

COMMISSIONER OF POLITICAL PRACTICES



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Subject: Complaint received October 7, 2010 against Montana Shrugged

You filed a complaint alleging that Montana Shrugged Tea Party Patriots violated campaign finance and practices statutes. As more specifically described below, Montana Shrugged is a membership organization formed in 2009, and has become involved in certain public policy discussions. According to the complaint, activities engaged in by Montana Shrugged "may" violate Montana campaign finance and practices laws.

Allegations

1. Prior to the election Montana Shrugged's website included a "YC Candidates" page listing Republican and Democratic candidates for public office in the 2010 elections. Republican candidates were generally described by the phrases "higher wages, lower taxes, limited government" and the Democrat candidates were described by the phrases "the party of spending and increased deficits."
2. Montana Shrugged's website contains a page called "The Patriot Chronicles," which is an archive of broadcasts of the organization's television program that is aired in Billings. There is a cost for the television access. The Patriot Chronicles program appears partisan, you allege, and sometimes consists of interviews or discussions with Republican candidates for the Montana Legislature and others, such as Republican US Congressman Denny Rehberg.
3. Montana Shrugged has a YouTube page where the videos described above are available for viewing. Montana Shrugged has also posted on its YouTube page promotional text for some candidates it interviewed, including Montana Senate candidate Roy Brown, a Republican.
4. Montana Shrugged maintains an email distribution list through which it sends emails to its members. The email service is provided by ConstantContact, which charges a monthly fee. The emails distributed by Montana Shrugged to its membership sometimes include language urging support for or opposition to candidates.

5. Montana Shrugged founders Eric and Jennifer Olsen have made statements on the Montana Shrugged website indicating that Montana Shrugged would be supporting and opposing certain candidates for public office. The complaint alleges that these statements are clear and unambiguous speech, indicating that a main purpose of Montana Shrugged is to support Republican candidates for public office.
6. The complaint alleges that Montana Shrugged may have made expenditures to create signs displayed at rallies, including an October 6, 2010 rally to support the candidacy of Roy Brown.
7. The complaint alleges that Montana Shrugged is located in an office building in Billings that presumably requires payments for rent, utilities, equipment, and supplies. According to the complaint, a portion of those expenditures must be used for the purpose of supporting or opposing candidates. In the alternative, according to the complaint, a person or corporation may have donated space and equipment to Montana Shrugged, resulting in in-kind contributions or expenditures.
8. The complaint alleges that Montana Shrugged appears to receive revenue from the sale of t-shirts, decals, buttons, flags, etc., on its website. In addition, Montana Shrugged accepts donations and contributions from individuals, corporations, and other organizations, which are placed in its general treasury and “may or may not have been earmarked for. . . candidate races.”
9. Montana Shrugged has not registered or reported as a political committee.
10. The complaint alleges that, based on the activities described, Montana Shrugged:
 - failed to register as a political committee and name a treasurer;
 - may have made illegal corporate in-kind contributions;
 - may have produced anonymous election materials;
 - may have failed to designate a campaign depository;
 - may have failed to keep campaign records;
 - may have failed to report their contributions and expenditures for the primary and general elections; and
 - may have violated contribution limits established by Montana law.

Montana Shrugged’s Response and Additional Information Relevant to the Complaint

I received and reviewed a response to the complaint submitted by legal counsel for Montana Shrugged. The response is summarized below, along with additional information that is pertinent to this analysis.

Montana Shrugged represents that it is a Montana non-profit corporation with no corporate members, but with a regular membership. Records of the office of the Montana Secretary of State confirm that Montana Shrugged was incorporated on June 22, 2010 as a public benefit corporation without members.

Montana Shrugged was co-founded by Eric Olsen and his daughter, Jennifer Olsen. Its principal place of business is in Billings, Montana.

Montana Shrugged was originally formed in April 2009, and had amassed more than 2,000 members one year after its founding. Eric and Jennifer Olsen therefore decided to incorporate for liability purposes. Montana Shrugged is organized and operated as a nonprofit social welfare organization under IRS code section 501(c)(4), and currently has nearly 3,000 members.

A person may become a member of Montana Shrugged by visiting its website and clicking on the "Join Us" link, which will add the person's name to Montana Shrugged's membership and email list. There is no charge to become a member.

Montana Shrugged is physically located at 208 North 29th Street, Suite 230, in Billings, Montana. According to Montana Shrugged's response to the complaint, an oil and gas exploration and extraction company is located in the same building, and donates space and computer access to Montana Shrugged.

Montana Shrugged broadcasts a regular half-hour talk show on Community Seven Television, which is a local Billings area cable access channel. The talk show, named "The Patriot Chronicles," is broadcast for one half hour every Thursday evening. Recordings of the show are posted on Montana Shrugged's YouTube webpage.

Montana Shrugged also maintains a Facebook page, a Twitter feed, a blog, and an email distribution system.

According to its website, Montana Shrugged is:

"committed to educating citizens about economic and constitutional issues which affect all citizens' abilities to pursue their inalienable rights for the pursuit of life, liberty, and happiness."

In addition, Montana Shrugged refers to itself as:

"a group of grassroots organizers who engage citizens in the pursuit of limited government," and states that it strives to "empower the public with opportunities to effect change in public policies that champion the principles of entrepreneurship and fiscal and regulatory restraint, i.e., balanced budgets."

Montana Shrugged also claims on its website that it educates citizens about where their elected officials stand on various issues, and "mobilizes citizens to effectively make their voices heard in public policy issue campaigns."

On its website, Montana Shrugged has contact information for Senators Baucus and Tester, Representative Rehberg, Governor Schweitzer, members of the Montana Legislature, Yellowstone County Commissioners, and Billings City Council members.

Montana Shrugged's "The Patriot Chronicles" show is in the format of a talk show, usually with Eric Olsen engaging in a discussion with an invited guest. The discussion each week centers on a particular issue, with the participants, according to Montana Shrugged, discussing and analyzing "policy implications for Montanans and their

government.” Montana Shrugged pays an annual fee of \$400 to the Community Seven Television station, which pays for air time and facility and equipment use.

Guests who have appeared on the show include:

- US Representative Denny Rehberg,
- Mark French (Republican candidate for Congress),
- Corey Stapleton (announced but not filed Republican candidate for Governor in 2012),
- Republican candidates for the Montana Legislature,
- two Republican candidates for Yellowstone County Attorney,
- two Republican candidates for Yellowstone County Commissioner,
- several TEA party organizers,
- several authors,
- a national security consultant, business owners, and other non-candidate guests.

In their response to the complaint, Montana Shrugged lists “candidates. . . from all political parties and across the ideological spectrum” who were also invited to appear on the show:

- Yellowstone County Commissioner Bill Kennedy,
- Senators Baucus and Tester,
- Congressional candidate Dennis McDonald,
- Governor Schweitzer,
- Secretary of State Linda McCulloch, and
- Lt. Governor John Bohlinger.

Thus far, no Democrats have appeared on the program.

According to the response, 14 of 34 guests on the show were non-candidate guests. Of those guests who were candidates for public office, three of them were candidates for federal office.

The complaint alleges that on Montana Shrugged’s YouTube page it posted “promotional text” for some of the candidates it interviewed, including Montana legislative candidates Roy Brown and James Knox. In response, Montana Shrugged states that it provides contact information for its guests to viewers of the Patriot Chronicles program, including the guest’s website if he or she is a candidate for office. Montana Shrugged denies that it distributes campaign materials, and contends that it does not coordinate campaign activities with candidates or their committees.

Montana Shrugged states that it pays ConstantContact \$28 per month to service the organization’s membership email list. Montana Shrugged admits that some emails to members include express advocacy and explicit support of or opposition to candidates in Montana.

An example is an email distributed to the membership that urged support for Montana legislative candidate Roy Brown and provided the date and time for a rally to support Brown (Exhibit G to the complaint.)

In its response Montana Shrugged states that it utilizes its Facebook profile to “reach out to members of the community and communicate about its activities,” admitting that the language used occasionally includes words of express advocacy. Montana Shrugged correctly points out that there is no cost for establishing a Facebook profile. Montana Shrugged states that based on the free Facebook profile and its use of donated office space and computer access, the costs of any communications on its Facebook page that may occasionally include express advocacy are minimal.

Montana Shrugged denies that it paid for or created signs displayed at the rally in support of Roy Brown on October 6, 2010, or on any other date. Montana Shrugged contends that individual rally attendees brought their own signs, and that Montana Shrugged has no control over those persons or the speech they choose to engage in.

Montana Shrugged admits that it sells promotional material on its website, and that it has received donations from individuals and other organizations.

Montana Shrugged admits that it has not registered or reported as a political committee, contending that it is not a political committee under Montana law. Montana Shrugged suggests that much of its speech may qualify for the media exception or the membership communication exception under Montana law. For similar reasons, Montana Shrugged denies that it improperly failed to designate a campaign depository or failed to keep campaign records.

Montana Shrugged argues that, to the extent it may have made any expenditures in support of or opposition to candidates, those expenditures were *de minimis* and therefore did not trigger political committee registration and reporting requirements. It asserts that spending for the “YC Candidates” website page (allegation #1 on page 1 of this letter) totals less than \$5.

Montana Shrugged denies that it has made any illegal corporate in-kind expenditures, denies that it violated contribution limits established by law, and denies that it has produced any anonymous election materials.

Analysis and Discussion

A person who believes a violation of the election laws or rules has occurred may file a written complaint with this office. (44.10.307(1), ARM.) I have authority to dismiss a complaint that is “too indefinite” or that does not contain sufficient allegations to enable me to determine that it states a potential violation of a statute or rule within my jurisdiction. (44.10.307(3)(a), ARM.)

Based on the information provided in the complaint and the response to the complaint, as well as information available on Montana Shrugged’s website, it appears Montana Shrugged is a grassroots membership organization primarily organized to address and discuss public

policy issues related to the goals of requiring governmental fiscal and regulatory restraint, and other aspects of limited government.

The partisan tone of the discussion is not surprising, given their political philosophy. Although the organization's activities may occasionally involve expressions of support for or opposition to candidates, I am not convinced based on the information before me that Montana Shrugged was formed primarily to campaign for or against candidates.

It appears that a substantial portion of Montana Shrugged's activities is exempt from registration and reporting requirements based on either the media exception or the membership communication exception, as explained below.

Montana law requires a "political committee" to register with the office of the Commissioner of Political Practices and file periodic reports of contributions and expenditures. For purposes of the analysis in this case, a "political committee" is two or more persons or an organization, corporation, association, etc., that makes a contribution or expenditure to support or oppose a candidate. (§§ 13-1-101(20) and 13-1-101(22)(a), MCA.)

Definitions of the terms "contribution" and "expenditure" both include exceptions for:

- 1) "the cost of any bona fide news story, commentary, or editorial distributed through the facilities of any broadcasting station . . ." (known as the "media exception") and
- 2) the cost of any communication by any membership organization or corporation to its members. . ." (known as the "membership exception"). (§§ 13-1-101(7)(b)(ii) and (iii), and 13-1-101(11)(b)(iii) and (iv), MCA.)

The emails distributed by Montana Shrugged to its members, as well as any other communications to the members, do not qualify as contributions or expenditures based on the membership exception referenced above. Thus, to the extent that any of the emails or other communications between Montana Shrugged and its members may include words of express advocacy, they are not subject to regulation under Montana's campaign finance and practices laws and rules.

The show known as The Patriot Chronicles qualifies for the media exception under Montana law, as a "commentary or editorial distributed through the facilities of [a] broadcasting station." Therefore, any discussions occurring between the host and guests on the program (whether or not the discussions include words of express advocacy) are not subject to regulation under Montana campaign finance and practices laws and rules.

Regarding the remainder of Montana Shrugged's alleged activities, Montana law defines an expenditure as "a purchase, payment, distribution, loan, advance, promise, pledge, or gift of money or anything of value made for the purpose of influencing the results of an election." (§ 13-1-101(11), MCA; emphasis added.)

"Anything of value" is broadly defined as goods that have a certain utility to the recipient and that are typically not given away for free. (§ 13-1-101(3), MCA.) This definition, however, must

be read together with the 9th Circuit decision in *Canyon Ferry Road Baptist Church v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009) (*Canyon Ferry*).

In 2004, efforts were made to obtain sufficient signatures to qualify Constitutional Initiative 96 for placement on the November 2004 ballot in Montana. CI-96, also known as the Montana Marriage Protection Amendment, would amend the Montana Constitution by providing: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state." The initiative eventually passed, and its provisions are now part of the Montana Constitution.

The church in Canyon Ferry had placed CI-96 petitions in its foyer, allowed one of its members to use the church's copy machine to make a few dozen copies of the CI-96 petition, and the church's Pastor had, as part of a regularly scheduled service, exhorted the attendees to sign the petitions in the church's foyer. Nearly 100 persons signed the petitions that were made available in the church. After investigating a campaign finance and practices complaint, the Commissioner of Political Practices found that the church should have registered as a political committee and reported its campaign activities in support of the ballot issue.

The Court upheld Montana's in-kind expenditure rule, 44.10.323(2), ARM, against a constitutional void for vagueness challenge. The Court also stated that Montana has a sufficient "state informational interest" to justify the mandatory reporting of contributions and expenditures, even in ballot issue campaigns.

The Court held, however, that the absence of a "minimum value threshold" for triggering reporting requirements is unconstitutional as applied to the Court's ballot activities in the case. (*Canyon Ferry*, 556 F.3d at 1028-33.) Observing that "there must be a level below which mandatory disclosure of campaign expenditures by 'incidental committees' runs afoul of the First Amendment," the Court declined to establish a level above *de minimis* at which disclosure could constitutionally be required.

Nevertheless, the Court stated that there could be no justification for the burden of "incidental reporting" to be imposed on the church based on its "extremely minimal in-kind expenditures" in support of CI-96. (*Canyon Ferry*, 556 F.3d at 1034 and note 17.)

Applying the guidance set forth in *Canyon Ferry*, the information presented with the complaint and in Montana Shrugged's response does not support a conclusion that any activities engaged in by Montana Shrugged that could conceivably be interpreted as expenditures under Montana law would have more than a *de minimis* value. Therefore, it does not appear that any of Montana Shrugged's activities that might fall outside of the media or membership exceptions would be subject to regulation under Montana campaign finance and practices laws and rules, due to the apparent minimal value of such activities. (See also Summary of Facts and Statement of Findings in *Matter of the Complaint Against Jack Vallance* (November 17, 2008); and *Matter of the Complaint Against Barbara Campbell, Utility Solutions, LLC, and Double-Tree, Inc* (November 17, 2008).)

For the reasons explained above, I am dismissing your complaint. It is too indefinite, and does not contain sufficient allegations to enable me to determine that it states a potential violation of a statute or rule within my jurisdiction. (44.10.307(3)(a), ARM.)

Based on the information currently before me, there is no basis to go forward with an investigation of the allegations in the complaint, and no further action with respect to Montana Shrugged is warranted.



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Commissioner

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