

State of Wisconsin \ Government Accountability Board

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JUDGE WILLIAM EICH
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KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the March 23-24, 2010 Meeting

TO: Members, Wisconsin Government Accountability Board

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

Prepared and Presented by:

Shane W. Falk, Staff Counsel

SUBJECT: Promulgation of Rule GAB 1.28, Regarding Definition of "Political Purpose"

Introduction and Recommendation:

At the direction of the Board and also upon request from the Legislature, staff recalled Clearinghouse Rule 09-013 regarding revisions to GAB 1.28, Wis. Adm. Code, from the two Legislative Committees charged with reviewing authority of the rule (Senate Committee on Labor, Elections, and Urban Affairs and Assembly Committee on Elections and Campaign Reform.) The Board had expressed a desire to receive and review the U.S. Supreme Court decision, Citizens United v. FEC, before continuing the promulgation of the rule so as to incorporate any necessary revisions due to the decision. This recall request was completed on July 1, 2009, when the Chief Clerks of the Assembly and Senate returned the Legislative Report to the Government Accountability Board, thus relinquishing the Legislature's jurisdiction over the rule and returning jurisdiction to the Board.

Pursuant to §227.19(4)(b)3m., Wis. Stats., the Board is within its statutory authority to resubmit the rule to the Legislature and continue the rule promulgation process, with or without modifications to the rule.

Staff recommends that the Board resubmit the proposed rule to the Legislature in its recalled form, but with some modifications to the analysis of the rule. See attached revised rule analysis, revisions in **bold** font. Staff opines that Citizens United v. FEC does not affect the substance of the text of the rule, but some reference to the case should be noted in the analysis nonetheless. While Citizens United v. FEC reaffirmed FEC v. WRTL which was the basis for the proposed rule, Citizens United did permit corporate independent expenditures.

Staff also recommends that the Board authorize final promulgation of the rule.

Background:

Following the public hearing for GAB 1.28 on March 30, 2009, the Government Accountability Board re-affirmed the final draft of the rule and directed the staff to continue forward with rule-making procedures.

Rule-making procedures required the submission of a Notice and Legislative Report to the Chief Clerks of both the Senate and Assembly. This was completed on April 29, 2009. By operation of §227.19(2), Wis. Stats., the Chief Clerks were required to refer the Notice and Legislative Report to the required standing committees. This process was completed in the Senate on May 4, 2009 (Committee on Labor, Elections, and Urban Affairs, Chair Sen. Spencer Coggs) and in the Assembly on May 7, 2009 (Committee on Elections and Campaign Finance Reform, Chair Rep. Jeff Smith.)

By operation of §227.19(4)(b)1., Wis. Stats., each respective committee had 30 days to complete its review of the proposed GAB 1.28. Pursuant to the same statute, on May 8, 2009, Sen. Coggs requested a meeting with G.A.B. staff, which extended the Senate Committee's review of the rule another 30 days to July 3, 2009. On May 12, 2009, Rep. Smith requested a meeting with G.A.B. staff, which extended the Assembly Committee's review of the rule another 30 days to July 6, 2009.

On March 30, 2009, the Government Accountability Board expressed a concern regarding the potential impact of Citizens United v. FEC on the rule and directed staff to delay publication and final promulgation of the rule until the Board had an opportunity to review the U.S. Supreme Court's decision. The Legislative Committees expressed similar concerns during their review of the rule. On June 22, 2009, the Board directed staff to recall the rule so as to preserve jurisdiction for further consideration following the release of Citizens United v. FEC. Staff recalled the rule on June 25, 2009 and the Legislative Committees returned the rule to the Government Accountability Board on July 1, 2009.

Current Status:

Should the Board direct staff to resubmit the rule to the Legislature, the Chief Clerks for each house of the Legislature will have 10 business days from receipt to refer the rule to the relevant standing committees. The committees will likely again be the Senate Committee on Labor, Elections, and Urban Affairs and the Assembly Committee on Elections and Campaign Reform. Upon referral from the Chief Clerks, these committees will then have 30 days to review the rule, pursuant to §227.19(4)(b)3m., Wis. Stats.

Either or both committees may object to the rule. If an objection is made, the rule shall be referred to the Joint Committee for Review of Administrative Rules, pursuant to §227.19(5), Wis. Stats., where another 30 day review period ensues. If the Joint Committee for Review of Administrative Rules concurs in an objection, it shall introduce a bill in each house to support the objection, pursuant to §227.19(5)(e), Wis. Stats.

Analysis:

The long awaited decision from the U.S. Supreme Court, Citizens United v. FEC, 558 U.S. ___, No. 08-205, *slip opinion* (January 21, 2010), did not affect the holding of FEC v. WRTL, 551 U.S. 449 (2007), which was the legal basis for the substantive portions of revisions to GAB 1.28. In deciding Citizens United, the U.S. Supreme Court could have revisited and modified the holding of WRTL. This is not what the U.S. Supreme Court did in Citizens United. Rather, the Court specifically relied upon the WRTL decision to hold that the *Hillary*

movie, and the ads promoting the movie, were the “functional equivalent” of express advocacy and therefore subject to the 2 U.S.C. §441b prohibitions on corporate “electioneering communications.” In short, the Court applied the WRTL holding: “the functional-equivalent test is objective: ‘a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.’” Citizens United at p. 7, *slip opinion*. The Court specifically held that under this test, *Hillary* and the ads promoting it, are equivalent to express advocacy. Id. at pp. 7 and 52.

In analyzing the objective “functional-equivalent test,” the Court noted that *Hillary*, the movie, was in essence a feature-length negative advertisement that urged viewers to vote against Senator Clinton for President. “In light of historical footage, interviews with persons critical of her, and voiceover narration, the film would be understood by most viewers as an extended criticism of Senator Clinton’s character and her fitness for the office of the Presidency.” Id. at 7-8. The Court went further and explained:

The narrative may contain more suggestions and arguments than facts, but there is little doubt that the thesis of the film is that she is unfit for the Presidency. The movie concentrates on alleged wrongdoing during the Clinton administration, Senator Clinton’s qualifications and fitness for office, and policies the commentators predict she would pursue if elected President. It calls Senator Clinton “Machiavellian,” App. 64a, and asks whether she is “the most qualified to hit the ground running if elected President,” *id.*, at 88a. The narrator reminds viewers that “Americans have never been keen on dynasties” and that “a vote for Hillary is a vote to continue 20 years of a Bush or a Clinton in the White House,” *id.*, at 143a-144a.

Citizens United argues that *Hillary* is just “a documentary film that examines certain historical events.” Brief for Appellant 35. We disagree. The movie’s consistent emphasis is on the relevance of these events to Senator Clinton’s candidacy for President. The narrator begins by asking “could [Senator Clinton] become the first female President in the history of the United States?” App. 35a. And the narrator reiterates the movie’s message in his closing line: “Finally, before America decides on our next president, voters should need no reminders of . . . what’s at stake—the well being and prosperity of our nation.” *Id.*, at 144a-145a. Citizens United at p. 8, *slip opinion*.

The Court confirmed the District Court’s finding, there is no reasonable interpretation of *Hillary* other than an appeal to vote against Senator Clinton. “Under the standard stated in McConnell and as further elaborated in WRTL, the film qualifies as the functional equivalent of express advocacy.” Id. at p. 8.

The Court also found that the one 30-second and two 10-second ads to promote *Hillary* fell within the definition of an “electioneering communication.” Id. at p. 52. The ads referred to then-Senator Clinton by name shortly before a primary and contained pejorative references to her candidacy. Id.

The U.S. Supreme Court’s holding and rationale from Citizens United reaffirms the WRTL “functional-equivalent test.” Currently, §11.01(16)(a), Wis. Stats., defines acts which are done for “political purposes,” and that definition includes, but is not limited to, express advocacy. The current version of GAB §1.28(2)(c), Wis. Adm. Code, identifies “magic words” qualifying a communication as express advocacy, but also provides that the “functional equivalents” do so as well. Further clarification of this statute and administrative code provision is warranted, in

the context of the U.S. Supreme Court's holdings in WRTL and Citizens United. The proposed rule GAB 1.28 and the revised analysis section appropriately codify the "functional-equivalent test." Promulgation of the proposed rule GAB 1.28 will provide clarity for any person, group, committee or organization wishing to make communications for a political purpose.

Proposed Motions:

MOTIONS:

1. Approve revisions to GAB 1.28 in the rule analysis section and reaffirm the text of the rule.
2. Pursuant to §227.19(4)(b)3m., staff shall resubmit GAB 1.28 to the Legislature with the amended rule analysis.
3. Staff shall continue all other steps necessary to complete promulgation of GAB 1.28.

ORDER OF THE GOVERNMENT ACCOUNTABILITY BOARD
CR 09-013

The Wisconsin Government Accountability Board proposes an order to amend s. GAB 1.28, Wis. Adm. Code, relating to the definition of the term “political purpose.”

ANALYSIS PREPARED BY GOVERNMENT ACCOUNTABILITY BOARD:

1. Statute Interpreted: s.11.01(16), Stats.
2. Statutory Authority: ss. 5.05(1)(f) and 227.11(2)(a), Stats.
3. Explanation of agency authority: Under the existing statute, s. 11.01(16), Stats., an act is for “political purposes” when by its nature, intent or manner it directly or indirectly influences or tends to influence voting at an election. Such an act includes support or opposition to a person’s present or future candidacy. Further, s. 11.01(16)(a)1., Stats., provides that acts which are for “political purposes” include but are not limited to the making of a communication which expressly advocates the election, defeat, recall or retention of a clearly identified candidate. The existing rule, s. GAB 1.28(2)(c), provides that the campaign finance regulations under ch. 11 of the Wisconsin Statutes apply to making a communication that contains one or more specific words “or their functional equivalents” with reference to a clearly identified candidate that expressly advocates the election or defeat of that candidate and that unambiguously relates to the campaign of that candidate.

Under the existing statute, s. 11.01(16)(a)1., Stats., and rule, s. GAB 1.28(2)(c), individuals and organizations that do not spend money to expressly advocate the election or defeat of a clearly identified candidate, or to advocate a vote “Yes” or vote “No” at a referendum, are not subject to campaign finance regulation under ch.11 of the Wisconsin Statutes. The term “expressly advocate” initially was limited to so-called “magic words” or their verbal equivalents. The Wisconsin Supreme Court, in *Wisconsin Manufacturers & Commerce (WMC) v. State Elections Board*, 227 Wis.2d 650 (1999), has opined that if the Government Accountability Board’s predecessor, the Elections Board, wished to adopt a more inclusive interpretation of the term “express advocacy,” it could do so by way of a rule. The Wisconsin Court of Appeals, in *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board*, 231 Wis.2d 670 (Wis. Ct. App. 1999), further opined:

And while, as plaintiffs point out, “express advocacy” on behalf of a candidate is one part of the statutory definition of “political purpose,” it is not the only part. Under s. 11.01(16), Stats., for example, an act is also done for a political purpose if it is undertaken “for the purpose of influencing the election . . . of any individual.

* * *

Contrary to plaintiffs’ assertions, then, the term “political purposes” is not restricted by the cases, the statutes or the code to acts of express advocacy. It encompasses many acts undertaken to influence a candidate’s election—including making contributions to an election campaign.

The United States Supreme Court, in *McConnell et al. v. Federal Election Commission (FEC) et al.*, 540 U.S. 93 (2003), in a December 10, 2003 opinion, has said that Congress and state legislatures may regulate political speech that is not limited to “express advocacy.” Specifically, the *McConnell* Court upheld, as facially constitutional, broader federal regulations of communications that (1) refer to a clearly identified candidate; (2) are made within 60 days before a general election or 30 days before a primary election; and (3) are targeted to the relevant electorate. The *McConnell* Court further opined:

Nor are we persuaded, independent of our precedents, that the First Amendment erects a rigid barrier between express advocacy and so-called issue advocacy. That notion cannot be squared with our longstanding recognition that the presence or absence of magic words cannot meaningfully distinguish electioneering speech from a true issue ad Indeed, the unmistakable lesson from the record in this litigation . . . is that *Buckley’s* magic-words requirement is functionally meaningless Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election.

In *Federal Election Comm’n. v. Wisconsin Right To Life, Inc. (WRTL II)*, 550 U.S. 549 (2007), a United States Supreme Court case, Chief Justice Roberts writing for the majority, opined that an ad is the functional equivalent of express advocacy, if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate, i.e. mentions an election, candidacy, political party, or challenger; takes a position on a candidate’s character, qualifications, or fitness for office; condemns a candidate’s record on a particular issue.

In *Citizens United v. FEC*, 558 U.S. ___, No. 08-205, pp. 7-8, slip opinion (January 21, 2010), the Court applied the *McConnell* and *WRTLII* holdings and stated: “the functional-equivalent test is objective: ‘a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate’.”

The revised rule will more clearly specify those communications that may not reach the level of “magic words” express advocacy, yet are subject to regulation because they are the functional equivalent to express advocacy, for “political

purposes,” and susceptible of no other reasonable interpretation other than as an appeal to vote for or against a specific candidate.

4. Related statute(s) or rule(s): s. 11.01(16), Stats., and s. GAB 1.28, Wis. Adm. Code.
5. Plain language analysis: The revised rule will subject to regulation communications that are “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” The revised rule will subject communications meeting this criteria to the applicable campaign finance regulations and requirements of ch. 11, Stats. **The scope of regulation will be subject to the United States Supreme Court Decision, *Citizens United vs. FEC* (No. 08-205) permitting the use of corporate and union general treasury funds for independent expenditures.**
6. Summary of, and comparison with, existing or proposed federal regulations: The United States Supreme Court upheld regulation of political communications called “electioneering communications” in its December 10, 2003 decision: *McConnell et al. v. Federal Election Commission, et al.* (No.02-1674), its June 25, 2007 decision of: *Federal Election Commission (FEC) v. Wisconsin Right to Life, Inc. (WRTL II)*, (No.06-969and 970), **and pursuant to its January 21, 2010 decision of: *Citizens United vs. FEC* (No. 08-205).**

The *McConnell* decision is a review of relatively recent federal legislation – The Bipartisan Campaign Reform Act of 2002 (BCRA) – amending, principally, the Federal Election Campaign Act of 1971 (as amended). A substantial portion of the *McConnell* Court’s decision upholds provisions of BCRA that establish a new form of regulated political communication – “electioneering communications” – and that subject that form of communication to disclosure requirements as well as to other limitations, such as the prohibition of corporate and labor disbursements for electioneering communications in BCRA ss. 201, 203. BCRA generally defines an “electioneering communication” as a broadcast, cable, or satellite advertisement that “refers” to a clearly identified federal candidate, is made within 60 days of a general election or 30 days of a primary and if for House or Senate elections, is targeted to the relevant electorate.

In addition, the Federal Election Commission (FEC) promulgated regulations further implementing BCRA (generally 11 CFR Parts 100-114) and made revisions incorporating the *WRTL II* decision by the United States Supreme Court (generally 11 CFR Parts 104, 114.) The FEC regulates “electioneering communications.”

7. Comparison with rules in adjacent states:

Illinois has a rule requiring a nonprofit organization to file financial reports with the State Board of Elections if it: 1) is not a labor union; 2) has not established a

political committee; and 3) accepts or spends more than \$5,000 in any 12-month period in the aggregate:

- A) supporting or opposing candidates for public office or questions of public policy that are to appear on a ballot at an election; and/or
- B) for electioneering communications.

In addition, the same rule mandates all the same election reports of contributions and expenditures in the same manner as political committees, and the nonprofit organizations are subject to the same civil penalties for failure to file or delinquent filing. (See Illinois Administrative Code, Title 26, Chapter 1, Part 100, s. 100.130).

Iowa prohibits direct or indirect corporate contributions to committees or to expressly advocate for a vote. (s. 68A.503(1), Iowa Stats.) Iowa does allow corporations to use their funds to encourage registration of voters and participation in the political process or to publicize public issues, but provided that no part of those contributions are used to expressly advocate the nomination, election, or defeat of any candidate for public office. (s. 68A.503(4), Iowa Stats.) Iowa does not have any additional rules further defining indirect corporate contributions or expressly advocating for a vote.

Michigan prohibits corporate and labor contributions for political purposes (s. 169.254, Mich. Stats.) and requires registration and reporting for any independent expenditures of \$100.01 or more (s. 169.251, Mich. Stats.) Michigan does not have any additional rules defining political purposes.

Minnesota statutes prohibit direct and indirect corporate contributions and independent expenditures to promote or defeat the candidacy of an individual. (s. 211B.15(Subds. 2 and 3), Minn. Stats.) A violation of this statute could subject the corporation to a \$40,000.00 penalty and forfeiture of the right to do business in Minnesota. A person violating this statute could receive a \$20,000.00 penalty and up to 5 years in prison. Minnesota does not have any additional rules defining indirect influence on voting. (s. 211B15 (Subds. 6 and 7), Minn. Stats.)

8. Summary of factual data and analytical methodologies: Adoption of the rule was primarily predicated on federal and state statutes, regulations, and case law. Additional factual data was considered at several Government Accountability Board public meetings, specifically the expenditures on television advertisements, and the actual transcripts for the same, as aired during a recent Wisconsin Supreme Court race.
9. Analysis and supporting documentation used to determine effect on small businesses: The rule will have no effect on small business, nor any economic impact.
10. Effect on small business: The creation of this rule does not affect business.

11. Agency contact person: Shane W. Falk, Staff Counsel, Government Accountability Board, 212 E. Washington Avenue, 3rd Floor, P.O. Box 7984, Madison, Wisconsin 53707-7984; Phone 266-2094; Shane.Falk@wisconsin.gov

FISCAL ESTIMATE: The creation of this rule has no fiscal effect.

INITIAL REGULATORY FLEXIBILITY ANALYSIS: The creation of this rule does not affect business.

TEXT OF PROPOSED RULE:

SECTION 1. GAB 1.28 is amended to read:

GAB 1.28 Scope of regulated activity; election of candidates.

(1) Definitions. As used in this rule:

(a) “Political committee” means every committee which is formed primarily to influence elections or which is under the control of a candidate.

(b) “Communication” means any printed advertisement, billboard, handbill, sample ballot, television or radio advertisement, telephone call, e-mail, internet posting, and any other form of communication that may be utilized for a political purpose.

(c) “Contributions for political purposes” means contributions made to 1) a candidate, or 2) a political committee or 3) an individual who makes contributions to a candidate or political committee or incurs obligations or makes disbursements for ~~the purpose of expressly advocating the election or defeat of an identified candidate~~ political purposes.

(2) Individuals other than candidates and ~~committees~~ persons other than political committees are subject to the applicable ~~disclosure related and recordkeeping related~~ requirements of ch. 11, Stats., ~~only~~ when they:

(a) Make contributions or disbursements for political purposes, or

(b) Make contributions to any person at the request or with the authorization of a candidate or political committee, or

(c) Make a communication ~~containing~~ for a political purpose.

(3) A communication is for a “political purpose” if either of the following applies:

(a) The communication contains terms such as the following or their functional equivalents with reference to a clearly identified candidate that expressly advocates the election or defeat of that candidate and that unambiguously relates to the campaign of that candidate:

1. "Vote for;"
2. "Elect;"
3. "Support;"
4. "Cast your ballot for;"
5. "Smith for Assembly;"
6. "Vote against;"
7. "Defeat;" or
8. "Reject."

(b) The communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. A communication is susceptible of no other reasonable interpretation if it is made during the period beginning on the 60th day preceding a general, special, or spring election and ending on the date of that election or during the period beginning on the 30th day preceding a primary election and ending on the date of that election and that includes a reference to or depiction of a clearly identified candidate and:

1. Refers to the personal qualities, character, or fitness of that candidate;
2. Supports or condemns that candidate's position or stance on issues; or
3. Supports or condemns that candidate's public record.

~~(3)~~(4) Consistent with s. 11.05 (2), Stats., nothing in sub. (1) ~~or~~ (2), or (3) should be construed as requiring registration and reporting, under ss. 11.05 and 11.06, Stats., of an individual whose only activity is the making of contributions.

SECTION 2. EFFECTIVE DATE.

This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.(22)(intro), Stats.

Dated March 23, 2010

KEVIN J. KENNEDY
Government Accountability Board
Director and General Counsel