation that is required by the MOVE Act. The Senate and Assembly Committees on Elections met and wrote two bills, SB 115 and SB 116, with feedback from G.A.B. staff. SB 115 moves the Presidential Preference election to coincide with the April Spring Election and requires the creation of a special Presidential Preference Only ballot 48- days before the election that must be sent to military and overseas electors to comply with the MOVE Act. SB 116 moves the September Partisan Primary to the second Tuesday in August and addresses the timeline of other election related events.

The Senate passed both bills before the end of the session in June; however the Assembly did not take up either bill before the Legislative Session ended. G.A.B. staff anticipates that the bills will be addressed quickly upon the start of the fall Legislative session. Staff will continue to provide feedback to the Legislature.

7. Federal Voting Assistance Program Grant Application

In mid-May 2011, the Federal Voting Assistance Program (FVAP) through the Department of Defense announced a nationwide \$16 million dollar grant opportunity for all 50 states. The grant program, "Electronic Absentee Systems for Elections (EASE)," will be awarded to states, territories, and/or localities for proposals that fulfill a public purpose of support by improving the voting experience of military and overseas voters, reduce impediments faced by them and stimulate the development of innovative approaches to absentee voting by military and overseas voters.

On July 13, 2011, Board staff submitted a proposal to the FVAP for an EASE grant. In the proposal, staff delineated the creation of a system that will allow military and overseas electors to receive their absentee ballot online. This system would integrate with current online tools such as ballot tracking, voter look-up, the online mail-in registration system and the Statewide Voter Registration System (SVRS). It would require the development of a ballot preparation tool to create an online ballot, an online ballot delivery tool to link an elector's address to the correct

ballot, and a data collection and evaluation tool, to integrate data from the new system with data collected in SVRS and the Wisconsin Election Data Collection System. Board staff asked for \$1.9 million over the next two years to complete the proposed project.

8. 2010-2011 Four-Year Voter Record Maintenance

On June 10, 2011, G.A.B. completed the 2010-2011 Four-Year Voter Record Maintenance. Voter's who did not respond to the Notice of Suspension of Registration sent on April 29, 2011 were given a status of "Inactive – 4 Year Maintenance" in SVRS. Voters whose records were recorded as returned undeliverable were also given the status "Inactive – 4 Year Maintenance."

G.A.B staff sent each municipality and county a list of inactivated voters from their jurisdictions. The list included all voters who were sent postcards as part of the Four-Year Voter Record Maintenance process and the voter's current status in SVRS.

Based upon the information in SVRS on June 10, 2011, of the 240,505 postcards mailed, 52,418 (22%) postcards were returned as undeliverable, 14,636 (6%) postcards were returned requesting continuation, and 173,451 (72%) postcards had not been recorded in the Statewide Voter Registration System (SVRS) as returned. Similar to the 2008 Four-Year Voter Record Maintenance, clerks continue to record the postcards that are continuing to be returned and to update the voter records accordingly.

The 2010 General Election was the last election where G.A.B. will conduct the Four-Year Voter Record Maintenance. For General Elections going forward, G.A.B. will continue to support clerks by identifying voters who qualify for the four-year record maintenance, and by providing uniform guidance for statewide consistency. Clerks, however, will be responsible for sending the Notices of Suspension of Registration and making updates to the voter records in their municipality. The changes in SVRS to accommodate this transition will be implemented prior to the 2012 General Election. G.A.B. appreciates the cooperation of its clerk partners in bring the 2010-2011 Four-Year Voter Record Maintenance process to completion.

9. Accessibility

Government Accountability Board staff are taking advantage of the 2011 Recall and Special Elections to conduct On-site Accessibility Compliance Reviews. In order to cover as many polling places as possible, the Government Accountability Board is supplementing our staff by hiring temporary workers who undergo extensive training to assist with the On-site Accessibility Compliance Reviews.

On July 12, 2011, G.A.B. staff and representatives conducted reviews in 20 counties for Recall Primaries in State Senate Districts 2, 8, 10, 14, 18, and 32. There were 79 polling places visited in 59 municipalities. On July 19, 2011, G.A.B. staff and representatives conducted On-site Accessibility Compliance Reviews in 9 counties for the Recall Primaries in State Senate Districts 12 and 22, and for the Recall General Election in State Senate District 30. There were 69 polling places visited in 42 municipalities.

Findings include:

- A. Insufficient signage for parking spaces and entrances.
- B. Doors that require more than 8 lbs. of force to open. Survey findings revealed doors as heavy as 12-17 lbs. in several locations.
- C. Required election notices are not always posted and those posted are not printed in 18 point font.

- D. Municipalities that received G.A.B. Accessibility improvement grant funds or supplies to assist respective polling places to achieve compliance could not show or demonstrate items that the funds were intended to purchase, or the supplies that were received. This finding is disturbing and will be closely followed-up for explanations.
- E. Less frequent problems identified include:
 - Lack of privacy for voters using accessible equipment.
 - Thresholds which are greater than 1/2-inch high.
 - Gaps and uneven pavement in the pathway from the parking area to the accessible entrance.
 - A buzzer located on the entrance door that does not work or simply needs a new battery.

Electronic Voting System Security: During the On-site Accessibility Compliance Reviews on July 12 and 19, 2011, staff and representatives also performed a visual inspection of the security tags on voting equipment to verify that serial numbers on the inspector's statement match the machines and tamper-evident seals. Staff and representatives continue to find inconsistency in the chief inspectors' attention to proper security procedures. Staff found that some chief inspectors are neglecting pre-election security checks and do not seem to fully understand the need for the tamper-resistant seal and security checks.

G.A.B. also plans to conduct another wave of On-site Accessibility Compliance Reviews on August 9, 2011 for the State Assembly District 48 General Election, and on August 16, 2011 for the Recall General Elections in State Senate Districts 12 and 22.

Training

Staff are creating web-based election training for the absentee functionality in the Statewide Voter Registration System. The training will aid clerks to learn how to track absentee applications and ballots using the Statewide Voter Registration System. The training will include written step by step instructions and web-base video demonstrations.

Plans are that staff will implement the web-based election training this summer in four phases. Phase 1 will train on entering and processing absentee applications in SVRS. Phase 2 will train how to process specific types of absentee applications in SVRS. Phase 3 will focus on the different types of absentee vote locations. Phase 4 will concentrate on absentee ballots. GAB Staff has set August 31, 2011 as the project date for completing all the absentee web-base election training.

Please refer to the Attachment titled, "Training Summary," for additional training information.

Other Noteworthy Initiatives:

1. Voter Data Interface

Clerks continue to use SVRS to run HAVA Checks to validate against Department of Transportation (DOT) and Social Security Administration (SSA) records, and confirm matches with Department of Corrections (DOC) felon information and Department of Health Services (DHS) death data, as part of on-going HAVA compliance.

Clerks process HAVA Checks and confirm matches on a continuous basis during the course of their daily election administration tasks. This process has been followed since the Interfaces became functional in SVRS on August 6, 2008.

Since the last Board Meeting, clerks processed approximately 9,160 HAVA Checks with DOT/SSA on voter applications in SVRS.

2. Retroactive HAVA Checks Status

As previously reported, Board staff is working with the Department of Transportation (DOT) to gather additional information to help resolve HAVA Check non-matches. Staff is taking a three-pronged approach to investigating and resolving the non-matches:

- DOT gave G.A.B. access to the Public Abstract Request System (PARS) look-up tool for G.A.B. to look up voters whose driver license does not match, so the driver license number can be corrected in SVRS. We are continuing to correct the non-driver license non-matches through PARS.
- DOT provided G.A.B. with a bulk file containing the names and dates of birth for all of the HAVA Check non-matches that resulted from names or dates of birth not matching. G.A.B. will do further analysis on the bulk file to group non-matches into categories to facilitate correction of the data. We will also be able to determine non-matches that result from name variations or typographical errors, versus truly different data which may require investigation.
- G.A.B. is working with DOT to enhance the existing HAVA Check such that DOT would not only provide the non-match reason (i.e. name, date of birth, or driver license number) but also provide the name and date of birth as it appears at DOT to assist clerks in resolving the non-matches. This proposed enhancement is in the process of being approved by the G.A.B. IT governance and management process for both agencies before we can proceed.

3. Voter Registration Statistics

As of Friday, July 15, 2011, there were a total of 3,286,006 active voters in SVRS. There were 1,043,663 inactive voters, and 272,700 were cancelled voters. 6,478 voters have been merged by clerks as duplicates since the last report. The number of active voters in SVRS has significantly decreased, and the number of inactive voters has increased since the last Board report due to the Four-Year Maintenance Process.

Note: An active voter is one whose name will appear on the poll list. An inactive voter is one who may become active again, e.g. convicted felon or someone who has not voted in four years. A cancelled voter is one who will not become active again, e.g. deceased person.

4. G.A.B. Help Desk

The G.A.B. Help Desk is supporting over 1,800 active SVRS users. The Help Desk staff assisted with processing the canvass, data requests and testing SVRS improvements. Help Desk staff is continuing to improve and maintain the two training environments that are being utilized in the field. Staff is monitoring state enterprise network status, assisting with processing data requests and processing voter verification postcards.

Overall, the majority of inquiries to the G.A.B. Help Desk during May, June and July from clerks were regarding assistance with setting-up the July 12, 2011 and July 19, 2011 Recall Primaries and Election and Special Election for Assembly Dist 48, recall inquiries, recount inquiries, and running reports. The majority of calls in June were from electors with questions concerning the 4 Year Maintenance postcards being mailed. On the July 12, 2011 Recall Primary Day, the majority of calls were from the voting public voicing concern about new Voter ID requirements, confusion at the polling place regarding Voter ID and asking where to vote. Many of these voters did not reside in a district with a primary.

Due to the redesigned poll list with upside down print, many clerks were having difficulty printing and requested assistance. Calls for this period also consisted of clerks requesting assistance entering data into the G.A.B. Canvass Reporting System and the Wisconsin Election Data Collection System (WEDCS), reconciling election data, entering Election Day Registrations (EDR) and running reports. Help Desk staff assisted with configuring and installing SVRS on many new clerk computers due to the end of the fiscal year with municipalities upgrading computer equipment.

Ethics Division CFIS reporting has generated a considerable amount of call traffic during July.

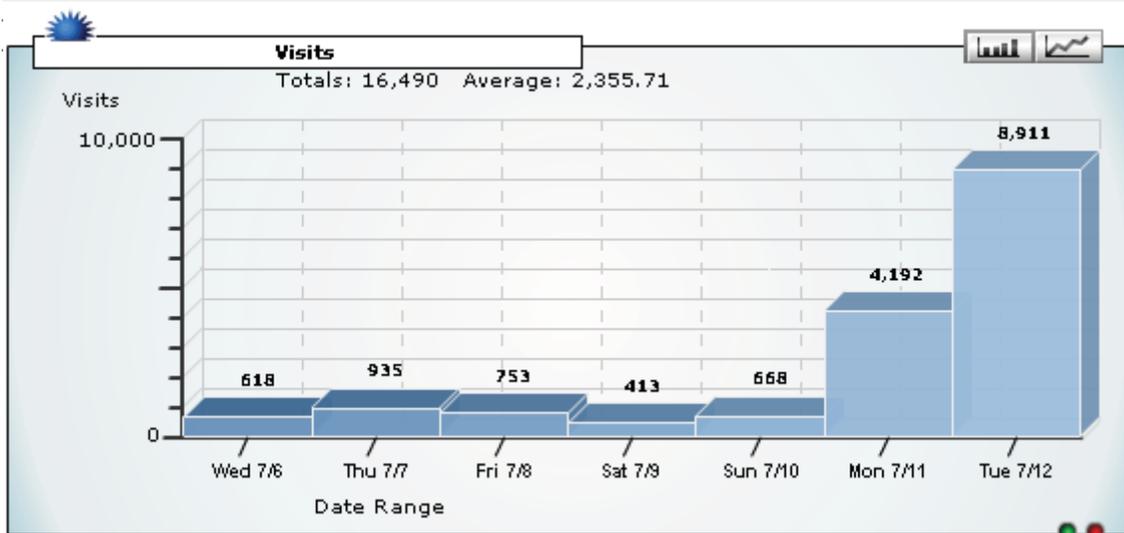
G.A.B. Help Desk Call Volume (261-2028)	
May 2011	1762
June 2011	1815
July 2011 (as of July 18, 2011)	1540
Total Calls for Period	5117

To alleviate distractions from the Reception Desk during recent activities and election related events, calls for the Front Desk's main number and the 800 number have remained transferred to the Help Desk. The Front Desk main number remains transferred due to the volume of activity at the front desk. The Help Desk operated on extended hours for both election events during this period.

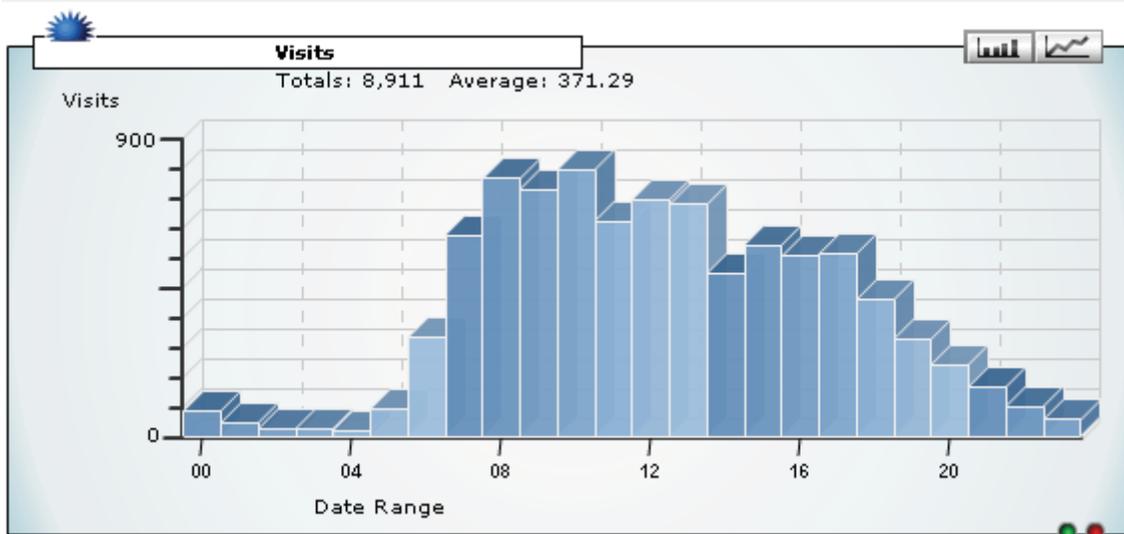
The G.A.B. main business telephone has remained forwarded to the Help Desk since April 4, 2011.

G.A.B. Reception Desk Call Volume (266-8005)	
May 2011	0
June 2011	0
July 2011	0
Total Calls for Period	0

The graph on the following page illustrates voter activity accessing the GAB Voter Public Access (VPA) website for the week of the July 12 Recall Primary. Statistics indicate unique visitors to the site. Primary day had 8,911 visitors, typically viewing 7 pages per visit.



Unique visits for July 12, 2011 only. Traffic peaked at 10:00 am with 803 visits per hour.



5. Click-and-Mail Voter Registration

Board staff continue to work on the new Click-and-Mail Voter Registration process that will allow voters to provide voter registration information on-line, and then print off and mail in a voter registration form. We are currently in the process of updating the web forms to accommodate the new changes included in the Voter Photo-ID bill. We hope to finalize the new system and make it available to the public in late Summer 2011.

6. SVRS Hardware Refresh

Beginning in early March 2011 G.A.B. and DET technical staff began the process of refreshing the SVRS server farm with new virtual servers and associated hardware. The Production servers (Prod), Development Servers (DEV), Systems Integration Testing Servers (SIT) and User Acceptance Testing Servers (UAT) environments have been rebuilt and migrated to the new SAN. The project has been completed meeting the June 30, 2011 deadline.

7. New Elections Division IT Team

As previously reported, the Elections Division has been working with a Department of Administration, Division of Enterprise Technology (DOA/DET) Team led by Herb Thompson to assemble a dedicated "team approach" to applications development and support for the Elections Division's IT Systems.

We have hired a dedicated IT Team to support Elections Division's labor-intensive applications. Lead to start on April 27, 2011, and a new applications developer to start in May 2011. Unfortunately, the new Team Lead was not retained, and the new applications developer opted not to join the team.

David Grassl, formerly of the Department of Administration, and lead architect for G.A.B. systems including WEDCS, Canvass, and Access Elections, is the Team Lead. He was also lead architect on the new Budget system at DOA, and several other groundbreaking projects. We are fortunate to have a person of David's caliber leading the G.A.B. dedicated IT Team!

As part of the IT Team's composition, we have also hired a new application developer, Rajesh Kirubanandham, also formerly from the Department of Administration. Rajesh is also well known to G.A.B. staff as the lead developer for the Canvass system, and the Redistricting proof of concept project. We retained Kamal Pasikanti as our database administrator, where he has been performing admirably for the last three-plus years. We are in the process of hiring another applications developer to fill the remaining slot on the team.

The new 4-member team will be co-managed by G.A.B. and DOA/DET (Herb), and will support all Elections Division software applications including SVRS, WEDCS, Canvass, Accessibility and any new IT tools the Division may need. The Team will also build capacity and functionalities within SVRS in order to process the 2010 Census redistricting results. Equally exciting, the Team will transfer the SVRS from a Citrix platform onto a web-based platform which will significantly boost performance and reduce operating costs.

8. Redistricting

The Wisconsin Legislature recently published the updated population data and census maps that resulted from the 2010 decennial Census, on March 21, 2011. This officially started the redistricting clock. Counties have up to 60 days to enact a tentative redistricting plan. Municipalities are allotted up to the following 60 days to enact an ordinance or resolution establishing municipal wards. After that, counties and municipalities are given up to 60 days to establish election districts. These three steps should be completed by October 1, 2011. All local elections beginning January 1, 2012 must be managed from the newly established districts. The Wisconsin Legislature must complete the new legislative districts by early May 2012 so they can be used for the 2012 fall elections. The Legislature provided a Geographic Information System (GIS) tool for municipalities and counties to draw their new districts. The new districts will be available as GIS data files as soon as they are complete.

G.A.B. IT staff are working on modifications to SVRS to allow for the new boundaries to be imported directly into SVRS, alleviating the need for clerks to manually enter them. There are many system upgrades and changes that will be made during 2011 to prepare SVRS for the new districts. A Proof of Concept and planning report were prepared in 2010 by DOA/DET which provides the roadmap for these changes.

Staff will remain in close communication with clerks during the redistricting process so clerks are aware of the timelines. Clerks should not be changing any of the existing districts in SVRS at this time. The current districts will remain in place until the new districts are ready to be

implemented (after October 1, 2011). Once the new districts have been imported, clerks will be given specific instructions on how to “tweak” and finalize their new district boundaries in SVRS.

Important Technical Information about the Redistricting Initiative: SVRS redistricting is done using address range technology today. This is a manually intensive process which takes a lot of time to get implemented. The G.A.B. Technical Team will be changing the SVRS district management software to a GIS-based solution. B G.A.B. did a proof of concept with this new technology when Dane County looked at the Regional Transit Authority (RTA) boundaries. G.A.B. was able to leverage GIS to cut-down the time needed to implement this new district by over 80%.

G.A.B. is currently collaborating with the Legislative Technology Service Bureau (LTSB) and the University of Wisconsin Applied Population Lab (UW APL) to leverage the WISE-LR districting software. LTSB and UW APL have been working jointly to create this new boundary management software to help local municipalities draw the new district lines. The WISE-LR software has no license fee associated to it so the cost to implement is much less.

Significant changes will be made to the SVRS Software in terms of:

- A. Address Validation (Use GIS instead of Address Ranges)
- B. Ability to references districts for previous elections
- C. Streamline the interface between local GIS groups and the SVRS GIS District Management Software
- D. Transparency to the public by using GIS Maps to display polling places and district maps

Timeline: G.A.B. is moving fast to implement this new feature to be ready for next year’s elections. A list of key milestones:

- Import District GIS Data and Complete Boundary Management Tool: 10/1/2011
- Convert SVRS Address Information (Voter, Polling Place, other locations): 11/1/2011
- Release new SVRS District Management Software (Include Voter Public Access Website): 4th Qty 2011
- NOTE: I’m working with the assumption that the G.A.B. team will manage the first iteration of setting up GIS districts in SVRS. Counties will do this 2nd quarter of 2012.

9. SVRS Core Activities

A. Software Upgrade(s)

SVRS 7.1 patch 8 was installed on June 18, 2011. This emergency patch changed the poll book to include a signature field as required by the 2011 Wisconsin Act 23, the Voter Photo ID Bill. The next version of SVRS (version 7.2) is planned to be installed after the 2011 August elections and will include the updates for the new Enhanced Mail-In Voter Registration process.

B. System Outages

There was an unscheduled, SASI network service outage on June 29, 2011 causing an interruption that impacted staff access to the state enterprise network for 1½ hours. This service outage did not impact clerk customer access to SVRS. DET investigation of the incident proved inconclusive as to the root cause. Technicians did discover that a redundancy fiber link serving G.A.B. was not operational at a switch in the DOA building. Service outage began at approximately 1:15 pm and concluded at 2:40 pm.

C. Data Requests

Staff regularly receives requests from customers interested in purchasing electronic voter lists. SVRS has the capability and capacity to generate electronic voter lists statewide, for any county or municipality in the state, or by any election district, from congressional districts to school districts. The voter lists also include all elections that a voter has participated in, going back to 2006 when the system was deployed.

The following statistics demonstrate the activity in this area from the last Board report through July 14, 2011:

- Fifty (50) inquiries were received requesting information on purchasing electronic voter lists from the SVRS system.
- Thirty-one (31) electronic voter lists were purchased.
- \$38,025 was received for the voter lists requested.

30-60 Day Forecast

1. Continue to assist Municipal Clerks, candidates and public to prepare for the August Recall elections.
2. Continue to Plan for full implementation of all components and aspects of the Voter Photo ID Law and the Legislatively-approved G.A.B. Voter Photo Plan for training local election officials and offering outreach informational services to the general public.
3. Continue development of G.A.B.'s Enhanced Mail-In Voter Registration Initiative.
4. Continue collaboration with the Department of Transportation (DOT) to resolve the HAVA Check non-matches that remain from the Retroactive HAVA Check Project, as well as the HAVA Checks that municipal clerks run on a regular basis.
5. Prepare for the Board's September 12 meeting.

Action Items

None.

ATTACHMENT #1

GAB Election Division's Training Initiatives
5/16/2011-8/2/2011

Training Type	Description	Class Duration	Target Audience	Number of Classes	Number of Students
SVRS "Initial" Application and Election Management	Instruction in core SVRS functions – how to navigate the system, how to add voters, how to set up elections and print poll books.	2 types of classes: Application; Election Mgmt /HAVA Interfaces; 16 hours	New users of the SVRS application software.	13	100
SVRS "Advanced" Election Management	Instruction for those who have taken "initial" SVRS training and need refresher training or want to work with more advanced features of SVRS.	2 types of classes: Absentee Process; Reports, Labels & Mailings; 4 – 8 hours each	Experienced users of the SVRS application software.	7	98
Voter Registration	Basic training in adding voter registration applications, searching for voters, updated voters.	3 hours	Municipal and county clerks, staff and temp workers who provide election support only.	The WBETS site is available to train temporary workers.	20
WisLine	Series of programs designed to keep local government officers up to date on the administration of elections in Wisconsin.	90 – 120 minute conference call, conducted by Elections Division staff.	Clerks and chief inspectors	Board staff conducted five WisLine teleconferences for clerks and chief inspectors covering the impact of the Voter Photo ID Law for elections held prior to the 2012 February Primary.	25 – 50 per program broadcast; audio files are available on the G.A.B. website for download.

ATTACHMENT #1

GAB Election Division's Training Initiatives
5/16/2011-8/2/2011

Training Type	Description	Class Duration	Target Audience	Number of Classes	Number of Students
WBETS	<p>Web Based Election Training System. Still under development. Reference materials were made available to the clerks in February; voter registration training made available to clerks 3/24/2008.</p>	Varies	County and municipal clerks and their staff.	Phase 1 of eLearning training plan completed; Absentee Process training modules under construction.	Site is available for clerks to train temp workers in data entry; relies are also able to access the site upon request.
Other	<ul style="list-style-type: none"> • Board staff gave election administration and SVRS presentations to county clerks at WCCA Convention in Ladysmith; WMCA Districts 1 & 2 in Birchwood. • Board staff developed training materials, including step-by-step guides, handouts and audio files for clerks to use for self-education and the training of election inspectors for the "soft" implementation of the Voter Photo ID Law for summer recall elections. 				

State of Wisconsin\Government Accountability Board

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KEVIN J. KENNEDY
Director and General Counsel

July 1, 2011

The Honorable Alberta Darling, Senate Co-Chair
Joint Committee on Finance
Room 317 East, State Capitol
Madison, WI 53707-7882

The Honorable Robin Vos, Assembly Co-Chair
Joint Committee on Finance
Room 309 East, State Capitol
Madison, WI 53708-8593

Dear Senator Darling, Representative Vos:

I am pleased to provide you and members of the Joint Committee on Finance a Plan on how we, the Government Accountability Board, propose to expend the \$1,965,200 approved by the Legislature and Governor Walker for implementing the new Voter Photo ID Law. We appreciate the Committee's support. This Plan is submitted in response to the language contained in the 2011-2013 Biennial Budget, which states, in part:

No later than July 1, 2011, and before making any expenditures under section 7.08 (12) of the statutes or 2011 Wisconsin Act 23, section 144 (1), for the purpose of outreach or public information, the government accountability board shall transmit to the co-chairpersons of the joint committee on finance in writing, a plan identifying the specific proposed purposes for the expenditures and proposed amounts to be expended for each specific purpose.

The Government Accountability Board's fiscal analysis estimated that \$2,180,900 was necessary to fully and successfully implement the Voter Photo ID Law. The Legislature appropriated \$1,965,200 for 2011-2013, which includes \$165,200 earmarked for training local election officials. The approval of a lesser amount of funds than requested necessitated some adjustments to the Board's Act 23 implementation budget as summarized in attached Plan. In addition to the specific requirement that expenditures be identified for outreach and public information, we are providing an overview of the Board's overall spending Plan for the biennium to implement the requirements of Act 23.

Thank you for your favorable consideration of our proposed Plan. I may be contacted at 608-261-8683 or Kevin.Kenendy@wi.gov to respond to questions you may have.

Sincerely,

Government Accountability Board

A handwritten signature in black ink that reads "Kevin J. Kennedy". The signature is written in a cursive, flowing style.

Kevin J. Kennedy
Director and General Counsel

Enclosure

cc: Legislative Fiscal Bureau (2)
Department of Administration
Members, Government Accountability Board
Nathaniel E. Robinson, Elections Division Administrator
Sharrie L. Hauge, Chief Administrative Officer

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KEVIN J. KENNEDY
Director and General Counsel

Government Accountability Board Budget Details for Implementing the Voter Photo Identification Law

Agency Request: \$2,180,900

Approved Budget: \$1,965,200

Budget Summary

1. <u>Public Information, Outreach, and Training/Education</u>		<u>\$751,300</u>
▪ Public Information Multi-Media Campaign	(\$436,100)	
▪ Public Outreach Campaign	(\$150,000)	
▪ Training/Education/Technical Assistance	(\$165,200)	
2. <u>Program Support</u>		<u>\$698,702</u>
▪ Personnel (Staffing Costs)	(\$599,292)	
▪ Staff Travel	(\$30,000)	
▪ Equipment	(\$10,000)	
▪ Administrative Expense	(\$59,410)	
3. <u>Statewide Voter Registration System (SVRS)</u>		<u>\$515,199</u>
▪ Modifications for Implementing Photo ID	(\$515,199)	
4. <u>Budget Total</u>		<u>\$1,965,200</u>
	(1,965,200)	

Budget Narrative

1. Public Information/Outreach and Training/Education **(\$751,300)**

A. Public Information Multi-Media Campaign **(\$436,100)**

Act 23 contains the following language:

SECTION 144. Nonstatutory provisions.

(1) PUBLIC INFORMATIONAL CAMPAIGN. In conjunction with the first regularly scheduled primary and election at which the voter identification requirements of this act

initially apply, the government accountability board shall conduct a public informational campaign for the purpose of informing prospective voters of the voter identification requirements of this act.

Action Plan:

The Board will conduct a comprehensive, statewide campaign to inform and educate the public about the voter identification requirements of Act 23. In its original fiscal estimate for SB-6, the Board projected a multi-media public education campaign would cost \$500,000, based on the budgets of previous state-sponsored campaigns for tourism, economic development and public health (H1N1 flu prevention). Due to the reduced budget, the Board intends to spend \$436,100 for the public information campaign.

There are several existing State contracts for advertising and public relations services. The Board proposes to use one of these contractors to purchase professional services for assisting to develop and deploy the statewide campaign. The Board will not use the firm for developing the text/information for the source materials/documents as that will be the responsibility of our knowledgeable staff. The advertising and public relations expertise would be use in deciding how to more effectively allocate limited advertising dollars. The Board will select an agency to assist staff in:

- Identifying target audiences and demographics
- Tailoring campaign themes to reach those audiences
- Producing advertisements but not drafting/developing the text
- Developing strategies and budgets for the deployment of paid media
(Includes the optimal mix of electronic, print, outdoor and online advertising)
- Managing media buys and placing advertisements.

In preparing the details of this budget Plan, staff consulted with a state advertising / public relations firm this is currently providing services to a State agency. To fulfill the specific directive regarding the first regular primary and election to which the law applies, we anticipate conducting focused waves of advertising prior to the February 21 primary and the April 5 general election / presidential preference primary. The recommended statewide campaign would consist of radio, billboards (posters), transit, online and print ads, and would generate more than 70 million impressions. The public informational campaign would be continued in conjunction with the Partisan Primary and General Elections in the fall of 2012, which involve much higher voter turnout than the spring elections.

In order to conduct a campaign that also includes television advertisements, staff was informed that a budget of \$892,000 would be required, and would generate approximately 117 million impressions. Board staff is not recommending inclusion of paid television advertising for budgetary reasons.

In addition to the paid multi-media campaign, the Board anticipates making extensive use of free/earned media through public service announcements, news releases, news conferences, and interviews with news media outlets. These activities will be carried out by existing Board staff as well as by project staff to be hired exclusively for assisting with the implementation of the Photo ID Law.

B. Public Outreach Campaign
(\$150,000)

Act 23 contains the following language:

SECTION 95. 7.08 (12) of the statutes is created to read:

7.08 (12) ASSISTANCE IN OBTAINING PROOF OF IDENTIFICATION. Engage in outreach to identify and contact groups of electors who may need assistance in obtaining or renewing a document that constitutes proof of identification for voting under s. 6.79 (2) (a), 6.86 (1) (ar), or 6.87 (4) (b) 1., and provide assistance to the electors in obtaining or renewing that document.

Action Plan:

In its fiscal estimate for SB-6, the Board projected a public outreach campaign would cost \$150,000. This dollar amount was based on the budget for a state-sponsored anti-smoking campaign, as well as advice from public relations professionals with expertise in conducting outreach campaigns. The Board plans to spend \$150,000 for outside assistance with the public outreach campaign. The overall campaign will be conducted using a combination of Board staff, including project staff to be hired exclusively for assisting with the implementation of the Photo ID Law, and outside consultants.

As previously stated, Wisconsin has several existing State contracts for advertising and public relations services. The Board proposes to use one of these contractors to purchase professional services for developing and deploying the outreach campaign. The objectives of the outreach campaign will be to:

- Identify groups of eligible voters needing assistance who may not have an acceptable form of identification.
- Identify organizations that work with these select groups of eligible voters
- Develop educational materials for these organizations to use in training their members/staffs about the new Voter ID Law
- Communicate educational messages on a more personal level; intersect within the lifestyles and communities of the target audiences via grassroots marketing efforts
- Minimize the number of historically disadvantaged voters who arrive at the polls without a Photo ID that meets statutory requirements
- Direct targeted voters and groups to a dedicated website and/or help line
- Complement paid advertising initiatives

Likely targets for the outreach campaign include:

- Elderly voters whose driver licenses or identification cards may have expired
- Both rural and urban populations
- Voters with disabilities
- Minority groups (e.g., African American/Hispanic/Hmong populations)
- College students

The advertising/public relations firm would assist Board staff in producing the following materials. Note that due to their respective areas of expertise, members of the Board staff would develop the text.

- Short video explaining how to obtain/renew statutory identification for voting; video to be distributed online and on CD/DVD
- PowerPoint presentation that can be customized for different target audiences

- Banners to be used at events
- Posters
- Brochures and other printed materials for distribution to community resource centers, senior citizen housing/retirement facilities, colleges, churches, physician offices, grocery stores, restaurants, libraries, government buildings, etc.

C. Training/Education/Technical Assistance
(\$165,200)

Key Statistics about Wisconsin's Electorate:

- Wisconsin 2010 population according to the 2010 Decennial Census, was approximately 5.7 million residents.
- The State's November 2010 estimated voting age population was 4,372,302. Of this number, 3,711,699 voting records were maintained in the Statewide Voter Registration System (SVRS), of which 3.5 million were eligible to vote.
- The State's 1,850 municipalities serve 2,827 polling places that comprise 3,600 reporting units (wards/precincts). 1,673 of the State's cities, towns and villages have a population under 5,000 and are mostly rural.
- The majority of the 1,850 municipal clerks (62 percent) responsible for administering local elections work part-time, and the turnover rate is between 20-25% annually. These facts underscore the need for ongoing training and continuous support to ensure uniform application of the many new requirements for the voting and election administration provisions contained in Act 23.
- Depending on the election (the November Presidential General Election especially), 20,000 to 30,000 poll workers are called upon to work the 2,827 polling places in both regular (13 hours) and split (less than 13 hours) shifts.

Action Plan:

Providing accurate and easy-to-understand information to the State's Local Election Officials (our partners), 3.5 million voters and another one million potential voters who are part of the voting age population about the requirements of the new Voter Photo ID Law is an important and also daunting and challenging task.

Materials will include but not be limited to brochures, pamphlets, informational flyers, and other documents developed for "getting out the word" through training, education, and technical assistance efforts, and related outreach initiatives. These training, educational, technical assistance and outreach initiatives are necessary and important components of the agency's overall strategy in addressing and complying with the Voter ID Law, making sure the electorate is reached, involved and well informed of the new law and its core requirements.

Obviously, a one-size-fits-all approach is not the answer. Given the manner in which people learn, recall, retain and act on information, an array of approaches will be used to make sure all reasonable and practical efforts are made to effectively reach Wisconsin's citizenry, including various targeted groups through a variety of training, education and technical assistance efforts, and related outreach initiatives.

Although the Training/Education/Technical Assistance task is delineated for informational purposes, in actuality, this component, along with the Public Information Multi-Media Campaign and the Public Outreach Campaign, are integrated and therefore complementary. Due to their interconnections, taken and implemented together, these initiatives will provide an effective combined tool for meeting this public policy and public information objective.

In its fiscal estimate for SB-6, the Board projected a budget for training, education and technical assistance to local election officials of approximately \$250,000. While that budget remains unchanged, it also includes the time of new project staff to be hired exclusively for assisting with the implementation of the Photo ID Law.

The Budget Summary Line Item for Training/Education/Technical Assistance of \$165,200 contains only funds being spent for Supplies and Services. Funds designated in the budget for new staff who will be working on training, education and technical assistance are included in the Personnel line under Program Support.

Supplies and Services costs for training, education and technical assistance include in-state travel to educational, training, technical assistance, and outreach sessions; production of polling place training aids; and production of training videos for local election officials, targeted groups and software for online training.

**2. Program Support
(\$698,702)**

Sufficient program support is critical to the success of an effective implementation of the Voter Photo ID Law. Key to this success is a cadre of knowledgeable and skilled staff.

Action Plan:

2011 Wisconsin Act 32, the 2011-2013 biennial budget, authorizes 5.0 two-year GPR project positions to implement the provisions of Act 23. The positions are to be utilized for public outreach and education, modification of the Statewide Voter Registration System, training of election officials, support of the Board's Help Desk, and revision of forms and materials.

**A. Personnel (Staffing Costs)
(\$599,292)**

Personnel cost details are as follows:

FTE	Classification	Hourly	Annual	Fringe	Total
3	PID* Elections Specialist	\$23.000	\$48,024	\$23,124	**\$213,444
1	PID IS Resource Support Tech-Entry	\$13.899	\$29,021	\$13,974	\$42,995
1	PID Office Operations Associate	\$13.968	\$29,165	\$14,043	\$43,208
5	Totals		\$202,258	\$97,387	***\$299,646

* PID = Photo ID

** The total annual cost for one PID Elections Specialist is \$71,148. The total annual costs for 3 PID Elections Specialist are \$213,444

*** The total annual costs for the 5 PID employees are \$299,646. The total funds allocated for personnel for the two-year time period is \$599,292

All five two-year project positions will devote 100% of their time to the implementation of the Voter Photo Law, and their respective primary tasks will be assigned in the following manner.

- The three (3) Photo ID Elections Specialists will be the Photo ID Program Specialists. These project employees will prepare materials, documents and information for the Public Information Multi-Media Campaign, the Public Outreach Campaign, and for Training/Education/Technical Assistance. In addition, these positions will provide and conduct training, education and technical assistance, as well as conduct public outreach activities. Hourly salary, depending on substance and relevance of the Candidate's training and experience, will not exceed \$23.00.
- The one (1) Information Specialist (IS) Resource Support Tech-Entry position will be assigned to our Help Desk to respond to public inquiries about Photo ID, and provide timely and accurate information about Photo ID.
- The one (1) Office Operations Associate will provide program and administrative support to the Photo ID program and the project Photo ID staff.

Election Administration is rooted in, and based on an array of complex Federal and State laws, rules, regulations and procedures. For an Election Specialist to achieve full performance and competence, experience gained during a four-year election cycle during which both a Gubernatorial and Presidential Election is conducted, is important. Time will not allow the five two-year project positions to go through this normal training cycle. Therefore, existing Government Accountability Board staff who are supported with Federal funds, and who have a demonstrated body of election administration program knowledge and experience, will be utilized as Lead Workers.

These Lead Workers will commence planning and preparation for the implementation of the Photo ID Law while the five two-year Photo ID project staff are being recruited and hired. These Lead Workers will also participate in the hiring, orientation, training, coaching and guiding the new Photo ID project staff. In addition, these Lead Workers will assist in monitoring, overseeing and evaluating the Voter ID project staff's work.

Based on the Government Accountability Board's experience and the need to obtain position numbers from the State Budget Office and work with the Department of Administration, Bureau of Human Resources, to recruit and hire the five two-year Photo ID project staff, it is anticipated that the recruitment, selection and initial training process will take about three months. The savings from personnel budget line item will be used to prorate the salary of Board staff who will be designated as Lead Workers for their respective time spent on planning and preparation for the implementation of the Photo ID Law while the five two-year Photo ID project staff are being recruited, hired and trained.

B. Staff Travel
(\$30,000)

To illustrate the environment in which the Photo ID project staff members have to operate, there are 114,141 miles of roads in Wisconsin. It takes about 7 hours to drive from the most southern part of the state to its northern peak, and about 5 hours to go from across the state from the far west border to the far east border. Wisconsin's population is sparsely scattered over 56,145 square miles.

Action Plan:

Based on the Government Accountability Board's experience in executing its regular and everyday election administration program activities, staff travel for implementing the new Photo ID Law will include numerous in-person interactions with the public and targeted groups, which will require a heavy travel schedule. Before, during and after elections, elections specialists' "in-the-field" travel to service local election partners and customers often increases to comprise 80% of their work hours. The State's Central Fleet vehicles are used for this purpose. Staff always stay at lodging facilities that honor the State lodging rate.

Based on the Government Accountability Board's experience in conducting regular training throughout the State, and given that Photo ID is a major new public policy that fundamentally changes the way Wisconsin's electorate has been voting for decades, we believe the information about the new law will need to be repeated in a variety of ways, including in-person group and classroom style meetings. These factors contribute to the allocation of \$30,000 for travel. In addition to the costs for the State's Central Fleet vehicles and lodging, this allocation also includes reimbursement for meals and related expenses incurred in accordance with established State Travel Guidelines.

Example:

➤ Total personal expenses: \$65 x 3 staff =	\$195.00
➤ 1 State Fleet Van, 2 days =	\$80.00
➤ Hotel, 2 nights for 3 people =	\$420.00
➤ \$695/trip x 43 trips =	\$30,00.00

C. Equipment
(\$10,000)

For purposes of this Plan, equipment is defined as computers for the five two-year project Photo ID employees.

Action Plan:

Procure five computers for the five two-year project Photo ID employees at \$2,000 each.

D. Administrative Expenses
(\$59,410)

Administrative expenses to help support the five two-year project Photo ID positions include: Telephone service, email accounts, office supplies, printing and postage.

Action Plan:

The allocation of \$59,410 for supplies and services will be tracked and monitored along with all other expenditures associated with this Photo ID Budget.

3. Statewide Voter Registration System (SVRS)
Modifications for Implementing Photo ID
(\$515,199)

Action Plan:

The SVRS will be modified in order to track whether an absentee voter has previously submitted photo ID and is therefore, not required to do so with subsequent absentee ballot

submissions. The SVRS will also need to be modified to manage the new provisional ballot scenarios, and training for clerks that use the SVRS will be imperative.

The SVRS will be modified so that the voter list and absentee ballot log print-outs used on Election Day indicate whether the voter has to show a statutory ID (to allow for the exemptions in the Act). This checkbox will be pre-populated based on the voter record so that election inspectors know if any exceptions to the legislatively-authorized ID requirement apply to the individual voter.

The SVRS will be updated to reflect the new Photo ID requirements. The SVRS field currently labeled “ID Required” field must be changed to “Proof of Residence Required” on the voter list, voter application node, and the voter record. A statutory ID field must also be added to the voter record and voter application node so it can be displayed on the voter list.

A number of reports and forms generated by SVRS must be updated. “ID Required” and “Proof of Residence Required” must be displayed on the absentee ballot label, absentee ballot log, absentee ballot log with districts, and absentee certificate envelope which are generated by SVRS. The existing uniform absentee instructions in SVRS will be updated to reflect the new procedures. The Voter Public Access feature on the Board’s website will be modified to display the “Proof of Residence Required” and “Statutory ID required” fields.

Due to the fact that only mail-in absentee ballots exempt the voter from presenting acceptable photo ID at future elections, SVRS will be enhanced to designate the absentee ballot transmission method on all absentee labels, the voter list, and the absentee ballot log. The new types of care facilities eligible to be covered by special voting deputies will also be shown. A new absentee witness name/address verification will be created to cover the different acceptable witness statements available for confined electors, voters in facilities covered by special voting deputies, and voters in facilities not covered by special voting deputies. SVRS will also be modified to remove the corroborating witness as an option in the voter application and voter record.

In order for these highly technical changes and modification to the Statewide Voter Registration System (SVRS) to be effectuated in time for the 2012 Election Cycle, a dedicated team of advanced-skilled IT specialists will be needed. SVRS User Acceptance Testing also will need to be completed.

Modifications will be made to the SVRS’ Voter Public Access (VPA) component in order to allow military and permanent overseas voters to submit requests for absentee ballots online, without the need to present a photo ID, as they are exempted from this requirement under Act 23. This will require modification of SVRS to accept application from the VPA site. This functionality will greatly assist military and overseas voters to receive, mark, return and track their ballot as required by the Federal Military and Overseas Voter Empowerment (MOVE) Act. Significant training of clerks on this additional absentee application process will be required.

It is estimated that about 5,380 hours at a blended rate of \$90 would be required for making the SVRS modifications, and about 755 hours at a blended rate of \$40 would be required for the testing.

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KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the August 2, 2011, Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy, Director and General Counsel
Wisconsin Government Accountability Board

Prepared by: Kevin J. Kennedy, Director and General Counsel
Sharrie Hauge, Chief Administrative Officer
Reid Magney, Public Information Officer

SUBJECT: Administrative Activities

Agency Operations

Introduction

The primary administrative focus for this reporting period has been providing information to the Joint Committee on Finance and the Legislative Fiscal Bureau with regard to our four, 13.10 requests, preparing for the second quarter Contract Sunshine certification, preparing for the close-out of FY-11 and preparations for the new fiscal year, creating a budget for the Voter Photo ID implementation, developing the budget section of the Federal Voter Assistance Program (FVAP) grant application, recruiting staff, communicating with agency customers, and developing legislative and media presentations.

Noteworthy Activities

1. Legislative Joint Committee on Finance (JCF) 13.10 Funding Requests

On March 10, 2011, staff submitted four separate Section 13.10 requests to the Legislative Joint Committee on Finance for inclusion at its next 13.10 meeting.

1. That the Joint Committee on Finance place our \$16,515 request for increased expenditure authority on the agenda. We are requesting **\$94,720** for FY-11 in our program revenue appropriation [s.20.511(1)(im)] supplies and services line to enable the agency to complete its current information technology (IT) project to upgrade our lobbying database and website.
2. That the Joint Committee on Finance transfer **\$40,800** from the Committee's supplemental appropriation [s.20.865(4)(a)] to the agency's GPR general operations appropriation to enable the agency to acquire the necessary resources to review, analyze, and determine the sufficiency of up to 16 legislative recall petitions that may be offered for filing between April 25, 2011, and May 31, 2011.
3. Pursuant to §13.101(4), Wis. Stats., the Government Accountability Board requests the Joint Committee on Finance release **\$7,000** to the agency's GPR Election-related cost reimbursement appropriation [§20.511 (1)(b)] to reimburse municipalities for extended

polling hours for the April 5, 2011, and May 3, 2011 elections. We have a shortfall in this appropriation due to across-the-board budget reductions this biennium.

4. That the Joint Committee on Finance transfer GPR expenditure authority totaling **\$67,637** for FY 2010-11 from the agency's GPR general operations [§20.511 (1)(a)] to the GPR election administration transfer account [§20.511 (1)(d)] and then to the SEG election administration fund [§20.511 (1)(t)] in order to qualify for HAVA Section 251 payments, which has a 5% state match requirement. This will enable G.A.B. to secure an additional \$1,285,090 in 2010 federal HAVA requirements payments.

On July 19, 2011, the JCF held their first quarterly meeting to address our 13.10 requests. However, as it was the end of the fiscal year, our needs changed significantly. The Financial staff was able to provide known fund balances, as opposed to the projected balances we first submitted in March.

Ultimately, the committee approved all four of our requests as follows:

1. To provide \$8,700 PR in 2010-11 to the Board's lobbying administration PR appropriation to permit the Board to upgrade its lobbying database and website. (This amount was based on actual need and our revised request).
2. To transfer \$40,800 from the Committee's 2010-11 supplemental appropriation to offset the costs of the recall expenses. (This amount was based on our original request, not the actual costs of the recall efforts, which were \$88,300).
3. To transfer \$5,400 on a one-time basis from the Committee's 2010-11 supplemental appropriation to reimburse municipalities for additional costs incurred to adjust polling hours to begin at 7:00 a.m., at any election held after April 29, 2006. (This amount was based on actual need and our revised request).
4. To transfer GPR expenditure authority totaling \$67,700 GPR for FY-2010-11 from the agency's GPR general operations to the SEG election administration fund in order to qualify for HAVA Section 251 payments, which requires a 5% state match. (This amount was approved based on our original request).

2. Contract Sunshine Program Update

The Government Accountability Board sent out its second quarterly certification for the year on July 1. This certification covered the period beginning April 1, 2011, and ending June 30, 2011. As has been the case with most recent certifications, agency response thus far has been outstanding and compliance remains very high. There are currently only two agencies that have failed to return their certification for this period: the Department of Transportation and the Department of Health Services. These agencies have been contacted multiple times regarding the certification progress by G.A.B. staff. These agencies will be listed on the Contract Sunshine website until such time as we receive their certification. It is our plan to pilot a single-agency audit of Contract Sunshine data in August or September to determine the methodology and resource commitment auditing will take. G.A.B. staff will seek the assistance of Legislative Audit Bureau staff to design audit procedures.

Contract Sunshine continues to receive enhancements to improve usability. G.A.B. staff is working with our vendor to review workflow processes within Contract Sunshine. Workflows that are found to be inefficient or confusing will be streamlined to improve user experience. Minor cosmetic improvements are also being developed. In terms of major changes in functionality, the ability of

agency contacts to make edits to their own agency data has been developed and is currently undergoing testing. This development, which should be available in August, gives agencies greater flexibility and control over the editing of their data for corrections, which formerly required G.A.B. intervention. The process developed by G.A.B. staff includes a step that requires G.A.B. staff to review all edits, which ensures a layer of accountability even as we decentralize this process. This process should remove some pressure in terms of demands upon G.A.B. staff and will also result in quicker turn-around time for edits for users.

3. Procurements

Financial services staff have been quite busy throughout June and July closing-out the previous fiscal year FY-11 (July 1, 2010 – June 30, 2011) accounts and opening the new fiscal year FY-12 (July 1, 2011 – June 30, 2012) accounts. Thirty-seven purchase orders were created last year, of which 34 were closed and three were carried over into this current fiscal year.

For the current fiscal year, thus far, we have created 10 new purchase orders, valued at \$560,921. Combined with the 3 carried-over purchase orders, the total value of purchase orders written for this fiscal year totals \$597,038.

These purchase orders have involved several procurement efforts, which include: hiring a 3-person team for comprehensive IT services (\$443,134); hiring temporary services staff to help with polling place accessibility surveys (\$4,864); hiring temporary services staff to go out onto the road to conduct polling place accessibility surveys (\$4,006); renewing the Contract Sunshine website programmer contract (\$11,300); renewing the lobbying database developer contract (\$89,984); renewing the photocopier maintenance agreements (\$6,445); renewing the Contract Sunshine web hosting services (\$1,188); and, carrying over FY-11 purchase orders for the Eye on Financial Relationships application programmer (\$9,975), Badger State Industries for systems furniture (\$16,545) and the Department of Administration for SWEBIS 1 maintenance (\$9,597).

4. Fiscal Year 11 Close-Out Activities and FY-12 Operating Budget Preparations

The financial services section has been extremely busy the last six weeks preparing numerous financial transactions in preparation for the end of FY-11 and setting up our FY-12 operating budget:

- Auditing and updating all interest earnings allocation calculations to properly account for and allocate \$5,209,999 in interest income to each federal program.
- Calculated and booked true-ups of our payroll expenditures for the last 4-quarters ensuring compliance with federal costing standards, especially employee time diverted to recall efforts.
- Calculated the FY-12 operating budgets.
- Validated fund classifications for the new GASB Statement No. 4 – Fund Balance Reporting and Government Fund Type Definitions to properly report our agency funds on the Comprehensive Annual Fiscal Report (CAFR) balance sheet depending upon state commitments, constraints and intentions. The CAFR is prepared in accordance with Generally Accepted Accounting Principles (GAAP).

- Verified all Section 261 (Accessibility) grants payments in WiSMART to ensure accurate expenditure targets for the federal fiscal year grant ending 9/30/2011.
- Assisted with developing the Voter Photo ID budget calculations and prepared the operating budget of \$1.9M.
- Audited monthly General Service billings for proper allocations to federal and state programs.
- Set up accounts for FY-12 and developed new accounting codes to track recall and Voter Photo ID expenses.

Staff continues to work on the FY-11 close-out process and will conclude this work in mid-August.

5. Other Financial Services Section Activity

- Calculated budget amounts being proposed for the Federal Voting Assistance Program (FVAP) grant application (the Electronic Absentee Systems for Elections (EASE). Our agency is requesting a two-year grant for \$1,919,864.
- Reviewed and approved numerous travel vouchers and invoice payments to ensure timely processing of fiscal year-end payables.
- Assisted in recall petitions and challenges work.
- Paid over 150 invoices (including 60 polling place reimbursements in 2-days).
- Made several deposits which consisted of \$322 for sales of copies, \$32,085 for sales of voter lists, and \$8,900 in campaign finance filing fees.
- Made travel arrangements for 10 staff and 10 temporary services staff to conduct polling place accessibility surveys across Wisconsin.
- Made travel arrangements for 4 agency staff to attend the Heartland conference and 3 agency staff to attend the NASED conference.

6. Staffing

Currently, we are recruiting for an Office Operations Associate position to support the HAVA program staff. On March 25 we hired an employee, but he resigned from his position on May 27.

Additionally, in our 2011-13 biennial budget, five new two-year project FTE (1-Elections Specialist, 2-Training Officers, 1-Help Desk support, 1-Office Associate) were approved for Voter Photo ID implementation. Recruitment efforts will begin once we receive position numbers and the position descriptions are approved. We also will begin recruitment efforts for nine additional staff vacancies.

On June 5, 2011, Ross Hein began his new appointment as an Elections Supervisor.

7. Communications Report

Since the May 17, 2011, Board meeting, the Public Information Officer has engaged in the following communications activities in furtherance of the Board's mission:

- The PIO continued to respond to an unusually high number of media and public inquiries on a variety of subjects, including the recall petition review process and the elections ordered by the Board, the aftermath of the Supreme Court recount, and the implementation of the new Voter Photo ID law. The PIO set up interviews with print and electronic journalists for Mr. Kennedy and also gave interviews when he was not available.
- In addition to media and public inquiries about Voter Photo ID law, the PIO worked with other Board staff to develop a report for the Joint Committee on Finance, which was submitted to the committee on July 1 for 14-day passive review. While the report covered the Board's overall budget and plans for all aspects of implementation of Act 23, it focused on the public information, public outreach and training aspects of the law. On July 15, the Joint Committee on Finance informed the Board that the plan had been approved. The next step is selecting an advertising/public relations agency from existing state contracts to assist the Board staff with the development and placement of a multi-media advertising campaign to educate the public about the need for a photo ID to vote beginning in February 2012. The agency will also assist the staff in development of materials for the public outreach campaign to groups which are likely to need assistance in obtaining a photo ID.
- The PIO created a new photo ID portal page on the website (<http://gab.wi.gov/elections-voting/photo-id>) with information relevant to voters and local election officials about Act 23. The previous portal page, with background about legislative proposals for the new voter photo ID law, is still available on the website.
- The PIO has been responding to a number of public records requests related to the Supreme Court recount.
- In the midst of the Board's many activities during June for the recall petitions and recall candidate challenges, the PIO coordinated preparations for a larger than usual number of presentations by Board staff to groups of international visitors:
 1. June 6 – visitors from Burkina Faso, Cameroon, Chad, Guinea, Guinea-Bissau, Kenya, Madagascar, Mali, Mauritius, Niger, Nigeria, Senegal, Uganda, Zambia, and Zimbabwe, hosted by International Institute of Wisconsin.
 2. June 20 – visitors from Algeria, Egypt, Mauritania, Morocco, Palestinian Territories, Saudi Arabia, Tunisia, and United Arab Emirates, hosted by International Institute of Wisconsin.
 3. June 21 – visitors from the country of Georgia, hosted by the International Institute of Wisconsin.
 4. June 30 – government officials from Kenya, hosted by Center for International Development, State University of New York.

The first three groups were all very interested in learning about the Board's role in the historic political events that occurred during the first half of 2011, including recall elections, the Supreme Court recount, and ethics investigations. The Kenyan delegation, which included members of the parliament who wished to learn about Wisconsin's recall laws because recall is a part of their new constitution. Operations Program Assistant Tiffany

Schwoerer provides invaluable assistance in putting together packets of materials for our guests and providing refreshments.

- The PIO has also worked on a variety of other projects including responding to concerns from Legislators on a variety of topics and communicating with our clerk partners.

8. Meetings and Presentations

During the time since the last Board meeting, Director Kennedy has been participating in a series of meetings and working with agency staff on several projects. The primary focus of the staff meetings has been to address legislative and budget implementation issues, including several internal and external meetings on Voter Photo ID implementation. The Director, staff counsel Mike Haas and recount project leader Ross Hein had several discussions with the Waukesha County Corporation Counsel, Judge Mawdsley and Barbara Hansen related to the statewide recount.

Considerable time has been spent meeting with attorneys from the Department of Justice on the large number of lawsuits to which the agency is a party, as well as the related court hearings. The agency's decisions have been upheld in all 10 cases emanating from the initial set of recall initiatives.

The Director has had several meetings and discussions with legislators and legislative staff members on election reform proposals. This has also included discussion with the Legislative Council staff, Legislative Reference Bureau drafting attorneys and analysts with the Legislative Fiscal Bureau.

One key meeting was with the Department of Administration Secretary Huebsch to discuss agency staffing issues. As a result of the meeting, federal funded Elections Division staff received an additional one-year extension. We are still working to finalize authorization for the final four years of federally-funded staffing.

The Director, along with the Division Administrators and other key staff, participated in several meetings with delegations of public officials, journalists and citizens from other countries. These meetings are described in the preceding section prepared by the agency public information officer.

The media has continued to make a number of inquiries on recall, recount, and legislative initiatives, particularly Voter Photo ID and redistricting, as well as the rules and costs associated with recall and the statewide recount. This has led to extended interviews with print journalists and a number of television and radio appearances. These included a May 27, 2011, appearance on Wisconsin Public Television related to photo identification background and implementation, a June 22, 2011 Wisconsin Eye show related to background and implementation of the new Voter Photo ID law (<http://www.wiseye.com/Programming/VideoArchive/EventDetail.aspx?evhdid=4418>) and two Wisconsin Public Radio call-in shows on June 9, 2011, and July 7, 2011.

On June 2, 2011, the Assembly and Senate elections committees held a joint public hearing on changing the date of the presidential preference primary from the third Tuesday in February to the first Tuesday in April. This initiative is based on changes in the national political party rules for the presidential nominating process. The staff has worked closely with the two state political parties, the legislative committees and the legislative drafter on this issue.

The staff has also been actively involved in the development of the legislation to move the September partisan primary. The legislative proposals will change the date of the partisan primary

from the second Tuesday in September to the second Tuesday in August. This is the same date as Minnesota and Michigan. There is more information on both these proposals in the legislative status report.

Judge Vocke participated in an orientation session with agency staff on June 22, 2011. This has been a recurring staff initiative for new Board members, which provides background information on the scope of the Board's jurisdiction, agency operations and key issues pending before the Board.

On May 12, 2011, the Joint Committee on Finance held an executive session on the agency budget. The Committee took executive action on July 19, 2011 with respect to the agency's emergency funding requests submitted in March of this year. They are more fully described in the administration section of this report.

On June 28, 2011, a team of staff including the Director, Elections Division Administrator Nat Robinson, Ross Hein, Sarah Whitt, and Katie Mueller traveled to Ladysmith to meet with county clerks. The team then proceeded to Birchwood to meet with Districts 1 and 2 of the Wisconsin Municipal Clerks Association. The presentations focused on Voter Photo ID implementation, on-line voter registration, and recall election administration, with an emphasis on new changes effective for 2011.

On June 29, 2011, the Director and Sarah Whitt participated in a teleconference meeting sponsored by the Pew Charitable Trusts Center on the States on voter registration modernization. This project has been ongoing since 2009. The goal is to establish a voter registration data sharing mechanism that will improve state voter registration data quality and facilitate voter registration by eligible citizens.

The Director attended a meeting in Chicago on July 20 and 21, 2011, of the Pew Charitable Trusts Center on the States Performance Index for Election Administration Working Group. The working group is focused on developing objective measures to evaluate the administration of elections. The working group consists of state and local election administrators and an equal number of academic researchers.

Ross Hein, Nat Robinson and Director Kennedy attended the summer meeting of the National Association of State Election Directors (NASSED) in Chicago on July 21 through July 23, 2011. Director Kennedy, along with Indiana Co-Director of Elections Brad King, presented a summary of election and campaign finance related legislation for the organization.

Looking Ahead

The staff will continue to complete its review of the issues identified from the statewide recount of the April 5, 2011, spring election for Supreme Court Justice. The staff will also be engaged in implementing several provisions of the photo identification legislation including provisions effective for the August recall and other 2011 elections. Staff will also turn its attention to a number of matters that have been postponed due to the recall and recount issues including proposed legislative changes.

Action Items

None identified by staff.

The Board's next meeting is scheduled for Monday September 12, 2011, beginning at 9:30 a.m.