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SS# 116-18, Wisconsin Administrative Register No. 755A3, 11/19/2018

WISCONSIN ETHICS COMMISSION
Proposed Rule Making Order

INTRODUCTORY CLAUSE

The Wisconsin Ethics Commission proposes a rule to amend Wis. ADMIN. CODE ETH 1.20 (9), 1.26 (2), 1.26 (6), 1.60 (1) (b), 1.70 (1), and 1.855 (2) to reflect the changes of 2015 Wisconsin Act 117; and create ETH 1.96 to clarify the attribution requirements of s. 11.1303, Stats., related to campaign finance.

RULE SUMMARY

- A. **Statutes interpreted:** Chapter 11, Stats.
- B. **Statutory authority:** The Wisconsin Ethics Commission is specifically directed to promulgate rules to administer Chapter 11 pursuant to s. 11.1304 (17), Stats.

11.1304 Duties of the ethics commission. The commission shall:
(17) Promulgate rules to administer this chapter.

The Commission also has specific authority to specific small items or other communications to which s. 11.1303 (2), Stats., does not apply pursuant to s. 11.1303 (2) (f), Stats.

11.1303 Attribution of political contributions, disbursements and communications.
(2)

...

(f) This subsection does not apply to communications containing express advocacy printed on small items on which the information required by this subsection cannot be conveniently printed, including text messages, social media communications, and certain small advertisements on mobile phones. The commission may, by rule, specify small items or other communications to which this subsection shall not apply.

The Commission also has general authority for the promulgation of rules to carry out the requirements of Chapters 11, 13, and 19.

s. 19.48(1), Stats.:

19.48 Duties of the ethics commission. The commission shall:
(1) Promulgate rules necessary to carry out ch. 11, subch. III of ch. 13, and this subchapter.

s. 227.11(2)(a), Stats.:

227.11 Extent to which chapter confers rule-making authority.

(2) Rule-making authority is expressly conferred on an agency as follows:

(a) Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation.

- C. **Explanation of agency authority:** The Ethics Commission is required to promulgate rules to administer Chapter 11, Stats. The Wisconsin Ethics Commission is also authorized by s. 11.1303 (2) (f), Stats. to specify small items or other communications to which the attribution requirement shall not apply.

The Government Accountability Board previously reviewed the provisions of Wis. Admin. Code ETH 1 as required by 2015 Wisconsin Act 117. In that review, the Board noted several provisions that were inconsistent with the new law, but it did not address other statutory and administrative references within ETH 1 that needed to be updated to harmonize the language with the newly created Chapter 11 or current administrative procedures before it was dissolved. This proposed rule would update provisions that currently contain references to the prior version of Chapter 11 as well as references to outdated forms of the Government Accountability Board. The Ethics Commission previously sought to repeal the inconsistent provisions in CR 18-047, which is currently pending approval of the Governor, and now seeks to amend the remaining provisions affected by 2015 Act 117.

- D. **Related statute(s) or rule(s):** CR 18-047.

- E. **Plain language analysis:** The rule amends several provisions of ETH 1 to eliminate references to outdated forms and statutory provisions that were repealed under the new campaign finance law created by 2015 Act 117.

The Commission currently only advises committees as to the language required to comply with s. 11.1303 (2), Stats. However, the Commission regularly receives inquiries regarding the necessity of attributions on certain communications or on items where an attribution cannot be conveniently printed. The Commission also regularly receives inquiries as to the required size of an attribution statement. Wisconsin law currently requires that an attribution statement be “readable, legible, and readily accessible.” This rule will propose standards to better define when an attribution is readable, legible, and readily accessible; as well an exception for certain small items or other communications as allowed by s. 11.1303 (2) (f), Stats.

- F. **Summary of, and comparison with, existing or proposed federal regulations:**

The Federal Elections Commission (FEC) provides a great deal of guidance as to the disclaimers required by federal law. Federal law requires the disclaimer to identify the

person(s) who paid for a communication and whether the communication was authorized by one or more candidates (e.g., “Paid for by the Sheridan for Congress Committee.”) Under federal law, any public communication made by a political committee – including communications that do not expressly advocate for the election or defeat of a clearly identified federal candidate or solicit a contribution – must display a disclaimer. The FEC also requires that disclaimers appear on political committee’s websites, and in certain email communications. All public communications that expressly advocate the election or defeat of a clearly identified candidate, electioneering communications, and all public communications that solicit any contribution require a disclaimer.

Disclaimers are not required when it cannot conveniently be printed (e.g., pens, buttons, similar small items), the display is not practical (e.g., apparel, water towers, skywriting), or when the item is of minimal value and does not contain a political message and is used for administrative purposes (e.g., a check). A disclaimer need not be on the front page of multi-page communications, as long as it is on one of the pages.

Similar to Wisconsin law, a disclaimer is also required when a communication is authorized by a committee even if the committee does not pay for it (e.g., “Paid for by the XYZ State Party Committee and authorized by Sheridan for Congress Committee”) or when another organization makes an express advocacy communication without the authorization of the candidate (e.g., “Paid for by the QRS Committee (www.QRScommittee.org) and not authorized by any candidate or candidate’s committee.)

Federal disclaimers are required to be “clear and conspicuous” regardless of the medium in which the communication is transmitted. A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if its placement is easily overlooked. A printed disclaimer must be contained within a printed box set apart from the contents of the communication.

Example:

<p>Paid for by the Save the Seahorses Committee and authorized by the McKay for Senate Committee.</p>

The print of the disclaimer must be of sufficient size to be “clearly readable” by the recipient of the communication, and the print must have a reasonable degree of color contrast between the background and the printed statement. Federal regulations specifically provide a safe harbor for disclaimers using black text in 12-point font on a white background in printed material measuring no more than 24 inches x 36 inches. In the alternative to a white background, a safe harbor is also available where the degree of contrast between the background color and the disclaimer text color is at least as great as the degree of contrast between the background color and the color of the largest text in the communication.

Television communications have similar guidelines for a “clearly readable” disclaimer at the end of the communication that must be displayed for a period of at least four seconds at a height of at least four percent of the picture height. Radio communications must contain an

audio disclaimer, although no specifications are given for an audio disclaimer other than the general “clear and conspicuous” disclaimer requirement.

G. Comparison with similar rules in adjacent states:

Minnesota (MINN. STAT. § 211B.04)

Minnesota law requires a committee to include a disclaimer on campaign literature distributed by the candidate or committee. The required form of the disclaimer is: “Prepared and paid for by the committee, (address).” If the material was produced and distributed without cost, the words “paid for by” may be omitted. The disclaimer requirement does not apply to fund-raising tickets, business cards, personal letters, or similar items that are clearly being distributed by the candidate. A disclaimer is also not required for bumper stickers, pins, buttons, pens, or similar small items on which the disclaimer cannot be conveniently printed; skywriting, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable; and online banner ads and similar electronic communications that link directly to an online page that includes the disclaimer.

Minnesota recently revised this requirement effective June 1, 2018. The revised disclaimer requirement makes the following changes:

- The disclaimer address must be either the committee’s mailing address or the committee’s website, if the website includes the committee’s mailing address.
- Adds an independent expenditure disclaimer (e.g., “This is an independent expenditure prepared and paid for by(name of entity participating in the expenditure,(address). It is not coordinated with or approved by any candidate nor is any candidate responsible for it.”
- The disclaimer requirement is met for an entire website or social media page when the disclaimer required appears once on the homepage of the site.
- For written communications other than an outdoor sign, website, or social media page, the disclaimer must be printed in 8-point font or larger.

Illinois (10 ILCS 5/9-9.5)

Illinois law requires that any committee that makes an expenditure for any kind of communication directed at voters and mentioning the name of a candidate in the next upcoming election must ensure that the communication clearly identifies the committee as having paid for it. This applies to any committee that pays for any part of the advertisement, including its production and distribution. This disclosure is not required if the item is too small to contain it. The disclosure is also not required for telephone surveys that use random sampling or other scientific survey methods to gauge public opinion about a candidate or public policy question. Finally, this disclosure requirement does not apply to expenditures for preparation or distribution of any printed communication paid for by a political committee controlled by a member of the Illinois General Assembly, provided the communication is directed at

constituents and is made in connection with the performance of governmental or public service functions. Vendors who produce political communications are required to keep records of the name and address of the person who made or requested the purchase and the amount paid.

Michigan (MICH. COMP. LAWS § 169.247, MICH. ADMIN. CODE r. 169.36)

Michigan law requires candidates and committees to place an identification on printed material referring to an election, candidate, or ballot question (e.g., “Paid for by the CTE Joe Smith, 123 Winners Lane, Lansing Michigan 48933.”) If the printed material is an independent expenditure, the statement must also include a disclaimer (e.g., “Not authorized by any candidate committee.”) Free social media such as Facebook, Twitter, or emails do not require an identification or disclaimer. An individual, other than a candidate, acting independently and not acting as an agent or any candidate or committee, is not required to provide an identification for printed material, but still must include an identification for radio/tv ads, robo-calls, or other paid electronic media. Michigan also requires certain identifications for certain mass communications referencing a clearly identified candidate or ballot question within 30/60 days of a primary/general election when the communication is targeted to the relevant electoral district.

Identifications and disclaimers must be in a place and in a print clearly visible to and readable by an observer. No specific font size is required, but the identification and/or disclaimer should be separate from any text and Michigan’s elections website specifically provides the example that a billboard identifier should be visible from the road. Michigan also lists a host of items that are exempted from the identification requirement due to size or difficulty of placement (e.g., aerial banners, pens, etc.)

Iowa (IOWA CODE § 68A.405, IOWA ADMIN. CODE r. 351-4.38 *et seq.*)

Iowa law requires a “paid for by” attribution statement on printed or displayed material that expressly advocates for or against a clearly identified candidate or ballot issue. The attribution shall identify the person paying for the material by name and address. If the material is an independent expenditure the attribution shall include that the material was not authorized by any candidate, candidate’s committee, or ballot issue committee.

Iowa’s attribution requirement does not apply to:

- Editorials, news articles, or other print or electronic media that are not paid political advertisements.
- Small items upon which the inclusion of the statement is impracticable (e.g., pens, buttons, etc.)
- T-shirts, caps, and other articles of clothing.
- An individual who acts alone and spends less than \$100 of his or her own money to advocate the passage or defeat of a ballot issue.
- Any material subject to federal regulations regarding an attribution requirement

Television, video, or motion picture advertising is required to display the attribution statement on screen for at least four seconds. Multi-page material need only include the attribution on a single page. For a website, the attribution need only appear on the home page of the site.

H. Summary of factual data and analytical methodologies: N/A

I. Analysis and supporting documentation used to determine effect on small businesses:
N/A

J. Effect on small business: N/A

K. Agency contact person:

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L. Place where comments are to be submitted and deadline for submission:

Written comments on the proposed rule will be accepted and receive consideration if they are received by June 17, 2019. Written comments should be addressed by mail to: David Buerger, P.O. Box 7125, Madison, WI 53707-7125; or by email to: eth.rulecomments@wi.gov.

Fiscal Estimate: The creation of this rule does not affect business.

Initial Regulatory Flexibility Analysis: The creation of this rule has no fiscal effect.

TEXT OF RULE

SECTION 1. ETH 1.20 (9) is amended to read:

ETH 1.20 (9) Any registrant who makes or receives an in-kind contribution shall report the contribution on ~~Schedule 3-C~~ of its campaign finance report.

SECTION 2. ETH 1.26 (2) is amended to read:

ETH 1.26 (2) The return of a contribution is not a disbursement ~~subject to the limitations on disbursements in s. 11.31, Stats.,~~ and it is not a contribution subject to the limitations on contributions in ss. 11.1101, 11.1103, 11.1104, and 11.1105, Stats.

SECTION 3. ETH 1.26 (6) is amended to read:

ETH 1.26 (6) A registrant who receives a return of contribution shall report it on the campaign finance report, ~~Form EB-2, on Schedule 1-C, OTHER INCOME,~~ and shall designate this as “return of contribution.”

SECTION 4. ETH 1.60 (1) (b) is amended to read:

ETH 1.60 (1) (b) An authorized expenditure for consulting services made by a candidate, candidate's committee, political action committee, or political party ~~committee~~ on behalf of another candidate shall be reported as an in-kind contribution to the candidate on whose behalf the expenditure was made, ~~except that expenditures made by political party committees on behalf of that party's presidential candidates shall not be reportable and shall not count against that party's state or local candidates' applicable contribution limits under ss. 11.1101, 11.1103, 11.1104, and 11.1105, Stats., and spending limits under s. 11.31 (2), Stats.,~~ except as provided in par. (c).

SECTION 5. ETH 1.70 (1) is amended to read:

ETH 1.70 (1) A candidate for or a person elected to a state or local office does not make an in-kind contribution to another candidate for a state or local office in another district when a candidate or election official travels to the district of the other candidate for political purposes. The candidate for or person elected to state or local office may be reimbursed from his or her personal campaign candidate committee ~~subject to the applicable spending limits of s. 11.31 (2), Stats., and s. ETH 1.44~~ and is deemed to provide nonreportable volunteer services to the candidate in the other district.

SECTION 6. ETH 1.855 (2) is amended to read:

ETH 1.855 (2) A contribution from a conduit account shall be in the form of a check or other negotiable instrument made out to the named candidate or to the candidate's ~~personal campaign committee~~, or to a legislative campaign committee, political party ~~committee~~, or support

~~committee under s. 11.18, Stats~~ political action committee. A conduit may not make an in-kind contribution as defined in s. ETH 1.20 (1) (e).

SECTION 7. ETH 1.96 is created to read:

ETH 1.96 Attribution requirements.

(1) DEFINITIONS. In this section:

- (a) “Readable” means able to be read easily.
- (b) “Legible” means each individual letter or character is clearly printed so it can be easily understood.
- (c) “Readily accessible” means capable of being seen without much difficulty.

(2) SPECIFICATIONS FOR ALL ATTRIBUTIONS. The language required by s. 11.1303, Stats., shall be presented in a clear and conspicuous manner that gives the recipient of the communication adequate notice of the identity of the person making the payment or reimbursement or assuming responsibility for the communication.

(3) ADDITIONAL SPECIFICATIONS FOR ATTRIBUTIONS IN WRITTEN COMMUNICATIONS. Written communications shall include an attribution containing the language required by s. 11.1303, Stats., in a manner that is readable, legible, and readily accessible. It is prima facie evidence that an attribution is readable, legible, and readily accessible if the attribution meets all of the following requirements:

- (a) It appears in a sans-serif font.
- (b) It meets the following applicable minimum font size:
 - 1. An attribution on a written communication measuring no larger than 8.5 inches by 11 inches must be printed in at least 10-point font;
 - 2. An attribution on a written communication that is larger than 8.5 inches by 11 inches, but is not larger than 24 inches by 36 inches, must be printed in at least 12-point font; or
 - 3. An attribution on any other written communication must appear in letters that are at least four percent of the vertical height of the written communication.
- (c) It appears in black text on a white background, or the degree of contrast between the background color and the text color is at least as great as the degree of contrast between the background color and the color of the largest text in the communication.
- (d) It remains visible for a period of at least four seconds.

(4) ADDITIONAL SPECIFICATIONS FOR ATTRIBUTIONS IN AUDIO-ONLY COMMUNICATIONS.

Communications that include only audio shall include an attribution containing the language required by s. 11.1303, Stats., in a manner that is clearly spoken.

(5) MATERIAL THAT DOES NOT NEED AN ATTRIBUTION. Communications that are contained in or on any of the following do not require attributions under s. 11.1303, Stats.:

(a) Business cards.

(b) Buttons.

(c) Pencils.

(d) Pens.

(e) Pins.

(f) Skywriting.

(g) Tickets.

(h) Small online ads and similar electronic communications where the language required by s. 11.1303, Stats., could not conveniently be included, and that either link directly to a website that includes the required attribution, or provide an automatic display that includes the attribution.

1. Sponsors of such small online ads or similar electronic communications must be able to establish, at the Commission's request, that including the attribution on the ad or communication was not possible due to size or technological constraints.
2. The link required by par. (h) must direct the recipient of the small online ad or similar electronic communication to the attribution in a manner that is readable, legible, and readily accessible, with minimal effort and without viewing extraneous material.
3. The automatic display required by par. (h) must display to the recipient of the small online ad or similar electronic communication the attribution in a manner that is readable, legible, and readily accessible. Examples of acceptable automatic display mechanisms include, but are not limited to, non-blockable pop-ups, roll-overs, or other similar mechanisms.

SECTION 8. EFFECTIVE DATE.

This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2), Stats.