

El. Bd. Op. 79-4 (Reaffirmed 3/26/08)

Summary:

The registration, recordkeeping and reporting requirements of the campaign finance law, Chapter 11, Stats., do not apply to a corporation which communicates its views on a general issue which may later become the subject of a referendum question. (Issued to Robert M. Whitney, October 18, 1979)

This opinion was reviewed by the Government Accountability Board pursuant to 2007 Wisconsin Act 1 and was reaffirmed on March 26, 2008.

Opinion:

You have asked if a non-profit membership corporation consisting of sole proprietorships, partnerships and corporations which makes communications on an issue which may become the subject of a referendum question must comply with the registration, recordkeeping and reporting requirements of Chapter 11, Stats.

There is currently pending before the Wisconsin Legislature a bill which would provide for a statewide referendum in the November general election of 1980 on a specific issue. This bill has not yet reached the floor of the Assembly or Senate and its approval is uncertain.

The corporation proposes to collect money from its membership in order to disseminate its views to the public on the general subject of the issue which could be submitted to the electorate as a referendum question. The communications of the corporation will contain no reference to a referendum or possible referendum. Nor would the corporation urge the electors to take a particular position on a future referendum question. In addition, any communication by the corporation would be made prior to the time the bill providing for the referendum would pass the legislature. Thus, the communication would be made before the legislature determines whether there would even be a referendum.

Any group or individual who promotes or opposes any referendum in this state is required to register before making disbursements, receiving contributions or incurring obligations in excess of \$25 in the aggregate calendar year for such purposes. §11.23, Stats. The group or individual is also subject to the recordkeeping, reporting and disclosure requirements of chapter 11, Stats. Based on a decision of the United States Supreme Court and an opinion of the Wisconsin attorney general, corporations who comply with the requirements of §11.23, Stats., may make expenditures to influence the result of a referendum question despite the prohibition contained in §11.38, Stats., on corporate political activity. First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); 67 OAG 211 (1978).

The requirements of chapter 11 do not apply to the situation which you have described because there is no referendum. The law defines referendum as any advisory, validating or ratifying question to be submitted to the electorate. §11.01 (18), Stats. In the situation which you have described there is no question which has been submitted to the electorate. Even though the

pending legislation provides for a statewide referendum on a specified issue, it has not been reduced to a question to be submitted to the electorate.

There are constitutional barriers which prohibit the State Elections Board from regulating the communications which you have described. The state does not have the compelling interest to regulate political communications or to impose registration, recordkeeping, reporting and disclosure requirements on a corporation if the activities of the corporation do not expressly advocate a particular result in a referendum. Buckley v. Valeo, 424 U.S. 1 (1976), Bellotti, supra. To do so would be to impinge on the First Amendment rights of the corporation of freedom of speech and freedom of association and to stifle informed discussion of issues. This limitation on the parameters of state-imposed campaign finance disclosure requirements for corporations making an expenditure in referendum questions has been reaffirmed by several opinions of the Wisconsin attorney general. 65 OAG 145 at pg. 154 (1976); 67 OAG 211 (1978). The Board has adopted the express advocacy test for referenda in GAB1.29, Wis. Adm. Code.

Therefore, it is the opinion of the Elections Board that registration, recordkeeping and reporting requirements of the Wisconsin campaign finance law contained in chapter 11, Stats., do not apply to the communications of a corporation on a general issue which later may become the subject of a referendum question, provided that those communications are made prior to the submission of a referendum question to the electorate. In addition, the state cannot regulate First Amendment guarantees of freedom of speech and freedom of association of a corporation by imposing the disclosure requirements of chapter 11, Stats., on communications which do not expressly advocate a particular result in a referendum.