STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

Minutes of the February 29, 2012, Meeting of the
Commission on Governmental Ethics and Election Practices
Held at the Commission Office, 45 Memorial Circle,
Augusta, Maine

Present: Walter F. McKee, Esq., Chair; André G. Duchette, Esq.; Margaret E. Matheson, Esq.; Michael T. Healy, Esq.; Hon. Jane A. Amero. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 9:05 a.m., Chair Walter McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the January 25, 2012 Meeting

Ms. Amero moved to accept the minutes as drafted. Ms. Matheson seconded.

Motion passed unanimously (5-0).

Agenda Item #2. Complaint by the Maine Democratic Party against Bruce L. Poliquin

Mr. Healy disclosed that he served on a non-profit board of directors with Mr. Poliquin, and during the 2010 Republican primary election cycle made a donation to Mr. Poliquin for his candidacy for governor.

Mr. Wayne explained that the Commission received State Treasurer Bruce L. Poliquin's initial statement of income form on February 16, 2011, and it was then posted on the Commission's website. In January 2012, the Maine Democratic Party filed a complaint with the Commission alleging that Mr. Poliquin's initial statement did not fully disclose the sources of his 2010 income. In a written response to questions from the Commission, Mr. Poliquin acknowledged that there was some missing information on the original statement. Mr. Poliquin then filed an amended statement. Mr. Poliquin noted, in his written response to the Commission staff, that he intended to fully comply with the letter and spirit of the reporting requirements and that he had no employment or investment income that created any conflict of interest for him as Treasurer of the State of Maine. Mr. Wayne noted that although Mr. Poliquin wanted to be here

today, he could not due to a family obligation. Mr. David Berry, Mr. Poliquin's attorney, is here in his place.

Mr. McKee stated for clarity that because Mr. Poliquin complied with the Commission's request for information in a timely manner, a penalty could not be assessed.

Mr. Wayne said the penalty assessment procedure for financial disclosure statements is slightly different than other penalty procedures. He stated that a penalty is only assessed if the filer were put on notice of an error or incompleteness by the Commission and did not respond to the notice within 15 days.

Ms. Amero disclosed that she made a contribution to Mr. Poliquin's 2010 gubernatorial campaign, among others. She also disclosed that she was formerly an associate with the law firm that David Berry, Mr. Poliquin's attorney, is currently associated with.

Mr. McKee confirmed that commissioners are allowed to make donations to candidates as long as they do not do any fundraising for a particular candidate or issue.

Ms. Kate Knox, Esq., representing the Maine Democratic Party, talked about the importance of financial disclosures and said they are common practice for federal, state and local officials. She said these reports are directly related to the public's ability to trust public officials and to their ability to understand how an official's business dealings and sources of income relate to their actions. She said there should not be an assumption that the presence of a business interest means there is a conflict of interest. The policy was put in place to help the public assess whether these officials' business roles could affect their decisions while in public office, and she said knowing their sources of income is an important tool for the public to have to make these assessments. Ms. Knox said Mr. Poliquin's original disclosure did not list any role, either as an income source or business affiliation, with Dirigo Holdings LLC, where he is the registered agent. She said at the very least this should have been listed under Part 10 – officer or director positions held – and perhaps under Part 3 – other sources of income. Mr. Poliquin's amended statement, did list Dirigo Holdings under Part 10. She said concern arose, however, when the amended statement made eleven additional disclosures. She said under Part 10 the listings went from three to five. Ms. Knox said she believed it was

important for the Commission to find that the original statement did not comply substantially with the statute.

Mr. McKee asked Ms. Knox if she agreed there could be no penalty under the statute.

Ms. Knox said she did agree. She commented that whether the penalty provision makes sense was a discussion for another day.

Mr. Healy stated that Mr. Poliquin's status as the registered agent of Dirigo Holdings was public knowledge since this information was registered with the Secretary of State. Ms. Knox agreed.

Mr. Healy asked if Ms. Knox believed the omission was intentional.

Ms. Knox said she could not hazard a guess as to motive. She said she did not believe it was intentional but did not agree with Mr. Poliquin's claim that the form was confusing. She said the directions in Part 10 are very clear in their requirement to list any office held in any for profit or nonprofit organization.

Mr. Healy asked what the past practice has been for disclosing limited partnership positions in Part 10. Ms. Knox said she was not aware of how various corporate forms have been treated in the past.

Mr. Healy asked if a shareholder in any corporation should be listed. Ms. Knox said in her view it would depend on whether shareholder would be considered a position of any nature, and she was not sure it would.

Mr. Healy said that it is his understanding that a limited partnership interest is more similar to the interest of a shareholder than an office holder, and commented that if he were reporting he would not have concluded that a limited partnership interest should be reported.

Ms. Knox expressed that the burden to comply with disclosure requirements is on the filer and that officials should seek counsel from the Commission if they are unsure what to report.

Counsel for Bruce Poliquin, David Barry, Esq., stated that Mr. Poliquin had a family commitment in Florida so he could not be in attendance today. He said Mr. Poliquin intended to comply fully with the letter and spirit of the income disclosure requirements. It was not his desire to hide or obfuscate any information required to be disclosed. The original statement disclosed the most important sources of Mr. Poliquin's income, he said, and complied with the requirements of the law. Mr. Barry stated that none of Mr. Poliquin's income sources or investments created any conflict of interest for him or compromised his ability to carry out his duties in an appropriate manner. Responding to Ms. Knox's prior testimony, Mr. Barry said the filing errors fall into two categories. The first was the sources of income, and the second was Part 10, officer or director positions held. He explained that the differences in the sources of income listed on the original and amended report pertain in part to income from membership dues at the Popham Beach Club. This was not included in the original filing because Mr. Poliquin believed that since he received no net income from the investment, but in fact took a loss on the club, it did not need to be reported. Mr. Barry said the form may need some clarification going forward. He said another source of income added to the amended form was from the Marshall Mall Associates Limited Partnership. Mr. Poliquin received $13,000 in non-cash passive income, which he did not recognize as a source of income because he did not receive any money from the investment. Also, his son's summer internship was not reported because he did not realize this was reportable.

Mr. Barry said with regard to Dirigo Holding LLC that the entity did not provide any income at all so Mr. Poliquin believed it did not need to be disclosed. Mr. Barry explained that Mr. Poliquin is a member of the LLC and its registered agent; information which is publicly available on the Secretary of State's website. He then questioned whether the statute and Part 10 of the form clearly require that member status in a limited liability company be reported. He noted that the Commission staff noticed a lack of clarity and, after consultation with their attorney, stated they would advise that such reporting is required.

Mr. McKee noted that Mr. Poliquin is the sole member and owner of the LLC. Mr. McKee noted that the instructions in part 10 include the language "position of any nature," and then asked Mr. Berry whether he would disagree that sole member should be included as a "position of any nature."

Mr. Barry did not disagree, but noted that Mr. Poliquin did not recognize that member status, sole member or not, was required to be disclosed at the time he completed the original filing.

Mr. McKee stated that the staff recommendation is only to find that Mr. Poliquin did not fully comply with the disclosure requirements, and stressed that such a finding does not suggest fraud or misrepresentation of any kind. He further noted that the Commission cannot assess a penalty under these circumstances. Mr. McKee asked Mr. Barry if he would accept that staff recommendation.

Mr. Barry said he would agree that it is not within the discretion or authority of the Commission to impose a penalty in this case. With respect to the Commission staff's recommendation for a finding of not full compliance, he suggested an alternative. He first noted that the staff found that the original statement disclosed the most significant sources of income and substantially complied with Title 5 §19 by providing the most significant information officials are required to disclose. However, because there was some information that was not included, the staff recommended that the Commission find that the original statement did not fully comply. Mr. Barry then said he understood the benefits to the public of full compliance by all officials, and recognized the important function of the Commission to ensure full compliance. Mr. Barry suggested, however, that due to the publicity of this case, heightening the awareness of the filing requirements has already been accomplished, and will not be enhanced through a finding of non-compliance. He further suggested that due to the staff's finding that Mr. Poliquin substantially complied with the disclosure requirements, Mr. Poliquin's confusion regarding disclosure of the position of member in a limited partnership, and the staff's acknowledgment of the ambiguities in the reporting requirements, that dismissal of the complaint would be appropriate. He said if that was not agreeable, he would suggest a finding that Mr. Poliquin's original statement did substantially comply with the disclosure requirements in the statute but failed to include all required information. He said the distinction between the staff recommendation and his suggested finding is not semantics but would be more fair and balanced and consist with the information presented.

Mr. McKee stated for clarity that instead of stating Mr. Poliquin did not fully comply with the disclosure requirements, Mr. Barry's proposed finding would state that he substantially complied in some parts but failed in others.

Mr. Barry said he would prefer that the complaint be dismissed. However, if the Commission feels a finding is appropriate, Mr. Berry would suggest the finding state that Mr. Poliquin's original disclosure substantially complied with the statutory requirements but did not include all information.

Mr. Healy referenced the additions to the amended filing and asked whether Mr. Poliquin would agree that their absence from the original filing was in error. Specifically, he asked if there was any dispute that Mr. Poliquin's son's income should have been listed.

Mr. Barry said there was no dispute that his son's income should have been included in the original filing.

Mr. Healy asked about the nature of the non-cash income from Marshall Mall Associates.

Mr. Barry said they indicated the income was "non-cash income" to denote that Mr. Poliquin did not receive payment from that entity in 2010. Mr. Poliquin did, however, receive a tax benefit, which is characterized as income and is required to be listed on a separate form for federal tax purposes. It was a source of income but was passive, non-cash income.

Mr. Healy asked if it was some form of depreciation.

Mr. Barry said that it was some form of depreciation, but said he was not in a position to provide a more technical description.

Mr. Healy clarified that because of the federal tax guidelines, the depreciation is required to be reported as income and Mr. Barry confirmed this. Mr. Berry added that when the amended disclosure form was being completed, they sought advice from an accounting professional and were told that non-cash income was considered income under the federal tax guidelines.

Mr. Healy asked if Mr. Poliquin agreed that it was a mistake to omit the passive income from the form.

Mr. Barry said Mr. Poliquin now recognizes that given the definition of income in the statute and the technical definition of income under the federal tax income regulations that the Marshall Mall Associates passive income of $13,000 is income and was required to be disclosed and should have been disclosed.

Mr. Healy asked whether Mr. Barry knew of any other instances where membership in a limited liability company is required to be disclosed.

Mr. Barry said that based on his research of publically available information – including various disclosure forms for government officials – he was not able to locate any forms requiring disclosure of membership in limited liability partnerships, although he could not say for sure that such disclosure was not required. He stressed that in filing the amended report, he and Mr. Poliquin chose to err on the side of disclosure.

Mr. Healy asked whether Mr. Poliquin was designated as a member in the disclosure made to the Secretary of State or whether he was only listed as the registered agent.

Mr. Barry said he was confident that Mr. Poliquin was identified on the Secretary of State's website as a member of the LLC.

Mr. Duchette asked whether Dirigo Holdings is a member-run or manager-run LLC. Mr. Barry said it is a member-run LLC. He said Dirigo Holdings employs a manager, but as a legal matter it is a member-run LLC.

Mr. Duchette asked if Mr. Berry had any information about how limited partnership interests are treated in other disclosure statutes.

Mr. Barry said his review of LLC reporting based on publically available information in Maine showed no requirement for disclosure of limited partnership interests.

Mr. McKee said he viewed the staff recommendation that Mr. Poliquin had not fully complied with disclosure requirements as a middle of the road finding. He said Mr. Poliquin cured the problem and that is all that really matters.

Mr. Duchette noted that other statutes offer language referring to "substantial compliance" with form requirements, however this one does not.

Mr. Wayne confirmed that.

Mr. McKee said that Mr. Poliquin acknowledged that there were items that should have been on the original form that have since been included on the amended form. He posited that the Commission should not consider possible motives for why a specific statement was or was not included on the form now that complete disclosure has been made.

Mr. Healy stated that Mr. Poliquin has fully complied with the amended form. Mr. McKee agreed.

Mr. Duchette questioned whether the Commission could make a finding of substantial compliance.

Mr. McKee stated that the Commission can characterize the finding in any way it chooses, but noted that such characterizations may only serve to forward outside goals of the parties.

Mr. Wayne agreed that the Commission can characterize the findings in any way it chooses.

Ms. Amero said now that Mr. Poliquin has fully complied, she would support making a positive statement. She said saying he did not fully comply is more negative than it needs to be, and suggested wording expressing that he did substantially comply with the disclosure law and is now in full compliance.

Mr. McKee said that although there could be very strong positions among Commissioners regarding those items that were not included in the original report, he would like to avoid that debate and adopt a middle ground finding. He said, for example, that in his view the Dirigo Holdings LLC omission was quite significant and should have been reported in the original form, but he would rather give either side the benefit of the doubt and stay in the middle as the staff recommendation does.

Mr. Duchette stated that the complaint could be dismissed now that Mr. Poliquin is in substantial compliance with the law.

Mr. Healy said the complaint could be dismissed on the grounds that Mr. Poliquin has fully complied.

Mr. McKee noted that the original form was not in full compliance and thus questioned whether the complaint could, as a matter of practice, be dismissed.

Mr. Healy said the wording of the staff recommendation makes him uncomfortable because there were many accusations in the complaint, some of which were well founded and some which were not. As an example, Mr. Healy stated that in his view Mr. Poliquin was not required to make the limited partnership disclosure. He said that because he does not feel that all the complaints were valid, simply making a finding that Mr. Poliquin did not fully comply would do a disservice to the public because it does not specify what he did wrong. Mr. Healy expressed again that the omissions were minor, especially the LLC disclosure since Mr. Poliquin's member status is a public record on file with the Secretary of State. He can understand that these omissions were made.

Mr. McKee said in his view the language in the staff finding, "did not fully comply," implies that Mr. Poliquin substantially complied, but did not fully comply, and that the language gives Mr. Poliquin the benefit of the doubt.

Ms. Matheson said she believed agreement was reached that the original filing was not complete but she thought it would be appropriate to state in the finding that the amended report is in full compliance.

Mr. McKee offered the language that Mr. Poliquin did not fully comply in his original filing but has now fully complied.

Ms. Matheson moved to find that Mr. Poliquin did not fully comply in his original filing but with his amended disclosure is in full compliance. Mr. McKee seconded.

Mr. Duchette suggested instead that they could find that Mr. Poliquin did substantially comply in his original filing although it was incomplete, and that he has now made it complete by filing an amended report.

Mr. Healy said Ms. Matheson's motion was accurate but it could be misused.

Mr. Duchette asked if possible misuse of its finding was the Commission's concern and Mr. Healy said it should be. Mr. Healy suggested that how people interpret the statement is of concern because of the potential to make issues that are not significant to the Commission appear significant.

Mr. McKee said Ms. Matheson's motion can be considered a benefit to both sides and is the most accurate.

Mr. Healy said he could support Mr. Duchette's language, which was that Mr. Poliquin's original filing was substantially compliant but incomplete but is now fully complete with the amended filing.

Mr. McKee questioned whether the original filing was substantially complete with the omission of Dirigo Holdings.

Mr. Duchette said he agreed that the Dirigo Holdings omission was significant but the other issues were minor.

Motion failed (2-3). In favor: Mr. McKee and Ms. Matheson; Opposed: Mr. Healy, Mr. Duchette and Ms. Amero.

Mr. Duchette moved to find that Mr. Poliquin's original filing was substantially compliant but incomplete, and that it has now been made complete with his amended filing. Ms. Amero seconded.

Mr. McKee expressed concern with including the "substantially compliant" language because it seemed to him to be a debate the Commission did not need to have. He noted that he will not be voting for Mr. Duchette's motion.

Ms. Matheson stated that she will be voting for the motion even though the "substantially compliant" language is not in the statute. She opined that reasonable minds can disagree about whether certain positions or interests should have been included in Mr. Poliquin's original filing. She believes that Mr. Duchette's motion carries forward that idea while also explaining that the original filing was incomplete.

Motion passed (4-1) with Mr. McKee opposed.

Agenda Item #3. Request by Rebecca D. Edmondson for Waiver of Late-Filing Penalty

Rebecca D. Edmondson began lobbying in Maine for the College Board in August 2011. When she attempted to file the December 2011 monthly report she accidentally filed the wrong report. She later filed the correct short form report for December (she had no lobbying activity in December). She requests a waiver of the $100 penalty. The staff recommends granting a full waiver.

Ms. Matheson moved that the Commission accept the staff recommendation and grant a complete waiver of the penalty because Ms. Edmondson made a bona fide effort to file the report and there was little harm to the public resulting from the late report. Mr. Duchette seconded.

Motion passed unanimously (5-0).

Agenda Item #4. Public Hearing on Rulemaking

The Commission received the following comments from the public on proposed amendments to the Commission Rules.

John Brautigam, Esq., on behalf of Maine Citizens for Clean Elections (MCCE), expressed general support for the changes and suggested some guiding principles for the Commission to consider in drafting the rule changes. Addressing specific changes, Mr. Brautigam expressed support for changing the independent expenditure reporting schedule from quarterly reports to sixty day pre-election reports. He also supports moving the reporting deadline from fourteen days before the election to eleven days before the election. Mr. Brautigam noted that MCCE's biggest concern is that there is currently no requirement to report the sources of contributions and funding to those making independent expenditures. He said that while the public is aware of the expenditures, there is no information about where the funds for the expenditure come

from. He said simply disclosing the name of the political action committee (PAC) does not reveal the true source of the funding. Mr. Brautigam drew a contrast with candidates, who are required to report funding sources. He also said that information about earmarked contributions to a PAC should be made available to the public as well. He said MCCE will be submitting written comments and suggesting language by the March deadline.

Mr. Brautigam addressed rules regarding the press exception and said that this language should be very clear while also recognizing the challenges of new media. It needs to be carefully constructed in order to allow freedom of the press without creating a loophole for faux media outlets that can circumvent disclosure requirements.

Mr. Healy asked how to distinguish between the two.

Mr. Brautigam said federal law looks at whether the media entity's main purpose is to comment on a particular campaign or issue or whether they have a history over several months of commenting on a variety of issues. He also said the nature of their ownership, for example if owned or associated with a political candidate or party, would be considered also when distinguishing the difference between a bona fide entity and one that was created just to circumvent the reporting requirements.

Mr. Healy asked whether the press exemption would apply if a newspaper were owned by a family member of a candidate.

Mr. Brautigam said existing law would apply, and it would depend on if there were a firewall between the ownership of the paper and the editorial decisions and writing.

Ms. Matheson asked if Mr. Brautigam was proposing to re-write the press exemption in the proposed rules changes.

Mr. Brautigam said one of his concerns was there is already an exemption in the definition of expenditure and contribution for the media, and there is a risk of confusion by also having a separate press exemption provision. He also expressed concern about the last sentence in the draft of the press exemption provision

which indicates that an additional purpose test will be used to determine if there is a press exemption. The last sentence states, "for the purpose of influencing the candidate or ballot question election that is the subject of the news story, commentary or editorial." He said this purpose test seems redundant since the previous phrase notes they are already being compensated by the candidate or candidate's committee. He said there will be written comments provided before March.

Mr. Healy asked under what circumstance Mr. Brautigam believed a person was entitled to anonymity when publishing views on political matters. He asked if Mr. Brautigam believed they should not have to disclose who they are and what they are spending.

Mr. Brautigam said he does not have the authority through MCCE to take a position on that, but personally he would assume a de minimus exception to disclose with many activities – pamphleteers, hand-bills, letters to the editor, etc.

Mr. Healy asked how the State should make a determination between those entities who should be regulated and those who should not.

Mr. Brautigam said there are competing rights; First Amendment rights of the speaker to anonymity, and the right of the public to know who is spending money to influence a campaign. He said those interests tilt more towards public disclosure when larger amounts of money are being spent.

Mr. Healy said there is no constitutional right to public disclosure.

Mr. Brautigam said there is no absolute constitutional right to anonymity when money is spent on a political campaign.

Mr. Healy agreed that there is no absolute right to anonymity but said whether there is a right to anonymity under certain circumstances is a question that will have to be addressed at some point.

Mr. Brautigam agreed that this issue is currently being decided by the courts. He opined that the Commission must confront the balance of interests involved. It is more important that clarity and consistency prevail in a standard everyone can know and understand.

Mr. Brautigam referred to the "testing the waters" section, and said the draft does follow the federal approach, which he thought was sensible. He did express concern, however, that the section contemplated the mental state of the candidate, an issue which is inherently subjective. He offered instead a bright line rule that would create a spending threshold whereby a person triggers filing and reporting requirements after raising or spending more than a designated amount. He explained that a person could be exploring a run for office with a small amount of funding, but the threshold would provide a line beyond which a candidate should be serious about campaigning. In line with this, Mr. Brautigam suggested removing the "unreasonable" language from the draft rule and making the amount that can be spent before a run for office is presumed a bright line amount.

Mr. Brautigam said MCCE would not support a testing the waters exemption without an established contribution limit. He said the absence of a contribution limit would open up the possibility for gaming the system by creating a loophole. He said federal law states that funding raised during this early "testing the waters" stage must apply with other provisions of law, and MCCE would like to see that incorporated in any final rule by the Commission.

Ms. Matheson said she believed previous discussions contemplated that contributions during this period would be similar to seed money contributions.

Mr. Wayne said he recalled that the discussion focused around contributions remaining within the seed money restrictions. He supported MCCE addressing this concern, and expressed a desire for the Commission to tackle this issue in the next iteration of the proposed rules.

Mr. Brautigam addressed the disclaimer exemption for expenditures under $100 and suggested more clarity regarding that provision. He said the definition of what is independent should be the same between statutory provisions so one definition applies for all expenditures. He said written suggestions will be submitted by the March deadline.

With regard to the repeal of accelerated reporting for traditionally financed candidates, Mr. Brautigam said the legislature could address repeal without eliminating this type of report all together. He advised that MCCE will monitor this situation closely. He said in order to maintain complete disclosure, current accelerated reporting requirements may need to be addressed in a different way.

With regard to membership communications, Mr. Brautigam suggested having the schedule parallel other reporting dates - eleven days before the election rather than three days before.

On the circulation form for qualifying contributions, he said MCCE supported having more flexibility for the staff to revise and implement the form. Mr. Brautigam also supported having information about whether the circulator was paid.

Vehicle travel reimbursement requirements need to be strict, and MCCE supports the proposed changes.

Mr. Healy asked about the requirements for leadership PACs to report contributions and expenditures.

Mr. Brautigam said those requirements are the same as for any other political action committee.

Mr. McKee noted for clarity that the deadline for submitting written and email comments is March 12, 2012.

Joseph Greenier, a concerned citizen from Stockton Springs, said he supports the travel log change but is concerned that it does not go far enough. He said candidates should be required to use a form provided by the Commission in order to be reimbursed. He said this would simplify the process for candidates and the Commission staff.

Mr. Greenier also suggested requiring candidates to pay sales tax on purchases made outside the state of Maine or purchases made from another candidate. He also said lobbyist disclosures need to be stricter, and suggested that former lobbyists should be restricted from working in state government for a certain time after ending their employment as a lobbyist.

Mr. McKee closed the public hearing on the proposed rulemaking.

Mr. McKee moved to go into Executive Session pursuant to Title 1 of the Maine Statutes, section 405(4), at 10:44 a. m. pursuant to Title 1, section 405(6)(F) to discuss information contained in an intra-agency communication related to an investigation that is confidential under Title 21-A section 1003(3A).

Ms. Matheson seconded.

Motion passed unanimously (5-0).

Mr. McKee moved to come out of Executive Session at 11:00 a. m. Ms. Matheson seconded. Motion passed unanimously (4-0).

Ms. Matheson moved to adjourn and Mr. McKee seconded the motion, which passed unanimously. The meeting adjourned at 11:01 a.m.

Respectfully submitted,

/s/ Jonathan Wayne

Jonathan Wayne, Executive Director