

"Montana Disclose Act" Signed Into Law; Important Details To Be Determined

May 2015

Montana Governor Steve Bullock signed the "Montana Disclose Act" into law late last month after several attempts to enact similar measures had failed in prior legislative sessions. Bullock hailed the law in a press release as an important measure in "requiring improved disclosure" that "will make Montana elections the most transparent in the nation." However, a closer examination of the final bill text that was signed into law reveals that the legislation punts the most important issue it purports to address over to the state's Commissioner of Political Practices. How the law will function in practice thus remains to be determined by administrative rulemaking.

The most significant and contentious issue that proponents of the Montana Disclose Act sought to tackle was so-called "dark money" groups that sponsor advertisements and other public communications deemed to be election-related, but that have not been required to disclose their donors. Similar to many other jurisdictions, Montana's preexisting law provided that a group whose "primary purpose" is "for the purpose of influencing the results of an election" must register with the state as a political committee and report its expenditure and contributor information on publicly available disclosure reports. Under Montana's current administrative regulations, entities that engage in election-related activities, but that do not have such activities as their "primary purpose," are deemed to be "incidental committees." Incidental committees are required to register and report their expenditure information, but are required to report information about contributors only if they provided funds "earmarked for a specified candidate, ballot issue, or petition for nomination."

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The point at which an entity engaging in political speech in Montana must disclose information about all of its donors (as opposed to only those who earmark their contributions) has thus depended on two interrelated factors: 1) whether its activities are political "expenditures" (i.e., made "for the purpose of influencing" elections); and 2) whether such activities are its primary purpose. The Montana Disclose Act does not deviate from this basic framework, but puts a finer point on these two issues.

Montana's preexisting law does not clearly define when an activity is deemed to be a political expenditure, although the regulations provide that communications "expressly advocating the success or defeat of a candidate or ballot issue" are "independent expenditures" if they are made independently of any candidate or political committee. In addition, the Commissioner of Political Practices, relying on a 1987 opinion by the U.S. Court of Appeals for the Ninth Circuit, has stated that political expenditures may include speech that, "when read as a whole, and with limited reference to external events, [is] susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."

The Montana Disclose Act expands the universe of speech deemed to be political expenditures by including not only express advocacy and communications "susceptible of no other reasonable interpretation," but also "electioneering communications," which are certain public communications made within 60 days of the start of voting in an election and that merely refer to candidates running in the election.

With respect to the dividing line between when an entity is an "incidental committee" and when its "primary purpose" is that of a full-blown political committee required to report all of its donors, the preexisting Montana statute and regulations do not provide any guidance on this issue. The Montana Disclose Act leaves this question to the Commissioner of Political Practices to decide by administrative rulemaking, but specifies that the Commissioner must consider "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." The new law does not specify, however, any numerical threshold for determining an entity's "primary purpose," or how low the Commissioner may set such a threshold. In short, sponsors of political messages or issue advocacy mentioning candidates in the 60 days before an election will be at the mercy of the Commissioner in terms of whether they must disclose their donors, much as they were before.

The Montana Disclose Act also makes a number of other important changes to the state's campaign finance laws. Whereas labor unions had been permitted to make contributions to candidates in Montana, as an apparent inducement to gain legislative support for the bill, the law now prohibits such contributions, thus putting unions on equal footing with corporations. At the same time, the law now permits both corporations and unions to make contributions to state PACs; under preexisting Montana law, corporations had been prohibited from contributing to state PACs. As before, corporations and unions also may establish "separate segregated funds" to solicit and accept voluntary political contributions from their employees, shareholders, and members.

Additionally, the Montana Disclose Act imposes new disclaimer requirements for election-related communications, alters the reporting deadlines for political committees, and provides for a somewhat less extensive reporting schedule for incidental committees.

The Montana Disclose Act does not contain an effective date. As a general matter, the default effective date in Montana for new legislation is the first day of October following passage by the legislature and approval by the governor.