

2008

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Recommended Citation

Economou, Theodora D. (2008) "Campaign Finance in Minnesota: Evaluating Minnesota's Ethics in Government Act," *William Mitchell Law Review*: Vol. 34: Iss. 2, Article 8.

Available at: <http://open.mitchellhamline.edu/wmlr/vol34/iss2/8>

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CAMPAIGN FINANCE IN MINNESOTA: EVALUATING MINNESOTA'S ETHICS IN GOVERNMENT ACT

Theodora D. Economou[†]

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I. INTRODUCTION

State and federal campaign finance laws continue to raise contentious issues of political and legal concern. In Minnesota, campaign financing is governed by Minnesota Statutes Chapter 10A, also known as the “Ethics in Government Act.”¹ This article

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1. Act of April 12, 1974, ch. 470, 1974 Minn. Laws 1149 (codified as amended at MINN. STAT. §§ 10A.01–.51 (2006)).

provides an overview of some of the key components of the Ethics in Government Act.² It concludes that even after the United States Supreme Court's recent decision in *FEC v. Wisconsin Right to Life, Inc.*,³ Minnesota's campaign finance regulations likely do not run afoul of the United States Constitution.⁴

II. MINNESOTA STATUTES CHAPTER 10A: THE ETHICS IN GOVERNMENT ACT

A. Overview

Minnesota Statutes Chapter 10A, known as the Ethics in Government Act (the "Act"), sets forth numerous regulations covering various aspects of campaign financing. The Act is administered by the Minnesota Campaign Finance and Public Disclosure Board (the "Board").⁵ Individuals who seek certain statewide elected offices in Minnesota,⁶ as well as "political committees,"⁷ "principal campaign committees,"⁸ "party units"⁹ and

2. See *infra* Part II.

3. See 127 S. Ct. 2652, 2665, 2671–74 (2007) (striking down a portion of the Bipartisan Campaign Reform Act, but reaffirming the general framework for analyzing campaign finance regulations set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976)).

4. See *infra* Part IV.

5. Minnesota Campaign Finance and Public Disclosure Board, http://www.cfboard.state.mn.us/campfin/Informal_Chronology_Campaign_Finance.pdf (last visited Dec. 27, 2007). In 1974, the Minnesota Legislature established what was then known as the Ethics Commission. § 2, 1974 Minn. Laws at 1153. Later, it became known as the Ethical Practices Board. Act of June 2, 1975, ch. 271, § 3, 1975 Minn. Laws 742, 744. Ultimately, it became known as the Campaign Finance and Public Disclosure Board. Act of May 30, 1997, ch. 202, art. 2, § 63, 1997 Minn. Laws 1493, 1549. Minnesota Rules Chapters 4501 and 4503–25 govern compliance with the Act, Minnesota Statutes Chapter 10A. Minn. R. 4501.0010 (2006). The Act has also been referred to as the "Ethical Practices Act." See e.g., 21 WILLIAM J. KEPPEL, MINNESOTA PRACTICE SERIES-ADMINISTRATIVE PRACTICE & PROCEDURE § 1.11 (2d ed. 1998).

6. The scope of this article is limited to Minnesota campaign finance and regulation, as the Federal Election Campaign Act has pre-empted Minnesota's Congressional Campaign Reform Act. See MINN. STAT. §§ 10A.40–51 (repealed 1999) (attempting, *inter alia*, to encourage Minnesota congressional candidates in federal elections to voluntarily limit the amount of money spent on campaigns). See also Act of May 24, 1999, ch. 220, § 51, 1999 Minn. Laws 1379, 1428 (repealing Minnesota's Congressional Campaign Reform Act). In *Weber v. Heaney*, the U.S. District Court for the District of Minnesota permanently enjoined enforcement of this portion of the Ethical Practices Act. 793 F. Supp. 1438, 1457 (D. Minn. 1992).

7. A "political committee" is defined as "an association whose major purpose is to influence the nomination or election of a candidate or to promote or defeat a

“political funds”¹⁰ are all subject to the campaign finance and public disclosure regulations promulgated by the Act and the Board.

The Act regulates campaign financing for all statewide elected offices.¹¹ The general provisions of the Act regulate and place limits on contributions to candidates seeking elected offices in Minnesota.¹² In addition, the Act requires registration of certain associations and disclosure of certain expenditures by registered associations and candidates.¹³ Also, the Act limits spending by candidates who accept public subsidies.¹⁴ Such candidates include state senators and representatives as well as judges of the Minnesota Supreme Court, appeals court, and district courts.¹⁵ The Act not only regulates candidates seeking statewide elected offices, but also regulates every “political committee,” “political fund,” “political party,” and “party unit.”¹⁶ These entities may not raise or spend

ballot question, other than a principal campaign committee or a political party unit.” MINN. STAT. § 10A.01 subdiv. 27 (2006).

8. A “principal campaign committee” is defined as “a principal campaign committee formed under section 10A.105.” *Id.* at subdiv. 34. A candidate cannot accept more than \$100 from one source unless the candidate “designates or causes to be formed a single principal campaign committee for each office sought.” *Id.* § 10A.105 subdiv. 1. The “single committee” rule requires the candidate not “authorize, designate, or cause to be formed any other political committee bearing the candidate’s name or title or otherwise operating under the direct or indirect control of the candidate.” *Id.* A candidate is allowed to “be involved in the direct or indirect control of a party unit.” *Id.*

9. A “party unit” or “political party unit” is defined as “the state committee or the party organization within a house of the legislature, congressional district, county, legislative district, municipality, or precinct.” § 10A.01 subdiv. 30.

10. A “political fund” is defined as “an accumulation of dues or voluntary contributions by an association other than a political committee, principal campaign committee, or party unit if the accumulation is collected or expended to influence the nomination or election of a candidate or to promote or defeat a ballot question.” *Id.* at subdiv. 28.

11. *See id.* at subdivs. 10, 15 (defining “candidate” and “election” broadly).

12. *Id.* § 10A.27 (limiting contributions); § 10A.273 (regulating contributions and solicitations during legislative session); § 10A.16 (prohibiting earmarking contributions); § 10A.15 (regulating contributions); § 10A.071 (prohibiting certain gifts).

13. *Id.* § 10A.20 (filing campaign reports); § 10A.08 (requiring representation disclosure); § 10A.04 (regarding lobbyist reports); § 10A.03 (requiring lobbyist registration); § 10A.14 (registering treasurer of political committee); § 10A.09 (filing economic interest statement).

14. *Id.* § 10A.25 (limiting spending); § 10A.322 (regarding spending limit agreements); § 10A.324 (regarding returning public subsidy).

15. *Id.* § 10A.01 subdiv. 10.

16. *Id.* at subdivs. 27–30.

more than \$100 in one year without registering with the Board,¹⁷ and may not spend money unless the treasurer or deputy treasurer of the committee, fund, party, or unit authorizes the expenditure.¹⁸

An individual becomes a “candidate” for an elected office subject to the provisions of the Act when such person seeks nomination or election to a state constitutional office, the legislature, or a judgeship.¹⁹ An individual seeks nomination or election to such offices when the individual takes the necessary action under state law to qualify for nomination or election, or receives contributions or makes expenditures in furtherance of his or her election or nomination in excess of \$100.00.²⁰ Minnesota law prohibits a candidate’s principal campaign committee from accepting contributions from individuals, political committees, or political funds in excess of certain defined limits.²¹

To discourage the appearance of corruption, the Act also limits aggregate contributions from sources such as political committees, political funds, lobbyists and large contributors.²² In addition, the Act prohibits candidates and their associated campaigns from soliciting or accepting contributions from certain persons and entities.²³ Specifically, candidates for the legislature or constitutional offices, candidates’ principal campaign committees, and political committees or party units established by all or part of the party organization within a house of the legislature may not solicit or accept contributions from registered lobbyists, political committees, political funds, or dissolving principal campaign committees during a regular session of the legislature.²⁴

17. § 10A.14 subdiv. 1.

18. MINN. STAT. § 10A.17 subdiv. 1 (2006).

19. § 10A.01 subdiv. 10.

20. *Id.* The definition also includes individuals who give “implicit or explicit consent for any other person to receive contributions or make expenditures in excess of \$100, for the purpose of bringing about the individual’s nomination or election.” *Id.*

21. *Id.* § 10A.27 subdiv. 1.

22. *Minn. Citizens Concerned for Life, Inc. v. Kelly*, 427 F.3d 1106, 1113–14 (8th Cir. 2005).

23. MINN. STAT. § 10A.273 (2006) (regulating contributions and solicitations during legislative session); § 10A.16 (prohibiting earmarking contributions); § 10A.15 (regulating contributions).

24. § 10A.273 subdiv. 1. The regular session does not include a “special session” or the “interim” period between sessions. *Id.* at subdiv. 3. Further, this section does not apply to a “legislative special election.” *Id.* at subdiv. 5.

B. The Campaign Finance And Public Disclosure Board

1. Establishment and Role of the Board

The Act requires the governor to appoint a campaign finance and public disclosure board.²⁵ The Board was originally established in 1974 and was charged with the administration of the Act.²⁶ Under the Act, the Board is to be comprised of six members, no more than three of whom are from the same political party, and none of whom may currently serve as a lobbyist.²⁷ Appointments of the Board's members are to be made with the "advice and consent" of three-fifths of both the state Senate and House of Representatives acting separately.²⁸ Members of the board serve staggered four-year terms.²⁹ Pursuant to the provisions of the Act, the Board is also required to hire an executive director.³⁰

The Board's functions can be divided into four major categories: campaign finance registration³¹ and disclosure;³² public subsidy administration;³³ lobbyist registration and disclosure;³⁴ and economic interest disclosure by public officials.³⁵ The Board is also authorized to issue and publish advisory opinions concerning the requirements and regulations of the Act in response to "real or hypothetical" situations submitted to the Board by qualified applicants.³⁶ The Board must respond to queries in writing within thirty days, unless a majority of the Board agrees to extend the time limit.³⁷ This article will devote particular attention to detailing the

25. *Id.* § 10A.02 subdiv. 1.

26. Act of April 12, 1974, ch. 470, § 2, 1974 Minn. Laws 1149, 1152.

27. § 10A.02 subdiv. 1.

28. *Id.*

29. *See id.* at subdiv. 2; *see also* MINN. STAT. § 15.0575 subdiv. 2 (2006) (requiring staggered terms for all administrative boards).

30. Minnesota Statutes section 10A.02 subdivision 5 provides that the executive director "serve[s] at the pleasure of the board." The director "serves as the secretary of the board and must keep a record of all proceedings and actions by the board." *Id.*

31. *Id.* § 10A.14 (governing the initial registration of political funds or committees, principal campaign committees and party units).

32. *Id.* § 10A.20 (governing the filing of campaign reports for each reporting period).

33. *Id.* § 10A.30; § 10A.31 subdiv. 7.

34. *Id.* § 10A.03.

35. *Id.* § 10A.09.

36. *Id.* § 10A.02 subdiv. 12.

37. *Id.* § 10A.05.

first category of the Board's major functions—administration of campaign finance and disclosure requirements and regulations.

2. *Regulation of Campaign Financing*

a. *Registration Requirements*

The Act provides detailed registration requirements for persons and entities involved in campaigns for elected offices.³⁸ Under section 10A.14, the treasurer of a political committee, political fund, principal campaign committee, or party unit must initially register with the Board no later than fourteen days after making or receiving a contribution—or making an expenditure—in excess of \$100.³⁹ The Board prescribes the required “Registration and Statement of Organization” for each type of entity, and makes the forms available online.⁴⁰ In accordance with

38. See §§ 10A.03–04, 10A.08–09, 10A.14, 10A.20.

39. *Id.* § 10A.14 subdiv. 1. A “contribution” is defined in section 10A.01 subdivision 11 as “money, a negotiable instrument, or a donation in kind that is given to a political committee, political fund, principal campaign committee, or party unit.” § 10A.01 subdiv. 11(a). Contributions include:

[L]oan[s] or advance[s] of credit to a political committee, political fund, principal campaign committee, or party unit, if the loan or advance of credit is: (1) forgiven; or (2) repaid by an individual or an association other than the political committee, political fund, principal campaign committee, or party unit to which the loan or advance of credit was made.

Id. at subdiv. 11(b). “If an advance of credit or a loan is forgiven or repaid as provided in this paragraph, it is a contribution in the year in which the loan or advance of credit was made.” *Id.* Contributions do not include “services provided without compensation by an individual volunteering personal time on behalf of a candidate, ballot question, political committee, political fund, principal campaign committee, or party unit, or the publishing or broadcasting of news items or editorial comments by the news media.” *Id.* at subdiv. 11(c). An expenditure, on the other hand, is defined in section 10A.01 subdivision 9 as “a 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.” An expenditure is “considered to be made in the year in which the candidate made the purchase of goods or services or incurred an obligation to pay for goods or services.” § 10A.01 subdiv. 9. An expenditure made for the purpose of defeating a candidate is “considered made for the purpose of influencing the nomination or election of that candidate or any opponent of that candidate.” *Id.* An expenditure “does not include ‘noncampaign disbursement’ as defined in section 10A.01 subdivision 26;” volunteering of personal time, or news or editorial broadcasting. *Id.* at subdiv. 9.

40. See § 10A.14 subdiv. 1; see also Minn. Campaign Fin. and Pub. Disclosure Bd., Registration and Statement of Organization Principal Campaign Committee

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section 10A.14, subdivision 2,

[t]he statement of organization must include:

- 1) the name and address of the committee, fund, or party unit;
- 2) the name and address of the chair of a political committee, principal campaign committee or party unit;
- 3) the name and address of any supporting organization of a political fund;
- ...
- 5) a listing of all depositories or safety deposit boxes used; and
- 6) for the state committee of a political party unit, a list of its party units.⁴¹

Under section 10A.025 of the Act, any person who signs⁴² and certifies any report or required filing, including the initial required registration, which the person knows contains false information, or who “knowingly omits required information,” is guilty of a gross misdemeanor and is subject to a civil penalty to be imposed by the Board of up to \$3000.⁴³ Records verifying the reports must be kept for four years from the date of filing the report.⁴⁴

b. Regulation of Contributions

Section 10A.15 of the Act governs contributions related to campaigns for elected offices.⁴⁵ This section provides that political

Form, http://www.cfboard.state.mn.us/forms/Candidate/Candidate_Registration.pdf (last visited Dec. 27, 2007).

41. § 10A.14 subdiv. 2.

42. Current law also allows for electronic signatures “consisting of a password assigned by the board.” § 10A.025 subdiv. 2.

43. *Id.*

44. *Id.* at subdiv. 3. “Records” include “vouchers, cancelled checks, bills, invoices, worksheets and receipts.” *Id.* A person who “knowingly violates” this subdivision is guilty of a misdemeanor. *Id.* “Material changes” in reports or statements previously filed with the Board must be reported “in writing” within ten days following the event “prompting the change or the date upon which the person filing became aware of the inaccuracy.” *Id.* at subdiv. 4. A person who “willfully fails” to make the required correction is guilty of a gross misdemeanor and is subject to a civil penalty imposed by the Board of up to \$3000. *Id.*

45. MINN. STAT. § 10A.15 (2006). See also *Minn. Campaign Fin. and Pub. Disclosure Bd., Contributions Issues* at 1, <http://www.cfboard.state.mn.us/pubs/campfin/contrib.pdf> (last visited Dec. 12, 2007).

committees, political funds, principal campaign committees, and party units may not retain any anonymous contribution in excess of \$20.⁴⁶ Rather, such contributions must be forwarded to the Board for deposit in the state elections campaign fund.⁴⁷ The Act specifies that all contributions received by or on behalf of a candidate, political committee, political fund, or party unit must be deposited in an account designated as the campaign fund of the candidate, political committee, political fund, or party unit.⁴⁸ These funds must be promptly deposited and reported as received in the reporting period in which they were received.⁴⁹ Contributions made within the last three days of a reporting period “must be reported as received during the reporting period whether or not deposited within th[e] period.”⁵⁰ The Act also specifies that contributions received during the last three days of a reporting period must be deposited within seventy-two hours of receipt.⁵¹

Under section 10A.15, subdivision 3a, a treasurer of a principal campaign committee may not deposit a contribution that on its face exceeds the limits for candidates set forth in section 10A.27 unless, at the time of deposit, the treasurer also “issues a check to the source for the amount of the excess.”⁵² Note that this section of the Act provides that a deposited contribution made to a candidate, principal campaign committee, political committee, political fund, or party unit may be returned to the contributor within sixty days after deposit.⁵³ “A contribution deposited and not returned within [sixty] days after that deposit must be reported as accepted.”⁵⁴

The Board applied this “reported-as-accepted” or “deemed accepted”⁵⁵ rule in recent probable cause findings. These rules were applied in cases involving the Board’s routine reconciliation inquiries to registered political committees which received

46. § 10A.15 subdiv. 1.

47. *Id.*

48. *Id.* at subdiv. 3.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at subdiv. 3(a).

53. *Id.* at subdiv. 3.

54. *Id.*

55. See Minnesota Campaign Finance and Public Disclosure Board, *Contribution Issues*, at 1, <http://www.cfboard.state.mn.us/pubs/campfin/contrib.pdf> (stating “[c]ontributions must be returned to the contributor (when necessary) within 60 days or are deemed to be accepted”) (last visited Dec. 30, 2007).

contributions from unregistered associations and inadvertently accepted the contributions by failing to return them within sixty days as provided by the statute.⁵⁶ The “therefore accepted” rule is also applied when an unregistered association makes a contribution in excess of one-hundred dollars to a political committee fund, candidate, or party unit.⁵⁷ For example, in a July 2007 case, *In re International Union of Operating Engineers*, the Board confirmed through its parallel inquiry into the Alliance for a Better Minnesota that the International Union made a contribution of \$5,000 from its general fund rather than from its registered political committee.⁵⁸ Thus, International Union was required to provide the recipient with the disclosure required under section 10A.27, subdivision 13.⁵⁹ The requirements of this required “disclosure” are those of the reporting requirements of section 10A.20.⁶⁰

56. See, e.g., Minnesota Campaign Finance and Public Disclosure Board, *In re the Minnesota DFL State Central Committee* (Aug. 21, 2007) http://www.cfboard.state.mn.us/bdinfo/investigation/070821_dfl.pdf (last visited Dec. 27, 2007); Minnesota Campaign Finance and Public Disclosure Board, *In re the Alliance for a Better Minnesota* (July 10, 2007) http://www.cfboard.state.mn.us/bdinfo/investigation/070710_Alliance_for_Minnesota.pdf (last visited Dec. 27, 2007). In *Alliance for a Better Minnesota*, there was no penalty imposed on the Alliance. *Id.* at 2. Rather, the Board ordered the Alliance to return the contribution to the contributors. *Id.* The contributors were unregistered associations, although each unregistered association had a political committee that contributed was registered with the Board. *Id.* at 1. Alliance cross-referenced the “contributing organizations with the Board’s list of registered political committee funds,” and thus Alliance had a “good faith” belief the checks were from the correct account. *Id.*

57. Campaign Finance Disclosure, Minn. State Ethical Practices Bd. Op. No. 135 (1993) (holding that “the creation of subsidiary political committees under Minnesota Statutes section 10A.15, subdivision 3c, for the purpose of allowing individuals to contribute more than one hundred dollars per calendar year by contributing one hundred dollars to each of the subsidiaries of the parent political committee is prohibited under Minnesota Statutes section 10A.29).

58. Minnesota Campaign Finance and Public Disclosure Board, *In re International Union of Operating Engineers*, at 1, http://www.cfboard.state.mn.us/bdinfo/investigation/070710_International_Union_Operating_Engineers.pdf (last visited Dec. 30, 2007).

59. *Id.* at 1.

60. *Id.*

The Act also prohibits “earmarking”⁶¹ contributions and attempts to circumvent the statutory contribution limits by redirecting contributions through another individual or entity.⁶² Pursuant to section 10A.15, subdivision 3b, contributions made to a candidate or principal campaign committee by a political fund, committee, or party unit must be reported as attributable to the political fund, committee, or party unit.⁶³ If the fund, committee, or party unit exists primarily to direct contributions other than from its “own money” to one or more candidates or principal campaign committees, such contributions count towards the contribution limits specified in section 10A.27.⁶⁴

61. See MINN. STAT. § 10A.16 (2006) (prohibiting “an individual, political committee, principal campaign committee, or party unit” from soliciting or accepting “a contribution from any source with the express or implied condition that the contribution or any part of it be directed to a particular candidate other than the initial recipient”). “An individual, political committee, political fund, principal campaign committee, or party unit that knowingly accepts an earmarked contribution is guilty of a gross misdemeanor” and subject to civil penalty of up to \$3000. *Id.*

62. The provisions against “earmarking” apply only to *contributions to a candidate*, not to political committees organized around ballot questions. *Minnesota Campaign Finance and Public Disclosure Board Op. 343* at 3, <http://www.cfboard.state.mn.us/ao/AO343.pdf> (last visited Dec. 27, 2007). In determining whether a donation from a non-profit charitable corporation with direction from the donor that the contribution be directed to the political committee to be formed regarding a constitutional amendment anticipated to be put on the state-wide ballot, the board noted:

The routing of donations through the Organization until the political committee is registered . . . is allowable because restrictions in Chapter 10A against routing donations to a political candidate through a third party do not apply to the Organization or political committee that will be created. For example, the prohibition on earmarking contained in Minn. Stat. Sec. 10A.16 applies to contributions made with the condition that they be forwarded to a particular candidate; the statute does not extend to ballot questions.

Similarly, Minn. Stat. Sec 10A.29 which prohibits making a contribution through or on behalf of another individual or association in order to circumvent the contribution limits contained in Chapter 10A does not apply because there are no limits on corporate contributions to ballot question committees to be circumvented.

Id.

63. MINN. STAT. § 10A.15 subdiv. 3(b) (2006).

64. The contribution limits of Minnesota Statutes section 10A.27 subdiv. 1 forbid candidates or their principal campaign committees from accepting aggregate contributions by any individual, political committee or political fund in excess of the following amounts for the following offices in election years: governor and lieutenant governor together, \$2000; attorney general, \$1000; secretary of state, \$500; state auditor, \$500; state senators and legislators, \$500. In non-election years, the limits are \$500 for the governor’s race, \$200 for the office

c. *Regulation of Expenditures*

Regulation of expenditures is based in part on a distinction between “independent expenditures” and “approved expenditures.” Approved expenditures are those made with the authorization or consent of the candidate.⁶⁵ Minnesota courts follow the United States Supreme Court’s test⁶⁶ for determining the validity of contribution limits and approved expenditures.⁶⁷ Because approved expenditures are by definition contributions to the candidate, approved expenditures are subject to the campaign expenditure limits and contribution limits specified in Minnesota Statutes sections 10A.25 and 10A.27 of the Act.⁶⁸

An independent expenditure is “an expenditure expressly advocating the *election* or *defeat* of a clearly defined candidate, if made without the express or implied consent, authorization or

of attorney general, and \$100 for all other state offices. *Id.* The “bundling” or “aggregate” limits do not apply to deliveries of contributions “collected by a member of the candidate’s principal campaign committee such as a block worker or volunteer who hosts a fund-raising event, to the committee’s treasurer, or a delivery made on behalf of a candidate’s spouse.” *Id.*

65. MINN. STAT. § 10A.01 subd. 4 (2006).

66. *See* Minn. Citizens Concerned for Life v. Kelly, 427 F.3d 1106, 1111 (8th Cir. 2005). In *Kelly*, the Minnesota Supreme Court answered in the affirmative the certified questions from the United States Court of Appeals for the Eighth Circuit as to whether the definition of “political committee” and “political fund” in Minnesota Statutes section 10A.01 subdivisions 27 and 28 were to be construed consistent with United States Supreme Court precedent. *Id.* at 1110. The Minnesota Supreme Court’s answer in *Kelly* was prescient in its choice to apply a narrow formulation of the question regarding the definition of a “political fund” or “political committee.” *Id.* at 1110–11. By limiting the definition to those associations (in the case of a political committee) or accumulations of contributions (in the case of political funds) to those which advocate or expend sums to promote or defeat the election of a particular candidate, or the promotion or defeat of a ballot question, the Court anticipated the essential holding in *FEC v. Wisconsin Right to Life*, which limits the ability of government to ban so called “issue” advertisements—ads which fall under the Bipartisan Campaign Reform Act’s definition of “electioneering communications” if made out of the general fund of a corporation or union within sixty days on the eve of the election. *FEC v. Wis. Right To Life, Inc.*, 127 S. Ct. 2652, 2671 (2007). In *Wisconsin Right to Life*, the Court was willing to accept the notion that the ban on direct campaign speech expressly advocating the defeat or election of a candidate for federal office by a corporation out of its general treasury funds was constitutional under *Buckley v. Valeo*, and the holding in *McConnell v. FEC* was emphatic in holding that the BCRA, as applied to so-called “issue advocacy” ads which did not expressly advocate election or defeat of a clearly identified candidate, was unconstitutional as applied. *See id.* at 2653.

67. *Cf.* MINN. STAT. §§ 10A.071, .15–.16, .27–.273 (2006).

68. MINN. STAT. §§ 10A.25, .27 (2006).

cooperation of . . . any candidate, candidate's principal campaign committee, or agent."⁶⁹ Although independent expenditures are not subject to ceilings for candidates under Minnesota law, such expenditures are subject to the disclosure provisions of section 10A.20 of the Act. Furthermore, independent expenditures are considered "protected speech" and thus continue to be subject to strict scrutiny under *FEC v. Wisconsin Right to Life, Inc.*⁷⁰

The constitutional validity of disclosure requirements for independent expenditures and approved expenditures was

69. *Id.* § 10A.01 subd. 18 (emphasis added); see also § 10A.025 subd. 2 (allowing for electronic signatures "consisting of a password assigned by the board").

70. 127 S. Ct. 2652 (2007). In *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994), the Eighth Circuit Court of Appeals considered a challenge by various Minnesota political funds of the 1993 amendments to Minnesota Statutes section 10A.25 subdivision 13 (now repealed). The 1993 statute challenged in *Day* provided for an increased public subsidy for candidates—either the candidate on whose behalf an independent expenditure was made, or the candidate against whom an expenditure was made—if the candidate raised twice the minimum amount required for a match. *Id.* at 1359. The amount of the additional public subsidy was to be equal to one-half the independent expenditures. § 10A.25 subd. 13(c), repealed by Act of May 24, 1999, ch. 220, § 30, 1999 Minn. Laws 1379, 1412. The Court held that this increased public subsidy based on increased independent spending advocating defeat of a candidate chilled free speech by potential "independent spenders" because "knowledge that a candidate who one does not want to be elected will have her spending limits increased." *Day*, 34 F.3d at 1360. The Court cited *Buckley v. Valeo*, noting that speech regarding debate of public issues and qualification of candidates is afforded the broadest First Amendment protection. *Id.* (citation omitted). The Court went on to inquire whether any compelling state interest justified such an infringement and held there was no such issue at stake when it stated, "[t]he state's professed interest, is the goal of enhancing the public's confidence in the political process by ensuring the viability of the legislature's statutory scheme designed to encourage candidates to accept voluntary campaign expenditures . . . any the accompanying public subsidies." *Id.* at 1361 (citation omitted). The Court, while doubting this "noble goal" could in theory reach the level of a compelling state interest held that in reality the interest was not legitimate because the available statistics for 1990 (all state candidates) and 1992 (legislative candidates) indicated that participation in the public subsidy approached 100 percent before the 1993 changes. *Id.* Thus, the Court concluded, the statutes' burden on First Amendment rights did not satisfy "strict, intermediate, or even cursory scrutiny." *Id.* at 1362. Note that the Court relied on relevant statistical evidence in order to analyze the relationship or "fit" between the asserted state interest in increasing public subsidies for election and the means chosen to meet that end—tying independent expenditures to amount of the subsidy. *Id.* at 1361. This is in accordance with *Buckley v. Valeo*, wherein the Court invalidated the blanket independent expenditure ceiling on the grounds that it failed to serve any substantial governmental interest in stemming the appearance or reality of corruption. 424 U.S. at 48–49.

established in *Buckley v. Valeo*.⁷¹ Under Minnesota law, all such expenditures by a political committee, political fund, principal campaign committee, or party unit must be authorized by the treasurer or deputy treasurer of the committee, fund, or party unit.⁷² According to Minnesota Statutes, “[a]n individual or association may not make an approved expenditure” (i.e., authorized by the candidate) “of more than \$20 without receiving written authorization from the treasurer of the principal campaign committee.”⁷³ Such authorization must state “the amount that may be spent and the purpose of the expenditure.”⁷⁴ In addition,

[a]ll written communications with those from whom contributions are independently solicited . . . or to whom independent expenditures are made on behalf of a candidate, must contain a statement in conspicuous type that the activity is an independent expenditure and is not approved by the candidate nor is the candidate responsible for it.⁷⁵ Similar language must be included in all oral communications⁷⁶

Such language must also be included “in conspicuous type on the front page of all literature and advertisements published or posted, and at the end of all broadcast advertisements made by that individual, political committee, political fund, or party unit on the candidate’s behalf.”⁷⁷

71. 424 U.S. 1, 69 (1976). While the *Buckley* Court invalidated independent expenditure limits as an unconstitutional burden on First Amendment rights, the disclosure provisions of the Federal Election Campaign Act were upheld based on the lack of a factual showing that contributors, even to minor parties, would fail to make contributions if their names were disclosed, that contributors would be harassed if identified, or that independent expenditures to be disclosed by individuals or groups earmarked for a candidate or for communication “expressly advocating” election or defeat of a candidate are significantly different from campaign contributions for purposes of disclosure. *Id.* at 72–75.

72. MINN. STAT. § 10A.17 subdiv. 1 (2006).

73. *Id.* at subdiv. 2.

74. *Id.*

75. *Id.* at subdiv. 4.

76. *Id.*

77. *Id.* “A person who knowingly violates subdivision . . . 4 or [who] falsely claims that expenditure was an independent expenditure is guilty of a gross misdemeanor and is subject to civil penalty imposed by the board of up to \$3,000.” *Id.* at subdiv. 5. Interestingly, the same conduct is a felony when committed by an individual in a representative corporate capacity and who causes a violation of the independent expenditures. Under the Fair Campaign Practice Act, “an officer, manager, stockholder, member, agent employee, attorney or other representative of a corporation” who violates the provisions regarding independent expenditures from corporate funds to a candidate is subject to not more than five years

3. Public Subsidies

Section 10A.322 of the Act outlines provisions for agreements candidates must sign and file with the Board before receiving a public subsidy from the state elections campaign fund.⁷⁸ Minnesota Rule 4503.1400 provides that “[a] public subsidy agreement is effective for the entire election cycle regardless of when the agreement is signed.”⁷⁹ This rule also provides that such agreements are “binding regardless of whether the candidate actually receives funds from the state elections campaign fund.”⁸⁰

The Board’s website provides, for each office sought, the necessary Public Subsidy Agreement form that candidates must file with the Board.⁸¹ The instructions provide that once the agreement is signed and filed, the agreement may not be rescinded.⁸² First time candidates for office, as defined in section 10A.25, subdivision 2(d) of the Act, are entitled to an increased spending limit of ten percent.⁸³ The agreement requires candidates to:

- “abide by the statutory spending limits” for that office;⁸⁴

imprisonment and is subject to a \$20,000 fine. MINN. STAT. § 211B.15 subd. 6 (2006). “A corporation convicted of violating [Minn. Stat. §211B] is subject to a fine [up to] \$40,000,” and a “domestic corporation may be dissolved” or a foreign corporation may forfeit its right to do business in Minnesota. *Id.* at subd. 7.

78. MINN. STAT. § 10A.322 (2006).

79. MINN. R. 4503.1400 subp. 2 (2005).

80. *Id.* at subp. 7.

81. Minnesota Campaign Finance and Public Disclosure Board, http://www.cfboard.state.mn.us/all_forms.htm (follow “Candidate” then “2007 Public Subsidy”) (last visited Nov. 23, 2007).

82. *Id.* (compare the “Instructions” section on any of the five forms).

83. MINN. STAT. § 10A.25 subd. 2(d) (2006). “First time candidate” means “a candidate who is running for that office for the first time and who has not run previously for any other office whose territory now includes a population that is more than one-third of the population in the territory of the new office.” *Id.*

84. See Minnesota Campaign Finance, *supra* note 81, at 13 (“Agreement” section on page two of the forms for the respective offices). Minnesota Statutes section 10A.255 subdivision 1 allows for an adjustment to the spending limits in general election years, to be determined by the executive director of the Board according to the statutory formula by multiplying the spending limits by the percentage increase in the consumer price index. *Id.* The latest spending limits for Governor and Lt. Governor, running together, in non-general election years 2007–2009 is \$478,760 (for the 2006 general election, it was \$2,393,800); Attorney General (2007–2009) non-general election is \$79,800 (for the 2006 general election, it was \$399,000); Secretary of State and State Auditor (2007–2009) non-general election is \$39,900 (for the 2006 general election, it was \$199,500); State Senator, \$59,900 and State Representative, \$30,100 for the general election.

- limit personal contributions by the candidate to the amounts required in Minnesota Statutes section 10A.27, subdivision 10;⁸⁵
- spend at least fifty percent of the subsidy payment “no later than the end of the reporting period preceding the general election” and return any excess in amount of public subsidy received that exceeds actual campaign expenditures by the required deadline;⁸⁶ and
- “make no [other] independent expenditures on behalf of another committee.”⁸⁷

To be eligible for a public subsidy, candidates must file an “Affidavit of Contribution” by the stated deadline.⁸⁸ The affidavit must verify that the candidate has accumulated the required threshold of contributions from persons eligible to vote in Minnesota, counting only the first \$50 received from each individual contributor.⁸⁹

4. *Civil Penalties for Noncompliance*

Under the Act, candidates who do not comply with campaign finance and disclosure regulations may be subject to civil penalties.⁹⁰

A candidate subject to the expenditure limits in section 10A.25 who permits the candidate’s principal campaign committees to make expenditures or permits approved expenditures to be made on the candidate’s behalf in

MINN. STAT. § 10A.25 subdiv. 2 (2006) (for election year totals); *id.* at subdiv. 6 (for non-general election year totals).

85. See Minnesota Campaign Finance, *supra* note 81, at 13 (“Agreement” section on page two of the forms for the respective offices).

86. *Id.*

87. *Id.*

88. MINN. STAT. § 10A.323 (2006).

89. Under section 10A.323, the thresholds are currently \$35,000 for Governor and Lt. Governor, running together, \$15,000 in contributions for the office of Attorney General, \$6000 for the offices of State Auditor and Secretary of State, \$3000 for State Senator, and \$1500 for State Representative. *Id.*

90. See, e.g., MINN. STAT. § 10A.02 subdiv. 11(c)(2) (2006); § 10A.025 subdivs. 2, 4; § 10A.03 subdiv. 3; § 10A.04 subdiv. 5; § 10A.08; § 10A.09 subdiv. 7; § 10A.11 subdiv. 7; § 10A.12 subdiv. 6.

excess of the limits imposed by Section 10A.25, as adjusted by Section 10A.255, is subject to a civil penalty up to four times the amount by which the expenditures exceed the limit.⁹¹

The Act requires candidates and their campaigns to report contributions and expenditures in a timely manner.⁹² Section 10A.20, subdivision 1 requires “[t]he treasurer of a political committee, political fund, principal campaign committee, or party unit” to file contribution and expenditure reports in the “first year it receives contributions or makes expenditures in excess of \$100 and must continue to file until the committee, fund, or party unit is terminated.”⁹³ Under section 10A.20 subdivision 2, “The reports must be filed with the board on or before January 31 of each year and additional reports must be filed as required.”⁹⁴

In each year in which the name of the candidate is on the ballot, the report of the principal campaign committee must be filed 15 days before a primary, ten days before a general election, seven days before a special primary and a special election, and ten days after a special election cycle.⁹⁵

Failure to comply with the Act’s reporting requirements may result in penalties. Failure to file required reports under section 10A.20 subdivision 12, after the Board’s certified notice of failure to file may subject candidates or regulated entities to a “late filing fee of \$5 per day, not to exceed \$100, commencing with the 11th day after the notice was sent.”⁹⁶ If an individual fails to file a required statement before a primary or election, then within three days after the date due, regardless of whether the individual has received any notice, the Board may impose a late filing fee of \$50 per day, not to exceed \$500, commencing on the fourth day after the date the statement was due.⁹⁷

Under the Act, the Board may impose additional civil penalties for failing to comply with reporting and disclosure requirements.⁹⁸ But before such penalties can be assigned, the Board must send a

91. § 10A.28 subdiv. 1.

92. See § 10A.20 subdiv. 1.

93. *Id.*

94. *Id.* at subdiv. 2(a).

95. *Id.* at subdiv. 2(b).

96. *Id.* at subdiv. 12.

97. *Id.*

98. *Id.*

second notice by certified mail to a candidate or entity who has failed to file a statement within fourteen days after the first notice was sent.⁹⁹ The second notice must state that the individual may be subject to a civil penalty for failure to file a statement.¹⁰⁰ If the candidate or entity then fails to file the statement within seven days after the second notice from the Board, the Board may impose a civil penalty of up to \$1,000.¹⁰¹ Similarly, failure to abide by contribution limits specified by the Act may also result in civil penalties.¹⁰² The Board may impose a civil penalty of up to four times the amount by which a contribution exceeds the applicable limits as stated in section 10A.27 for the following:

- (1) a lobbyist, political committee, or political fund;
- (2) a principal campaign committee;
- (3) a political party; or
- (4) a candidate who permits the candidate's principal campaign committee to accept contributions.¹⁰³

III. RECENT DEVELOPMENTS

A. *FEC v. Wisconsin Right to Life, Inc.*

In *FEC v. Wisconsin Right to Life, Inc.*,¹⁰⁴ the United States Supreme Court addressed the constitutionality of certain provisions of the Bipartisan Campaign Reform Act ("BCRA").¹⁰⁵ Specifically, section 203 of BCRA makes it a federal crime for corporations to broadcast, shortly before an election, any communication targeted to the electorate that names a federal candidate for elected office.¹⁰⁶ The *Wisconsin Right to Life* Court began by discussing *McConnell v. FEC*,¹⁰⁷ in which the United States Supreme Court

99. *Id.*

100. *Id.*

101. *Id.*

102. MINN. STAT. § 10A.28 (2006).

103. *Id.* at subdiv. 2(1)-(4).

104. 127 S. Ct. 2652 (2007).

105. *Id.* at 2659.

106. *Id.* at 2658-59.

107. 540 U.S. 93 (2003).

upheld the constitutionality of section 203 in a facial overbreadth challenge under the First Amendment.¹⁰⁸ There, the Court upheld section 203, concluding that there was no overbreadth concern because the speech in question was the “functional equivalent” of express campaign speech.¹⁰⁹

The *Wisconsin Right to Life* case differed, however, in that it concerned an as-applied challenge to section 203 of BCRA.¹¹⁰ Wisconsin Right to Life, Inc. (“WRTL”) is a “nonprofit, nonstock, ideological advocacy organization.”¹¹¹ In July 2004, WRTL began running a series of radio and television ads during the lead up to the 2004 Wisconsin primary.¹¹² When WRTL realized that its plan to run the ads past August 15, 2004, would be illegal as “electioneering communication[s]” under section 203, it brought suit against the FEC seeking declaratory and injunctive relief.¹¹³ Specifically, WRTL asserted that it had a First Amendment right to broadcast the ads at issue.¹¹⁴ The Supreme Court held that section 203’s prohibition on the use of corporate funds to finance “electioneering communications” during pre-federal-election periods violated WRTL’s free speech rights when applied to its issue-advocacy advertisements.¹¹⁵

B. *Impact on Minnesota’s Ethics in Government Act?*

In *Wisconsin Right to Life*, the Supreme Court affirmed the essential framework set forth in *Buckley v. Valeo*, wherein contribution limits to candidates (or their principal campaign committees) passed constitutional muster because they were held to represent a “marginal restriction upon the contributor’s ability to engage in free communication.”¹¹⁶ In *Buckley*, the compelling state interest in avoiding corruption justified the contribution and disclosure provisions of FECA.¹¹⁷ As long as Minnesota continues to abide by the latest constitutional parameters enunciated by the

108. *Wis. Right to Life*, 127 S. Ct. at 2659 (citing *McConnell*, 540 U.S. 93).

109. *Id.*

110. *Id.*

111. *Id.* at 2660.

112. *See id.* at 2660–61 (detailing the ads run by WRTL).

113. *Id.* at 2661.

114. *Id.*

115. *Id.* at 2673.

116. *Id.* at 2676 (Scalia, J., concurring) (quoting *Buckley v. Valeo*, 424 U.S. 1, 20–21 (1976)).

117. *Buckley*, 424 U.S. 1 at 26–27.

United States Supreme Court, the Ethical Practices Act should continue to withstand constitutional challenge. The portion of the Bipartisan Campaign Reform Act¹¹⁸ that was held unconstitutional

118. The Bipartisan Campaign Reform Act (BCRA) of 2002 (also referred to as “McCain-Feingold”), amended the Federal Election Campaign Act of 1971 (FECA) by regulating the use of so-called soft or “non-federal” money which could be used for activities designed to influence state or local elections or get-out-the-vote drives, including “issue ads” (ads that were specifically intended to affect election results but did not refer to voting for or against a named candidate), and various other provisions designed to prevent circumventing FECA. Section 203 of the BCRA attempted to prohibit corporations or unions from using general treasury funds for communications that are intended to or have the effect of influencing federal elections. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court, by a 5-4 margin, upheld some of the provisions, including § 203, which was struck down in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007). In a lengthy decision, the *McConnell* Court ruled that, *inter alia*, the soft money limitations and solicitation bans and the regulation of electioneering communications by holding:

- 1) BCRA’s ban on solicitation by national political parties of any soft money not subject to the FECA’s campaign contribution limitations and the reporting requirements are properly analyzed under a less rigorous standard of review than strict scrutiny, under *Buckley v. Valeo*. The “less rigorous” standard is denominated “closely drawn” scrutiny. The Court rejected the argument that the soft money regulations impose burdens fundamentally different from the contribution limits upheld in *Buckley v. Valeo*.

[W]hile § 323(a) [of BCRA] prohibits national parties from receiving or spending non-federal money, and § 323(b) prohibits state party committees from spending non-federal money on federal election activities, neither provision in any way limits the total amount of money parties can spend.”

540 U.S. at 139.

- 2) BCRA’s Title I limitations on raising and spending soft money do not violate the First Amendment, nor do they violate principles of federalism. Interestingly, the Court held that in the face of a Tenth Amendment challenge, the Court focuses on whether states and state officials are “commandeered” to carry out federal regulatory schemes and since BCRA does not require states to carry out the regulation, states are free to enforce their own restrictions on state electoral financing. *Id.* at 186.
- 3) Under BCRA, state and local candidates are forbidden from raising and spending soft money to fund “public communications” that promote or attack federal candidates. 2 U.S.C. § 442i (f) places limits on the source and amount of contributions to be spent on “public communications” that directly impact federal elections. *Id.* at 184.
- 4) In order to prevent “circumvention” of the BCRA limitations on the raising and spending of “soft money,” section 323(d) of the Act prohibits political parties from soliciting and donating funds to tax-exempt organizations that engage in electioneering activities “by soliciting the donations to third-party organizations, the parties would avoid FECA’s source and amount limitations, as well as its disclosure restrictions.” *Id.* at 175. The Court went on to state that § 323(d) restricts solicitations “only to those 501(c) groups ‘making expenditures or disbursements in connection with an election for

in *Wisconsin Right to Life*, involved a ban on so-called “issue advertising within 60 days of an election,” if funded out of the general treasury of unions or corporations. Minnesota Statutes Chapter 10A imposes no similar restrictions that might be construed as impinging on First Amendment rights. Thus, under *Buckley*¹¹⁹ and its progeny, the Ethics in Government Act should continue to stand.

IV. CONCLUSION

As long as Minnesota law remains, as Justice Scalia put it in his concurrence in *Wisconsin Right to Life*,¹²⁰ on the correct side of the “express–advocacy line, set in concrete on a calm day by *Buckley*,”¹²¹

Federal office’ and to § 527 organizations, which by definition engage in partisan political activity.” *Id.* at 177 (citation omitted).

- 5) The Court upheld the various disclosure requirements under BCRA which now require detailed periodic financial reports to be filed with the Federal Elections Commission. The disclosures encompass expenditures for “electioneering communications,” meaning any “broadcast, cable or satellite communication” that clearly identifies a candidate for federal office, airs within 60 days of a general election or 30 days of a primary election, and is targeted to the relevant electorate. *Id.* at 194. The BCRA disclosure requirements regarding funding of “electioneering communications” covers persons, corporations and labor groups. Any person who contributes more than \$1000 to a person or group paying for electioneering communications, or who spends (or expects to spend, pursuant to an executory contract) more than \$10,000 in a calendar year on electioneering communication, is subject to the new disclosure rules. *Id.* at 194–95.

Minnesota law does not forbid corporations to use general treasury funds to influence ballot questions. MINN. STAT. § 211B.15 subdiv. 4 (2006). Since corporations (or unions) would have to form and register a political fund or committee to make “independent expenditures” or direct contributions on behalf of or in defeat of a clearly identified candidate, the constitutional infirmity found in *Wisconsin Right to Life* appears absent in Minnesota law, as there is not so broad a term as “electioneering communication” contained in Chapter 10A. Justice Scalia, writing in Part II of his concurrence in *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652, 2674 (Scalia, J., concurring), would overrule *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990), which upheld a restriction on corporate independent expenditures in support of or in opposition to any candidate for state office—as opposed to restrictions on corporate expenditures regarding ballot questions, which were held unconstitutional in *First National Bank v. Bellotti*, 435 U.S. 765 (1978). However, even Justice Scalia noted that *Austin* was limited to express advocacy. *Wis. Right to Life*, 127 S. Ct. at 2679 (Scalia, J., concurring). Thus, as long as *Austin* stands, MN law should remain on firm ground.

119. *Buckley v. Valeo*, 424 U.S. 1 (1976).

120. See generally *Wis. Right to Life*, 127 S. Ct. at 2674–87.

121. *Id.* at 2684.

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then the Ethics in Government Act should remain on firm constitutional ground.