



## WISCONSIN LEGISLATIVE COUNCIL AMENDMENT MEMO

<b>2005 Senate Bill 1</b>	<b>Assembly Substitute Amendment 5</b>
<i>Memo published: April 17, 2006</i>	<i>Contact: Ronald Sklansky, Senior Staff Attorney (266-1946) Russ Whitesel, Senior Staff Attorney (266-0922)</i>

2005 Senate Bill 1, as amended by the Senate, creates a new agency entitled the Government Accountability Board to regulate the election, lobby, and ethics laws of Wisconsin. This memo briefly compares Engrossed Senate Bill 1 with the provisions of Assembly Substitute Amendment 5 to Senate Bill 1.

### **GOVERNMENT ACCOUNTABILITY BOARD**

#### **A. Senate Bill 1**

##### ***1. Creation***

Senate Bill 1 in effect combines the powers and duties of the current Elections Board and Ethics Board into a new entity entitled the Government Accountability Board (board). The new body consists of four persons nominated by the Governor, and appointed with the advice and consent of the Senate. A member may not be an officer or employee of a registrant under the campaign finance law. Except for initial appointments, members will serve for four-year terms.

The members of the board will be appointed from nominations submitted to the Governor by a nominating committee consisting of:

- a. The Chief Justice of the Supreme Court.
- b. The Dean of the Marquette University Law School.
- c. The Dean of the University of Wisconsin Law School.

The nominating committee also must convene and make recommendations to the Governor when vacancies occur on the board. The Chief Justice serves as chairperson of the committee. No person may be nominated by the committee unless the person receives the unanimous approval of the committee.

No member of the board may hold another position that is subject to the Code of Ethics for state public officials or the Code of Ethics for local public officials. Also, no member, for one year immediately prior to the date of appointment, may have been, and no member while serving on the board may become, a member of a political party, an officer or member of a committee in any partisan political club or organization, a candidate for any partisan office or an officer or employee of a registrant under the campaign finance law. Further, no member may be a lobbyist or an employee of a principal (person who employs a lobbyist).

## ***2. Board Employees***

The board is required to employ an executive director outside the classified service and is required to employ its own legal counsel. The board will have three division administrators. The administrator of the Enforcement Division may be removed from office only by the executive director for cause.

### ***B. Assembly Substitute Amendment 5***

#### ***1. Creation***

Assembly Substitute Amendment 5 increases the membership of the board from four to seven for staggered four-year terms. Four of these six members must have prosecutorial experience. The seventh member must be a retired judge. All of the members of the board will be nominated by the Governor and appointed with the advice and consent of the Assembly and Senate. Each of the members must be appointed from nominations submitted by a Government Accountability Candidate Committee, which consists of one court of appeals judge from each of the court of appeals districts. The judges are chosen by lot by the Chief Justice of the Supreme Court in the presence of the other judges. These nominees must receive the unanimous approval of the nominating committee.

Assembly Substitute Amendment 5 retains the provisions in Senate Bill 1 relating to board members' service and affiliation. Assembly Substitute Amendment 5 provides that the board's actions will be taken by a simple majority of the board. The board's investigatory proceedings, except for the results of a vote on a board action, may be conducted in closed session and, prior to public proceedings regarding violations of the law, all of the board's investigatory materials will be confidential.

#### ***2. Board Employees***

***Assembly Substitute Amendment 5*** makes no change to the provisions relating to the board employees in Senate Bill 1.

## **ENFORCEMENT DIVISION**

### **A. Senate Bill 1**

#### ***1. Creation***

Senate Bill 1 creates an Enforcement Division that is attached to the board. An administrator, who will be appointed by the executive director of the board, with the advice and consent of the board, will direct and supervise the Enforcement Division. The administrator will serve a term of not less than four years nor more than six years.

#### ***2. Powers and Duties of Enforcement Division***

The Enforcement Division is required to investigate and prosecute alleged violations of laws administered by the board, including civil and criminal actions brought by the board, and must assist district attorneys and the Attorney General in prosecuting criminal actions referred to them by the Enforcement Division. The board must employ at least one full-time attorney and at least one full-time investigator within the Enforcement Division.

Any person may file a complaint with the Enforcement Division alleging a violation of the election, lobbying, or ethics laws. The division must investigate the complaint unless the Enforcement Division finds the complaint to be without merit. The Enforcement Division may on its own, or upon direction of the board, investigate any potential violation of the election, ethics, or lobby laws whenever the division has probable cause to believe that a violation has occurred. If the complaint concerns a question as to whether an election official or a private person is acting in conformity with the law or rules of the board, the person filing the complaint must serve a copy of the complaint upon that official or private person and that official or private person becomes a party to the case. An election official or private person may move to dismiss a complaint if it is clearly without merit. If the Enforcement Division finds, in response to a motion, that a complaint is clearly without merit, the division must dismiss the complaint. If the division does not dismiss a complaint, the division must issue a proposed decision, which must include findings of fact and conclusions of law and may include an order. The order may require an election official or a private person to act in conformity with the relevant laws or rules of the board or may impose a civil penalty for such violations for which a civil penalty is applicable.

Generally, the Enforcement Division may, with or without approval of the board, prosecute any civil or criminal violation of election, lobby, and ethics laws in the name of the board. However, prior to commencing a criminal prosecution, the Enforcement Division must notify the district attorney for the county in which the violation is alleged to have occurred. If the district attorney notifies the Enforcement Division that a criminal prosecution will not be commenced, or the district attorney fails to commence a prosecution within 30 days after receiving notice from the Enforcement Division, the Enforcement Division may, with the approval of the board, commence a criminal prosecution regarding that alleged violation. The jurisdiction of the Enforcement Division is concurrent with the jurisdiction of the board, the district attorneys, and the Attorney General to conduct investigations and enforce the election, lobby, and ethics laws. The Enforcement Division may request assistance from the Department of Justice.

The Enforcement Division may subpoena and bring before it any person and require the production of any papers, books, or other records relevant to an investigation and may obtain an order from a circuit court to permit the inspection and copying of records of a financial institution to obtain evidence of violation of election, lobby, or ethics laws. Prior to issuing a subpoena or obtaining a search warrant, the Enforcement Division must submit a written request to do so to the board. If the board does not disapprove the request within seven days of receiving the request, the Enforcement Division may proceed to issue the subpoena or obtain the search warrant.

If the Enforcement Division issues a decision that contains an order, the order is effective upon service of the order notwithstanding any appeal to the board or a circuit court except that the Enforcement Division may stay such an order pending an appeal.

The Enforcement Division is bound by applicable laws, rules, formal opinions, and actions of the board, except that the Enforcement Division may nonacquiesce in any formal opinion or action of the board by publishing a notice of nonacquiescence in the Wisconsin Administrative Register. Following publication of the notice, the Enforcement Division is not bound by the formal opinion *or action* in which nonacquiescence has been registered.

A party aggrieved by an Enforcement Division decision may, within 20 days, appeal to the board, which may affirm, modify, or reverse an order of the Enforcement Division. The Enforcement Division or a defendant may seek judicial review of the board's decision.

If the Enforcement Division finds, by a preponderance of the evidence, that a complaint is frivolous, the division may order the complainant to forfeit not more than the greater of \$500 or the expenses incurred in investigating the complaint. Upon request of the division, the Attorney General must begin proceedings to recover the amount of any unpaid forfeiture.

### ***3. Budget Requests***

All budget requests by the Enforcement Division must be submitted by the board to the Department of Administration without change except as concurred in by the Enforcement Division.

## **B. Assembly Substitute Amendment 5**

### ***1. Creation***

Assembly Substitute Amendment 5 makes no change to the provisions of Senate Bill 1 relating to the creation of the Enforcement Division.

### ***2. Powers and Duties of Enforcement Division***

Assembly Substitute Amendment 5 makes the following changes to the provisions of Senate Bill 1 relating to the powers and duties of the board and the Enforcement Division:

a. The board and a district attorney may not conduct simultaneous investigations. The board and a district attorney shall share investigatory information regarding possible violations under the board's jurisdictions and, if it appears that simultaneous investigations may begin or have begun, the board's

investigation will continue and the district attorney's investigation will be suspended. If a district attorney is conducting an investigation, and the board is not, the district attorney may refer the investigation to the board at any time. Before a district attorney may commence a criminal prosecution, the district attorney must provide written notice to the board. If the board will not commence a criminal prosecution within 30 days of the notice, the district attorney may proceed.

If a district attorney refers a matter to the board concerning a possible criminal violation of the elections, ethics, or lobbying regulation laws by a state official and the board determines not to commence a criminal prosecution, the substitute amendment directs the board to report to the district attorney within 30 days of the referral why it will not commence a prosecution.

If a district attorney opens an investigation of a possible criminal violation of the elections, ethics, or lobbying regulations laws, then the district attorney must report to the board concerning the status of the investigation no later than the end of each 90-day period until the investigation is concluded. Similarly, if a district attorney commences a criminal prosecution for a violation of the elections, ethics, or lobbying regulation laws, the district attorney must report to the board on the status of the prosecution no later than the end of each 180-day period. Within 30 days after receiving any report, the substitute amendment permits the board to direct the district attorney to close the investigation or to terminate the prosecution.

b. The board may retain special counsel to act as an investigator in any matter. Also, the administrator is authorized to investigate any matter without retaining an investigator.

c. The substitute amendment allows the Enforcement Division to nonacquiesce in any formal opinion of the board, but not in any "action" of the board, as permitted by Senate Bill 1.

d. The board's seven-day passive review period, relating to the issuance of a subpoena or obtaining a search warrant, is extended to a 10-day passive review period.

e. When a defendant who is a resident of Wisconsin, in a criminal case relating to the violation of a law under the board's jurisdiction, the substitute amendment provides that the trial shall be held in circuit court for the county where the defendant resides. The substitute amendment retains the authority of the judge, upon request of the defendant, to move the trial if an impartial trial cannot be held in the original location.

### ***3. Budget Requests***

Assembly Substitute Amendment 5 makes no change to the budget request provisions of Senate Bill 1.

## **ADVICE FROM EXECUTIVE DIRECTOR**

### **A. Senate Bill 1**

Current law provides that a person may request a formal opinion from the Elections Board with respect to the person's authority or responsibilities under Wisconsin's election laws. No person acting in good faith upon a formal opinion issued to the person by the board will be subject to civil or criminal

prosecution, if the material facts are as stated in the opinion request. Similarly, an individual may request an advisory opinion from the Ethics Board regarding the propriety of any matter regarding the application of Wisconsin's ethics or lobby laws. It is *prima facie* evidence of intent to comply with these laws when a person refers a matter to the board and abides by the board's advisory opinion, if the material facts are as stated in the opinion request.

Senate Bill 1 retains current law providing that a person may request a formal opinion from the board's executive director with respect to the person's authority or responsibilities under Wisconsin's election laws. The executive director may consult with the board before issuing a formal opinion. Senate Bill 1 also provides that a person seeking advice as to the applicability of Wisconsin's election, ethics, or lobby laws must present the opinion request to the executive director of the board. The executive director may issue an opinion. Prior to issuing an opinion, the executive director may consult with the board, and, in the case of an opinion regarding Wisconsin's ethics or lobby laws, must not reveal any information to the board that would identify the requester of the opinion.

#### **B. Assembly Substitute Amendment 5**

Assembly Substitute Amendment 5 makes no change to the provisions of Senate Bill 1 relating to advice from the executive director, except that the current law provision regarding a formal opinion under the election law is removed.

### **EFFECTIVE DATE AND INTERIM MANAGEMENT**

#### **A. Senate Bill 1**

The provisions of the bill relating to the creation of the board and the Enforcement Division generally take effect on the day after publication of the bill as an act. The remaining provisions generally take effect on the first day of the sixth month beginning after the date of publication.

Further, the director of the Legislative Council staff is required to serve as executive director of the board, without additional compensation for that service, until such time as the board initially appoints an executive director and the appointee qualifies to take office. The director of the Legislative Council staff is vested with full authority and responsibility to carry out all functions of the executive director of the board, the Enforcement Division, and the administrator of the Enforcement Division prior to appointment and qualification of the initial executive director, including the retention and termination of all staff not transferred to the board that the board is authorized to employ under the bill.

#### **B. Assembly Substitute Amendment 5**

Assembly Substitute Amendment 5 provides that the process by which the board will be created and operated will take effect on January 1, 2007. The remainder of the provisions of the substitute amendment will take effect on June 1, 2007. The interim administrative provisions are retained.

### **LOCAL OFFICIALS**

Currently, local public officials are subject to a separate statutory Code of Ethics for local public officials which imposes standards of conduct that are more limited than the standards that apply under

the Code of Ethics for state public officials and officers. Unlike the state code, the Code of Ethics for local public officials does not include any requirement to file economic statements of interest. Assembly Substitute Amendment 5 abolishes the Code of Ethics for local public officials and extends the state Ethics Code to apply to all local public officials. Senate Bill 1 did not include a provision that local public officials must comply with the Ethics Code.

“Local public official” is defined in current statutes to mean an individual holding a public office. “Local public office” is defined in s. 19.42 (7w), Stats., to mean any of the following, except a state public office:

- a. An elective office of a local unit of government.
- b. A county administrator or administrative coordinator or a city or village manager.
- c. An appointive office or position of a local governmental unit in which an individual serves for a specified term, except a position limited to the exercise of ministerial action or a position filled by an independent contractor.
- d. The position of member of the board of directors of a local exposition district not serving for a specified term.
- e. An appointive office of a local government which is filled by the governing body or the executive or administrative head of the local government and in which the incumbent serves at the pleasure of the appointing authority except a clerical position, a position limited to the exercise of ministerial action, or a position filled by an independent contractor.

### **Legislative History**

On November 1, 2005, the Senate took the following actions: (a) Senate Amendments 1 to 4 were adopted on voice votes; (b) Senate Amendment 5 was adopted on a vote of Ayes, 33; Noes, 0; and (c) Senate Bill 1, as amended, was passed on a vote of Ayes, 28; Noes, 5.

The bill was referred to the Assembly Committee on Campaigns and Elections. The committee in an executive session on March 2, 2006 adopted Assembly Substitute Amendment 5 on a vote of Ayes, 5; Noes, 1. The committee recommended concurrence in the bill, as amended, on a vote of Ayes, 5; Noes, 1.

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