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State Administration and  
Veterans' Affairs Interim Committee  
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# REVISING LOBBYING LAWS:

## Preliminary Bill Drafts for Discussion

### SCOPE NARROWED - BILL DRAFTS OFFERED

At its meeting Jan. 16, 2020, the State Administration and Veterans' Affairs Interim Committee (SAVA) narrowed the scope of its lobbying law examination to:

- I. Conforming statutes to court rulings and legal guidance that limits lobbying to mean supporting or opposing the introduction or enactment of legislation by legislators and the legislature.
- II. Revising the deposit of the lobbying fee so that the total amount goes to the state general fund.
- III. Simplifying when and how reports are filed and eliminating outdated terminology.

This paper examines these issues and summarizes three preliminary bill drafts (PDs) prepared as starting points for further discussion about whether and how to revise the relevant lobbying laws.

### I. CONFORMING STATUTES TO COURT RULINGS

#### INITIATIVE 85 (1980) ENACTED BROAD LANGUAGE

In 1980, the people of Montana overwhelmingly approved Initiative 85, which expanded Montana's lobbying laws.

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The title of I-85 read:

"THIS PROPOSED INITIATIVE REQUIRES PUBLIC DISCLOSURE OF MONEY SPEND TO INFLUENCE ACTION OF A PUBLIC OFFICIAL. ALL INDIVIDUALS OR BUSINESSES WHO EMPLOY LOBBYISTS AND SPEND MORE THAN \$1,000 A YEAR TO PROMOTE OR OPPOSE OFFICIAL ACTION OF A PUBLIC OFFICIAL MUST GIVE A COMPLETE ACCOUNTING OF ALL MONEY SPENT. THE PROPOSAL DOES NOT APPLY TO INDIVIDUAL CITIZENS LOBBYING ON THEIR OWN BEHALF. ELECTED OFFICIALAS ARE REQUIRED TO PUBLICALLY DISCLOSE THEIR BUSINESS INTERESTS. CRIMINAL AND CIVIL PENALITES ARE PROVIDED FOR VIOLATIONS OF THE PROVISIONS OF THIS INITIATIVE."

Two lawsuits subsequently challenged the constitutionality of I-85 provisions.

## SUPREME COURT DECISIONS INVALIDATED PARTS OF I-85<sup>1</sup>

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In *Montana Auto. Assoc. v. Greely*, the 1981 Montana Supreme Court found that:

- (1) certain provisions infringed on constitutional rights and so were unconstitutional and "beyond redemption";
- (2) the unconstitutional provisions were severable from other parts of the law; and
- (3) there was a compelling state interest in requiring certain lobbying activities to be disclosed.

In *State Bar v. Krivec*, the 1981 Montana Supreme Court ruled that:

- (1) an attorney seeking to influence a public official exercising quasi-judicial power was not lobbying;
- (2) the definition of lobbying did not cover official activities of a purely ministerial nature; and

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<sup>1</sup> See *Montana Automobile Association v. Greely*, 193 Mont. 378, 632 P. 2d 300 (1981) and *State Bar of Montana v. Krivec*, 193 Mont. 477, 632 P. 2d 707 (1981).

(3) the regulation of lobbying by attorneys did not intrude on the court's power to regulate the conduct of attorneys.

## 1983 LEGISLATURE ENACTED CHANGES PROPOSED IN *GREELY*

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In Appendix A of *Greely*, the court offered statutory revisions that the 1983 Legislature enacted to conform the lobbying laws to the court's findings. The revisions struck:

- (1) wording that individual rights to contact officials was limited to Montana citizens;
- (2) vague language about improper conduct by lobbyists;
- (3) a prohibition against compensating lobbyists on a contingency basis; and
- (4) reporting requirements on spending related to derivative research, producing certain publications, news stories, and political contributions.

## RULES LIMIT THE APPLICATION OF CURRENT LAW

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In *Krivec*, the court applied a broad definition of quasi-judicial functions in the context of its finding that an attorney seeking to influence a public official regarding quasi-judicial actions was not lobbying.

A 2002 rule adopted under then Commissioner of Political Practices (COPP) Linda Vaughey, [ARM 44.12.101A](#), limited the applicability of lobbying rules to legislative lobbying and suggested that the legislature clarify the extent to which non-legislative lobbying should be covered in the future. The rule states:

"Based on the preceding [i.e. the *Krivec* definition of quasi-judicial functions] the commissioner has attempted to clarify legislative lobbying issues relating to promoting or opposing the introduction or enactment of legislation in 2002 rulemaking. It likely will be necessary to seek clarification of non-legislative lobbying issues in a future legislative session. Until the quasi-judicial function exemption and other non-legislative lobbying provisions of the Act are revised, either legislatively or via court decision, the rules will not be applied to non-legislative lobbying activities."

In response to questions about reporting, COPP [legal guidance provided in 2003](#) stated:

"Because of the expansive definition of "quasi-judicial function" adopted by the Supreme Court in Krivec, supra (see also ARM 44. 12.101 A), only lobbying activities that involve "the practice of promoting or opposing the introduction or enactment of legislation before the legislature or the members of the legislature ..." are presently reportable."

In summary, although current statutes still use the term "public official", which is defined as including elected state officials or appointed state officials as well as legislators, the law is applied only to lobbying legislators about the introduction or enactment of legislation because of two 1981 Montana Supreme Court decisions and the COPP's rules interpreting those decisions.

## PRELIMINARY BILL DRAFT (PD) 02 - CONFORM STATUTES TO RULINGS

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Preliminary Bill Draft (PD) 02 conforms Montana's statutes on lobbying to the current practice that limits the definition of lobbying to supporting or opposing the introduction or enactment of legislation by a legislator or the legislature. (See [PD 02](#), drafter Scurr)

## II. DEPOSIT LOBBYING FEE TO GENERAL FUND

### LOBBYING FEE CURRENTLY SPLIT

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Section 5-7-103, MCA, sets the licensing fee for lobbying at \$150. Enacted in 1959, the fee was initially set at \$10. It was raised to \$50 in 1993. In 2003, the fee was raised by \$100 and this increase was earmarked to help pay for legislative broadcasting services, which are now provided by the Montana Public Affairs Network (MPAN).

Thus, of the total \$150 fee, \$50 must be deposited to the state general fund and \$100 must be deposited to a special revenue account for the Legislative Services Division.

The [Legislative Services Division reports](#) it budgeted at total of \$59,524 for the FY 2020-2021 biennium to be paid from the special revenue account for MPAN services. This amount represents only about 5% of the total \$1.2 million biennial budget for MPAN. A general fund appropriation covers the balance.

## AUDITS FIND ACCOUNTING ERRORS

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Financial accounting for lobbying fee revenue is complicated. Under current law, the lobbying fee is paid for a license that spans two calendar years with the license expiring on Dec. 31 of the even-numbered year, unless terminated earlier by the lobbyist. However, accounting standards require reporting on a fiscal year basis while revenue from the fee must be recognized evenly over the life of the license.

Several legislative financial compliance audits have found COPP accounting errors related to splitting this fee not only between the general fund and the special revenue account, but also by fiscal and calendar years.

The [April 2019 financial compliance audit report](#) on the COPP stated:

"In fiscal years 2017 and 2018 the office did not record multi-year permit revenue in accordance with state accounting policy, resulting in material misstatements.

State accounting policy requires revenue for licenses and permits valid for more than one year be recognized evenly over the life of the permit. These permits are valid for two calendar years and are usually issued right before a legislative session. Therefore, the revenue from these permits should be recognized over three fiscal years with 25 percent recognized in the fiscal year issued, 50 percent recognized in the next fiscal year, and 25 percent recognized in the third fiscal year. A total of \$61,350 and \$1,800 was collected for these permits in fiscal years 2017 and 2018, respectively."

## REVENUE FLUCTUATES ANNUALLY

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As previously mentioned, because most lobbying fees are paid just before the beginning of a legislative session held in odd-numbered years and the license is good for two years, revenue from the fee fluctuates significantly between odd and even years.

For example, according to the Legislative Fiscal Division, total revenue ranged from a high of about \$140,000 in fiscal year 2003 but dropped to about \$1,000 the next fiscal year.

For detailed information on fee revenue each fiscal year since 2002, see the Feb. 18, 2020, [Lobbyist Registration Fee Revenue memorandum](#) by Katy Callon, Fiscal Analyst, LFD.

## PRELIMINARY BILL DRAFT (PD) 03 - DEPOSIT TOTAL FEE TO GENERAL FUND

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Preliminary Bill Draft (PD) 03 provides that the entire lobbying fee be deposited to the state general fund, thus eliminating the need to split the fee between the general fund and a state special revenue account. (See [PD 03](#), drafter Scurr.)

## III. REVISE WHEN AND HOW REPORTS ARE FILED

### INFLATION-ADJUSTED THRESHOLD A MOVING TARGET

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Section 5-7-112, MCA, sets a payment threshold amount that triggers when an individual must register as a lobbyist and when a principal must report lobbying expenditures.

This payment threshold is currently a moving target because the statute requires the COPP to adjust the amount every two years by an inflation factor. Section 5-7-112, MCA, states that the inflation factor must "reflect the annual average change in the consumer price index from the prior year to the year in which the general election is held". Then, the "resulting figure must be rounded up or down to the nearest \$50 increment". The COPP must adopt this threshold by rule.

This formula and process delays adoption of each new threshold and adds uncertainty to lobbyist registration and principal reporting requirements.

The legislature enacted the threshold payment amount and inflation formula in 2003 under HB 689. The bill struck the definition of "lobbying for hire", which included a \$1,000 threshold for living and travel expenses. Before the 2003 change, the law stated:

""Lobbying for hire" includes activities of the officers, agents, attorneys, or employees of a principal who are paid, reimbursed, or retained by the principal and whose duties

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include lobbying. If an individual is reimbursed only for his personal living and travel expenses, which together are less than \$1,000 per calendar year, that individual is not considered to be lobbying for hire."

To replace the stricken definition, the bill added language to the definition of a "lobbyist". The new language stated an individual was not a lobbyist if the individual "receives payments from one or more persons that total less than the amount specified under [section 5, which became 5-7-112] in a calendar year."

The new section set \$2,150 as the threshold for 2002 through 2004 that would trigger a person registering as a lobbyist and instructed the COPP to adjust the amount by the inflation factor previously described. The COPP's rule (ARM 44.12.204) states that the threshold for 2019 and 2020 is \$2,600.

The 2003 bill also provided that this new threshold amount would be used to trigger reporting by a principal under section 5-7-208, MCA.

## REPORTING REQUIREMENTS AND TIMELINES ARE COMPLEX

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Reporting requirements for principals are outlined in section 5-7-208, MCA, which includes:

- (1) an additional and different payment threshold for monthly reporting;
- (2) different reporting periods depending on whether the lobbying occurred during a session or interim; and
- (3) misleading and outdated statutory language.

Principals are subject to reporting requirements only if their lobbying payments in a calendar year exceed the inflation-adjusted threshold amount set under section 5-7-112, MCA, which is \$2,600 for 2019 and for 2020. After that threshold is met, monthly reporting is triggered if the principal spends at least \$5,000 in a month, irrespective of whether the spending was during a session or an interim.

However, because of subsection (4) in section 5-7-112, MCA, certain reports are mandatory even if the thresholds are not met.

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The COPP's [lobbying guidance](#) outlines the mandatory reporting as follows:

For session lobbying:

- By Feb. 15 of a session year to cover January; and
- By 30 days after the adjournment of a regular or special session to cover any payments not yet reported.

For interim lobbying:

- By Feb. 15 of a non-session year to cover all payments since the end-of-session report; and
- By Feb. 15 of the session year to cover all payments since the last Feb. 15 report.

Thus, assuming a principle met the section 5-7-112, MCA, threshold amount in each calendar year, the principal would file two different reports on Feb. 15 during a session year, one that covered the previous year occurring during the interim and one that covered January of the session year.

How would these reporting thresholds and timelines be applied for the 2019 and 2020 calendar years? If a principal paid for (or expected to pay for) lobbying during January of the 2019 session and those payments exceeded (or were expected to exceed) the \$2,600 threshold, the principal would report on Feb. 15, 2019, to cover the January payments. The principal would also report following a month when payments during that month exceeded \$5,000. Then, the principal must report 30 days after the 2019 session adjourned and the report would cover any payments not previously reported.

If the principal continued to pay for lobbying after the 2019 session adjourned, the principal would file another report on Feb. 15, 2020, that would cover all payments made since the report filed 30 days after session adjournment in 2019. If the principal continued to make payments for lobbying in 2020 that exceeded the \$2,600 calendar year threshold, then on Feb. 15, 2021, the principle would file two reports, one covering January of the 2021 session and the other covering the 2020 calendar year. However, as previously stated, the principal would also need to file a report by the 15th of any month following a month when payments during the month exceeded \$5,000.

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Aside from the reporting thresholds, deadlines, and periods covered, outdated and ineffective language remains in the statute. For example, section 5-7-208(2), MCA, refers to lobbying "solely to influence legislative action", while section 5-7-208(3), MCA, refers to lobbying "to influence any other official action by a public official or to influence other action and legislative action". Because of the two Montana Supreme Court cases previously mentioned, the COPP applies the lobbying laws only with respect to legislative lobbying, so this quoted statutory language is essentially ineffective.

## REPORTS MAY BE FILED IN ELECTRONIC OR HARDCOPY FORMAT

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Lobbying reports may be filed in an electronic format or in a hard copy format. As explained in COPP guidance, the reports may be submitted as follows:

1. electronically through the COPP's online lobbyist database;
2. as a digital PDF;
3. by regular mail;
4. by facsimile transmission, i.e., FAX;
5. by email; or
6. in person delivery to the COPP's office.

For public access to the reports, the COPP maintains two different databases, one that stores the [electronic reports submitted online](#) and another that stores the [digitized hard copy forms](#). The COPP staff must digitize reports manually submitted. One must check both databases when searching for reports.

## PRELIMINARY BILL DRAFT (PD) 04 - FOR DISCUSSION ON REPORTING

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Preliminary Bill Draft (PD) 04 provides only a starting point for a broader policy and technical discussion on when and how lobbying reports should be filed. To prime the discussion, the bill:

- (1) sets one payment threshold of \$3,000, for registering as a lobbyist and reporting as a principal;
- (2) eliminates the annual adjustment for inflation;

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- (3) establishes a monthly reporting period during sessions and the interim once the threshold has been exceeded, irrespective of the amount spent in a previous month;
- (4) eliminates the misleading language about lobbying other public officials and strikes the outdated term "telegraph"; and
- (5) requires electronic reporting (although the bill does not specify whether electronic reporting includes a submission of a digitized hard copy of the reporting form).

*(See [PD 04](#), drafter Scurr)*

## CONCLUSION AND NEXT STEPS

This paper discussed only those issues chosen by the committee at its Jan. 16, 2020, meeting and offered preliminary bill drafts as starting points for further discussion. The committee may act to revise, adopt, or drop any of these bills at any time after appropriate notice, public comment, and discussion.

State Administration and Veterans Affairs  
Zoom Remote Meeting  
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Staff Summary of Lobbying Revisions  
Exhibit 1

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