

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

Jeffrey A. Mangan, Commissioner of Political Practices  To North Fund  No. COPP-2021-ONC-001	ORDER OF NONCOMPLIANCE FIRST AMENDED
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WHEREAS, the COPP issued an Order of Noncompliance on January 11, 2021, ordering North Fund to submit all finance disclosure information as required by Mont. Code Ann. §13-37-229 by January 21, 2021; and

WHEREAS, the North Fund requested reconsideration and provided additional information regarding its 2020 activities on January 15, 2021; and

WHEREAS, the Commissioner and North Fund agree to extend the deadline for compliance by 20 days<sup>1</sup> of the date of this order in order for North Fund to provide the Commissioner the following additional information:

- An accounting of North Fund's reported \$30,222,707 for non-ballot measure related activities<sup>2</sup>, that a minimum include:
  - Dates of expenditures;
  - Amount/s of expenditures;

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<sup>1</sup> February 10, 2021

<sup>2</sup> Correspondence from North Fund dated January 14, 2021, to the COPP

- The name of the vendor, organization, grantee, or recipient;
- And, the purpose of the expenditure.

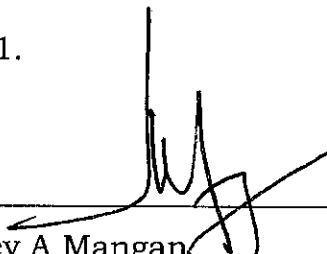
A Copy of North Fund's January 14, 2021, letter is attached. The original Order of Noncompliance is hereby incorporated by reference.

The Commissioner will review the information provided and issue a final agency determination within a reasonable amount of time.

IT IS FURTHER ORDERED that a County Attorney or the Commissioner may, on failure by North Fund to submit the above requested information, within 20 days after receiving this First Amended Order of Noncompliance, may initiate a civil action pursuant to sections §13-37-124 and §13-37-128, MCA; and

FURTHER, if North Fund is aggrieved by the issuance of this Order of Noncompliance, it may seek judicial review in District Court pursuant to section §13-37-122, MCA.

DATED this 21<sup>st</sup> day of January, 2021.



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Jeffrey A Mangan  
Commissioner of Political Practices  
Of the State of Montana  
P. O. Box 202401  
1209 8<sup>th</sup> Avenue  
Helena, MT 59620  
Phone: (406)-444-3919



GALLIK, BREMER & MOLLOY, P.C.

January 14, 2021

Jeffrey A. Mangan, Commissioner  
1209 Eighth Avenue  
P.O. Box 202401  
Helena, Montana 59620-2401

Re: Your Decision dated December 28, 2020 in *Zabawa v. North Fund*, No. COPP  
2020-CFP-043

Dear Commissioner Mangan:

We write in response to your December 28 Decision (hereinafter the “Decision”) in which you concluded that there were sufficient facts to find that North Fund’s proper designation under Montana law is as an independent, rather than incidental, committee, as well as your order of noncompliance subsequently issued on the same basis on Monday, January 11, 2021 (the “Order”). We respectfully submit that the Decision and Order are incorrect and contrary to law and write to request reconsideration.

In support, and specifically in response to the Decision’s express reliance upon the perceived lack of certain information regarding North Fund’s internal operations and its activities and expenditures outside of Montana, we are submitting additional information to you and request that the determination regarding the proper designation of North Fund be re-evaluated, consistent with 44.11.203, ARM.

North Fund presently intends to seek judicial review of the Decision and the Order by filing a petition by next Thursday, January 21, 2021. To ensure that you have time to fully and fairly consider the additional information that we are providing, without having to contend simultaneously with a judicial action that could be mooted should you find that re-evaluation of your determination of North Fund’s status is appropriate, we request that you withdraw your Decision and Order in the interim.<sup>1</sup>

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<sup>1</sup> If, after considering this letter and the additional information we are providing to you, you continue to believe that North Fund should have registered as an independent committee, we would ask that you issue a revised Decision setting forth your reasoning, so that we may then determine whether judicial review remains appropriate.

To be clear, we disagree with the statement in the Decision that this additional information was requested, but not previously provided. At all times, we acted in good faith and made our best efforts to respond promptly and thoroughly to all requests from you. Your original correspondence regarding your decision to reclassify North Fund provided no explanation for the basis of your determination. Without the benefit of that explanation, North Fund made its best attempt to provide the type of details contemplated in 44.11.203 in response. On multiple occasions we requested the opportunity to speak with you to clarify any questions you might have, but your office did not respond to those requests. We also believe that the Decision misconstrued some of the information that North Fund provided to your office. Had we been given the opportunity to discuss these matters, and better understood the basis of your initial reclassification decision, we likely could have clarified some questions raised by your Decision and supplemented these materials earlier. As it stands, we believe that your Decision in this matter created a new precedent for what constitutes an organization's primary purpose that contradicts longstanding practice by COPP and incorrectly categorizes North Fund as an independent committee under Montana law. Now that it is clear from the Decision what you were relying on, North Fund should have a full and fair opportunity to address the criteria that you have applied and to address the perceived informational deficits relied upon in the Decision.

**1. No money contributed to North Fund was earmarked for Montana ballot measures; the decision to make the expenditures was North Fund's alone.**

As an initial matter, and specifically as it relates to your recently-issued Order, your direction that North Fund must provide, separately and apart from the materials we have submitted to you thus far, with "a list of contributors and the amount/s contributed," appears to be based on a fundamental misassumption about North Fund and how its expenditures in Montana were made. This is not a case where contributors gave to North Fund with the intention or even knowledge that those funds would be used to make expenditures in connection with the Montana ballot measures. Nor were contributors involved in North Fund's decision to make any expenditures in Montana. Thus, while North Fund has attempted at all times to comply with Montana campaign finance law and to cooperate with your office, it is not clear how North Fund can comply with your order.

As explained in the accompanying supplemental declaration of Christina Uribe, North Fund's Board Treasurer, North Fund operates on a nationwide level, and none of North Fund's donors earmarked their contributions to support the Montana ballot measures in question, or even to support or oppose Montana measures or candidates generally. Uribe Supplemental Decl. ¶ 14. The decision to make expenditures in Montana this year was the decision of North Fund and its Board members; it was not directed by any contributors to the fund. *Id.* Thus, the amounts "contributed" have already been disclosed to you on North Fund's campaign finance disclosures.

We presume that COPP does not mean to order North Fund to disclose all of its donors nationwide. As discussed below, such an order would clearly overreach far beyond what Montana law allows, and what the federal constitution would permit. But if COPP means to request only that North Fund identify how much was contributed in support of the Montana ballot measures

and who made the decisions to contribute that money to those measures, then COPP already has the relevant information in hand.

Thus, for this reason alone, we request that you reconsider the order of non-compliance issued on January 11. If you will not withdraw the Order on these grounds, we ask that you reconsider your underlying Decision for the reasons that follow.

**2. North Fund is properly characterized as an incidental committee under Montana law.**

The plain language of the governing statutes and administrative rules establish that the question of whether a committee is properly designated as an incidental or independent committee turns on its *primary purpose*. Incidental committees are those that are “not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues, but that may incidentally become a *political* committee” (not an *independent* committee) “by receiving a contribution or making an expenditure.” § 13-1-101(23), MCA (emphasis added). As acknowledged in your Decision, 44.11.202(6) expressly contemplates that incidental committees may make multiple expenditures. (See Decision at 11) (noting that the regulation provides that “Incidental committee *reportable election activity* may consist of: (a) making one or more expenditures”) (emphasis added). Because North Fund is not organized for the *primary purpose* of supporting or opposing ballot issues, it is not appropriately classified as an independent committee. As discussed further below, this is true whether you consider North Fund’s expenditures in Montana alone, or across the nation.

As an initial matter, however, we would like to address the assertion in your Decision, which appeared to be of particular importance to your ultimate conclusion, that North Fund declined to respond to requests for information and allegedly did not provide detailed information about the activities it has supported in other states. We believe that this inaccurately characterizes our communications with your office, as well as misconstrues information that we did provide. As you know, North Fund registered as an incidental committee in March of 2020. It was first notified by a call from a reporter that COPP had determined that its proper classification was instead as an independent committee. That call prompted us to contact your office and it was at that point we obtained the September 11, 2020 letter stating your determination. Although that letter did not explain the basis for your determination, it expressly invited North Fund to request that the determination be reconsidered, as authorized by 44.11.203(6). In multiple responses, North Fund made good faith efforts to provide information to allow you to do so.

First, in our September 30 response requesting reclassification as an incidental committee, we provided a detailed overview of North Fund’s history, mission, and representative sample of the types of programs it supports nationally. North Fund also provided its Articles of Incorporation and a declaration signed by the organization’s treasurer detailing the total of North Fund’s receipts and expenditures each year since its founding.

Your office subsequently requested additional information in a letter dated October 6, 2020, which included a number of prompts and questions framed in broad terms. North Fund

again provided a good faith, detailed response, including a copy of its bylaws. This subsequent response included two requests for an opportunity to speak with you by phone to further understand what information your office was seeking and to answer any questions your office had. Specifically, in the October 23, 2020 transmittal email, we wrote: “As indicated in the concluding paragraph of the letter responding to your request for additional information, Amber Maltbie and I would appreciate an opportunity to speak with you by phone to clarify any questions you may have after reviewing the letters. Please let us know if you will agree to a call and if so, dates and times that would work.” Our response letter (also dated October 23, 2020) included a substantially similar request. Neither request was acknowledged. The only communication we received from your office between providing our October 23 response and the date of the Decision was a request for North Fund’s 2019 990s, on December 16, 2020, which were provided to your office within 24 hours.

Importantly, both our September 30 and October 23 letters describe programs and efforts outside of Montana, some of which is subject to the same public disclosure as the out-of-state-ballot measures that received the special focus of your Decision. For example, we provided you with the information that North Fund is a registered lobbyist employer in six states—Georgia, Iowa, Michigan, Tennessee, Virginia, and Wisconsin. Not only can this be easily verified online, the amounts spent and issues lobbied are available as well. We also submitted to you information that showed that North Fund’s expenditures and grants on non-ballot related activity in 2020 comprised approximately 70% of its total expenditures. Thus, North Fund maintains that, even if we focus solely on the information that was provided to you previously, and upon which you rely to substantiate your conclusion in the Decision, North Fund is properly characterized as an incidental committee under Montana law.

Nevertheless, as the Decision makes clear, you believe you would have benefited from more information. To further substantiate the information previously provided to you, the attached supplemental declaration from North Fund’s treasurer, Ms. Uribe, provides updated information about North Fund’s 2020 ballot measure activity (i.e., not just the activity through the date of our October 23 letter). This establishes that, in the most recent accounting of 2020 activity (current through November 30, 2020), the total amount spent on ballot-measure related activity across the country was only 36.5%, of which the total spent on the Montana ballot measures in question was only 10.6%. *See* Uribe Supplemental Decl. ¶ 5. In terms of total expenditures, North Fund spent nearly \$48 million in 2020, including lobbying expenditures in a total of 20 different states, grants to more than 100 organizations that engage in educational and other non-elections related activity to promote social change, most prominently in the areas of gun violence prevention, voter education and turnout, gender and reproductive equity, enfranchisement and protection of citizens’ rights to have their votes counted (with focus on first-time voters, student voters, and minority voters), and election modernization, payments to contractors and consultants, and minimal personnel expenses. *Id.* ¶ 10. As this information further illustrates, North Fund’s expenditures made in relation to the Montana ballot measures in question are properly classified as incidental.

### 3. The Decision misapplied Montana law and was arbitrary and capricious.

For the reasons discussed above, and as previously set forth in our prior correspondence, we believe that classification of North Fund as an independent committee is not only contrary to law, but was arbitrary and capricious. Historically, your office has treated committees like North Fund that have similarly made expenditures and contributions to Montana ballot measures as incidental committees, and has done so on a far less robust record of those other committees' primary purpose and activities than the one you have before you. The Decision and Order together represent a striking departure from COPP's prior treatment and classification of political committees similarly situated to North Fund, and makes it difficult—and likely, in many cases impossible—for such entities to make decisions about how to engage in political activity in Montana while ensuring that they are not later found in violation of the state's campaign finance laws.

For example, your Decision relies on the fact that North Fund coordinated with New Approach Montana, resulting in in-kind contributions, in concluding North Fund is an independent committee. First, North Fund properly reported making in-kind contributions to New Approach Montana, and New Approach Montana reported receiving in-kind contributions from North Fund, as required by campaign finance statutes. The very definition of an in-kind contribution turns on whether or not the donor coordinated with the benefitting committee. Second, and more importantly, at no point in this process has your office raised the question of whether North Fund had coordinated with New Approach Montana, information that North Fund would have readily provided and indeed did disclose on its timely filed campaign finance reports.

The reliance on North Fund's in-kind contributions to support its re-classification as an independent committee is itself an inconsistent application of the "primary purpose" factors. Consider, for example, the following organizations that engaged in Montana ballot issue advocacy while registered as incidental committees without objection by your office:

- Ballot Initiative Strategy Center (BISC), which describes its purpose as to "strengthen democracy by implementing a national progressive strategy *for ballot measures* rooted in building state-based power," registered in 2018 and 2020 as an incidental committee. (emphasis added). In both election cycles, 100% of BISC's Montana expenditures were in-kind contributions to support multiple ballot issues.
- Marijuana Policy Project, which highlights the use of ballot measures to change marijuana laws on its website, was registered in 2020 as an incidental committee, and made multiple in-kind and direct contributions to a ballot issue committee.
- Alliance for Gun Responsibility, which states in the "about" section of its website "We've made more progress in Washington than we ever thought possible! We've passed three initiatives, a record number of our 2018 endorsed candidates won, and we passed TEN gun violence prevention bills during the 2019 legislative session," reported making in-kind contributions, including for staff time engaged in such activity as hiring contractors for the ballot issue committee.

- AARP reported making in-kind contributions, including significant staff time, on each of six consecutive C-4s supporting a ballot issue committee in 2018. AARP was registered as an incidental committee.

Each of the above-referenced committees<sup>2</sup> provided significant in-kind support to Montana ballot issue committees, as reflected in the public records maintained by your office. Most hold themselves out as leaders of policy change through the use of ballot measures. Yet, according to your office, each of them properly filed as incidental committees. Just like North Fund, the incidental committees identified above properly reported in-kind contributions, and the ballot issue committees that received those in-kind contributions properly reported them as contributions. If providing an in-kind contribution to a ballot issue committee means that a committee is an independent and not incidental committee, then incidental committees would not exist under Montana law, despite the language in the applicable statutes and administrative rules.

You also rely on the fact that North Fund does not have a website or social media presence. This, too, is arbitrary. There is no language in the applicable statutes or administrative rules that even mentions websites or social media. That issue is therefore irrelevant to the determination of whether North Fund is an incidental or independent committee.

The above-described departures are in addition to the differential treatment received by numerous other similarly situated committees, some of which we have previously identified for you in our prior correspondence.

#### **4. COPP's application of Montana law in the Decision raises serious First Amendment issues.**

Finally, and in addition to the issues discussed above, if it stands, the Decision raises several significant First Amendment issues, particularly as to the application of Montana campaign finance law against entities like North Fund, which operates on a national level, is supported by donors nationwide, and primarily engages in activities that are not related to the support of ballot issues—much less the support of ballot issues in Montana, or even the support of marijuana-related policy change.

As noted, current figures indicate the relevant expenditures and contributions amount to only 10.6% of North Fund's spending in 2020, it is the only election-related activity in which North Fund has engaged in at any point in Montana, and it represented the first time that North Fund has made expenditures or contributions in support of a marijuana-related ballot measure, anywhere in the United States. *None* of North Fund's donors earmarked their contributions to support the Montana ballot measure in question, or even to support elections-related activity in Montana. The decision to direct the money into Montana to support these ballot measures was the decision of North Fund alone. *See* Uribe Supplemental Decl. ¶ 14. As a result, North Fund's

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<sup>2</sup> This is a representative list only. The examples of groups providing significant in-kind support to Montana ballot issue committees yet registering as incidental committees are simply too numerous to include in this letter.



campaign finance reports already disclose the amount of contributions made to support the measures and who made them (i.e., North Fund).

Declaring North Fund an “independent committee” that potentially must disclose every person and entity that has separately contributed to North Fund nationwide as a result of elections activity that North Fund independently chose to undertake that accounted for a mere fraction of North Fund’s activities during 2020—all of which was timely and properly reported in accordance with Montana’s laws governing incidental committees—clearly does not further any constitutionally-sufficient interest in compelling disclosure and puts the Montana laws on a collision course with the First Amendment. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79-81 (1976) (holding reporting and disclosure requirements imposed by Federal Election Campaign Act could survive constitutional scrutiny only so long as they were construed to reach only that speech which is “unambiguously campaign related”); *Buckley v. Am. Const. Law Found.*, 525 U.S. 182, 203 (1999) (noting that “that ballot initiatives do not involve the risk of ‘*quid pro quo*’ corruption” that justify broad disclosure in cases involving candidate elections). We submit that Montana law does not permit you to compel the disclosure of this information under these circumstances—or that Montana could constitutionally authorize you to do so.

\* \* \*

As you know, your legal determinations are subject to de novo review by the district court. *See, e.g., Steer, Inc. v. Dep’t of Revenue*, 245 Mont. 470, 474, 803 P.2d 601, 603 (1990). In light of this, and for the reasons set forth above and in our letters of September 30 and October 23, 2020, we respectfully request that you reconsider your Decision and determine that North Fund is properly classified as an incidental, not an independent committee.<sup>3</sup> In the interim, and to avoid potentially unnecessary litigation, we request that you withdraw your Decision and order of noncompliance to allow time to fully and fairly consider our objections and the supplemental materials provided. North Fund remains fully committed to complete cooperation with your office as you consider its reclassification and we would ask again that if you have any questions about the materials that we have provided, that you allow us the opportunity to discuss those with you so that we can ensure that any further decision regarding North Fund’s classification is not based on any misunderstandings either about the information that we have provided or about the criteria that you are applying.

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<sup>3</sup> North Fund expressly reserves the right to identify any and all issues and arguments relevant to the determination of whether it is properly classified as an incidental committee in its Petition for Judicial Review.

Thank you for your consideration. If you do not reconsider your Decision and order of noncompliance, we will proceed with a Petition for Judicial Review.

Sincerely,

A handwritten signature in black ink, appearing to be 'Amber Maltbie', with a long horizontal flourish extending to the right.

Amber Maltbie  
Nossaman LLP

A handwritten signature in black ink, appearing to be 'James P. Molloy', written in a cursive style.

James P. Molloy  
Gallik, Bremer & Molloy, P.C.

## SUPPLEMENTAL DECLARATION OF CRISTINA URIBE

I, Cristina Uribe, declare:

1. I am the Board Treasurer of North Fund. I submit this declaration to supplement my earlier September 29, 2020 declaration, which is incorporated herein, and specifically to provide additional information responsive to statements made in the Commissioner of Political Practice's ("COPP") December 28, 2020 Decision in *Zabawa v. North Fund* (the "December 28th Decision"). I have personal knowledge of the matters set forth in this declaration and, if called upon to do so, I could and would competently testify as to them.

2. At every stage of COPP's consideration of North Fund's committee classification, North Fund has endeavored to provide full and accurate responses to COPP's requests for information. At the time that I prepared my September 29th declaration and in COPP's subsequent October 6, 2020 letter, it was not clear to North Fund how much information about its non-Montana activities COPP believed was necessary to inform its consideration of North Fund's committee classification. While we endeavored to provide illustrative information about North Fund's non-Montana activities, it is clear from the Decision that it is COPP's view it would have benefitted from even more information. This declaration represents North Fund's ongoing effort to provide COPP with information to properly inform its classification of North Fund.

3. In total, and based on North Fund's most recent financial data, which is current as of November 30, 2020, North Fund's expenditures in 2020 amounted to \$47,633,914. Only \$17,411,207 of North Fund's 2020 expenditures nationwide involved ballot measures. Specifically, North Fund made \$874,707 in in-kind contributions and \$16,536,500 in direct contributions relating to ballot measures.

4. As I affirmed in my prior declaration, North Fund made zero expenditures in the State of Montana in 2019. North Fund's first and only expenditures made in Montana were in 2020 and were detailed in and timely reported on North Fund's financial disclosures filed with COPP, all of which can be found on Montana's Campaign Electronic Reporting System, publicly viewable by searching for "North Fund" at <https://cers-ext.mt.gov/CampaignTracker/public/search>. As reflected by those reports, only \$5,067,020 of North Fund's 2020 expenditures were made in Montana, all of which related to ballot measures CI-118 and I-190. As reflected in those disclosures, North Fund made \$339,520 in in-kind contributions and \$4,727,500 in direct contributions relating to these measures.

5. In sum, North Fund's 2020 contributions in Montana—all of which were timely and publicly reported in North Fund's campaign finance reports with COPP—represented a mere 10.6% of its overall expenditure activity. And all of North Fund's ballot measure-related expenditures in 2020 nationwide—including its expenditures in Montana—represented only 36.5% of its overall expenditure activity.

6. From January 1, 2020 to November 30, 2020 North Fund expenditures amounted to \$30,222,707 for non-ballot measure related activities. Those activities are the principal means by which North Fund acts to fulfil its purpose, as discussed further below.

7. As reflected by North Fund's articles of incorporation and bylaws, provided to COPP as attachments to North Fund's letters of September 30 and October 23, respectively, North Fund's primary purpose is to promote social welfare by, among other things, providing public education and conducting advocacy regarding progressive policies.

8. In its October 23 letter, North Fund also explained that it has a robust program that advances preferred policy outcomes through a number of avenues, with examples including

grassroots action and activism, legislative lobbying, and educational initiatives on a broad range of issue areas. North Fund further stated that its activities included education programs regarding the need for statehood for the District of Columbia and efforts to foster civic engagement of youth and young people in New Hampshire, neither of which related to any election.

9. Despite the significant amount of information North Fund provided in its prior responses, it is clear from COPP's December 28th Decision that its conclusion that North Fund had been misclassified under Montana law was based, at least in part, on COPP's view that it lacked sufficient information as to North Fund's purpose and its non-Montana activities.

10. Thus, in addition to the information provided above, North Fund submits the following information about these types of activities, which account for the vast majority of North Fund's activities (both throughout its entire existence, as well as during the year 2020). The majority of North Fund's expenditures are through grants as well as lobbying in support of organizations that drive social change and promote public education with a focus on the following issues: increasing the effectiveness of issue campaigns and public communications campaigns, gun violence prevention, gender and reproductive equity, voter education and turnout, enfranchisement and protection of citizens' rights to have their votes counted (with focus on first-time voters, student voters, and minority voters), and election modernization.

11. In 2020, this activity included lobbying expenditures in a total of 20 different states, grants to more than 100 organizations that engage in educational and activity related to the issues discussed above, as well as payments to contractors and consultants, and minimal personnel expenses. The expenditures made by North Fund in connection with the Montana ballot measures in question represent the only time in which North Fund has ever made any expenditures in any state relating to marijuana or cannabis reform policies.

12. I want to reiterate that, since it began engaging in activity in Montana this year, North Fund has carefully tried to comply with Montana's campaign finance laws. Prior to beginning this activity, North Fund carefully considered the language of the relevant statutes and rules, COPP's prior treatment of similar organizations, and North Fund's own activities, before concluding that it constituted an incidental committee under Montana law. As a result, North Fund made the full and timely disclosures that Montana law requires of incidental committees.

13. Even if COPP's determination that North Fund is properly classified as an independent committee were correct as a matter of law (which North Fund disputes), it is not clear how North Fund could comply with the COPP's order that North Fund produce "a list of contributors and the amount/s contributed." Decision at 26.

14. North Fund operates on a nationwide level, and none of North Fund's donors earmarked their contributions to support the Montana ballot measures in question or to support or oppose Montana measures or candidates generally. The decision to make the expenditures was the decision of North Fund and its Board members (whose names can be found on materials previously provided to COPP); it was not directed by one or more donors. Thus, it is not clear what COPP envisions by ordering North Fund to disclose its contributors and the amounts contributed to this project. The amounts contributed have already been disclosed on North Fund's campaign finance disclosures as an incidental committee. And all decisions to contribute funds in Montana were made by North Fund itself, not by some other contributor.

15. North Fund remains fully committed to complete cooperation with COPP. If COPP determines that this additional information is not sufficient to satisfy the relevant inquiry, North Fund remains willing to meet with COPP and to attempt to determine whether there is other information that could be provided to COPP to facilitate the proper classification of North

Fund's status as a political committee under Montana law. Without further guidance, however, it is difficult to determine precisely what additional information we can provide your office about these activities. We appreciate your consideration of these matters.

I declare under penalty of perjury under the laws of Montana that the foregoing is true and correct.

Jan 14, 2021 Oakland, California  
Date and Place

  
Cristina Orbe (Jan 14, 2021 17:10 PST)  
Signature