PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Montana Legislative Services Division

Legal Services Office

TO: State Administration and Veterans' Affairs Interim Committee

FROM: K. Virginia Aldrich

DATE: August 18, 2015

RE: Legislative Administrative Rule Review Report

Pursuant to 5-5-228, MCA, the State Administration and Veterans' Affairs Interim Committee is responsible for reviewing administrative rules within its jurisdiction. Staff for the State Administration and Veterans' Affairs Interim Committee has prepared this report for informational purposes only. This report does not represent any action or opinion of the State Administration and Veterans' Affairs Interim Committee and does not preclude additional action that may be taken by the State Administration and Veterans' Affairs Interim Committee pursuant to its authority under the Montana Administrative Procedure Act (Title 2, chapter 4, MCA).

MAR NOTICE NUMBER: 44-2-207

AGENCY/BOARD: Commissioner of Political Practices (CoPP)

RULE CLASSIFICATION: (e.g. substantive/interpretative/emergency/temporary): Substantive

SUBJECT: CoPP Rules Concerning Campaign Finance Reporting, Disclosure, and Practices

NOTICE DESCRIPTION: (e.g. proposal notice/adoption notice): Notice of Public Hearing on Proposed Adoption, Transfer, Transfer and Amendment, and Repeal

SUMMARY OF RULE(S): The Commissioner of Political Practices proposes to adopt 12 new rules, transfer five rules, transfer and amend 43 rules, and repeal five rules. Staff has provided the CoPP with comments and other suggestions for the improvement of wording and accuracy of the rules, such as noting that statute requires that rules "may not unnecessarily repeat statutory language" (2-4-305(2), MCA) or suggesting that certain statutes be added or deleted from the list of implemented statutes or authority-granting statutes. A general overview of the proposed rules and significant potential issues are noted below, but this memo is not intended to be an exhaustive list of the amendments and updates found within the proposed rulemaking notice. Committee members should refer to the text of the proposed rule notice for the exhaustive list of amendments and policy decisions concerning this rulemaking notice.

New Rule I provides a definition for “primary purpose” and clarifies the criteria that the Commissioner of Political Practices may use to determine whether the primary purpose of a committee is to support or oppose candidates or ballot issues. This determination results in whether the committee must report as an independent committee, ballot issue committee, political party committee, or incidental committee. Staff has suggested sections 13-1-101 and 13-37-114, MCA, be added to the list of implemented statues because the use of “primary

purpose” does not occur in the statutes currently listed in the implemented statutes (though the reporting based on the determination of a political committee’s primary purpose is reflected in the implemented statutes). In statute, "primary purpose" was added by Senate Bill 289 (Ch. 259, L. 2015) in the definition of "incidental committee" in 13-1-101, MCA. However, it added it by saying an incidental committee "is not specifically organized or operating for the primary purpose of supporting or opposing candidates". Although *not* the primary purpose of an incidental committee, the statute directs the CoPP to determine the "primary purpose" by rule for purposes of the definition of "incidental committee." The term also appears in the definition of "independent committee". In the reasonable necessity statement, the CoPP clarifies that the CoPP has adopted the primary purpose rule for the definition of an independent committee, rather than an incidental committee.

New Rule II consolidates and clarifies the statutory requirements for candidate filings, including the candidate, campaign treasurer, and campaign depository requirements for a statement of candidacy.

New Rule III provides that state officers and candidates, including judicial candidates for state district court or the Supreme Court, must file a business disclosure with the CoPP. Staff has suggested that the cited authority be updated to 2-2-136, MCA, because 13-37-114, MCA, only provides rulemaking authority for implemented statutes in Title 13, chapters 35 and 37. Staff has requested that the CoPP clarify language concerning “elected candidates” to apply only to statewide or state district offices, as the currently wording appears broader than the intention of the rule.

New Rule IV specifies the commissioner’s options if a candidate or political committee fails to file required statements, disclosures, or reports.

New Rule V provides requirements for candidates or political committees accepting electronic contributions, including a requirement that electronic contributions must be reported as received *on the day the electronic contribution is made* to the online service provider or payment gateway. However, the two implemented statutes appear to differ on when reports are due. The first statute states that "[a] statement showing the amount received from or provided by each person and the account in which the funds are deposited must be prepared by the campaign treasurer at the *time the deposit is made*" (emphasis added) (13-37-207, MCA). The second statute requires the disclosure of "the amount and nature of debts and obligations owed to a political committee or candidate . . ." (13-37-229, MCA). The two statutes differ on whether the contributions must be reported at the time the contribution is deposited or at the time the debt and/or obligation is created; but because section 13-37-207, MCA, appears to specifically address the issue of contributions being deposited into an account, it is not clear whether the proposed rule fulfills the Legislature's intentions. However, the CoPP notes that because both statutes require reporting, once as an obligation and once as funds received, the proposed rule will prevent duplicate reporting requirements for the same contribution.

New Rule VI provides requirements and examples for attributions on election materials.

New Rule VII provides a definition for a "coordinated expenditure", factors for determining or considering whether an election communication, electioneering communication, or election activity constitutes a coordinated expenditure, and expenditures not considered coordinated expenditures. The rule provides a rebuttable presumption that there is coordination in specific instances as delineated in the rule; however, the rule provides certain exceptions to the rebuttable presumption if a vendor engaging in arms-length transactions submits a "single written firewall statement for any applicable twelve-month election cycle". The rule specifies that coordinated expenditures will be treated and reported as in-kind contributions, and they are reportable by the candidate and the political committee.

New Rule VIII provides guidelines for the commissioner to determine de minimis acts, and it also provides examples of acts considered to be de minimus in the past that have not triggered reporting and disclosure obligations.

New Rule IX generally restates the statutory definition and statutory requirements concerning election communications.

New Rule X explains the definition of electioneering communication and lists exceptions. Senate Bill 289 (Ch. 259, L. 2015) instructed the CoPP to determine which communications would not be classified as an electioneering communication by rule. This rule provides that communications not classified as electioneering communications include communications that depict the name, image, likeness, or voice of one or more clearly identified candidates or of a political party, ballot issue, or other question submitted to the voters but that are susceptible to no reasonable interpretation other than as unrelated to the election, the voter information pamphlet by the Secretary of State, and any communications by local government or state agencies that only includes non-election information about a candidate, ballot issue, or election. Staff has suggested that language to clarify what "non-election information about a . . . ballot issue, or election" means be added to the exceptions. New Rule X also adds that an electioneering communication "may also include an independent expenditure".

New Rule XI clarifies statutory terminology and requirements with respect to fair notice periods for campaign advertising.

New Rule XII prohibits the personal use of campaign funds by a candidate, candidate's family, or staff of a candidate's campaign, defines expenditures considered to be made for "personal use", provides exceptions, and provides requirements for the disposal of personal and real property purchased with campaign funds. Statute currently provides that *surplus* campaign funds may not be used "for personal benefit." The CoPP notes that the definition of "expenditure" specifies that it does not mean "payments by a candidate for a filing fee or for personal travel expenses, food, clothing, lodging, or personal necessities for the candidate and the candidate's family". The CoPP notes in the statement of reasonable necessity that "[t]he use of campaign funds for personal expenditures such as meals, lodging, and utilities does enable a candidate of lessor means to be able to take time off of their primary job and campaign for public office. This alternative has been thoroughly considered, but was ultimately rejected based on the

requirements of the statute and in the face of the larger public trust obligation of expending campaign funds in a manner that supports the candidacy, rather than the candidate." The CoPP states that the CoPP "believes such a rule is needed to clarify existing responsibilities and obligations of candidates and committees in regards to use of campaign funds".

The CoPP proposes to transfer and amend 43 rules, including rules relating to definitions. Many rules were updated for consistency, grammar, and updated rule numbers.

Of the more substantive transfer and amendments, the CoPP proposes to update the definition of "contribution" (proposed to be 44.11.401). The proposed definition excludes "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 benefit the associational interest of the political party but also constitute election activity benefitting a particular candidate of the same political party." The rule also provides that "any coordinated expenditure not counted toward contribution limits . . . must be reported as a contribution and shall be reported based upon the actual cost for such paid staff . . . ." Thus, the CoPP proposes to exempt paid staff by political parties from aggregate political party contribution limits, but the CoPP proposes to require disclosure as a contribution. As the CoPP notes in its statement of reasonable necessity, "[t]his determination is set out in the CoPP's Advisory Opinion COPP-AO-2014-009." The CoPP advisory opinion gives a detailed analysis of the CoPP's position.[1] However, the definition of "contribution" in Title 13 provides:

> "'Contribution" means . . . 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 . . . . (13-1-101, MCA) (emphasis added).

The CoPP's advisory opinion stated that "it is the opinion of the Commissioner that value of paid personal services provided to a candidate's campaign and paid for by a political committee is a contribution . . . . However, a political committee's provision of, or payment for, personal services providing internal legal and accounting services to a political committee or candidate committee for non-election purposes is not such an in-kind contribution. Further, a provision of in-kind paid personal services by a political party committee to a candidate, while still a contribution for reporting and disclosure purposes, does not count toward the monetary limits placed on contributions by political party committees." In the opinion, the CoPP argues that the overall definition of "contribution" includes "anything of value" and the definition of volunteer services suggest that the correct approach to statutory construction in this instance should give effect to all provisions by counting the contributions toward disclosure but not toward the aggregate limits. The CoPP notes that "[m]uch of Montana Title 13 statutory language, including [this exception] was borrowed from comparable federal law. The FEC . . . interpreted the contribution language to mean that contribution included all paid personal services except for the internal, non-electioneering legal and accounting services provided to the political or

[1] This opinion is available on the CoPP website at: http://politicalpractices.mt.gov/content/5campaignfinance/SandyWelchAParticularDefinitionofContributionAdvisoryOpinion

candidate committee."[2] The CoPP opinion notes that the FEC "by advisory opinion, limited the language to apply to internal legal/accounting work." Furthermore, the CoPP opinion "attempt[s] to reconcile and create consistency in the [CoPP's] previous positions on this issue." The CoPP notes that it has a 20 year history of interpreting the provision to "require in-kind contribution reporting and disclosure of the value of election use of paid staff by any entity involved in a ballot issue campaign." Because the law applies equally to ballot committees and candidate committees, the CoPP argues, the statute should be interpreted the same for both. Although the CoPP cites 1-2-101, MCA, ([w]here there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all"), the same statute also instructs a judge "not to insert what has been omitted or to omit what has been inserted." Furthermore, the very next statute instructs that "[w]hen a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it" (1-2-103, MCA). Contrary to the CoPP's previous treatment of ballot committee, the CoPP's advisory opinion issued in 2014, and the proposed rule, the text of the definition of "contribution" appears to potentially be broader than the exception for political parties under this proposed rule. The bill draft for Senate Bill 289 originally deleted the language at issue from the definition of "contribution," but the bill was amended on second reading to insert the text back into the definition.

Furthermore, when an expenditure is made, it is reportable by the entity making the expenditure. The definition of expenditure exempts "services . . . provided in a manner that they aren't contributions under [the definition of contribution]". Thus, if a contribution is exempted under the definition of "contribution", it is also exempted from reporting as an expenditure; both contributions and expenditures are required to be reported under 13-37-225, MCA. Because of the potential inconsistency between the text of the statute and the proposed rule, it is not clear whether the rule sufficiently fulfills the mandates of 2-4-305, MCA, which provides that the adoption of a rule "is not valid or effective unless it is . . . consistent and not in conflict with the statute". If the proposed rule is deemed inconsistent with the statute, further changes to the proposed rules may be required (such as an exception in New Rule VII concerning coordination, under the rule discussing in-kind contributions in 44.11.403, under the definition of "in-kind expenditure" and "coordinated expenditure" in 44.11.501, and under the discussion of campaign expenses in 44.11.502).

The transfer and amendment of the extended definition of expenditure (proposed to be transferred to 44.11.501) includes the requirement that a candidate must report any campaign

[2] Previously, the definition of a "contribution" in federal law included "the payment, by any person other than a candidate or political committee, of compensation for the personal services of another person which are rendered to such candidate or committee without charge for any such purpose", similar to the wording at issue here. This was subsequently replaced with language that said a contribution "means the payment, by any person other than a candidate or a political committee, of compensation for the personal services of another person which are rendered to such candidate or political committee without charge for any such purpose, except that this paragraph shall not apply in the case of legal or accounting services rendered to or on behalf of the national committee of a political party . . . other than services attributable to activities which directly further the election of a designated candidate or candidates to Federal office, nor shall this paragraph apply in the case of legal or accounting services rendered to or on behalf of a candidate or political committee solely for the purpose of insuring compliance with the provisions of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954. . . . Section 2 USC § 431. Congress eventually simplified the problematic language by providing a contribution includes "the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose." Section 52 USC § 30101.

expenses paid personally by a candidate.

The transfer and amendment of the definition and type of political committees (proposed to be 44.11.202) consolidates and restates the rules related to types of political committees, moved into statute from rule by Senate Bill 289. It also discusses the treatment of "subunits of a main political committee" and "subunits within those entities defined under 'person'" as separate political committees.

The transfer and amendment of a rule concerning elections to which aggregate contribution limits apply (proposed to be 44.11.222) and the transfer and amendment of designations of contributions for primary and general elections (proposed to be 44.11.224) include discussions concerning aggregate contributions in sections 13-37-216 and 13-37-218, MCA. Although "aggregate contributions" in 13-37-216, MCA, relate to *each* election, section 13-37-218, MCA, relates to "total combined monetary contributions from all political committees . . . ." Because of this distinction, staff has discussed these two rules with the CoPP, and the CoPP has agreed to strike the references to 13-37-218, MCA, from these rules concerning "aggregate contributions", since that terminology is not used in 13-37-218, MCA, and that statute refers to an aggregate counted over the entire election cycle, rather than each election. The CoPP has also agreed to update the language in 44.11.222(1) to reflect that the aggregate contributions apply to "each election in a campaign" consistent with the statute.

The transfer and amendment of the disposal of surplus campaign funds and property rule (proposed to be 44.11.702) inserts provisions concerning the disposition of personal and real property.

The transfer and amendment of a rule regarding aggregate contribution limits for write-in candidates (proposed to be 44.11.223) inserts a requirement that a write-in candidate who ran unsuccessfully in a primary must close the primary election account and may not use any primary election funds for the write-in election campaign. The CoPP notes that the statute noting that a candidate cannot dispose of surplus campaign funds by contributing it to another campaign is located in 13-37-240, MCA, and the CoPP will add this statute to the list of implemented statutes.

The transfer and amendment of limits on receipts from political committees (proposed to be 44.11.226) updates the total combined contributions from political committees other than political party committees for the 2016 election cycle as required by statute.

The transfer and amendment of the filing of statement of report (proposed to be 44.11.302) provides that statewide candidates, incidental committees, independent committees, statewide ballot issue committees, and political party committees must file their reports electronically. It also provides that state district candidates must file electronically if the contributions received or expenditures made exceeds $500, but state district candidates can apply for a waiver. Staff has asked the CoPP for a clarification as to whether incidental and independent committees must file electronically routinely or only if they have made an expenditure related to statewide candidates.

The CoPP is working on a response. The CoPP has also agreed to amend the language in subsection (2) to delete the reference to a "committee" to clarify that only candidates can apply for a waiver.

The transfer and amendment of a rule concerning in-kind contributions (proposed to be 44.11.403) and in-kind contributions (proposed to be 44.11.503) inserts new requirements that upon receiving or making an in-kind contribution or in-kind expenditure, its value shall be calculated and reduced to writing subject to a specific calculation method described in the rule.

The transfer and amendment of reporting loans as contributions (proposed to be 44.11.405), the transfer and amendment of reporting debts and obligations owed to a candidate or political committee (proposed to be 44.11.505), and the transfer and amendment of reporting debts and obligations owed by a candidate or political committee (proposed to be 44.11.506) add requirements that state that the terms of all loans to a candidate must be written, signed by the parties, retained, and made available for inspection.

The transfer and amendment of reporting of expenditures (proposed to be 44.11.502) includes a directive to independent, political party, and incidental committees that they must, "within two business days of making an expenditure of $500 or more for a reportable election activity, file a Form C-7E if the expenditure is made between the 17th day before the election and the day of the election". Although most independent committees, political party committees, and incidental committees are required to file "within 2 business days of making an expenditure of $500 or more for an electioneering communication if the expenditure is made between the 17th day before the election and the day of the election", not all of these committees are subject to this reporting requirement under 13-37-226, MCA. The CoPP has agreed to update the proposed text to reflect the exclusions in 13-37-226, MCA. Furthermore, in the proposed rule, the CoPP requires these committees to report expenditures for "reportable election activity", a broadly defined term. However, 13-37-226, MCA, requires expenditures for "an electioneering communication." The CoPP has agree to update the rule's language for consistency with the requirements of the statute.

The CoPP also proposes to repeal five rules because the CoPP has transferred, clarified, and updated the information in the other rules found in this notice.

NOTES: Public hearings are scheduled for September 2 and 3, 2015, from 9 a.m. until 4 p.m. in Room 303 (the Old Supreme Court Chambers), State Capitol Building, Helena, Montana. The public comment period ends on September 10, 2015.

FULL TEXT OF NOTICE: The full text of the notice proposal may be found online at **http://www.mtrules.org/gateway/ShowNoticeFile.asp?TID=6555**

Cl0134 5230gafa.