

Report From Agency

ORDER OF THE GOVERNMENT ACCOUNTABILITY BOARD CR 10-087

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

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, and 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 Federal Election Commission provides rules at 11 CFR 109.10, which regulate persons who are not a committee and who 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 in the aggregate 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 in the aggregate 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 5/9-1.15, Ill. Stats., defines “expenditure” generally and to include an electioneering communication or a communication expressly advocating for or against the nomination for election, election, retention or defeat of a clearly identifiable public official or candidate that is not made in connection, consultation or concert with or at the request or suggestion of the public official or candidate, the public official’s or candidate’s designated political committee or campaign, or any of their agents. Persons, including individuals, making independent expenditures exceeding an aggregate of \$3,000 in any 12 month period in Illinois are by definition political committees and subject to substantially similar registration, reporting, and disclaimer requirements as committees in Wisconsin. See ss. 5/9-8.6, 9-9.5, and 9-10. The Illinois administrative rules do not address independent expenditures likely due to the specificity and inclusiveness of the Illinois statutes.

Chapter 351—4.27 of the Iowa Administrative Code underwent redrafting in 2010 and prescribes requirements for registration and reporting of independent expenditures and it applies to any person, other than a candidate or a committee that has or should register, that makes one or more independent expenditures in excess of \$750.00 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 electronically on forms proscribed by the Iowa Ethics and Campaign Disclosure Board . 351—4.27 and 4.27(2) and (3), Iowa Adm. Code. A disclaimer on communications is required. 351—4.27(6), Iowa Adm. Code. A person making independent expenditures may need to instead file an organization statement as a political committee as defined by 68A.102(18), Iowa Stats., and comply with all committee reporting requirements.

Michigan Statutes ss. 169.203 and 169.208 provide 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. See Michigan Statutes ss. 169.224, et al. See also generally R 169, Parts 2 and 3, Michigan Admin. Code. Pursuant to Michigan Statutes s. 169.251 a person other than a committee who makes independent expenditures in the amount of \$100.01 or more in a calendar year is also required to make a report of the independent expenditure.

Minnesota statutes regulate independent expenditures, requiring registration upon a committee, fund, or party unit making or receiving a contribution, or making an expenditure exceeding \$100.00. ss. 10A.12(subd. 1a), 10A.14 and 10A.121, Minn. Stats. Campaign reports from a committee, fund, or party unit are prescribed by s. 10A.20, Minn. Stats. See also s. 211A.02, Minn. Stats. Individuals are also required to report independent expenditures exceeding \$100.00 within 24 hours of the expense. s. 10A.20(subd. 6b), Minn. Stats. Disclaimers are addressed in ss. 10A.17 and 211B.04, Minn. Stats. Minnesota has begun promulgation of an administrative rule specifically addressing disclaimers for independent expenditures (proposed Part 4503.1500.)

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
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 August 30, 2010.

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:

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) "Designated depository account" means a depository account specifically established by an organization to receive contributions and from which to make independent disbursements.
- (c) "Disbursement" has the meaning given in s. 11.01(7), Stats.
- (d) "Filing officer" has the meaning given in s. 11.01(8), Stats.
- (e) "Incurred obligation" has the meaning given in s. 11.01(11), Stats.
- (f) "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.
- (g) "Organization" means any person other than an individual, committee, or political group subject to registration under s. 11.23, Stats.
- (h) "Person" includes the meaning given in s. 990.01(26), Stats.

(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) 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.
- (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 s. 11.30(1) and (2)(a) and (d), 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."

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(2) (intro.), Stats.

Dated May 1, 2012

KEVIN J. KENNEDY
Government Accountability Board
Director and General Counsel