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Details: Emergency Rule extension requests by Government Accountability Board.
(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2009-10

(session year)

Joint

(Assembly, Senate or Joint)

Committee for Review of Administrative Rules ...

COMMITTEE NOTICES ...

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* Contents organized for archiving by: Stefanie Rose (LRB) (June 2012)

MEMORANDUM

DATE: May 13, 2010
TO: Members of the Wisconsin Legislature
FROM: Wisconsin Government Accountability Board
SUBJECT: EMERGENCY RULE, CH. GAB 1.91,
ORGANIZATIONS MAKING INDEPENDENT DISBURSEMENTS

Appended hereto, please find a copy of the Government Accountability Board's emergency rule, creating ch. GAB 1.91, relating to organizations making independent disbursements. A public hearing on the Board's emergency rule may be held within 45 days of the date of publication of the Board's rule in the Wisconsin State Journal, or in conjunction with the public hearing on the permanent rule pursuant to s. 224.24(4), Stats. Publication in the Wisconsin State Journal is anticipated to occur on May 20, 2010, but no later than May 24, 2010. A subsequent hearing notice will be filed and the hearing will occur at the Government Accountability Board's office at 212 E. Washington Avenue, Third Floor, Madison, Wisconsin 53703.

If anyone has any questions about the Board's rule or about the hearing on the rule, the person to contact is Shane W. Falk, Staff Counsel, whose telephone number is (608) 266-2094).

NOTICE OF ORDER OF THE GOVERNMENT ACCOUNTABILITY BOARD

The Wisconsin Government Accountability Board proposes an order to adopt an emergency rule to create s. GAB 1.91, Wis. Adm. Code, relating to organizations making independent disbursements.

STATEMENT OF EMERGENCY FINDING:

The Government Accountability Board creates s. GAB 1.91, Wis. Adm. Code, relating to organizations making independent disbursements. The rule enumerates registration, reporting, and disclaimer requirements of provisions of ch. 11, Stats., which apply to organizations receiving contributions for independent disbursements or making independent disbursements.

Pursuant to §227.24, Stats., the Government Accountability Board finds an emergency exists as a result of the United States Supreme Court decision *Citizens United v. FEC*, 558 U.S. ___, (No. 08-205)(January 21, 2010). Within the context of ch. 11, Stats, the rule provides

direction to organizations receiving contributions for independent disbursements or making independent disbursements. Comporting with *Citizens United*, this emergency rule order does not treat persons making independent disbursements as full political action committees or individuals under s. 11.05, Stats., for the purposes of registration and reporting. With respect to contributions or in-kind contributions received, this emergency rule order requires organizations to disclose only donations “made for” political purposes, but not donations received for other purposes.

The Board adopts the legislature’s policy findings of s. 11.001, Stats., emphasizing that one of the most important sources of information to voters about candidates is available through the campaign finance reporting system. The Board further finds that it is necessary to codify registration, reporting and disclaimer requirements for organizations receiving contributions for independent disbursements or making independent disbursements so that the campaign finance information is available to voters. The rule must be adopted immediately to ensure the public peace and welfare with respect to the administration of current and future elections.

ANALYSIS PREPARED BY GOVERNMENT ACCOUNTABILITY BOARD:

1. Statutes Interpreted: ss. 11.01(4) and (18m), 11.05, 11.055, 11.06, 11.09, 11.10, 11.12, 11.14, 11.16, 11.19, 11.20, 11.21(16), 11.30, 11.38, 11.513, Stats.
2. Statutory Authority: ss. 5.05(1)(f) and 227.11(2)(a), Stats.
3. Explanation of agency authority: Express rule-making authority to interpret the provisions of statutes the Board enforces or administers is conferred on it pursuant to s. 227.11(2)(a), Stats. In addition, s. 5.05(1)(f), Stats., provides that the Board may promulgate rules under ch. 227, Stats., for the purpose of interpreting or implementing the laws regulating the conduct of elections or election campaigns or ensuring their proper administration.

In *Citizens United v. FEC*, 558 U.S. ____, (No. 08-205)(January 21, 2010), the United States Supreme Court greatly expanded the rights of organizations to engage in independent expenditures and strengthened the ability of the government to require disclosure and disclaimer of the independent expenditures. Pursuant to s. 5.05(1), the Board has the responsibility for the administration of campaign finance statutes in ch. 11, Stats. Rules promulgated by the Board will ensure the proper administration of the campaign finance statutes and properly address the application of *Citizens United v. FEC*.

4. Related statute(s) or rule(s): ch. 11, Stats., and ch. GAB 1, Wis. Adm. Code.
5. Plain language analysis: Within the context of ch. 11, Stats, the proposed order will provide direction to organizations receiving contributions for independent disbursements or making independent disbursements following the U.S. Supreme Court decision in *Citizens United v. FEC*, 558 U.S. ____, (No. 08-205)(January 21,

2010). The proposed rule enumerates registration, reporting, and disclaimer requirements of provisions of ch. 11, Stats., which apply to organizations receiving contributions or making independent disbursements. Comporting with *Citizens United*, the proposed rule does not treat persons making independent disbursements as full political action committees or individuals under s. 11.05, Stats., for the purposes of registration and reporting. With respect to contributions or in-kind contributions received, this proposed rule requires organizations to disclose only donations “made for” political purposes, but not donations received for other purposes.

6. Summary of, and comparison with, existing or proposed federal regulations: At the federal level, the FEC provides rules at 11 CFR 109.10, which regulate persons who are not a committee and make independent expenditures. An independent expenditure statement and reports quarterly are required for any person making independent expenditures in excess of an aggregate \$250.00 in a calendar year. If a person makes an independent expenditure of \$10,000.00 or more, an independent expenditure statement and report must be filed within 48 hours of the expenditure. Any person making an independent expenditure of \$1,000.00 or more within 20 days of an election must file an independent statement and report within 24 hours of the expenditure. The independent expenditure statement must include the identity of the person making the expenditure, any contributions received in excess of \$200.00, and the candidate benefitted by the expenditure. In addition, a disclaimer is required for any communication resulting from an independent expenditure.
7. Comparison with rules in adjacent states:

Section 5/9-1.5, Ill. Adm. Code, defines “expenditure” generally and to include an electioneering communication regardless of whether the communication is made in concert or cooperation with, or at the request, suggestion or knowledge of a candidate, a candidate’s authorized local political committee, a State political committee, or any of their agents. Sections 5/9-1.7 and 1.8, Ill. Adm. Code, define local and State political committees to include a candidate, individual, trust, partnership, committee, association, corporation, or any other organization or group of persons which accept contributions or make expenditures on behalf of or in opposition to a candidate and exceeding an aggregate of \$3,000.00 in any 12 month period. Persons making independent expenditures in Illinois are by definition committees and subject to substantially similar registration, reporting, and disclaimer requirements as committees in Wisconsin.

Chapter 351—4.27 of the Iowa Administrative Code sets forth requirements for registration and reporting of independent expenditures and it applies to any person, other than a candidate or registered committee, that makes one or more independent expenditures in excess of \$100.00 in the aggregate. 351—4.27, Iowa Adm. Code. A person subject to filing an independent expenditure statement must identify the person making the expense and for whom it benefits. 351—

4.27(2), Iowa Adm. Code. There is no requirement to file a statement of organization registering a committee or public disclosure reports. 351—4.27(7), Iowa Adm. Code. A disclaimer on communications is required. 351—4.27(6), Iowa Adm. Code.

Michigan statutes regulate independent expenditures, but the administrative rules do not specifically address them. Michigan Statutes s. 169.208 provides a definition for an “independent committee,” which upon exceeding \$500.00 in contributions or expenditures is subject to substantially similar registration, reporting, and disclaimer requirements as committees in Wisconsin.

Minnesota statutes regulate independent expenditures, but the administrative rules do not specifically address them.

8. Summary of factual data and analytical methodologies: Adoption of the rule was predicated on state statutes and federal case law.
9. Analysis and supporting documentation used to determine effect on small businesses: The rule may have a minimal effect on small businesses that will participate in receiving contributions or making independent disbursements. The economic impact of this effect is minor. Businesses may have a filing fee of \$100.00, if the amount of aggregate independent disbursements made in any year exceeds \$2,500.00.
10. Effect on small business: The creation of this rule may have a minimal effect on small businesses as explained above.
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 minimal fiscal effect. There may be additional registrants filing reports with the Board and potentially additional enforcement actions that may require staff action. The extent of this potential fiscal impact is undetermined.

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

TEXT OF PROPOSED RULE:

Pursuant to the authority vested in the State of Wisconsin Government Accountability Board by ss. 5.05(1)(f), 227.11(2)(a) and 227.24, Stats., the Government Accountability Board hereby adopts an emergency rule creating GAB 1.91, Wis. Adm. Code, interpreting ch. 11, Stats., as follows:

SECTION 1. GAB 1.91 is created to read:

1.91 Organizations Making Independent Disbursements

- (1) In this section:
 - (a) "Contribution" has the meaning given in s. 11.01(6), Stats.
 - (b) "Disbursement" has the meaning given in s. 11.01(7), Stats.
 - (c) "Filing officer" has the meaning given in s. 11.01(8), Stats.
 - (d) "Incurred obligation" has the meaning given in s. 11.01(11), Stats.
 - (e) "Person" includes the meaning given in s. 990.01(26), Stats.
 - (f) "Organization" means any person other than an individual, committee, or political group subject to registration under s. 11.23, Stats.
 - (g) "Independent" means the absence of acting in cooperation or consultation with any candidate or authorized committee of a candidate who is supported or opposed, and is not made in concert with, or at the request or suggestion of, any candidate or any agent or authorized committee of a candidate who is supported or opposed.
 - (h) "Designated depository account" means a depository account specifically established by an organization to receive contributions and from which to make independent disbursements.
- (2) A corporation, or association organized under ch. 185 or 193, Stats., is a person and qualifies as an organization that is not prohibited by s. 11.38(1)(a)1., Stats., from making independent disbursements until such time as a court having jurisdiction in the State of Wisconsin rules that a corporation, or association organized under ch. 185 or 193, Stats., may constitutionally be restricted from making an independent disbursement.
- (3) Upon accepting contributions made for, incurring obligations for, or making an independent disbursement exceeding \$25 in aggregate during a calendar year, an organization shall establish a designated depository account in the name of the organization. Any contributions to and all disbursements of the organization shall be deposited in and disbursed from this designated depository account. The organization shall select a treasurer for the designated depository account and no disbursement may be made or obligation incurred by or on behalf of an organization without the authorization of the treasurer or designated agents. The organization shall register with the board and comply with s. 11.09, Stats., when applicable.

- (4) The organization shall file a registration statement with the appropriate filing officer and it shall include, where applicable:
 - (a) The name, street address, and mailing address of the organization.
 - (b) The name and mailing address of the treasurer for the designated depository account of the organization and any other custodian of books and accounts for the designated depository account.
 - (c) The name, mailing address, and position of other principal officers of the organization, including officers and members of the finance committee, if any.
 - (d) The name, street address, mailing address, and account number of the designated depository account.
 - (e) The registration statement shall be signed by the treasurer for the designated depository account of the organization and shall contain a certification that all information contained in the registration statement is true, correct and complete.
- (5) The designated depository account for an organization required to register with the Board shall annually pay a filing fee of \$100.00 to the Board as provided in s. 11.055, Stats.
- (6) The organization shall comply with s. 11.05(5), Stats., and notify the appropriate filing officer within 10 days of any change in information previously submitted in a statement of registration.
- (7) An organization making independent disbursements shall file the oath for independent disbursements required by s. 11.06(7), Stats.
- (8) An organization receiving contributions for independent disbursements or making independent disbursements shall file periodic reports as provided ss. 11.06, 11.12, 11.19, 11.20 and 11.21(16), Stats., and include all contributions received for independent disbursements, incurred obligations for independent disbursements, and independent disbursements made. When applicable, an organization shall also file periodic reports as provided in s. 11.513, Stats.
- (9) An organization making independent disbursements shall comply with the requirements of §11.30(1); (2)(a) and (d), Wis. Stats., and include an attribution identifying the organization paying for any communication, arising out of independent disbursements on behalf of or in opposition to candidates, with the following words: "Paid for by" followed by the name of the organization and the

name of the treasurer or other authorized agent of the organization followed by
“Not authorized by any candidate or candidate’s agent or committee.”

This rule shall take effect upon its publication in the official state newspaper,
the Wisconsin State Journal, pursuant to s. 227.24, Stats.

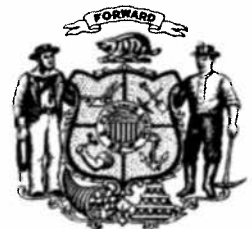
Dated this 10th day of May, 2010.

/s/

Kevin J. Kennedy
Director and General Counsel
Government Accountability Board



WISCONSIN STATE LEGISLATURE



State of Wisconsin\Government Accountability Board

212 East Washington Avenue, 3rd Floor
Post Office Box 7984
Madison, WI 53707-7984
Voice (608) 266-8005
Fax (608) 267-0500
E-mail: gab@wisconsin.gov
http://gab.wi.gov



JUDGE GORDON MYSE
Chair

KEVIN J. KENNEDY
Director and General Counsel

August 3, 2010

Hand Delivered

✓ The Honorable Jim Holperin
Senator, 12th Senate District
Co-Chair Joint Committee for Review of Administrative Rules
Room 409 South
State Capitol
Madison, WI 53703

The Honorable Josh Zepnick
Representative, 9th Assembly District
Co-Chair Joint Committee for Administrative Rules
Room 219 North
State Capitol
Madison, WI 53703

Re: Administrative Rules of the Government Accountability Board: EmR 1016
Ch. GAB 1.91, relating to organizations making independent disbursements

Dear Senator Holperin and Representative Zepnick:

Pursuant to §227.24(2), Wis. Stats., please consider this letter the Government Accountability Board's petition or request for a 60 day extension of the expiration date of Emergency Rule 1016 (GAB §1.91,) relating to organizations making independent disbursements. Emergency Rule 1016 was published, and therefore effective, on May 20, 2010. The rule will expire on October 16, 2010, unless extended. This request is timely.

Please find enclosed a copy of the Memorandum/Notice to the Legislature regarding EmR 1016 (GAB §1.91,) relating to organizations making independent disbursements. This Memorandum/Notice includes the text of EmR 1016 in its entirety and was provided to the Chief Clerks of each House on May 13, 2010 for distribution to all of their individual members.

A threat to the public peace, health, safety or welfare continues and will only be avoided by a 60 day extension of the entirety of EmR 1016. The current EmR 1016 will expire on October 16, 2010, which is 150 days from the effective date of May 20, 2010. The October 16, 2010 expiration date falls after the September 14, 2010 Partisan Primary and just before the November 2, 2010 General Election. An emergency continues to exist as a result of the United States Supreme Court decision *Citizens United v. FEC*, 558 U.S. ___, (No. 08-205)(January 21, 2010).

Within the context of the state's campaign finance law, ch. 11, Wis. Stats, the rule provides direction to organizations receiving contributions for independent disbursements or making independent disbursements. Comporting with *Citizens United*, this emergency rule order does not treat persons making independent disbursements as full political action committees or individuals under §11.05, Wis. Stats., for the purposes of registration and reporting. With respect to contributions or in-kind contributions received, this emergency rule

order requires organizations to disclose only donations "made for" political purposes, but not donations received for other purposes.

The Board adopted the legislature's policy findings of §11.001, Wis. Stats., emphasizing that one of the most important sources of information to voters about candidates is available through the campaign finance reporting system. The Board further found that it is necessary to codify registration, reporting and disclaimer requirements for organizations receiving contributions for independent disbursements or making independent disbursements so that the campaign finance information is available to voters. In part, the rule was adopted immediately to ensure the public welfare with respect to the administration of the current elections.

Failing to extend EmR 1016 could result in unequal treatment of organizations subject to campaign finance registration and reporting requirements through October 16, 2010 and those that would not be required to register and report after October 16, 2010. In the context of the November 2, 2010 General Election, this unequal treatment is an additional threat to the public welfare. To avoid threats to the public welfare, the Joint Committee for Review of Administrative Rules should grant a 60 day extension of EmR 1016, thus placing the expiration date well after the November 2, 2010 General Election.

Promulgation of a permanent rule GAB 1.91 by the Government Accountability Board prior to the current October 16, 2010 expiration date of EmR 1016 is impossible. A permanent rule GAB 1.91 has been submitted to Legislative Council for review; however, upon return of the Legislative Council report, a public hearing must be held. In addition, the permanent rule GAB 1.91 must still be submitted to the Legislature, which has a minimum 30 day review process. Finally, the Legislative Reference Bureau requests a 45 day lead time for publication of permanent rules in the Administrative Register after receiving approval from the Legislature. This normal rulemaking timeline extends well beyond the current expiration date of October 16, 2010.

In closing, the Government Accountability Board respectfully requests that the Joint Committee for Review of Administrative Rules extend the October 16, 2010 expiration date for EmR 1016 by 60 days.

If you have any questions about this matter, or if I can be of any other assistance, please feel free to contact me.

Sincerely,

GOVERNMENT ACCOUNTABILITY BOARD



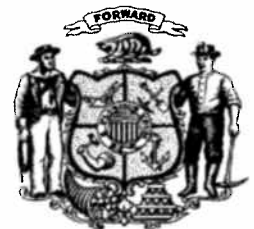
Shane W. Falk
Staff Counsel

Enclosure

cc: Bruce Hoesly, Legislative Reference Bureau (via email only)
Via Email: adminrules@wisconsin.gov



WISCONSIN STATE LEGISLATURE





STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

114 East, State Capitol
P.O. Box 7857
Madison, WI 53707-7857
608/266-1221
TTY 1-800-947-3529

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.

¶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. Atty 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. Atty 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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GOVERNMENT
ACCOUNTABILITY BOARD

**WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE**

Ronald Sklansky
Clearinghouse Director

Terry C. Anderson
Legislative Council Director

Richard Sweet
Clearinghouse Assistant Director

Laura D. Rose
Legislative Council Deputy Director

CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 10-087

AN ORDER to create GAB 1.91, relating to organizations making independent disbursements.

Submitted by **GOVERNMENT ACCOUNTABILITY BOARD**

07-07-2010 RECEIVED BY LEGISLATIVE COUNCIL.

08-03-2010 REPORT SENT TO AGENCY.

RS:JKR

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]
Comment Attached YES NO
2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]
Comment Attached YES NO
3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]
Comment Attached YES NO
4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]
Comment Attached YES NO
5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]
Comment Attached YES NO
6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]
Comment Attached YES NO
7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]
Comment Attached YES NO



WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

Ronald Sklansky
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CLEARINGHOUSE RULE 10-087

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]

I. Statutory Authority

The rule imposes registration and reporting requirements on organizations, including corporations and associations that make independent disbursements. Chapter 11, Stats., imposes registration and reporting requirements on committees. Section 11.01 (4), Stats., defines "committee" as any *person* other than an individual and any combination of two or more persons, permanent or temporary, that makes or accepts contributions or makes disbursements, whether or not engaged in activities that are exclusively political, except that a "committee" does not include a political "group." "Person" is not defined in ch. 11, Stats.; however, s. 990.01 (26), Stats., defines "person" to include all partnerships, *associations*, and *bodies* politic or *corporate*.

It appears that under ch. 11, Stats., registration and reporting requirements already apply to a corporation or association that makes or accepts contributions or makes disbursements. That is, the corporation or association would be treated as a committee. An independent disbursement under the rule may be a disbursement for purposes of ch. 11, Stats., and subject to ch. 11., Stats., registration and reporting requirements. Consequently, the rule creates an alternate set of registration and reporting requirements that may apply to the same activity that is already subject to registration and reporting requirements under ch. 11, Stats.

In addition, for independent disbursements that are subject to registration and reporting requirements under the rule, but not to ch. 11, Stats., requirements, the rule creates a new system

of registration and reporting for independent disbursements that are not regulated by ch. 11, Stats.

In its report to the Legislature, the board should clearly explain the following matters:

- a. How the regulation of the new entity, "organization," under the rule differs from the regulation of a committee under ch. 11, Stats.
- b. The statutory authority for treating an "organization" differently than a committee under ch. 11, Stats.; the decision of the U.S. Supreme Court in *Citizens United v. FEC*, 558 U.S. ___ (dated January 21, 2010) may have invalidated portions of s. 11.38, Stats., but it did not alter the statutory structure under which the board administers and implements ch. 11, Stats. In other words, if *Citizens United* requires alterations in ch. 11, Stats., what power does the board, rather than the Legislature, have to effect those changes?

2. Form, Style and Placement in Administrative Code

- a. In the rule summary, the heading titled "Place where comments are to be submitted and deadline for submission" should be included. [s. 1.02 (2) (a) 12., Manual.]
- b. In s. GAB 1.91 (4) (e), the paragraph should be replaced with the following: "A signature of the treasurer for the designated depository account of the organization and a certification that all information contained in the registration statement is true, correct and complete."

4. Adequacy of References to Related Statutes, Rules and Forms

- a. In the "statutes interpreted" section of the rule summary, "and" should be inserted between "11.38," and "11.513."
- b. In the "comparison with rules in adjacent states" section of the rule summary, it appears that the references to the Illinois Administrative Code should instead be to the Illinois statutes. In addition, chapter 351-4.27 (7) of the Iowa Administrative Code does not exist. Lastly, the agency should include a citation to support the assertion that Michigan statutes contain certain registration, reporting, and disclaimer requirements upon exceeding \$500 in contributions or expenditures.
- c. In s. GAB 1.91 (9), "s. 11.30 (1) and (2) (a) and (d), Stats." should replace "§ 11.30 (1); (2) (a) and (d), Wis. Stats." [s. 1.07, Manual.]

5. Clarity, Grammar, Punctuation and Use of Plain Language

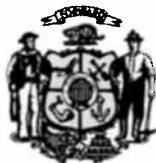
- a. In the title on the first page, "PROPOSED" should replace "PROPOSED."
- b. In the "Summary of, and comparison with, existing or proposed federal regulations" section of the rule summary, the following changes should be made:

- On the second line, the acronym "FEC" should be replaced by the name "Federal Election Commission."
 - On the third line, "who" should be inserted between "and" and "make."
 - On the sixth line, "in the aggregate" should be inserted between "expenditure" and "of."
 - On the eighth line, "in the aggregate" should be inserted between "expenditure" and "of."
- c. In the "comparison with rules in adjacent states" section of the rule summary, it appears that "\$750.00" should replace "\$100.00" when describing the Iowa Administrative Code provisions.
- d. In s. GAB 1.91 (1), the definitions should be arranged in alphabetical order. [s. 1.01 (7), Manual.]



State of Wisconsin\Government Accountability Board

212 East Washington Avenue, 3rd Floor
Post Office Box 7984
Madison, WI 53707-7984
Voice (608) 266-8005
Fax (608) 267-0500
E-mail: gab@wisconsin.gov
<http://gab.wi.gov>



JUDGE GORDON MYSE
Chair

KEVIN J. KENNEDY
Director and General Counsel

August 16, 2010

Hand Delivered

✓ The Honorable Jim Holperin
Senator, 12th Senate District
Co-Chair Joint Committee for Review of Administrative Rules
Attn: Jamie Stark
Room 409 South
State Capitol
Madison, WI 53703

The Honorable Josh Zepnick
Representative, 9th Assembly District
Co-Chair Joint Committee for Administrative Rules
Attn: Ryan Schroeder
Room 219 North
State Capitol
Madison, WI 53703

Re: Administrative Rules of the Government Accountability Board: EmR 1016
Ch. GAB 1.91, relating to organizations making independent disbursements

Dear Senator Holperin and Representative Zepnick:

On August 3, 2010 and pursuant to §227.24(2), Wis. Stats., the Government Accountability Board petitioned or requested a 60 day extension of the expiration date of Emergency Rule 1018 (GAB §1.91,) relating to organizations making independent disbursements. That petition or request contained an inadvertent reference to EmR 1018, when it should have referenced EmR 1016. Please find enclosed the original August 3, 2010 petition or request as modified with the correct reference to EmR 1016.

Please note that it is my understanding that this matter will be reviewed by the Joint Committee for Administrative Rules on Tuesday, August 24, 2010 beginning at 10:00 a.m.

Thank you for your understanding. If you have any questions about this matter, or if I can be of any other assistance, please feel free to contact me.

Sincerely,

GOVERNMENT ACCOUNTABILITY BOARD

A handwritten signature in black ink, appearing to read "Shane W. Falk".

Shane W. Falk
Staff Counsel
Enclosure