

COMMISSIONER OF
POLITICAL PRACTICES



STATE OF MONTANA

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November 24, 2015

Members of the Montana Legislature
Montana State Capitol
Helena, MT 59601

Re: Commissioner of Political Practices Justification for Rules

Dear Montana Legislator,

We write to provide written justification for the COPP campaign finance reporting and disclosure rules, proposed by publication in the Montana Administrative Register, on August 13, 2015, Notice No. 44-2-207 and adopted by the COPP through filing with the Montana Secretary of State on November 24, 2015. We note that the objections to COPP rules by 23 legislators did not list specific reasons for the objections¹. Accordingly, the COPP is responding in general.

1. The Rules Pass Legislative Intent Review by the Principal Bill Sponsor

Duane Ankney, Senate District 20, was the primary sponsor of SB 289, the bill that, when passed into law, led to many of the proposed rules. Senator Ankney agreed that the rules met legislative intent:

"As the sponsor of the Disclose Act, I appreciate the dedication and effort that has been taken to implement this law by the Commissioner and his staff. I support the rules that are being presented to add more disclosure for the voters of Montana.

As a candidate, my supporters donate to my campaign and put their name, address and occupation out there for everyone to see. Anyone else

¹ In contrast, the objections by legislators to the Department of Revenue's proposed rule were much more specific. See <http://leg.mt.gov/content/Committees/Interim/2015-2016/Revenue-and-Transportation/Committee-Topics/SB410-Polling/exhibit-h-objection-letters.pdf>

participating in the political process, either on my side or another, should have to do the same thing. These rules close the loopholes that are being manipulated in Montana today."

Please see the Adoption Notice comments Nos. 89, 117 and 150 for a summary of Senator Ankeny's comments.

2. The Rules Were Written and Adopted As Provided by Law

SB 289 was signed into law on April 22, 2015. Senate Bill 289 explicitly recognized that regulations would need to be adopted in order to implement the law. The COPP, in turn, recognized that there was time urgency if the regulations were to be in place in time for the 2016 election cycle. The COPP assembled a team of 10 people to draft, vet and prepare the rules. The team included 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. Each meeting was open to the public.

On July 2, 2015, the COPP publically offered any interested person to look at the major proposed rules, and to submit comment for the COPP's consideration before the COPP published their proposed rules on August 13, 2015. These comments were incorporated into the vetting process. On August 13, 2015 the vetted rules were reduced to proposed rules and published in the Montana Administrative Register at Notice No. 44-2-207. This proposal notice included new rules for adoption, and old rules for transfer, amendment and repeal. The Notice was properly published according to the provisions of the Montana Administrative Procedure Act with each rule published being followed by a statement of reasonable necessity for adoption of the rule.

Beginning on August 13, 2015 and continuing through September 10, 2015, the COPP accepted written comment in support of and in opposition to the rules. On September 2 and 3, 2015, the COPP held two consecutive 7 hour days of public hearings for members of the public and legislature to express support for or objections to the rules. In total 67 individuals and organizations

provided comments on the rules, either in writing or by testimony². The COPP then transcribed all public comment and grouped the comments according to subject matter, resulting in 190 comments. The COPP considered and responded to each of 190 comments, publishing the comments and responses in the Adoption Notice.

On November 24, 2015 the COPP filed its notice of adoption with the Secretary of State's office. The COPP will complete its role in the MAPA process when it is able to publish the Notice of Adoption in the Montana Register.

3. Intent Discussion as to Specific Rules.

There are 16 rules for which objections are lodged. The COPP groups and responds to those objections as follows.

a. Intent Shown by Statement of Purpose

Six of the COPP's sixteen adopted rules are consistent with intent discerned by a reading of the SB 289 statement of purpose. The SB 289 preamble³ said the bill's purpose was that of "revising definitions of "contribution", "expenditure", and "political committee" and "defining campaign related terms". As a result, five of the COPP's adopted rules revise administrative rules in conformance with this expressed intent. In doing this the adopted rules took definitions out of preexisting COPP rules, and put them in one definition section at the beginning of the rules. These five COPP adopted rules are: 1) Adopted Rule 44.10.301 (44.10.301) Introduction and Definitions; 2) Adopted Rule 44.10.321 (44.11.401) Contribution – Definition; 3) Adopted Rule 44.10.323 (44.11.501) Expenditure - Definition; 4) Adopted Rule

² None of the 23 objecting legislators provided comments.

³ The preamble of Senate Bill 289 states "An Act generally revising campaign finance laws; revising definitions of "contribution", "expenditure", and "political committee"; clarifying types of political committees; defining campaign related terms; revising attribution requirements; prohibiting a union from contributing to candidates; requiring the Commissioner of Political Practices to adopt rules to determine the primary purpose of an incidental committee and to define what constitutes a *de minimis* act, contribution or expenditure; revising when a political committee files certification with the Commissioner; clarifying disclosure requirements for election materials; revising the times for filing certain reports; clarifying disclosure requirements for contributions and expenditures; allowing the Commissioner of Political Practices to require certain reports to be filed electronically; requiring the Commissioner to post certain report information on a website, providing disclosure requirements for incidental committees; clarifying that certain disclosure reports are to be filed regardless of an entity's tax status; revising and expanding the Commissioner's rulemaking authority..."

44.10.327 (44.11.202) Political Committee Definition and Types; 5) Adopted Rule 44.10.329 (44.11.204) Political Committee Classification; and 6) Adopted Rule VI (44.11.601) Attribution on Election Material.

b. Intent Shown by Statutory Language

Three of the 16 adopted rules challenged by the 23 legislators offer language consistent with intent directly expressed by statute: 7) Adopted Rule I (44.11.203) Primary Purpose: "for the purpose of subsection (22), the primary purpose is determined by the commissioner by rule and includes criteria such as the allocation of budget, staff or members' activity or the statement of purpose or goal of the person or individuals that form the committee", Mont. Code Ann. § 13-1-101(22)(b). And "the rules must...include the criteria and process used to determine the primary purpose of an incidental committee...", Mont. Code Ann. § 13-1-114(2). 8) Adopted Rule VIII (44.11.603) De Minimis: "the rules must...define what constitutes de minimis acts, contributions or expenditures...", Mont. Code Ann. § 13-1-114(2). 9) Adopted Rule X (44.11.605), Electioneering Communication: "the term does not mean...a communication that the commissioner determines by rule is not an electioneering communication", Mont. Code Ann. § 13-1-101 (15)(b).

c. Intent Shown by Transparency Purpose

Five of the 16 rules challenged by the 23 legislators implement transparency, the primary intent of SB 289: 10) Adopted Rule IV (44.11.240), Consequences for Failure to File Required Statements, Reports or Disclosures; 11) Adopted Rule V (44.11.408), Electronic Contributions, Reporting; 12) Adopted Rule VII (44.11.602), Coordination; 13) Adopted Rule XI (44.11.607), Fair Notice Period Before Election; 14) Adopted Rule XII (44.11.608), Personal Use of Campaign Funds.

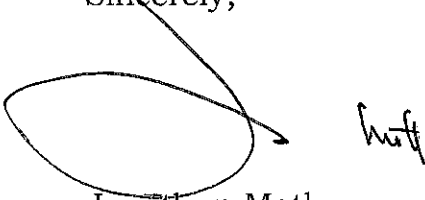
d. Collateral Changes

Two of the 16 rules challenged by the 23 legislators adjust the COPP's general rulemaking authority as necessary to accommodate other changes: 15) Adopted Rule 44.10.201 (44.11.102) Advisory Opinions and Selected Incorporation of Certain Attorney General Rules, Regarding Declaratory Rulings and Rulemaking; and 16) Adopted Rule 44.10.307 (44.11.106) Complaints of Violations. The amendments to the old rules address changes in other agency's rule numbers, amends cross references to the COPP's rules, cites to the privacy policy of the COPP, and makes other minor amendments for

clarification and grammatical changes which are consistent with the intent of the legislation.

The Commissioner and the COPP therefore respectfully request your affirmance that the COPP's proposed rules are "consistent with the intent of the legislature", Mont. Code Ann. § 2-4-403. Thank you for your time and consideration of this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Motl", is written to the right of a large, hand-drawn oval. A line from the word "Sincerely," above points to the oval.

Jonathan Motl
Montana Commissioner of Political Practices