INDEX TO APPENDIX

Clearinghouse Rule 09-013

ORDER OF THE GOVERNMENT ACCOUNTABILITY BOARD
CR 09-013

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

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

3. 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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> * * *
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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. **549** (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.

In *Citizens United v. FEC*, 558 U.S. ___, No. 08-205, pp. 7-8, *slip opinion* (January 21, 2010), the Court applied the *McConnell* and *WRTLII* holdings and stated: "the functional-equivalent test is objective: 'a court should find that [a communication] is the functional equivalent of express advocacy only if [it] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate'."

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.

4. Related statute(s) or rule(s): s. 11.01(16), Stats., and s. GAB 1.28, Wis. Adm. Code.

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. **The scope of regulation will be subject to the United States Supreme Court Decision, *Citizens United vs. FEC* (No. 08-205) permitting the use of corporate and union general treasury funds for independent expenditures.**

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), its June 25, 2007 decision of: *Federal Election Commission (FEC) v. Wisconsin Right to Life, Inc. (WRTL II)*, (No.06-969and 970), **and pursuant to its January 21, 2010 decision of: *Citizens United vs. FEC* (No. 08-205).**

   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.

9. Analysis and supporting documentation used to determine effect on small businesses: The rule will have no effect on small business, nor any economic impact.

10. Effect on small business: The creation of this rule does not affect business.

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 no fiscal effect.

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

TEXT OF PROPOSED RULE:

SECTION 1. GAB 1.28 is amended to read:

GAB 1.28 Scope of regulated activity; election of candidates.
(1) Definitions. As used in this rule:

(a) "Political committee" means every committee which is formed primarily to influence elections or which is under the control of a candidate.

(b) "Communication" means any printed advertisement, billboard, handbill, sample ballot, television or radio advertisement, telephone call, e-mail, internet posting, and any other form of communication that may be utilized for a political purpose.

(c) "Contributions for political purposes" means contributions made to 1) a candidate, or 2) a political committee or 3) an individual who makes contributions to a candidate or political committee or incurs obligations or makes disbursements for ~~the purpose of expressly advocating the election or defeat of an identified candidate~~ political purposes.

(2) Individuals other than candidates and ~~committees~~ persons other than political committees are subject to the applicable ~~disclosure-related and recordkeeping-related~~ requirements of ch. 11, Stats., ~~only~~ when they:

(a) Make contributions or disbursements for political purposes, or

(b) Make contributions to any person at the request or with the authorization of a candidate or political committee, or

(c) Make a communication ~~containing~~ for a political purpose.

(3) A communication is for a "political purpose" if either of the following applies:

(a) The communication contains terms such as the following 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:

1. "Vote for;"
2. "Elect;"
3. "Support;"
4. "Cast your ballot for;"
5. "Smith for Assembly;"
6. "Vote against;"
7. "Defeat;" or
8. "Reject."

(b) The communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. A communication is susceptible of no other reasonable interpretation if it is made during the period beginning on the 60th day preceding a general, special, or spring election and ending on the date of that election or during the period beginning on the 30th day preceding a primary election

and ending on the date of that election and that includes a reference to or depiction of a clearly identified candidate and:

1. Refers to the personal qualities, character, or fitness of that candidate;
2. Supports or condemns that candidate's position or stance on issues; or
3. Supports or condemns that candidate's public record.

~~(3)~~(4) Consistent with s. 11.05 (2), Stats., nothing in sub. (1) ~~or~~ , (2), or (3) should be construed as requiring registration and reporting, under ss. 11.05 and 11.06, Stats., of an individual whose only activity is the making of contributions.

SECTION 2. 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)(intro), Stats.

Dated March 23, 2010

KEVIN J. KENNEDY
Government Accountability Board
Director and General Counsel

State of Wisconsin | Government Accountability Board

Meeting of the Board
Wednesday, December 22nd, 9:30 a.m. | Agenda

Teleconference Meeting
G.A.B. Conference Room
212 East Washington Avenue, Third Floor
Madison, Wisconsin

Wednesday, December 22, 2010

9:30 a.m.

A. Call to Order

B. Roll Call

C. Director's Report of Appropriate Meeting Notice

D. Public Comment (Limit of 5 minutes per individual appearance)

E. Consideration of Emergency Administrative Rule GAB 1.28

F. Adjournment

The Government Accountability Board has scheduled its next meeting for January 13, 2011 as a teleconference at the Government Accountability Board offices, 212 East Washington Avenue, Third Floor in Madison, Wisconsin beginning at 9:30 a.m.

The Government Accountability Board may conduct a roll call vote, a voice vote, or otherwise decide to approve, reject, or modify any item on this agenda.

State of Wisconsin \ Government Accountability Board

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JUDGE GORDON MYSE
Chairperson

KEVIN J. KENNEDY
Director and General Counsel

MEMORANDUM

DATE: For the December 22, 2010 Meeting

TO: Members, Wisconsin Government Accountability Board

FROM: Kevin J. Kennedy
Director and General Counsel
Government Accountability Board

Prepared and Presented by:

Shane W. Falk, Staff Counsel

SUBJECT: Emergency Rule Amending ch. GAB §1.28, Wis. Adm. Code

Background:

The attached Emergency Rule Order amends ch. GAB §1.28, Wis. Adm. Code, relating to the definition of the term "political purpose," by repealing the second sentence of ch. GAB §1.28(3)(b), Wis. Adm. Code. This proposal has been prepared following consultation with the Wisconsin Attorney General's Office concerning pending lawsuits in which the validity of ch. GAB § 1.28 has been challenged.

The amendment in the attached Emergency Rule Order is to the rule that was published on July 31, 2010 and effective on August 1, 2010, following a lengthy two year period of drafting, internal review and study, public comment, Legislative review, and consideration of U.S. Supreme Court decisions, including the *Citizens United* decision. Following the effective date, three separate lawsuits were filed seeking a declaration that the rule was unconstitutional and beyond the Board's statutory authority: one in the U.S. District Court for the Western District of Wisconsin, one in the U.S. District Court for the Eastern District of Wisconsin, and one in the Wisconsin Supreme Court. On August 13, 2010, the Wisconsin Supreme Court temporarily enjoined enforcement of the August 1, 2010 rule, pending further order by the Court.

In the lawsuit in the U.S. District Court for the Western District of Wisconsin, the Board, after consulting with its litigation counsel from the Wisconsin Attorney General's office, previously executed a joint stipulation with the plaintiffs in that case, asking the Court to permanently enjoin application and enforcement of the second sentence of ch. GAB §1.28(3)(b), Wis. Adm. Code. On October 13, 2010, the Court issued an Opinion and Order which, among other things, denied the parties' request for that permanent injunction and stayed the case pending the outcome of the case in the Wisconsin Supreme Court. In denying the permanent injunction, the Court noted that "G.A.B. has within its own power the ability to refrain from

enforcing, or removing altogether, the offending sentence from a regulation G.A.B. itself created" and emphasized that "removing the language—for example, by G.A.B. issuing an emergency rule—would be far more 'simple and expeditious' than asking a federal court to permanently enjoin enforcement of the offending regulation." *Wisconsin Club for Growth, Inc. v. Myse*, No. 10-CV-427, slip op. at 2 (W.D. Wis. Oct. 13, 2010). The Court further noted that staying the case would give the Board time to resolve some or all of the pending issues through further rulemaking. *Id.*, slip op. at 14.

In addition, the Board, through its litigation counsel, has represented to the Wisconsin Supreme Court that it does not intend to defend the validity of the second sentence of ch. GAB § 1.28(3)(b) and that it would stipulate to the entry of an order by that Court permanently enjoining the application or enforcement of that sentence.

The attached Emergency Rule Order brings ch. GAB § 1.28 into conformity with the above stipulation and with the representations that have been made to the Wisconsin Supreme Court. The proposed emergency rule also comports with the suggestions made in the October 13, 2010, Opinion and Order of the U.S. District Court for the Western District of Wisconsin.

The only change that the proposed emergency rule makes to the August 1, 2010, rule is the repeal of the second sentence of GAB 1,28(3)(b). All other portions of GAB 1.28 would be unchanged. However, all of the revisions to GAB 1.28 that were effected on August 1, 2010, remain temporarily enjoined pending further order of the Wisconsin Supreme Court.

Recommendation:

Staff, following consultation with litigation counsel from the Wisconsin Attorney General's Office, recommends that the Board adopt the attached Emergency Rule Order amending ch. GAB 1.28, Wis. Adm. Code.

Proposed Motions:

1. **MOTION:** Pursuant to §§5.05(1)(f), 227.11(2)(a) and 227.24, Wis. Stats., the Board approves the attached Notice of Order of the Government Accountability Board (Emergency Rule Order Amending GAB 1.28, Wis. Adm. Code) and directs the staff to publish it.

2. **MOTION:** Pursuant to § 227.24(4), Stats., the staff shall schedule a public hearing to occur within 45 days of the anticipated publication date of the Notice of Order of the Government Accountability Board (Emergency Rule Order Creating GAB 1.28, Wis. Adm. Code).

NOTICE OF ORDER OF THE GOVERNMENT ACCOUNTABILITY BOARD

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

STATEMENT OF EMERGENCY FINDING:

The Government Accountability Board amends s. GAB 1.28(3)(b), Wis. Adm. Code, relating to the definition of the term "political purpose." Section GAB 1.28 as a whole continues to clarify the definition of "political purposes" found in s. 11.01(16)(a)1., Stats., but repeals the second sentence of s. GAB 1.28(3)(b) which prescribes communications presumptively susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

This amendment to s. GAB 1.28(3)(b) is to the rule that was published on July 31, 2010 and effective on August 1, 2010, following a lengthy two year period of drafting, internal review and study, public comment, Legislative review, and consideration of U.S. Supreme Court decisions. Within the context of ch. 11, Stats, s. GAB 1.28 provides direction to persons intending to engage in activities for political purposes with respect to triggering registering and reporting obligations under campaign financing statutes and regulations. In addition, the rule provides more information for the public so that it may have a more complete understanding as to who is supporting or opposing which candidate or cause and to what extent, whether directly or indirectly.

Pursuant to §227.24, Stats., the Government Accountability Board finds an emergency exists as a result of pending litigation against the Board and two decisions by the United States Supreme Court: *Federal Election Commission (FEC) v. Wisconsin Right to Life, Inc. (WRTL II)*, 550 U.S. 549 (2007) and *Citizens United v. FEC*, 558 U.S. ___, (No. 08-205)(January 21, 2010). Following the effective date of the August 1, 2010 rule, three lawsuits were filed seeking a declaration that the rule was unconstitutional and beyond the Board's statutory authority: one in the U.S. District Court for the Western District of Wisconsin, one in the U.S. District Court for the Eastern District of Wisconsin, and one in the Wisconsin Supreme Court. On August 13, 2010, the Wisconsin Supreme Court temporarily enjoined enforcement of the August 1, 2010 rule, pending further order by the Court.

In the lawsuit in the U.S. District Court for the Western District of Wisconsin, the parties previously executed a joint stipulation asking the Court to permanently enjoin application and enforcement of the second sentence of s. GAB 1.28(3)(b). On October 13, 2010, the Court issued an Opinion and Order denying that injunction request. In denying the injunction, the Court noted that "G.A.B. has within its own power the ability to refrain from enforcing, or removing altogether, the offending sentence from a regulation G.A.B. itself created" and emphasized that "removing the language—for example, by G.A.B. issuing an emergency rule—would be far more 'simple and expeditious' than asking a federal court to permanently enjoin enforcement of the offending regulation." *Wisconsin Club for Growth, Inc. v. Myse*, No. 10-CV-427, slip op. at 2 (W.D. Wis. Oct. 13, 2010). The Court further

noted that staying the case would give the Board time to resolve some or all of the pending issues through further rulemaking. *Id.*, slip op. at 14.

In addition, the Board, through its litigation counsel, has represented to the Wisconsin Supreme Court that it does not intend to defend the validity of the second sentence of s. GAB 1.28(3)(b) and that it would stipulate to the entry of an order by that Court permanently enjoining the application or enforcement of that sentence.

This amendment brings s. GAB 1.28(3)(b) into conformity with the above stipulation, with the representations that have been made to the Wisconsin Supreme Court, and with the suggestions made in the October 13, 2010, Opinion and Order of the U.S. District Court for the Western District of Wisconsin. The Board finds that the immediate adoption of this amendment will preserve the public peace and welfare by providing a simple and expeditious clarification of the meaning of s. GAB 1.28 for litigants, for the regulated community, and for the general public and by doing so in advance of the 2011 Spring Election and any other future elections.

ANALYSIS PREPARED BY GOVERNMENT ACCOUNTABILITY BOARD:

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

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

3. 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.

   Under s. 5.05(1), Stats., the Board is expressly vested with responsibility for the administration of all Wisconsin laws relating to elections and election campaigns, specifically including chapters 5 through 12 of the Wisconsin Statutes. Pursuant to that responsibility, s. 5.05(1)(f), Stats., gives the Board express statutory authority to promulgate administrative rules "for the purpose of interpreting or implementing the laws regulating the conduct of elections or elections campaigns or ensuring their proper administration." Similarly, s. 227.11(2)(a), Stats., grants state agencies—including the Board—the authority to "promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute," as long as the rule does not "exceed[] the bounds of correct interpretation." Sections 5.05(1)(f) and 227.11(2)(a), Stats., thus give the Board clear and express authority to promulgate rules that interpret and implement the meaning of all Wisconsin laws that regulate or govern the proper administration of election campaigns in this state, including s. 11.01(16), Stats.

Section GAB 1.28, as promulgated on August 1, 2010, made a number of changes to the Board's interpretation and implementation of the statutory definition of an act "for political purposes" under s. 11.01(16), Stats. Those changes were fully analyzed and explained in the July 13, 2010, Order of the Government Accountability Board, CR 09-013.

The present amendment involves only the repeal of the second sentence of s. GAB 1.28(3)(b). All other portions of GAB 1.28, including the first sentence of s. GAB 1.28(3)(b), are unchanged. Moreover, all of the revisions to GAB 1.28 that were effected on August 1, 2010, remain temporarily enjoined pending further order of the Wisconsin Supreme Court. The present amendment has no effect on the continued effectiveness of that injunction.

The first sentence of s. GAB 1.28(3)(b), provides that any communication that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" is a communication "for political purposes" within the meaning of s. 11.01(16), Stats., and hence is subject to all of the campaign finance regulations under ch. 11 of the Wisconsin Statutes that apply to communications for a political purpose—subject, of course, to any additional requirements or limitations contained in particular statutes.

The second sentence of s. GAB 1.28(3)(b) additionally identifies communications which are susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. That is, any communications that possess the characteristics enumerated in the second sentence of s. GAB 1.28(3)(b) would automatically be deemed communications for a political purpose and, as a result, would automatically be subject to the applicable campaign finance regulations under ch. 11 of the Wisconsin Statutes.

As a result of litigation challenging the validity of the August 1, 2010, amendments to s. GAB 1.28, the Board has entered into a stipulation to refrain from enforcing the second sentence of s. GAB 1.28(3)(b). The Board, through its litigation counsel, has also represented that it does not intend to defend the validity of that sentence and has sought judicial orders permanently enjoining its application or enforcement. This sentence is removed by this emergency rule.

This amendment does not affect the first sentence of s. GAB 1.28(3)(b), under which individuals and organizations that raise or spend money to make communications that are susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate, are subject to campaign finance regulation under ch. 11 of the Wisconsin Statutes. As previously noted however, all of the August 1, 2010, amendments to s. GAB 1.28—including the first sentence of s. GAB 1.28(3)(b)—are currently subject to the August 13, 2010, temporary injunction by the Wisconsin Supreme Court.

4. Related statute(s) or rule(s): s. 11.01(16), Stats., and s. GAB 1.28, Wis. Adm. Code.

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 criterion to the applicable campaign finance regulations and requirements of ch. 11, Stats. The scope of regulation will be subject to the United States Supreme Court Decision, *Citizens United vs. FEC* (No. 08-205), permitting the use of corporate and union general treasury funds for independent expenditures.

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), its June 25, 2007 decision of: *Federal Election Commission (FEC) v. Wisconsin Right to Life, Inc. (WRTL II)*, (No.06-969and 970), and pursuant to its January 21, 2010 decision of: *Citizens United vs. FEC* (No. 08-205).

   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 contributions 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:

   Pursuant to Public Act 96-0832, Illinois revised its "electioneering communication" statute in 2009, effective July 1, 2010, to include the "no reasonable interpretation other than an appeal to vote for or against" test, among other revisions. Subject to some delineated exemptions found in 10 ILCS 5/9-

1.14, the statute now defines an "electioneering communication" as any broadcast, cable or satellite communication, including radio, television, or internet communication, that:

> 1) refers to a clearly identified candidate or candidates who will appear on the ballot, a clearly identified political party, or a clearly identified question of public policy that will appear on the ballot,
> 2) is made within 60 days before a general election or 30 days before a primary election,
> 3) is targeted to the relevant electorate, and
> 4) is susceptible to no reasonable interpretation other than an appeal to vote for or against a clearly identified candidate, a political party, or a question of public policy.

As a result of the adoption of Public Act 96-0832, Illinois is undergoing a substantial revision of its administrative code with respect to campaign finance and disclosure rules. (See proposed Illinois Administrative Code, Title 26, Chapter 1, Part 100, Campaign Financing, JCAR260100-101389r01). In the context of excluding "independent expenditures" from the term "contribution," Section 100.10(b)(3)G., of the proposed rules include both electioneering and express advocacy communications as forms of independent expenditures.

Iowa's Administrative Code defines "express advocacy" as including a communication that uses any word, term, phrase, or symbol that exhorts an individual to vote for or against a clearly identified candidate or the passage or defeat of a clearly identified ballot issue. (Chapter 351—4.53(1), Iowa Administrative Code.)

Michigan statutes define a "contribution" as anything of monetary value made for the purpose of influencing the nomination or election of a candidate or the qualification, passage or defeat of a ballot question. (s. 169.204(1), Mich. Stats.) "Expenditure" is defined as a payment of anything of monetary value in assistance of or opposition to the nomination or election of a candidate or the qualification, passage or defeat of a ballot question. (s. 169.206(1), Mich. Stats.) Michigan does not have any additional rules defining political purposes.

Minnesota statutes define a "campaign expenditure" or "expenditure" as the purchase or payment of money or anything of value, or an advance of credit, made or incurred for the purpose of influencing the nomination or election of a candidate or for the purpose of promoting or defeating a ballot question. (s. 10A.01, Subd. 9, Minn. Stats.) "Independent expenditure" is defined as an expenditure expressly advocating the election or defeat of a clearly identified candidate, if the expenditure is not coordinated with any candidate or any candidate's principal campaign committee or agent. (s. 10A.01, Subd. 18, Minn. Stats.) Minnesota does not have any additional rules defining political purposes.

8. Summary of factual data and analytical methodologies: The factual data and analytical methodologies underlying the adoption of the August 1, 2010 amendments to s. GAB 1.28 have been described in the July 13, 2010, Order of the Government Accountability Board, CR 09-013. The adoption of the present amendment to s. GAB 1.28(3)(b) is predicated on the same data and methodologies and also on developments related to several court cases challenging the validity of the August 1, 2010 amendments to s. GAB 1.28. These developments were discussed by the Board in a closed session meeting with its litigation counsel on December 14, 2010. These developments are also being discussed in an open session, public meeting of the Board on December 22, 2010.

9. Analysis and supporting documentation used to determine effect on small businesses: The rule will have no effect on small business, nor any economic impact.

10. Effect on small business: The creation of this rule does not affect business.

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

12. Place where comments are to be submitted and deadline for submission: Government Accountability Board, Attn: Shane W. Falk, 212 E. Washington Avenue, 3rd Floor, P.O. Box 7984, Madison, Wisconsin 53707-7984, no later than January 28, 2011.

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 amending GAB 1.28, Wis. Adm. Code, interpreting ch. 11, Stats., as follows:

SECTION 1. GAB 1.28(3)(b) is amended to read:

(b) The communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. ~~A~~

~~communication is susceptible of no other reasonable interpretation if it is made during the period beginning on the 60th day preceding a general, special, or spring election and ending on the date of that election or during the period beginning on the 30th day preceding a primary election and ending on the date of that election and that includes a reference to or depiction of a clearly identified candidate and:~~

1. ~~Refers to the personal qualities, character, or fitness of that candidate;~~
2. ~~Supports or condemns that candidate's position or stance on issues; or~~
3. ~~Supports or condemns that candidate's public record.~~

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 22nd day of December, 2010.

Kevin J. Kennedy
Director and General Counsel
Government Accountability Board

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December 21, 2010

VIA E-MAIL & U.S. MAIL

State of Wisconsin
Government Accountability Board
212 East Washington Avenue, 3rd Floor
P.O. Box 7984
Madison, WI 53707-7984

RE: ***Consideration of Emergency Administrative Rule GAB 1.28***

Dear Board:

We represent Intervenors Mary Bell and the Wisconsin Education Association Council in the pending original action before the Wisconsin Supreme Court, *Wisconsin Prosperity Network, Inc. v. Myse, et al.*, Case No. 2010-AP-1937-OA. The matter is currently set for full briefing with an oral argument scheduled for March 9, 2011.

At 3:05 p.m. yesterday, we received an e-mail from the GAB's counsel advising that an emergency meeting of the GAB is scheduled for December 22, 2010, at which the Board will be considering a proposed "emergency rule" deleting the second sentence of revised GAB 1.28(3)(b). We object to the proposed "emergency" rule on the following grounds:

1. **There is no emergency.** Section 227.24(1)(a), Wis. Stats., allows emergency rulemaking only "if preservation of the public peace, health, safety or welfare necessitates putting the rule into effect prior to the time it would take effect if the agency complied with the procedures." It is incomprehensible that the GAB seeks to sidestep its normal deliberative process and limit public comment and involvement in this issue, as there is no potential harm to public peace, health, safety or welfare. Even if the revised rule were currently being enforced, a bright line standard requiring disclosure of certain categories of public communications occurring at or around the time of an election presents no imminent public harm. As the Supreme Court held earlier this year, "disclosure requirements" such as those included in GAB 1.28(3)(b) "permit citizens and shareholders to react to the speech of corporate entities in a proper way," and this "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." *Citizens United v. FEC*, 130 S.Ct. 876, 915-16 (2010). The notion of any "emergency" is further belied by the fact that the Wisconsin Supreme Court enjoined enforcement of the rule by order on August 16, 2010 pending its

final determination on the Petition for Original Action. There is thus ***no*** conceivable emergency warranting this unusual and abbreviated procedure.

2. **The rule is constitutional.** Intervenors will defend the constitutionality of the rule as written. The rule advances First Amendment interests, and is within the GAB's rulemaking authority. As the latest in a series of rulemaking by the Elections Board/GAB designed to interpret the meaning of "political purpose," the revised rule deserves to be vigorously defended. As WEAC and Mary Bell have argued, and intend to argue to the Wisconsin Supreme Court, the revisions to the rule, including the second sentence of GAB 1.28(3)(b), clarify and refine the legal standards applicable to political speech in lock-step with the Supreme Court's evolving jurisprudence on the matter. *See McConnell v. FEC*, 540 U.S. 93, 194 (2003) ("reject[ing] the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy . . . ."); *FEC v. Wisconsin Right to Life* ("*WRTL*"), 551 U.S. 449, 469-70 (2007) ("[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."); and *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 915-916 (2010) ("[W]e reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy."). Even if the Attorney General concludes that the rule exceeds the Board's rulemaking authority, Intervenors, on behalf of themselves and other citizens with rights to see the laws enforced as written, should have the right to present these issues in the pending original action.

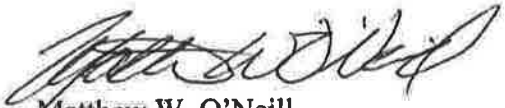
3. **No Court has suggested partial repeal.** The stated grounds for the proposed "emergency" rule is that the Board, after consulting with the Attorney General's Office, had agreed to the entry of an injunction with respect to the second sentence of GAB 1.28(3)(b). The memorandum recommending this emergency action suggests that the federal court, in denying the proposed stipulated injunction, "suggest[ed]" that the Board repeal the sentence in question. Not so. The Court independently found that the Board and the Attorney General "fail[ed] to establish that disclosure and disclaimer requirements constitute probable violation of federal law." *Wisconsin Club for Growth, Inc. v. Myse*, No. 10-CV-427, Slip. Op. at 9 (W.D. Wis. Oct. 13, 2010). Rather than hastily undo a bright line rule adopted in due course and after thoughtful consideration with appropriate public input, the Board should step back and let the constitutional and statutory authority issues be decided in the appropriate, deliberative fashion required by law.

For these reasons, WEAC and Mary Bell respectfully request that the Board vote to reject the proposed Emergency Rule.

Thank you for your attention to this matter.

Very truly yours,

FRIEBERT, FINERTY & ST. JOHN, S.C.



Matthew W. O'Neill
mwo@ffsj.com

MWO:las
Enclosures
cc: (All via e-mail & U.S. mail)
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Kurt Kobelt, Esq.
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