

LEGAL REVIEW NOTE

Bill No.: HB 728

LC#: LC 3085, To Legal Review Copy, as
of February 19, 2025

Short Title: Revise campaign finance laws
to prohibit contributions from public entities

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CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review IS NOT dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).

Legal Reviewer Comments:

HB 728, as drafted, may raise potential constitutional conformity issues with respect to the First Amendment to the U.S. Constitution and Article II, section 7, of the Montana Constitution, which provides in pertinent part that "No law shall be passed impairing the freedom of speech or expression."

HB 728 prohibits a “public entity” from making a campaign contribution. Specifically, HB 728 provides:

NEW SECTION. Section 1. Prohibition on campaign contributions from public entities. (1) It is unlawful for a public entity, directly or through an intermediary, to make a disbursement for an electioneering communication, a contribution, or an expenditure, or to make an express or implied promise to make a contribution or an expenditure, in connection with a candidate's campaign.

(2) It is unlawful for a candidate to solicit, accept, or receive a contribution, expenditure, or disbursement described in subsection (1) from a public entity.

(3) An individual who violates subsection (1) or (2) is liable in a civil action pursuant to 13-37-128.

(4) The prohibitions in subsections (1) and (2) do not apply to individual public employees.

(5) For the purposes of this section, "public entity" means any public association or group, union, hospital, nongovernmental organization, nonprofit, school district, or municipality that receives state or federal funding.

In *McCutcheon v. FEC*, 572 U.S. 185, 191, 134 S. Ct. 1434, 1441 (2014), the U.S. Supreme Court considered the limitation of restrictions on political contributions:

The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute. Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 26-27, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (*per curiam*). At the same time, we have made clear that Congress may not regulate contributions simply to reduce the amount of money in politics, or to restrict the political participation of some in order to enhance the relative influence of others. See, e.g., *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 749-750, 131 S. Ct. 2806, 2827, 180 L. Ed. 2d 664, 686 (2011).

Also, in *Citizens United v. FEC*, 558 U.S. 310, 75 L. Ed. 2d 753 (2010), the U.S. Supreme Court overturned federal limits on corporate independent expenditures, taking up the specific issue of independent expenditures in the form of electioneering communications. The Court found that a federal law prohibiting such expenditures had "restrictions [that] are . . . invalid and cannot be applied" *Id.* at 799. The Court reasoned that independent expenditures (including independent expenditures made for the purposes of electioneering communications) did not give rise to corruption or the appearance of corruption, although the Court did not extend this holding to direct corporate contributions or disclosure requirements. *Id.* at 794. The Court stated that "the Government may not suppress political speech on the basis of the speaker's corporate identity.

HB 728 provides that “any public association or group, union, hospital, nongovernmental organization, nonprofit, school district, or municipality that receives state or federal funding” is prohibited from making a disbursement for an electioneering communication, a contribution, or an expenditure. This restriction as applied to corporations and associations that are for profit entity or an association or group that is not incorporated as a nonprofit entity may conflict with

Citizens United v. FEC for electioneering communications. Therefore, HB 728 may present constitutional conformity issues with respect to the First Amendment to the U.S. Constitution and Article II, section 7, of the Montana Constitution.

Requester Comments: