

# State of Wisconsin\Government Accountability Board

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JUDGE WILLIAM EICH  
Chair

KEVIN J. KENNEDY  
Director and General Counsel

March 25, 2010

The Honorable J.B. Van Hollen, Attorney General  
Wisconsin Department of Justice  
State Capitol, Room 114 East  
Madison, Wisconsin

HAND DELIVERED

Opinion Request: Enforceability of §11.38(1)(a)1., Wis. Stats.

Dear Attorney General Van Hollen:

I write on behalf of the Government Accountability Board ("G.A.B.") to ask your opinion whether the provisions of §11.38(1)(a)1., Wis. Stats., prohibiting corporate independent disbursements remain enforceable following the United States Supreme Court decision, *Citizens United v. FEC*, 558 U.S. \_\_\_, No. 08-205, *slip opinion* (1/21/2010.)

A corporate prohibition on any contribution or disbursement, directly or indirectly, has been a part of Wisconsin statutes since at least 1905. Currently, §11.38(1)(a)1., Wis. Stats., provides:

No foreign or domestic corporation, or association organized under ch. 185 or 193, may make any contribution or disbursement, directly or indirectly, either independently or through any political party, committee, group, candidate or individual for any purpose other than to promote or defeat a referendum.

In *Citizens United*, the U.S. Supreme Court reviewed the constitutionality of 2 U.S.C. §441b, which provides:

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

DEPT. JUSTICE...

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In *Citizens United*, the U.S. Supreme Court held in part as follows:

We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

...

Section 441b's restrictions on corporate independent expenditures are therefore invalid . . .

*Citizens United v. FEC*, p. 50, *slip opinion*.

In *Citizens United*, the U.S. Supreme Court noted that when the *Buckley* Court examined an expenditure ban, it found "that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify the [ban] on independent expenditures." While the *Buckley* Court sustained the limits on direct contributions in order to ensure against the reality or appearance of corruption, it did not extend this rationale to independent expenditures and the Court declined to do so in *Citizens United*. See Id. at pp. 40-41.

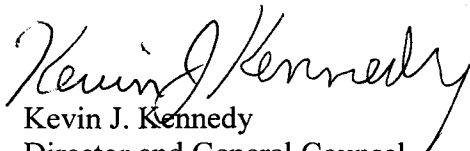
It appears that the underlined portions of §11.38(1)(a)1., Wis. Stats., and 2 U.S.C. §441b above contain similar corporate prohibitions against independent expenditures. The U.S. Supreme Court addressed the constitutionality of the corporate prohibition on independent expenditures found in 2 U.S.C. §441b in the *Citizens United* decision, which may affect the enforceability of the portion of §11.38(1)(a)1., Wis. Stats., that prohibits independent corporate disbursements.

Pursuant to §165.015(1), Wis. Stats., the Attorney General shall give his or her opinion in writing upon all questions of law submitted to him or her by the head of any department of state government. By a unanimous vote, the Government Accountability Board directed staff to request an Advisory Opinion from you, as the Wisconsin Attorney General, regarding the impact of *Citizens United* as to enforcement of ch. 11, Wis. Stats., specifically §11.38(1)(a)1., Wis. Stats.

If you have any further questions, please feel free to call me at (608) 266-8005 or email me at [Kevin.Kennedy@wi.gov](mailto:Kevin.Kennedy@wi.gov) .

Sincerely,

**GOVERNMENT ACCOUNTABILITY BOARD**

  
Kevin J. Kennedy  
Director and General Counsel