

Agenda

Item #3



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

To: Commissioners
From: Benjamin Dyer, Political Committee and Lobbyist Registrar
Date: January 14, 2015
Re: Options for Legislative Changes to Contribution Limits

Introduction

In the *Woodhouse* decision, the court found that, in the 2014 three-way gubernatorial race, it violated equal protection principles for donors to Eliot Cutler to be limited to giving \$1,500 because he did not have a primary election when donors to Paul LePage or Michael Michaud could give \$1,500 for the primary election and another \$1,500 for the general election.¹ This memo presents some options to adjust our campaign contribution limits statutes and rules in light of the *Woodhouse* decision. It provides a brief overview of our current campaign contribution limits system and then presents three potential options for change.

Current Contribution Limit Law – Contribution Limits Per Election

21-A M.R.S.A. §1015 sets current per contributor contribution limits at the following amounts:

Governor	\$1,500
County office	\$750
Legislative office	\$375
Municipal office	\$750

These limits are “per election.” 21-A M.R.S.A. §1001 defines election to mean “any primary, general, or special election for state, county or municipal offices.” Only

¹ *Woodhouse, et al. v. Maine Commission on Governmental Ethics and Election Practices, et al.*, Docket No. 1:14-cv-266-DBH.

candidates enrolled in a political party recognized by the state are eligible to participate in a primary election. (21-A M.R.S.A. §331) Candidates not enrolled in a political party only participate in the general election, and may only raise funds for the general election. For candidates participating in a primary election, amounts raised before a primary election are presumed to be raised for the primary election. Amounts raised after the primary election and before the general election are presumed to be raised for the general election. (Rules Chapter 1, Section 6(7)(C)) While a candidate may raise funds for the general election before the primary election, those funds must be held in a separate account and may not be spent to promote the candidate's nomination in the primary election. (Rules Chapter. 1, Section 6(7)(A)) Accordingly, in an election for legislative office, a party candidate could raise \$375 for the primary election and another \$375 for the general election, for a total of \$750 per contributor for the two elections, while an unenrolled candidate could raise only \$375 per contributor during that same time period.

Option 1 – Contributions Limited Per Election Cycle

One alternative to Maine's present contribution limit system is to base the contribution limits on an "election cycle." In this system candidates, both party and unenrolled, would be collecting contributions for an election cycle, a period of time tied to particular dates rather than particular elections.

Several other states, including Hawaii, Delaware, Illinois, Maryland, Michigan, and Wisconsin, use some variation of this system for limiting contributions. Two states, Hawaii and Delaware, illustrate the two principal approaches to defining an election cycle.

Hawaii defines an "election period" as:

"(1) The two-year period between the day after the general election through the day of the next general election, if candidate is seeking nomination or election to a two-year office;

(2) The four-year time period between the day after the general election through the day of the next general election, if a candidate is seeking nomination or election to a four-year office; or

(3) For a special election, the period between the day after the general election for that office through the day of the special election.” (Haw. Rev. Stat. §11-302)

Delaware defines its election period as:

“1. For a candidate for reelection to an office to which the candidate was elected in the most recent election held therefor, the period beginning on January 1 immediately after the most recent such election, and ending on the December 31 immediately after the general election at which the candidate seeks reelection to the office.

2. For a candidate for reelection to an office which the candidate attained since the last election held therefor (whether the candidate attained the office by succession, appointment or otherwise), the period beginning on the day the candidate succeeded to or was appointed to the office, and ending on the December 31 immediately after the general election at which the candidate seeks reelection to the office.

3. For a candidate for election to an office which the candidate does not hold, the period beginning on the day on which the candidate first receives any contribution from any person (other than from the candidate or from the candidate's spouse) in support of that candidate's candidacy for the office, and ending on the December 31 immediately after the general election at which the candidate seeks election to the office.” (Del. Code Ann. Tit. 15, §8002(11) (2015))

Of the states surveyed, Michigan follows a similar election period as Hawaii, while Illinois, Maryland and Wisconsin follow the Delaware approach. Of these two approaches, the staff believes the Hawaiian approach of starting the election cycle the day after the general election is better as such a start date is easy to remember, allows candidates to begin raising funds for the next election immediately after the last election,

and already aligns with some the Commission Rules Chapter 1, Section 6(7) regarding presumptions about which elections contributions are raised for.

Statutory and Rules Changes Required for Option 1²

Amend 21-A M.R.S.A. §1001 to add a new subsection 2-A:

2-A. Election Cycle. “Election Cycle” means

- (1) the two-year period between the day after the general election through the day of the next general election, if a candidate is seeking nomination or election to a two-year office;
- (2) the four-year period between the day after the general election through the day of the next general election, if a candidate is seeking nomination or election to a four-year office;
- (3) the six-year period between the day after the general election through the day of the next general election, if a candidate is seeking nomination or election to a six-year office; or
- (4) for a special election, the period between the day after the general election for that office through the day of the special election.

Amend 21-A M.R.S.A. §1015 as follows:

1. Individuals. An individual may not make contributions to a candidate in support of the candidacy of one person aggregating more than \$1,500 in any ~~election~~ election cycle for a gubernatorial candidate, more than \$350 for a legislative candidate, more than \$350 for a candidate for municipal office and beginning January 1, 2012 more than \$750 for a candidate for municipal office or more than \$750 in any ~~election~~ election cycle for any other candidate. This limitation does not apply to contributions in support of a candidate by that candidate or that candidate's spouse or domestic partner. Beginning December 1, 2010, contribution limits in accordance with this subsection are adjusted every 2 years based on the Consumer Price Index as reported by the United States Department of Labor, Bureau of Labor Statistics and rounded to the nearest amount divisible by \$25. The commission shall post the current contribution limit and the amount of the next

² Additionally, the Commission may wish to recommend adjustments to the amount of the contribution limits since these proposed changes would effectively cut in half the amount that a party candidate may collect from any contributor.

adjustment and the date that it will become effective on its publicly accessible website and include this information with any publication to be used as a guide for candidates.

2. Committees; corporations; associations. A political committee, political action committee, other committee, firm, partnership, corporation, association or organization may not make contributions to a candidate in support of the candidacy of one person aggregating more than \$1,500 in any ~~election~~ election cycle for a gubernatorial candidate, more than \$350 for a legislative candidate, more than \$350 for a candidate for municipal office and beginning January 1, 2012 more than \$750 for a candidate for municipal office or more than \$750 in any election for any other candidate. Beginning December 1, 2010, contribution limits in accordance with this subsection are adjusted every 2 years based on the Consumer Price Index as reported by the United States Department of Labor, Bureau of Labor Statistics and rounded to the nearest amount divisible by \$25. The commission shall post the current contribution limit and the amount of the next adjustment and the date that it will become effective on its publicly accessible website and include this information with any publication to be used as a guide for candidates.

...

8. Political expenditure limitation amounts. Total expenditures in any election for legislative office by a candidate who voluntarily agrees to limit campaign expenditures as provided in subsection 7 are as follows:

A. For State Senator, \$25,000; and

B. For State Representative, \$5,000.

Expenditure limits are per ~~election~~ election cycle and may not be carried forward from one election cycle to another. For calculation and reporting purposes, the reporting periods established in section 1017 apply.

Amend Rules Chapter 1, Section 1 to reference the new statutory definition:

2-A. "Election Cycle" has the same meaning as in the Act [§1001(2-A)].

Pros of Option 1

- Ease of administration. A single contribution limit cycle reduces confusion among candidates and contributors and provides staff with a single relevant figure and time period when reviewing reports.
- Ease of compliance. Candidates would not have to understand primary and general election contribution limits and when they apply. They would have a single figure for a contribution limit and would not have to segregate half the funds they could raise in a separate account.
- Addresses objections raised in legal challenges. Contributors to unenrolled candidates could give the same amounts to their candidates as contributors to candidates in political parties.

Cons of Option 1

- Unenrolled candidates, who participate only in the general election, would be able to collect the same amount per contributor as candidates enrolled in a political party, who, in addition to the general election, must also participate in a primary election. This could be perceived as unfair to party candidates facing one or more opponents in a hotly contested primary election.

Option 2 – Contribution Limits Per Election, but Primary not Considered a Separate Election if Candidate is Unopposed

Another alternative to Maine's current contribution limits system is for the law to continue to set contribution limits on a per election basis but to treat candidates running "unopposed" in a primary election as having only a single general election, for purposes of campaign contribution limits.

Florida, Montana, and South Carolina use such a contribution limit system.

Contributions are limited per election, with the primary and general elections being separate elections. However, the primary election is not considered an election if the candidate is unopposed.

Florida defines an “unopposed candidate” as:

“A candidate for nomination or election to an office, who, after the last day on which a person, including a write-in candidate, may qualify, is without opposition in the election at which the office is to be filled or who is without such opposition after such date as a result of a primary election or of withdrawal by other candidates seeking the same office. A candidate is not an unopposed candidate if there is a vacancy to be filled under Section 100.111(4), F.S., if there is a legal proceeding pending regarding the right to a ballot position for the office sought by the candidate, or if the candidate is seeking retention as a justice or judge.” (Fla. Stat. Tit. 9, §106.011(18) (2014))

Montana defines the term “contested primary” in pertinent part as:

“[a] primary election in which two or more candidates compete for the same nomination.

(a) In partisan primary elections, if two or more candidates compete for one party's nomination, but only one candidate seeks a different party's nomination, it is a "contested primary", resulting in two elections to which the contribution limits in 13-37-216, MCA, apply only with respect to the primary for which two or more candidates compete for the party's nomination. For example, if two candidates seek Party A's nomination in the primary election for a public office, it is a contested primary with respect to Party A's nomination. If only one candidate seeks Party B's nomination for the same public office, it is not a contested primary with respect to Party B's nomination. ...

(Admin. R. Mont. 44.10.334 (2014))

Statutory and Rules Changes Required for Option 2³

Modify the definition in 21-A M.R.S.A. §1001(2) as follows:

2. Election. “Election” means any primary, general or special election for state, county or municipal offices as defined in Title 30-A, section 2502, subsection 1, except that an unopposed primary is not considered an election for purposes of the contribution limits in Title 21-A, section 1015.

Add a definition to the Rules Chapter 1, Section 1, as follows:

18-A. Unopposed Primary. “Unopposed primary” mean a primary election in which, after the last day on which a person, including a write-in candidate, may qualify, only one candidate is recognized by the state as a candidate for nomination to the office to be filled.

Pros of Option 2

- Simple statutory change. Requires only adjusting the definition of election for contribution limits purposes and defining an “unopposed primary.”

Cons of Option 2

- Creates uncertainty. With the relatively late dates at which someone can qualify for the primary ballot (mid-March) and the even later deadline for declared write-in candidates (45 days before the primary election), neither the candidates nor the Commission staff would know for certain when a candidate is in an opposed primary until late in the primary season.
- Encourages “gamesmanship.” This alternative would encourage political parties to try to qualify two candidates for every nomination, even if that meant getting a candidate on the ballot who had no intention of running a serious campaign, simply to ensure the actual candidates would be able to raise the maximum per contributor for the election year.

³ These are the obvious changes required to implement this alternative, but further review of the statutes and rules may reveal the need for other changes to avoid inconsistencies.

Option 3 – Unenrolled Candidates Have Two Limits Only If All Opponents are Unopposed in Primary Elections

The Commission has also discussed an alternative which would treat unenrolled candidates as having a primary election for contribution limits purposes in certain situations.

Statutory Changes Required for Option 3

Amend 21-A M.R.S.A. §1015 to include a new subsection:

2-A. Contributions to unenrolled candidates. An unenrolled candidate who is seeking nomination by petition pursuant to chapter 5, section 2 is deemed to have a primary election for purposes of determining limits under this section only if no opposing party candidate in that election cycle has a contested primary election.

Add a definition to the Rules Chapter 1, Section 1, as follows:

7-A. “Contested primary election.” A contested primary election means a primary election in which no more than one candidate has qualified for the ballot for that particular office and there is no declared write-in candidate for that office.

Pros of Option 3:

- This approach is targeted to addressing the specific equal protection problem presented by the *Woodhouse* plaintiffs in the 2014 gubernatorial race, and otherwise maintains the status quo.
- It preserves the ability of party candidates in contested primaries to raise the additional amount per contributor to help fund that election contest.

Cons of Option 3:

- As with Option 2, neither the unenrolled candidate nor the Commission staff would know how much the unenrolled candidate could raise from each contributor until quite late in the primary election season when the number of candidates competing in the primary for that office could be determined.

Conclusion

Of the three options presented in this memo, Commission staff recommends the first option: campaign contribution limits tied to an election cycle. This option, particularly when the election cycle is defined as beginning the day after the general election and ending the day of the following general election, would be clear from the beginning of any campaign, easily understandable by candidates, easy to implement for the staff, and not subject to gamesmanship by the political parties. While this option would result in unenrolled candidates and candidates without any opponent in the primary election being able to raise as much money per donor as candidates facing a contested primary election, the certainty of this system would allow candidates and parties to plan for a primary election, which could mitigate those concerns.

Current 21-A MRSA §1015.

1. Individuals. An individual may not make contributions to a candidate in support of the candidacy of one person aggregating more than \$1,500 in any election for a gubernatorial candidate, more than \$350 for a legislative candidate, more than \$350 for a candidate for municipal office and beginning January 1, 2012 more than \$750 for a candidate for municipal office or more than \$750 in any election for any other candidate. This limitation does not apply to contributions in support of a candidate by that candidate or that candidate's spouse or domestic partner. Beginning December 1, 2010, contribution limits in accordance with this subsection are adjusted every 2 years based on the Consumer Price Index as reported by the United States Department of Labor, Bureau of Labor Statistics and rounded to the nearest amount divisible by \$25. The commission shall post the current contribution limit and the amount of the next adjustment and the date that it will become effective on its publicly accessible website and include this information with any publication to be used as a guide for candidates.

[2011, c. 382, §1 (AMD) .]

2. Committees; corporations; associations. A political committee, political action committee, other committee, firm, partnership, corporation, association or organization may not make contributions to a candidate in support of the candidacy of one person aggregating more than \$1,500 in any election for a gubernatorial candidate, more than \$350 for a legislative candidate, more than \$350 for a candidate for municipal office and beginning January 1, 2012 more than \$750 for a candidate for municipal office or more than \$750 in any election for any other candidate. Beginning December 1, 2010, contribution limits in accordance with this subsection are adjusted every 2 years based on the Consumer Price Index as reported by the United States Department of Labor, Bureau of Labor Statistics and rounded to the nearest amount divisible by \$25. The commission shall post the current contribution limit and the amount of the next adjustment and the date that it will become effective on its publicly accessible website and include this information with any publication to be used as a guide for candidates.

[2011, c. 382, §2 (AMD) :]

3. Aggregate contributions. No individual may make contributions to candidates aggregating more than \$25,000 in any calendar year. This limitation does not apply to contributions in support of a candidate by that candidate or that candidate's spouse or domestic partner.

[2007, c. 443, Pt. A, §12 (AMD) .]

4. Political committees; intermediaries. For the purpose of the limitations imposed by this section, contributions made to any political committee authorized by a candidate to accept contributions on the candidate's behalf are considered to be contributions made to that candidate. If the campaign activities of a political action committee within a calendar year primarily promote or support the nomination or election of a single candidate, contributions to the committee that were solicited by the candidate are considered to be contributions made to the candidate for purposes of the limitations in this section. For purposes of this subsection, solicitation of contributions includes but is not limited to the candidate's appearing at a fundraising event organized by or on behalf of the political action committee or suggesting that a donor make a contribution to that committee.

For the purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, that are in any way earmarked or otherwise

directed through an intermediary or conduit to the candidate are considered to be contributions from that person to the candidate. The intermediary or conduit shall report the original source and the intended recipient of the contribution to the commission and to the intended recipient.

[2011, c. 389, §14 (AMD) .]

5. Other contributions and expenditures. Any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents is considered to be a contribution to that candidate.

The financing by any person of the dissemination, distribution or republication, in whole or in part, of any broadcast or any written or other campaign materials prepared by the candidate, the candidate's political committee or committees or their authorized agents is considered to be a contribution to that candidate.

[1989, c. 504, §§7, 31 (AMD) .]

6. Prohibited expenditures. A candidate, a treasurer, a political committee, a party or party committee, a person required to file a report under this subchapter or their authorized agents may not make any expenditures for liquor to be distributed to or consumed by voters while the polls are open on election day.

[1991, c. 839, §11 (AMD); 1991, c. 839, §34 (AFF) .]

7. Voluntary limitations on political expenditures. A candidate may voluntarily agree to limit the total expenditures made on behalf of that candidate's campaign as specified in section 1013-A, subsection 1, paragraph C and subsections 8 and 9.

[1995, c. 384, §2 (NEW) .]

8. Political expenditure limitation amounts. Total expenditures in any election for legislative office by a candidate who voluntarily agrees to limit campaign expenditures as provided in subsection 7 are as follows:

- A. For State Senator, \$25,000; and [2007, c. 443, Pt. A, §14 (AMD).]
- B. For State Representative, \$5,000. [2007, c. 443, Pt. A, §14 (AMD).]
- C. [2007, c. 443, Pt. A, §14 (RP).]

Expenditure limits are per election and may not be carried forward from one election to another. For calculation and reporting purposes, the reporting periods established in section 1017 apply.

[2007, c. 443, Pt. A, §14 (AMD) .]

9. Publication of list. The commission shall publish a list of the candidates for State Representative and State Senator who have agreed to voluntarily limit total expenditures for their campaigns as provided in section 1013-A, subsection 1, paragraph C.

For the purposes of subsections 7 and 8 and this subsection, "total expenditures" means the sum of all expenditures made to influence a single election that are made by a candidate or made on the candidate's behalf by the candidate's political committee or committees, the candidate's party or the candidate's immediate family.

[1995, c. 384, §2 (NEW) .]

Current Chapter 1, Section 6(7) of Commission Rules

7. For the purposes of the limitations imposed by 21-A M.R.S.A. §1015(1), 21-A M.R.S.A. §1015(2), 21-A M.R.S.A. §1015(3), and 21-A M.R.S.A. §1056, the following guidelines shall apply:
 - A. For all contributions received through the day of the primary election by candidates enrolled in a political party, the candidate shall designate on the applicable campaign finance report whether the candidate received the contribution for the primary or the general election. If a candidate receives a contribution before the primary election and designates it for the general election, the candidate must deposit the contribution in an account that is separate from all funds received for the primary election and may not use the contribution in any way to promote the candidate's nomination in the primary election.
 - B. Notwithstanding division (c) below, if a candidate loses in the primary, all contributions made to that candidate for the purpose of liquidating debts and liabilities associated with the candidate's candidacy are deemed to be made in the primary election.
 - C. All contributions made to a general election candidate from the day after the primary election through the date of the general election are deemed to be made for the general election.
 - D. Notwithstanding division (e) below, all contributions made after the general election to a general election candidate for the purpose of reducing debts and liabilities associated with the candidate's candidacy are deemed to be made in the general election.
 - E. All contributions made after the day of the general election to a candidate who has liquidated all debts and liabilities associated with that election are deemed to be made in support of the candidate's candidacy for a subsequent election.
 - F. Subparagraphs A through E above shall apply to any write-in candidate who has qualified under 21-A M.R.S.A. §723, or who has received contributions or made expenditures with the intent of qualifying as a candidate.