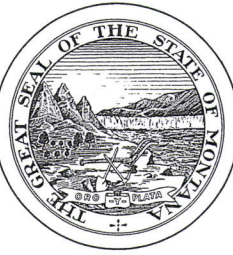


COMMISSIONER OF
POLITICAL PRACTICES



STATE OF MONTANA

JONATHAN R. MOTL
COMMISSIONER
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HELENA, MONTANA 59620-2401
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August 19, 2015

Senator Dee Brown
Chairperson
And Members
State Administration and Veterans' Affairs Interim Committee
Helena, MT

Hand-Delivered

Dear Senator Brown and Members of SAVA:

I write regarding the agency overview of the Commissioner of Political Practice's office.

You have before you the agency overview providing a description of the functions and budget of the COPP, a summary of the 2015 legislative activity concerning the COPP and an update of litigation activity involving the COPP. You should have also received by e-mail a copy of the draft COPP administrative rules, set for public hearing on September 2 and 3, 2015.

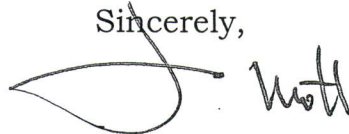
As I believe you know, the COPP draft rules were the product of a 10 person vetting team including 7 attorneys (Jonathan Motl, Jim Scheier, Jaime MacNaughton, Andy Huff, Sarah Clerget, Mike Black, and Kirsten Madsen), a legal intern (Anne Sherwood, 2nd year U of M law), and two COPP staffers (Mary Baker and Vanessa Sanddal). The group met on 8 consecutive Wednesdays during May and June of 2015 with each meeting running from 2 to 6 hours, depending on the issues before the group. Each draft rule was presented by one member of the group and then vetted by the entire group. The presentation included a thorough review of the language of the rule, as measured by applicable standards of constitutionality and statutory construction.

I note that the summary of 2015 legislative action states at page 2 that HB 116 carried by Representative Bennett passed as part of SB 289. That HB 116 language was included in SB 289 and did pass the Senate but did not pass the House and therefore was not in the final language. As I believe most of you know, the issue addressed by HB 116 was in-kind paid personal services

provided by political parties to candidates. Those services have a long history of deference provided through internal COPP actions of successive Commissioners. While that historical COPP deference was informal and internal, the COPP dealt with the issue formally and publically in COPP-2014-AO-009: "A particular definition of contribution." The issue was raised to SAVA at its August 15, 2014 meeting and the legislature through HB 116. As the Mike Black legal memo points out, because SB 289 amended the definition of contribution without changing the formal administrative interpretation set out in COPP-2014-AO-009, the administrative policy, at first informal but now formally stated remains in effect. The COPP's proposed update of contribution includes this formal policy position as a regulation.

Thank you for the opportunity to appear before the Committee.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Motl". The signature is stylized with a large, sweeping initial "J" and a cursive "Motl".

Jonathan Motl

Commissioner of Political Practices

C

Sheri Scurr

Submitted by the COPP (Commissioner Motl) to SAVA for Review at its August 15, 2014 meeting

PROPOSAL NO. 1 Expanded Electronic Filing	Amending §13-37-226(2), (3), and (5).	Add the word "electronically" after the word "reports" in each of the specified subsections
PROPOSAL No. 2 Delete Local Filing	Amending §13-37-225(1) and(3).	Delete the requirement of any report filing with an election administrator of a county.
PROPOSAL No. 3 Add "Electioneering" Definition	Amending §13-1-101	Add an "electioneering" definition to Title 13 that defines any purchase, payment (etc) of any form of communication that mentions a candidate by name within 60 days of an election as an expenditure that must be reported and disclosed, with accompanying political committee registration. This is law nuanced with constitutional considerations and will require careful drafting.
PROPOSAL No. 4 Delete Certain language in Contribution Definition	Amending §13-1-101(7)(a)(iii)	Delete words "other than a candidate or political committee."
PROPOSAL No. 5 Exempt in-kind personal services by a political party	Amending §13-37-216(5)	Add "In-kind personal services provided by a political party organization are not included in the limits set by subsection (3)."
PROPOSAL No. 6 Expand election day to voting days	Amending 13-35-211(1)	Strike " in which an election is being held " and put in its place "in which voting on an election is taking place"
PROPOSAL No. 7 Robo calls as a campaign practice violation	Amending 45-8-216	Add a new subsection (4) reading "A person engaged in an activity described in subsection (1)(e) during any 60 day period before an election addressed by the activity becomes a political committee that must attribute as defined by 13-35-225, become certified under 13-37- 201 and report under 13-37-225. Failure to do so is a violation of

		title 13, chapters 35 and 37.”
PROPOSAL No. 8 Authority to Deputize COPP in-house counsel	Amending 13-37-111(6)(b)(i)	Change to “may not be an employee, <u>other than attorney, employed by</u> of the office of the commissioner...”
Proposal No. 9 Conform to court ruling	13-35-231 MCA	Change to “A political party may not endorse , contribute to or make an expenditure to support of oppose a judicial candidate.”
PROPOSAL No. 10 Add additional reporting periods	13-37-226(3)(4)(5)	Add a May 1 and Oct. 1 reporting date at each subsection.
PROPOSAL No. 11 Allow retention of cost recovery	13-37-129	Add as last sentence: “However, any amount recovered by the commissioner as a recovery of the cost of litigation may be retained by the commissioner as a litigation fund for future enforcement actions.”
ROPOSAL No. 12 Add Sign Placement as campaign practice consideration	Title13,chapter 35	Add new statute that requires a candidate receive permission of property owner before placing a political sign on private property and further requiring a candidate to place signs in conformance with all state, local and national highway safety and local planning laws. The violation of this section would be a campaign practice violation.

January 20, 2015

Honorable Jeff Essmann
Chairperson
House State Administration Committee
Bill Harris – Vice Chair
Casey Schreiner– Vice Chair

Members

Bryce Bennett
Bob Brown
Moffie Funk
Frank Garner
Edward Greef
Denise Hayman
Jessica Karjala
Austin Knudsen
Debra Lamm
Forrest Mandeville
Wendy McKamey
Dale Mortensen
Jean Price
Ray Shaw
Kathy Swanson
Susan Webber
Art Wittich

Re: House Bill 116
Hearing Date: Tuesday, January 20,
2014 at 9:00 AM
Sponsor: Representative Bryce
Bennett

Dear Chairperson Essmann and members of the Committee:

The Office of the Commissioner of Political Practices supports House Bill 116 and respectfully offers the following information to the members of the House State Administration Committee.

HB 116 clarifies Montana law by specifically stating that political parties may provide in-kind services (candidate support through field staff paid by the political party) to Montana candidates for public office without the value of those in-kind services counted toward the aggregate contribution limits applied to a political party by §13-37-216(3)MCA. The reasons for this clarification

are several and are explained at length in that certain COPP Advisory Opinion May 19, 2014, a copy of which is attached to this testimony.

The Advisory Opinion came as the product of a vetting process, including a public hearing held in Helena on March 4, 2014. The Advisory Opinion describes a largely unpublished 20 year COPP “tradition”, beginning in 1996 with Commissioner Argenbright, of affording political parties the ability to use paid party staff to assist Montana candidates for public office without regard to any consideration of the value of paid party staff as a contribution to the candidate. The Advisory Opinion then reviews contrary formal COPP Decisions, made in regard to use of paid staff in ballot issue campaigns, that determine the value of paid staff to be a contribution and require the reporting and disclosure of any such paid staff time.

The Advisory Opinion points out that wholesale application of the ballot issue paid staff Decisions to candidate campaigns could mean that the value of political party paid staff are counted as part of the contribution limits applicable to a political party. The Advisory Opinion determines that this is an undesirable outcome since it rejects the “common sense” deference to use of political party staff provided by Montana tradition and encouraged by U. S. Supreme Court Decisions based on associational rights of political parties. *Randall v. Sorrell*, 548 U.S. 230 (2006). HB 116 follows the path of the Advisory Opinion in exempting political party paid staff from contribution limits but still requiring reporting and disclosure of the value.

Please see the attached Advisory Opinion for a more detailed explanation of the above analysis. HB 116 affords political parties full use of paid staff to support candidates while still allowing for full disclosure and reporting of the value of those paid staff services. Accordingly, HB 116 serves the associational rights of political parties and the reporting and disclosure obligations that accompany a contribution or expenditure concerning a Montana political campaign.

Thank you for your consideration of HB 116.

Sincerely,

Jonathan R. Motl
Commissioner of Political Practices

MEMORANDUM

BLACK LAW OFFICE
Post Office Box 318
Clinton, Montana 59825

TO: Jon Motl
Commissioner of Political Practices

FROM: Michael G. Black

RE: Draft Rule Regarding "Contribution"

DATE: June 29, 2015

Senate Bill (SB) 289, Section 2, amends Mont. Code Ann. § 13-1-101 by amending the definition of "contribution," which now reads:

(9) (a) "Contribution" means:

(i) the receipt by a candidate or a political committee of an advance, gift, loan, conveyance, deposit, payment, or distribution of money or anything of value to support or oppose a candidate or a ballot issue;

(ii) an expenditure, including an in-kind expenditure, that is made in coordination with a candidate or ballot issue committee and is reportable by the candidate or ballot issue committee as a contribution;

(iii) the receipt by a political committee of funds transferred from another political committee;

(iv) the payment by a person other than a candidate or political committee of compensation for the personal services of another person that are rendered to a candidate or political committee.

(b) "Contribution" does not mean services provided without compensation by individuals volunteering a portion or all of their time on behalf of a

candidate or political committee or meals and lodging provided by individuals in their private residences for a candidate or other individual.

This amended definition implicates the terms of existing Rule 44.10.321, ARM, and other definitions in Mont. Code Ann. § 13-1-101.

It is significant that the Legislature amended the definition of “contribution” after the COPP issued the advisory opinion COPP-2014-AO-009 (May 19, 2014). This advisory opinion considered and harmonized prior COPP interpretations of “contribution” in the context of political party committees. Thus, prior to the recent amendment to the statutory definition, the COPP had determined that, for purposes of determining compliance with political party contribution limits established pursuant to 13-37-216, MCA, a “contribution” does not include a coordinated expenditure made solely by a political party committee in the form of provision of personal services by paid staff of the political party that serve the associational interest of the political party and concurrently benefit a particular candidate of the political party.

The associational interest of a political party seeking to assist in election of candidates from its own party has been recognized by the United States Supreme Court. *See, Randall v. Sorrell*, 548 U.S. 230, 256-59 (2006); *California Democratic Party v. Jones*, 530 U.S. 567, 574-76 (2000). In *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 437 (2001) (*Colorado II*), the Supreme Court considered coordinated political party spending that may be an attempt to circumvent contribution limits under federal law. The Court considered the role of political parties and independent expenditures under the First Amendment. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court had observed that treating coordinated expenditures as contributions "prevents attempts to circumvent the [statutory contribution limits] through prearranged or coordinated expenditures amounting to disguised contributions." 424 U.S. at 47.

In light of the provisions of SB 289, and prior interpretations of COPP, I have drafted a proposed rule defining “contribution” that is consistent with COPP treatment of political party committees and COPP interpretation of this term in application to the associational interests of political parties providing paid staff to the campaigns of candidates from the same party.

In *Musselshell Ranch Co. v. Seidel-Joukova*, 2011 MT 217, ¶14, 362 Mont. 1, 261 P.3d 570, the Montana Supreme Court stated:

‘We presume that the legislature is aware of the existing law, including our decisions interpreting individual statutes We presume that if the legislature disagreed with our interpretation . . . it would have amended the statute accordingly.’ *Swanson v. Hartford Ins. Co.*, 2002 MT 81, 22, 309 Mont. 269, 46 P.2d 584 (internal citation and quotation marks omitted). *See also* Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* vol. 2B, § 49:5, 32-34 (7th ed., Thomson-Reuters/West 2008) (‘Judicial construction of a statute becomes part of the legislation from the time of its enactment.’).

Moreover, as long as the COPP “intended to issue an interpretation” of a statute he or she enforces, the COPP’s interpretation of ambiguities in that statute is generally accorded deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). *Langadan v. Ashcroft*, 383 F.3d 983, 987 (9th Cir. 2004). A court may defer to an agency’s interpretation of a statute when it is consistent with the statutory mandate and does not frustrate the underlying legislative policy. *Tyler v. United States*, 929 F.2d 451, 455 (9th Cir. 1991).

I have attempted to draft a proposed rule on contributions that is consistent with past COPP decisions and federal court opinions, which were known to the Legislature when it passed SB 289 without amending “contribution” to preclude the COPP’s interpretation that has allowed political party committees to provide paid staff to campaigns without such expenditures counting against aggregate political party contribution limits. I have also reviewed statutory provisions and regulations from sister states, discussion of contributions in scholarly articles and other secondary sources, and materials provided by COPP staff. The proposed rule is attached.

Enclosure

cc: Jaime MacNaughton
Anne Sherwood

Mary Baker
Vanessa Sanddal
Jim Scheier
Sarah Clerget
Kirsten Madsen
Vanessa Sanddal

1 **Section 8.** Section 13-37-216, MCA, is amended to read:

2 **"13-37-216. Limitations on contributions -- adjustment.** (1) (a) Subject to adjustment as provided for
3 in subsection (4) and subject to 13-35-227 and 13-37-219, aggregate contributions for each election in a
4 campaign by a political committee or by an individual, other than the candidate, to a candidate are limited as
5 follows:

6 (i) for candidates filed jointly for the office of governor and lieutenant governor, not to exceed \$500;

7 (ii) for a candidate to be elected for state office in a statewide election, other than the candidates for
8 governor and lieutenant governor, not to exceed \$250;

9 (iii) for a candidate for any other public office, not to exceed \$130.

10 (b) A contribution to a candidate includes contributions made to ~~the candidate's committee and to any~~
11 political committee organized on the candidate's behalf.

12 ~~(2) (a) A political committee that is not independent of the candidate is considered to be organized on~~
13 ~~the candidate's behalf. For the purposes of this section, an independent committee means a committee that is~~
14 ~~not specifically organized on behalf of a particular candidate or that is not controlled either directly or indirectly~~
15 ~~by a candidate or candidate's committee and that does not act jointly with a candidate or candidate's committee~~
16 ~~in conjunction with the making of expenditures or accepting contributions.~~

17 ~~_____ (b) A leadership political committee maintained by a political officeholder is considered to be organized~~
18 ~~on the political officeholder's behalf.~~

19 ~~(3)~~(2) All political committees except those of political party organizations are subject to the provisions
20 of ~~subsections (1) and (2)~~ subsection (1). For purposes of this subsection, "political party organization" means
21 any political organization that was represented on the official ballot at the most recent gubernatorial election.
22 Political party organizations may form political committees that are subject to the following aggregate limitations,
23 except as provided in subsection (3), adjusted as provided for in subsection (4), and subject to 13-37-219, from
24 all political party committees:

25 (a) for candidates filed jointly for the offices of governor and lieutenant governor, not to exceed \$18,000;

26 (b) for a candidate to be elected for state office in a statewide election, other than the candidates for
27 governor and lieutenant governor, not to exceed \$6,500;

28 (c) for a candidate for public service commissioner, not to exceed \$2,600;

29 (d) for a candidate for the state senate, not to exceed \$1,050;

30 (e) for a candidate for any other public office, not to exceed \$650.

1 (3) In-kind personal services provided by a political party organization to a candidate are not included
 2 in the limits set in subsection (2). The value of these in-kind personal services is subject to reporting and
 3 disclosure by the candidate and by the political party organization.

4 (4) (a) The commissioner shall adjust the limitations in subsections (1) and ~~(3)~~ (2) by multiplying each
 5 limit by an inflation factor, which is determined by dividing the consumer price index for June of the year prior to
 6 the year in which a general election is held by the consumer price index for June 2002.

7 (b) The resulting figure must be rounded up or down to the nearest:

8 (i) \$10 increment for the limits established in subsection (1); and

9 (ii) \$50 increment for the limits established in subsection ~~(3)~~ (2).

10 (c) The commissioner shall publish the revised limitations as a rule.

11 (5) ~~A~~ Except as provided in subsection (3), a candidate may not accept any contributions, including
 12 in-kind contributions, in excess of the limits in this section.

13 (6) For purposes of this section, "election" means the general election or a primary election that involves
 14 two or more candidates for the same nomination. If there is not a contested primary, there is only one election
 15 to which the contribution limits apply. If there is a contested primary, then there are two elections to which the
 16 contribution limits apply."

17
 18 **Section 9.** Section 13-37-219, MCA, is amended to read:

19 **"13-37-219. Limitations on contributions to candidate when office sought is not known.** A
 20 candidate, as defined in 13-1-101~~(6)(b)~~(8)(b), who has not determined the office to which the individual will seek
 21 nomination or election is subject to the lowest contribution limitation of the offices the candidate is considering
 22 seeking."

23
 24 **Section 10.** Section 13-37-225, MCA, is amended to read:

25 **"13-37-225. Reports of contributions and expenditures required.** (1) Except as provided in
 26 13-37-206, each candidate and political committee shall file periodic reports of contributions and expenditures
 27 made by or on the behalf of a candidate or political committee. Except as provided in subsection (3), all reports
 28 required by this chapter must be filed with the commissioner and with the election administrator of the county in
 29 which a candidate is a resident or the political committee has its headquarters. However, where residency within
 30 a district, county, city, or town is not a prerequisite for being a candidate, copies of all reports must be filed with