CENTER for COMPETITIVE POLITICS
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July 14, 2015

BY EMAIL (CPPRules@mt.gov)

The Hon. Jonathan Motl
Commissioner of Political Practices
State of Montana
1209 Eighth Avenue
Helena, MT 59620

Re: Comments regarding proposed changes to ARM § 44.10.301 *et seq.*

Dear Commissioner Motl:

The Center for Competitive Politics ("CCP")[1] submits these comments in response to your office's initial draft of its proposed changes to Montana's campaign finance regulations. The proposed rules go beyond even the already expansive authority the Montana Legislature recently granted to your office in SB 289, and are thus contrary to law. The proposed rules are also unconstitutionally vague and overbroad and alarming in the absolute discretion they purport to grant to one individual to regulate political speech in all of Montana.

A) The Proposed Rules Exceed the Commissioner's Statutory Authority

A cardinal principle of American administrative law is that an agency's jurisdiction is limited by the authority granted to it by statute.[2] The proposed regulations exceed the Commissioner's statutory authority in at least two important respects.

First, the proposed rules purport to introduce a new definition for the term "election activity" that goes far beyond how that term is used in the statute.[3] The statute itself, as amended

[1] The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, it presently represents nonprofit, incorporated educational associations in challenges to state campaign finance laws in Colorado and Delaware and recently won a case in the Nevada Supreme Court. It is also involved in litigation against the state of California.

[2] *See, e.g.*, *Schuster v. Northwestern Energy Co*., 373 Mont. 54, 57 (2013) (holding that the Montana Public Service Commission had "no authority over the dispute because '[t]he relief sought has nothing to do with the regulation of public utilities *as contemplated by the statutes*.'") (emphasis added); *Flathead Citizens for Quality Growth, Inc. v. Flathead County Bd. of Adjustment*, 341 Mont. 1, 25 (2008) (noting that a county board of adjustment's "authority is constrained by the statute").

by SB 289, does not impose any affirmative legal obligations on "election activity." In fact, the term appears only twice in Section 14 of the Act in the following contexts:

> (1) The reports required under 13-37-225 through 13-37-227 from incidental committees must disclose the following information concerning contributions to the committee that are designated by the contributor for a specified candidate, ballot issue, or petition for nomination or that are made by the contributor in response to an appeal by the incidental committee for contributions to support ***incidental committee election activity***, including in-kind expenditures, independent expenditures, election communications, or electioneering communications . . .
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> (4) An incidental committee that does not receive contributions for a specified candidate, ballot issue, or petition for nomination and that does not solicit contributions for ***incidental committee election activity***, including in-kind expenditures, independent expenditures, election communications, or electioneering communications, is required to report only its expenditures.
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> 64th Legislature, SB 289 § 14 (emphasis added).

It is indisputably clear from the context in which it is used that the phrase "election activity" refers only to the specific activities enumerated after the limiting word "including." Notably, the Legislature did not use the phrase "including, but not limited to," or otherwise specify after the enumeration of these activities that "other similar activities" also may have to be reported by incidental committees. Indeed, aside from the activities enumerated here – *viz.* "in-kind expenditures," "independent expenditures," "election communications," and "electioneering communications" – the statute provides for no other activities that may trigger "incidental committee status."[4] In short, the statute does not contemplate that some sort of more generalized, free-floating "election activity" would also require entities to register and report as "incidental committees."

In contravention of the plain text of the statute, the proposed rules not only purport to define the term "election activity" in exceedingly vague and broad terms that go beyond the specific activities contemplated by the statute (a point which I discuss more fully in the next section), but they also purport to use "election activity" (1) to determine an entity's "primary purpose" for the purposes of political committee status;[5] (2) to impose reporting requirements tied to "reportable election activity";[6] and (3) to determine when an expenditure is deemed to be

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[3] Proposed ARM 44.10.301(16).

[4] *See* SB 289 § 2, to be codified at Mont. Code §§ 13-1-101(22)(a) (defining "incidental committee"); 13-1-101(17)(a)(ii) (defining "expenditure"); 13-1-101(24) (defining "independent expenditure").

[5] Proposed ARM 44.11.203(2)(e) and (g).

[6] Proposed ARM 44.10.301(31) and 44.10.531(7)(b).

"coordinated" and therefore an in-kind contribution.[7] Not a single one of these uses of the wholly made-up concept of "election activity" is authorized by the statute.

The second way in which the proposed regulations exceed the Commissioner's statutory authority is in the vague and open-ended definition of "electioneering communications." The statute is indisputably clear in defining an "electioneering communication" as:

> a paid communication that is publicly distributed by radio, television, cable, satellite, internet website, newspaper, periodical, billboard, mail, or any other distribution of printed materials, that is made within 60 days of the initiation of voting in an election, that does not support or oppose a candidate or ballot issue, that can be received by more than 100 recipients in the district voting on the candidate or ballot issue, and that:
> (i) refers to one or more clearly identified candidates in that election;
> (ii) depicts the name, image, likeness, or voice of one or more clearly identified candidates in that election; or
> (iii) refers to a political party, ballot issue, or other question submitted to the voters in that election.[8]

Unlike Section 6 of SB 289, which invites the Commissioner to come up with criteria for determining an entity's "primary purpose," the Legislature notably did not invite the Commissioner to put his own additional gloss on the Legislature's definition of an "electioneering communication."[9] And yet the proposed rules would give the Commissioner unfettered discretion in considering a seemingly boundless universe of other unspecified "facts and circumstances surrounding [a communication's] creation and distribution" in determining whether certain speech is an "electioneering communication."[10] Where in the statute is the Commissioner given such sweeping authority?

B) The Proposed Rules Are Unconstitutionally Vague and Overbroad

While vague regulations must be avoided as a general matter,[11] it is especially essential that regulations concerning political speech be as precise as possible. As the U.S. Supreme Court has stated, "[W]here a vague statute 'abut[s] upon sensitive areas of basic First Amendment

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[7] Proposed ARM 44.11.602(1).

[8] SB 289 § 2, to be codified at Mont. Code §§ 13-1-101(15)(a).

[9] *Compare id.* with SB 289 § 6.

[10] Proposed ARM 44.11.605(4).

[11] *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.").

freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to 'steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.'"[12] Even when a regulation "merely" imposes registration and reporting requirements on political speakers, the Supreme Court has ruled that such requirements still "burden the ability to speak," and are subject to an "exacting scrutiny" standard of judicial review.[13]

1. *The proposed rules' definition of "election activity," "primary purpose," and "coordination" are void for vagueness.*

As discussed above, the proposed regulations' definition of "election activity" goes beyond the four types of speech enumerated in the statute as "incidental committee election activity." Instead, the proposed rule purports to regulate "any action . . . that concerns, relates to, or could be reasonably interpreted as an attempt to influence or affect an election."[14] This language is so broad that it is simply impossible for anyone speaking (or not speaking) on any political (or non-political) topic to know in advance whether they will be subject to regulation.

While the open-ended "reasonably interpreted" language in the proposed definition already goes beyond the relatively more objective "*no* reasonable interpretation" standard the statute uses to define the term "support or oppose,"[15] it is also just one factor for determining "election activity"; it does not limit in any way the boundless scope of the rest of the definition of "election activity." Instead, *any* "action" that "concerns" or "relates to" or is an "attempt to influence or affect an election" may be regulated as an "election activity." Because there is absolutely no "proximate cause" type of limitation built into this concept, if a butterfly flaps its wings and sets off a chain reaction that affects an election in some manner, however minimal, that "action" could "relate[] to" an election and be deemed an "election activity."[16]

Setting aside the theoretical "butterfly effect," take the more concrete examples of a nonpartisan voter registration or get-out-the-vote drive or a news story or editorial. While the statute has properly exempted such communications from regulation as "election communications" and "electioneering communications,"[17] the definition of "election activity" in the proposed rules is so vague that it acts as a catchall that very likely subjects these activities to

[12] *Id.* at 109 (internal citations omitted).

[13] *Citizens United v. FEC*, 558 U.S. 310, 366 (2010).

[14] Proposed ARM 44.10.301(16).

[15] *Compare id.* with SB 289 § 2, to be codified at Mont. Code § 13-1-101(47).

[16] *See, e.g.*, "Butterfly effect," *Merriam-Webster Dictionary*, *at* http://www.merriam-webster.com/dictionary/butterfly%20effect.

[17] *See* SB 289 § 2, to be codified at Mont. Code §§ 14(b) and 15(b).

the same regulatory effects (namely, registration and reporting requirements),[18] thereby vitiating the exemptions the Legislature enacted.[19]

The proposed regulations' treatment of "primary purpose" and "coordination" are similarly vague. As a preliminary matter, it is impossible to tell from the face of many of the factors for determining a group's "primary purpose" which way they cut, or how any one or more of these factors are to be weighed against the others. For example, how does "the number of persons, individuals, members, participants, or shareholders" affect "primary purpose," and how is this factor even applied? "Number of persons" . . . what, or where? Assuming this means the "number of persons" an entity has (whatever that means), does a greater or smaller "number of persons" indicate more or less of a "primary purpose of supporting or opposing candidates"? The proposed rules do not say.

Even worse, the factors for determining "primary purpose" and "coordination" include "but are not limited to" to the ones set forth in the proposed rule, and thus could entail whatever other factors the Commissioner may conjure up at any given time, without any advance notice to the public.[20] This lack of "explicit standards" invites the type of "arbitrary and discriminatory enforcement" the U.S. Supreme Court has warned against.[21] It gives the Commissioner dangerous and unlimited discretion to regulate for or against anyone he wishes on any basis he chooses, and flies in the face of the principle that ours is a "government of laws, not of men."[22]

2. *The proposed rules are overbroad in their discrimination against newcomers.*

Not only are the proposed rules void for vagueness, but they are also overbroad in their presumption that any groups formed during the six months immediately preceding voting in any election have a "primary purpose" of affecting the election if they make expenditures or accept contributions exceeding the $250 threshold.[23] First, this provision suffers from the obvious defect that it does not link a group's expenditures to the relevant upcoming election. Thus, even if a relatively new entity makes expenditures related to an election more than six months out, it is still presumed to have the "primary purpose" of affecting the election coming up within the next six months.

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[18] *See* notes 5 and 6, *supra*.

[19] The proposed rules exempt "election activity" in the form of news stories and editorials only from regulation as a "coordinated expenditure," but not from the other registration and reporting requirements generally applicable to "election activities."

[20] Proposed ARM 44.11.203(2) and 44.11.602(2).

[21] *See* note 11, *supra*.

[22] *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

[23] Proposed ARM 44.11.203(2)(i).

Putting that aside, as the U.S. Supreme Court has noted, "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application."[24] The most salient issues tend to vary from one election to another. A legislative issue may arise suddenly, and citizens may wish to band together quickly to speak about that issue. If the issue is closely associated with particular politicians, a group that has just formed to address that issue should not be subject to greater reporting burdens than a preexisting group if both groups sponsor a few expenditures advocating for or against those politicians. The proposal to treat new and preexisting groups differently, even if they engage in identical speech, violates a basic principle of fairness, as well as the Constitution. As the U.S. Supreme Court has stated, "the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."[25]

C) Conclusion

For these reasons discussed above, CCP urges the Commissioner to substantially revise the proposed rules.

Respectfully yours,

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Center for Competitive Politics

[24] *Buckley v. Valeo*, 424 U.S. 1, 42 (1976).

[25] *Citizens United*, 558 U.S. at 350.

[26] Eric Wang is also Special Counsel in the Election Law practice group at the Washington, DC law firm of Wiley Rein, LLP. Any opinions expressed herein are those of the Center for Competitive Politics and Mr. Wang, and not necessarily those of his firm or its clients.