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CAMPAIGN FINANCE – INCORPORATION OF COMMITTEE

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Facts

You submitted a request for advice on behalf of a candidate committee (the “Committee”) that is registered with the Government Accountability Board. The Committee is now in the process of incorporating under Chapter 181, Wis. Stats., as a non-stock, non-profit corporation. The express purpose of the Committee is limited to political activities that may be undertaken by candidates and candidate committees under Chapter 11, Wis. Stats. You state that the rationale for so incorporating is to limit the Committee’s liability consistent with Wisconsin law.

In your correspondence, you point out that federal candidate committees are regularly incorporated, but state campaign committees rarely do so. You correctly identified two prior instances where Wisconsin campaign committees have indeed incorporated — 1) Terry Kohler, a candidate committee for governor in 1982; and 2) Mark Todd, a candidate committee for governor in March of 2008.

Finally, you have correctly cited El.Bd.Op. 75-8 as having addressed this issue. In addition, El.Bd.Op. 75-8 was reaffirmed by the Government Accountability Board on October 6, 2008. The relevant portion of El.Bd.Op. 75-8 states:

It is the Board's opinion that a non-profit corporation created expressly and exclusively to engage in political activities which has incorporated for liability purposes only is essentially a political committee and, therefore, does not come within the prohibition of §11.38 (1)(a) 1, Stats. Thus, a separate segregated fund may be organized in the form of a non-profit corporation solely for purposes of liability.

Question

You ask whether the reaffirmation of El.Bd.Op. 75-8 and the Supreme Court’s decision in FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986), is confirmation that §11.38(1)(a), Wis. Stats., does not apply to the Committee, even though the Committee is organized as a non-stock corporation under Ch. 181, Wis. Stats.

Discussion

Prohibition of Corporate Contributions and Expenditures: State and Federal

Wisconsin has long prohibited corporations from making contributions or disbursements for any political purpose, other than to promote or defeat a referendum. Section 11.38(1)(a)1., Wis. Stats., specifically prohibits corporations from making 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.”

At the federal level, a similar corporate prohibition is found in 2 U.S.C. §441b(a), which provides:

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

#### Exceptions to State and Federal Corporate Prohibitions

Wisconsin and Federal authorities have not interpreted these corporate prohibitions to apply to all corporations in all situations. Over time, Wisconsin, the Federal Election Commission, and the U.S. Supreme Court have carved out to limited and narrow exceptions to the corporate prohibition. These exceptions have stood the test of time and currently are well-settled matters of law.

##### 1. Committee May Incorporate if For Liability Purposes Only

In the mid-1970's the Federal Election Commission issued a formal opinion that was later reduced to a provision of the Code of Federal Regulations. In 11 CFR 114.12, the Federal Election Commission provided:

[a]n organization may incorporate and not be subject to the provisions of this part [the regulations prohibiting corporations from making contributions or disbursements for a political purpose] if the organization incorporates for liability purposes only, and if the organization is a political committee as defined in 11 CFR 100.5. Notwithstanding the corporate status of the political committee, the treasurer of an incorporated political committee remains personally responsible for carrying out their respective duties under the Act.

Wisconsin also acted in similar fashion and recognized a narrow exception to Wisconsin's law prohibiting corporate disbursements and expenditures. This was the origin of El.Bd. 75-8 (affirmed 10/3/08), whereby the Government Accountability Board reaffirmed the State Elections Board's 1975 formal opinion providing:

It is the Board's opinion that a non-profit corporation created expressly and exclusively to engage in political activities which has incorporated for liability purposes only is essentially a political committee and, therefore, does not come within the prohibition of §11.38 (1)(a) 1, Stats. Thus, a separate segregated fund may be organized in the form of a non-profit corporation solely for purposes of liability.

## 2. MCFL Qualifying Corporation

In 1986, the U.S. Supreme Court recognized a second exception to the corporate prohibition of 2 U.S.C. §441b; however, this exception was limited to corporate disbursements for certain non-business corporations and maintained the prohibition on corporate contributions. In FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 241 (1986), a non-business corporation called Massachusetts Citizens for Life, Inc., challenged the ban on corporate independent expenditures. The U.S. Supreme Court noted that restrictions on corporate political activity are generally justified by “the need to restrict ‘the influence of political war chests funneled through the corporate form’ . . . and to regulate the ‘substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization.’” Id. at 257 (quoting Federal Election Commission v. National Conservative Political Action Committee, 470 U.S. 480, 501 (1985) and Federal Election Commission v. National Right to Work Committee, 459 U.S. 197, 207 (1982)). The Court went on to state that “[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation’s political ideas. They reflect instead the economically motivated decisions of investors and customers.” Id. at 258.

The Court found that although MCFL had assumed the corporate form, it did not pose the same threat to the political process that a business corporation would. Id. at 259. MCFL’s money is “not a function of its success in the economic marketplace, but its popularity in the political marketplace,” since “[i]ndividuals who contribute to [MCFL] are fully aware of its political purposes, and in fact contribute precisely because they support those purposes.” Id. at 259-60. The Court held that 2 USC 441b’s ban on corporate independent expenditures was unconstitutional as applied to a corporation that was formed for the express purpose of promoting political ideas and that cannot engage in business activities, has no shareholders or other persons with a claim on its assets, and was not established by a business corporation or labor union and has a policy not to accept contributions from a business corporation or union.

Wisconsin has followed the U.S. Supreme Court’s recognition and exception for qualifying MCFL corporations and the Government Accountability Board has reaffirmed four informal opinions addressing the issue. In fact, the Government Accountability Board has authorized the promulgation of administrative rules to further formalize this exception.

## Comparison of Incorporated and Unincorporated Committees

Allowing political committees to incorporate for liability purposes without facing additional regulations, as El.Bd.Op. 75-8 currently allows, actually has few consequences. Under current law, committees are considered voluntary associations. See Vader v. Ballou, 151 Wis. 577 (1913); Elections Board v. Ward, 314 N.W.2d 120, 121 (Wis. 1982). Under Wisconsin common law, voluntary associations can neither sue nor be sued. Crawley v. American Society of Equity, 139 N.W. 734 (Wis. 1913) (“Being neither organized under our statutes nor incorporated, the *Wisconsin State Union* is a mere voluntary association and an action to enforce any liability it may have incurred must be brought against the individual members thereof.”). A member of a voluntary association is jointly and severally liable for “the debts [of the association] if incurred during his period of membership and contracted for the purpose of carrying out the objects for which the association was formed.” Ballou, at 579.

The individual liability of members of a voluntary association “is limited to contract[s] for goods or service appropriate and necessary to the purpose for which the committee is formed.” Ward, at 123. “No rule of common law in this state imposes joint or several liability upon a committee member for other than contractual obligations.” *Id.* Although, at common law, voluntary associations cannot be sued and their members can be sued only for contractual obligations, the Wisconsin Supreme Court has held that “if the legislature imposes either an affirmative duty to act or an obligation to respond that can only be satisfied by the capacity to sue or be sued, it will be concluded that the legislature by implication has conferred upon the entity whatever attributes are required to make effective the legislative intent.” *Id.* at 122-23. The Court concluded that the legislature had made political committees suable entities when it made them subject to civil forfeiture in §11.60, Wis. Stats.

Allowing committees to incorporate will not limit the parties that the Board will be able to sue for civil forfeitures or injunctions. Although assuming a corporate form would protect individual members of the committee from suit, the Board is already unable to seek forfeitures from individuals simply because they are members of a committee, since, as stated above, members of a voluntary association can only be sued in their individual capacity in contractual disputes.

The Board can seek forfeitures from any member of a committee, incorporated or not, who actually commits a violation of ch. 11, Wis. Stats. §11.60, Wis. Stats. Several other statutory provisions give the Board greater latitude in seeking individual forfeitures from candidates or treasurers. Section 11.10(1), Wis. Stats., requires treasurers or candidates to certify the accuracy of finance reports and makes candidates individually responsible for the accuracy of reports whether or not they sign the certification. Additionally, §11.16(1)(c), Wis. Stats., imputes all obligations or disbursements made by the committee’s treasurer or other authorized agents to the candidate. Section 11.20(13), Wis. Stats., authorizes an action against the candidate, campaign treasurer, or the candidate’s personal campaign committee, if any, or any combination of them for failure of a candidate or treasurer to file a report or statement required by ch. 11, Wis. Stats., by the time prescribed by law. Finally, and most importantly, §11.27(2), Wis. Stats., creates a

presumption that every act of every member of the committee is done with the knowledge and approval of the candidate unless clearly proven otherwise.

### Advice

The Government Accountability Board advises:

The candidate committee may organize as a non-stock corporation under Ch. 181, Wis. Stats., and is exempt from §11.38(1)(a)1., Wis. Stats., but only so long as the committee is formed for the express purpose of and is limited to political activities that may be undertaken by candidates and candidate committees under Chapter 11, Wis. Stats., and the rationale for so incorporating is to limit the committee's liability consistent with Wisconsin law. Despite its incorporation, the committee, the candidate and the treasurer are not exempt from liability specifically prescribed by ch. 11, Wis. Stats.