

**STATE OF MONTANA
OFFICE OF THE GOVERNOR
EXECUTIVE ORDER No. 15-2018**

**EXECUTIVE ORDER REQUIRING DISCLOSURE OF DARK MONEY SPENDING
FOR ENTITIES DOING BUSINESS WITH THE STATE OF MONTANA**

WHEREAS, in 2010, the U.S. Supreme Court’s *Citizens United* decision allowed unlimited direct spending by corporations in elections;

WHEREAS, two years later, the Supreme Court invalidated Montana’s own Corrupt Practices Act, which had banned direct corporate spending in elections;

WHEREAS, following *Citizens United*, there was an explosion in corporate spending in elections, much of which was funneled through so-called “dark money” organizations that conceal the source of funds used to influence an election;

WHEREAS, at the same time, the Supreme Court has endorsed the salving power of transparency in elections, holding that public disclosure can increase public confidence in government decision-making and prevent corruption from taking hold;

WHEREAS, since *Citizens United*, states—including Montana through its Disclose Act—have created innovative disclosure programs to shine light on dark money in elections;

WHEREAS, the Supreme Court in *Citizens United* observed that “[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are “in the pocket” of so-called moneyed interests.” 558 U.S. 310, 370-71 (2010) (citing *McConnell v. FEC*, 540 U.S. 93, 259 (2003) (opinion of Scalia, J.); *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 261 (1986));

WHEREAS, the Supreme Court also praised the role of commercial relationships in promoting disclosure, noting that shareholder objections “can be more effective today because modern technology makes disclosures rapid and informative,” and that “[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” *Id.*;

WHEREAS, disclosure promotes First Amendment values by keeping the public informed and enabling the public to make informed assessments of their government, and at the same time disclosure fights corruption in government;

WHEREAS, Montanans also enjoy a constitutional right to know, which entitles Montanans to examine both the decisions of government and the forces brought to bear on those decisions;

WHEREAS, while the Montana legislature has a set of lobbying rules, there are fewer pay-to-play restrictions for entities seeking to do business with state government;

WHEREAS, disclosure rules for state procurement are essential to secure Montanans' right to know surrounding these important government functions;

WHEREAS, disclosure rules for state procurement prevent corruption, promote confidence in government, and inform the public of the operations of government;

WHEREAS, the public has an interest in comprehensive, aggregate information about government contractors' participation in elections;

WHEREAS, federal courts have routinely upheld anti-corruption measures, including contribution prohibitions and disclosure requirements, for entities doing business in front of the government;

WHEREAS, both before and after *Citizens United*, the Supreme Court has endorsed the importance of strong disclosure rules and questioned whether “uninhibited, robust, and wide-open’ speech can occur when organizations hide themselves from the scrutiny of the voting public”—rather, the Court has stated that disclosure favors the “First Amendment interests of individual citizens seeking to make informed choices in the political marketplace.” *McConnell*, 540 U.S. at 197;

WHEREAS, it is the responsibility of government to ensure the integrity of its institutions;

WHEREAS, the public must have confidence that decisions made by government are not subject to undue political influence;

WHEREAS, the government of Montana purchases millions of dollars in services each year with public dollars; and

WHEREAS, as Governor, I have a responsibility to oversee executive branch procurement, I have an obligation to the public to ensure procurement decisions are freely and fairly made without any undue influence, and I have a duty to supervise the official conduct of all executive and ministerial officers.

NOW, THEREFORE, I, STEVE BULLOCK, Governor of the State of Montana, pursuant to the authority vested in me under the Constitution and the laws of the State of Montana, including Title 2, Chapter 15 and Title 18, Chapter 4, do hereby order and direct the implementation of disclosure rules for executive branch contracting as follows:

I. POLICY

It is the policy of the executive branch that entities seeking to do business with the State of Montana must disclose contributions or expenditures they have made in elections, as detailed in this Executive Order.

II. DEFINITIONS

As used in this Executive Order, the following definitions apply:

1. “electioneering communication” means a paid communication that is publicly distributed by radio, television, cable, satellite, internet website, mobile device, newspaper, periodical, billboard, mail, or any other distribution of printed or electronic materials, that is made within 60 days of the initiation of voting in an election in Montana, that can be received by more than 100 recipients in the district in Montana voting on the candidate or ballot issue, and that:
 - a. refers to one or more clearly identified candidates in that election in Montana;
 - b. depicts the name, image, likeness, or voice of one or more clearly identified candidates in that election in Montana; or
 - c. refers to a political party, ballot issue, or other question submitted to the voters in that election in Montana.

The term does not mean:

- a. a bona fide news story, commentary, blog, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, internet website, or other periodical publication of general circulation unless the facilities are owned or controlled by a candidate or political committee;
 - b. a communication by any membership organization or corporation to its members, stockholders, or employees;
 - c. a commercial communication that depicts a candidate’s name, image, likeness, or voice only in the candidate’s capacity as owner, operator, or employee of a business that existed prior to the candidacy; or
 - d. a communication that constitutes a candidate debate or forum or that solely promotes a candidate debate or forum and is made by or on behalf of the person sponsoring the debate or forum.
2. “covered expenditure” means:
 - a. A contribution, expenditure, or transfer made by the contracting entity, any of its parent entities, or any affiliates or subsidiaries within the entity’s control, that:
 - i. is to or on behalf of a candidate for office, a political party, or a party committee in Montana; or
 - ii. is to another entity, regardless of the entity’s tax status, that pays for an electioneering communication, or that makes contributions, transfers, or expenditures to another entity, regardless of its tax status, that pays for electioneering communications; and
 - b. The term does not include an expenditure made by the contracting entity, any of its parent entities, or any affiliates or subsidiaries within the entity’s control made in the ordinary course of business conducted by the entity making the

expenditure; or investments; or expenditures or contributions where the entity making the expenditure or contribution and the recipient agree that it will not be used to contribute to candidates, parties, or electioneering communications.

3. “executive branch” refers to the departments and agencies subject to the Governor’s executive authority as described in Article VI, Section 4 of the Montana Constitution and § 2-15-103, MCA.

III. DISCLOSURE REQUIREMENT

1. When soliciting for state procurement contracts, every contracting department and agency shall require all entities submitting offers for state government contracts with a total contract value of over \$25,000 for services or \$50,000 for goods to disclose “covered expenditures” that the contracting entity has made within two years prior to submission of their bid or offer. Certification that disclosure of this information has been made in a manner consistent with Department of Administration policies shall be required as a condition of submitting a bid or offer.
2. The disclosure of “covered expenditures” shall only be required whenever the aggregate amount of “covered expenditures” made within a 24-month period by the bidding or applying entity, any parent entities, or any affiliates or subsidiaries within the entity’s control exceeds \$2,500.
3. The final form of the disclosure required by this Executive Order shall be defined by the Department of Administration, but must include at a minimum:
 - a. the full name and address of the person or entity to whom each expenditure is made;
 - b. the date and amount of each expenditure;
 - c. the purpose and description of each expenditure;
 - d. in the case of an expenditure made for a direct campaign expenditure for express advocacy, if known at the time that the expenditure is reported, the name of each candidate, including the office held and office sought as applicable, whose election or defeat the expenditure advocates, or each ballot measure the passage or defeat of which the expenditure advocates; and
 - e. in the case of an expenditure made to an entity that purchases electioneering communications, if known at the time that the expenditure is reported, the name of each candidate, including the office held and office sought as applicable, to whom the communication refers or each ballot measure to which the communication refers.
4. Any disclosure under this Executive Order must be made to the Department of Administration, or to the contracting department or agency, at the time of the contract bid or offer. If the disclosure is made to a department or agency other than the Department of Administration, the recipient department or agency must forward the disclosure to the Department of Administration. The Department of Administration will compile this

information and make it available in a searchable database on a public website, such as transparency.mt.gov.

5. For contracts that are 24 months or longer, the Department of Administration or the contracting department or agency will require an updated disclosure form from successful contracting entities every 12 months.
6. No contracting department or agency may discriminate between bidding or applying entities because of the content of an entity's expenditures or contributions disclosed under this Executive Order; however, departments or agencies may not award a contract with a total contract value of more than \$25,000 for services or \$50,000 for goods to any entity that does not complete the required certification under this Executive Order.
7. By September 1, 2018, the Department of Administration shall prepare such policies and issue such orders as are deemed necessary and appropriate to carry out this Executive Order. Such policies and orders must minimize the costs of compliance for contractors and shall not interfere with the ability of contractors, or their officers, or employees to engage in political activities to the extent otherwise permitted by law.
8. Each contracting department or agency shall cooperate with the Department of Administration in implementing this Executive Order and provide such information and assistance as the Department of Administration may require in the performance of its functions under this Executive Order.

Severability: if any provision, clause, or implementing policy ("provisions") of this Executive Order or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Executive Order which can be given effect without the invalid provision or application, and to this end the provisions of this Executive Order are declared to be severable.

This Order is effective immediately and its disclosure provisions shall apply to contracts resulting from solicitations and applications received on or after October 1, 2018.