Report From Agency

REPORT

OF

GOVERNMENT ACCOUNTABILITY BOARD

Clearinghouse Rule 09-013
s. GAB 1.28
Wisconsin Administrative Code

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

ANALYSIS PREPARED BY GOVERNMENT ACCOUNTABILITY BOARD:

1. Proposed Rule: See Proposed Order attached immediately following this report.

2. Statute Interpreted: s.11.01(16), Stats.

3. Statutory Authority: ss. 5.05(1)(f) and 227.11(2)(a), Stats.

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

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

rule. The Wisconsin Court of Appeals, in *Wisconsin Coalition for Voter Participation, Inc. v. State Elections Board,* 231 Wis.2d 670 (Wis. Ct. App. 1999), further opined:

> And while, as plaintiffs point out, "express advocacy" on behalf of a candidate is one part of the statutory definition of "political purpose," it is not the only part. Under s. 11.01(16), Stats., for example, an act is also done for a political purpose if it is undertaken "for the purpose of influencing the election . . . of any individual.
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> Contrary to plaintiffs' assertions, then, the term "political purposes" is not restricted by the cases, the statutes or the code to acts of express advocacy. It encompasses many acts undertaken to influence a candidate's election—including making contributions to an election campaign.

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

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

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

The revised rule will more clearly specify those communications that may not reach the level of "magic words" express advocacy, yet are subject to regulation because they are the functional equivalent to express advocacy, for "political purposes," and susceptible of no other reasonable interpretation other than as an appeal to vote for or against a specific candidate.

5. Plain language analysis: The revised rule will subject to regulation communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." The revised rule will subject communications meeting this criteria to the applicable campaign finance regulations and requirements of ch. 11, Stats.

6. Summary of, and comparison with, existing or proposed federal regulations: The United States Supreme Court upheld regulation of political communications called "electioneering communications" in its December 10, 2003 decision: *McConnell et al. v. Federal Election Commission, et al.* (No.02-1674) and pursuant to its June 25, 2007 decision of: *Federal Election Commission (FEC) v. Wisconsin Right to Life, Inc. (WRTL II),* (No.06-969and 970).

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

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

7. Comparison with rules in adjacent states:

   Illinois has a rule requiring a nonprofit organization to file financial reports with the State Board of Elections if it: 1) is not a labor union; 2) has not established a political committee; and 3) accepts or spends more than $5,000 in any 12-month period in the aggregate:

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

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

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

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

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

8. Summary of factual data and analytical methodologies: Adoption of the rule was primarily predicated on federal and state statutes, regulations, and case law. Additional factual data was considered at several Government Accountability Board public meetings, specifically the expenditures on television advertisements, and the actual transcripts for the same, as aired during a recent Wisconsin Supreme Court race. See Appendix A.

9. List of persons who appeared or registered for or against the proposed rule at any public hearing held by the agency:

March 30, 2009 Public Hearing:

Mike McCabe, Wisconsin Democracy Campaign—Favor
Mike Wittenwyler, Representing Diverse Group of Orgs.—Oppose

Andrea Kaminski, League of Women Voters—Favor
Reid Alan Cox, Center for Competitive Politics—Oppose

November 11, 2008 Informational Hearing:

Mike McCabe, Wisconsin Democracy Campaign—Favor
League of Women Voters—Favor

October 6, 2008 Informational Hearing:

Mike McCabe, Wisconsin Democracy Campaign—Favor
Mike Wittenwyler, Assoc. of Wisconsin Lobbyists, et al.—Oppose
Jay Heck, Common Cause in Wisconsin—Favor

August 28, 2008 Informational Hearing:

Beverly Speer, Wisconsin Democracy Campaign—Favor
Randy Elf, James Madison Center for Free Speech—Oppose
Steve Hoerstring, Center for Competitive Politics—Oppose
Mike Wittenwyler, Assoc. of Wisconsin Lobbyists, et al.—Oppose
Jay Heck, Common Cause in Wisconsin—Favor
James Buchen, Wisconsin Manufacturers and Commerce—Oppose
Deborah Goldberg, et al., Brennan Center for Justice—Favor
Lawrence Dupuis, ACLU of Wisconsin—Oppose

March 26, 2008 Informational Hearing:

Deborah Goldberg, Brennan Center for Justice—Favor
Mike McCabe, Wisconsin Democracy Campaign—Favor
Shane W. Falk, former Elections Board chair—Favor
Mike Wittenwyler, Assoc. of Wisconsin Lobbyists, et al.—Oppose

10. Summary of public comments to the proposed rule and the agency's response to the comments:

Generally, those persons or organizations speaking in favor of the proposed rule emphasized the need to regulate communications that are the "functional equivalent" of express advocacy campaign advertisements to address the "compelling interest in designing a system for fully disclosing contributions an disbursements made on behalf of every candidate for public office" as is set forth in s. 11.001(1), Stats. In addition, persons or organizations speaking in favor of the proposed rule seek to level the playing field between candidates and the individuals or groups that outspend candidates without any disclosure and possibly with funds otherwise prohibited by campaign finance regulations. Furthermore, persons or organizations speaking in favor of the proposed rule supported the agency's

authority to define "political purpose" and that the proposed rule does not violate recent U.S. Supreme Court decisions.

Generally, those persons or organizations speaking in opposition to the proposed rule expressed a concern that recent U.S. Supreme Court decisions appear to reestablish a more restrictive approach to regulating speech and that the proposed rule may violate speech rights of those wishing to produce advertisements that avoid using "magic words" expressly advocating for a candidate.

The Government Accountability Board carefully and thoroughly considered all public comments from both informational and the public hearings. Comments from the informational hearings assisted with the ultimate drafting of the rule. Following the public hearing on March 30, 2009, the Government Accountability Board unanimously approved the final draft of the proposed rule without additional modifications.

March 30, 2009 Public Hearing:

Mike McCabe, Wisconsin Democracy Campaign—Favor
Appendix B: Mike Wittenwyler—Oppose
Andrea Kaminski, League of Women Voters—Favor
Appendix C: Reid Alan Cox—Oppose

November 11, 2008 Informational Hearing:

Mike McCabe, Wisconsin Democracy Campaign—Favor
Appendix D: League of Women Voters—Favor

October 6, 2008 Informational Hearing:

Mike McCabe, Wisconsin Democracy Campaign—Favor
Mike Wittenwyler, Assoc. of Wisconsin Lobbyists, et al.—Oppose
Jay Heck, Common Cause in Wisconsin—Favor

August 28, 2008 Informational Hearing:

Appendix E: Beverly Speer, Wis. Democracy Campaign—Favor
Appendix F: Randy Elf, James Madison Center for Free Speech Oppose
Appendix G: Steve Hoerstring, Center for Competitive Politics—Oppose
Appendix H: Mike Wittenwyler, Assoc. of Wisconsin Lobbyists, et al.—Oppose
Jay Heck, Common Cause in Wisconsin—Favor
James Buchen, Wisconsin Manufacturers and Commerce—Oppose
Appendix I-K: Deborah Goldberg, et al., Brennan Center for Justice—Favor
Appendix L: Lawrence Dupuis, ACLU of Wisconsin—Oppose

March 26, 2008 Informational Hearing:

Appendix M: Deborah Goldberg, Brennan Center for Justice—Favor
Mike McCabe, Wisconsin Democracy Campaign—Favor
Shane W. Falk, former Elections Board chair—Favor
Appendix N: Mike Wittenwyler, Assoc. of Wisconsin Lobbyists, et al.—Oppose

11. Explanations of modifications to the proposed rule as a result of the public comments or testimony received at public hearings: The Government Accountability Board makes no substantive modifications to this rule following the March 30, 2009 public hearing.

12. Legislative Council staff clearinghouse report: See Clearinghouse Report to Agency attached immediately following this report

13. Response to Legislative Council staff recommendations in the clearinghouse report: The Government Accountability Board considered the Legislative Council recommendation to repeal and recreate s. GAB 1.28, Wis. Adm. Code, rather than amending it. The Government Accountability Board chose to emend s. GAB 1.28, Wis. Adm. Code. With that exception, the Government Accountability Board adopted the Legislative Council's staff's comments and has incorporated the suggested changes in the rule.

14. Final regulatory flexibility analysis: The creation of this rule does not affect business.

15. Economic impact report: Not applicable.

16. Changes to the proposed rule's plain language analysis or fiscal estimate: Not applicable.

CONCLUSION AND RECOMMENDED ACTION:

The Government Accountability Board unanimously concludes that s. GAB 1.28 should be amended. The amendment of this rule is necessary to effectuate the legislative policy set forth in s. 11.001, Stats., in which the legislature already found that the state has a compelling interest in designing a system for fully disclosing contributions and disbursements made on behalf of every candidate for public office, and in placing reasonable limitations on such activities. The revised rule will more clearly specify those communications that may not reach the level of "magic words" express advocacy, yet are subject to regulation because they are the functional equivalent to express advocacy, for "political purposes," and susceptible of no other reasonable interpretation other than as an appeal to vote for or against a specific candidate.

The Government Accountability Board recommends promulgation of this rule.

Respectfully submitted,

April 29, 2009

GOVERNMENT ACCOUNTABILITY BOARD

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Shane W. Falk, Staff Counsel