



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

Commission Meeting: April 25, 2018
Agenda Item #6

To: Commissioners
From: Jonathan Wayne, Executive Director
Date: April 17, 2018
Re: For Discussion – Possible Policy on Party Employees

This memo is to provide background information for a discussion proposed by Commissioner Bill Lee. At your February 22, 2018 meeting, you considered a request by the Maine Democratic Party to investigate whether persons responsible for the www.maineexaminer.com website failed to comply with campaign finance disclosure requirements. Shortly before a December 2017 run-off mayoral election in Lewiston, the website published seven negative stories about the Democratic nominee, Ben Chin. In addition, the Maine Republican Party (MRP) made eight payments to Facebook to advertise some of the Chin stories on Facebook pages controlled by the MRP.

Some of the potential compliance issues raised in this matter are:

- Was the Maine Examiner required under 21-A M.R.S.A. § 1014(2-A) to include a statement of who made or financed expenditures for the website?
- Was any person required to file an independent expenditure report with the Lewiston City Clerk under 21-A M.R.S.A. § 1019-B?
- Did the MRP timely file complete campaign finance reports with the Lewiston City Clerk and the Commission, as required by 21-A M.R.S.A. § 1017-A?

The Executive Director of the MRP, Jason Savage, responded that he was solely responsible for the Maine Examiner and the website was a personal project he undertook on his own time, apart from his employment with the MRP. According to Mr. Savage, the total cost of operating the website was \$74.

The MRP responded that it does not own or control the Maine Examiner and did not authorize its Executive Director to create it. The MRP stated that Mr. Savage operated the website in his individual capacity, at his own expense, outside the scope of his employment with the MRP. At the February 22 meeting, the Commission closely examined the statutory requirements in question and the information provided by counsel, and determined not to conduct any further investigation.

Following the meeting, Commissioner Bill Lee contacted me and suggested that I schedule for your April meeting a discussion of a possible presumption that if an employee of a political party creates communications to voters advocating for or against candidates, the preparation of those communications would be presumed to be within the scope of his or her employment. In response to Commissioner Lee's suggestion, the Commission staff drafted the attached rule for your consideration. (Please see paragraph 13 at the end of the attachment.) If you would like to move forward with this, the staff can discuss possible timing with you at the April meeting.

Thank you.

Chapter 1: PROCEDURES

SECTION 7. EXPENDITURES

1. **Expenditures by Consultants, Employees, and Other Agents of a Political Campaign**
 - A. Each expenditure made on behalf of a candidate, political committee, or political action committee by any person, agency, firm, organization, etc., employed or retained for the purpose of organizing, directing, managing or assisting the candidate, the candidate's committee, or the political action committee must be reported separately by the candidate or committee as if made or incurred by the candidate or committee directly. The report must include the name of the third party vendor or payee to whom the expenditure was made, the date of the expenditure, and the purpose and amount of the expenditure. It is not sufficient to report only the total retainer or fee paid to the person, agency, firm, organization, etc., if that retainer or fee was used to pay third party vendors or payees for campaign-related goods and services.
 - B. If a candidate or committee has paid a media buyer, advertising consultant or similar contractor to purchase advertising time or for the production of television or radio advertising, the candidate or committee may disclose the advertising time and production costs in the aggregate, rather than itemizing each payment made by the contractor to a third party vendor or payee. *Maine Clean Election Act* candidates must obtain from their contractor(s) documentation of every payment of \$50 or more made on their behalf by a contractor or subcontractor related to television or radio advertising.
2. **Expenditures by Political Action Committees.** In addition to the requirements set forth in 21-A M.R.S.A. §1060(4), the reports must contain the purpose of each expenditure and the name of each payee and creditor.
3. **Timing of Reporting Expenditures**
 - A. Placing an order with a vendor for a good or service; signing a contract for a good or service; the delivery of a good or the performance of a service by a vendor; or a promise or an agreement (including an implied one) that a payment will be made constitutes an expenditure, regardless whether any payment has been made for the good or service.
 - B. Expenditures must be reported at the earliest of the following events:
 - (1) The placement of an order for a good or service;
 - (2) The signing of a contract for a good or service;
 - (3) The delivery of a good or the performance of a service by a vendor;

- (4) A promise or an agreement (including an implied one) that a payment will be made; or
 - (5) The making of a payment for a good or service.
 - C. At the time the duty to report an expenditure arises, the person submitting the report is required to determine the value of goods and services to be rendered (preferably through a written statement from the vendor) and to report that value as the amount of the expenditure. If the expenditure involves more than one candidate election, the report must include an allocation of the value to each of those candidate elections.
4. **Advance Purchases of Goods and Services for the General Election** *[Repealed]*
5. All campaign-related payments made with the personal funds or credit card of the candidate or an individual authorized by the candidate must be reported as expenditures in the reporting period during which the payment to the vendor or payee is made. The candidate must report the name of the vendor or payee to whom the payment was made, the date of the expenditure, and the purpose and amount of the expenditure. When the expenditure is reported, the candidate should indicate the person who made the payment by entering "Paid by [name of candidate or supporter]" in the remarks section of the expenditure schedule. It is not sufficient to report only the name of the candidate or authorized individual to whom reimbursement was made and the total amount of the reimbursement.
6. Multiple expenditures for bank fees and for vehicle travel may be reported in an aggregate amount, provided that the candidate or committee identifies the time period of the expenditures in the remarks section of the report.
7. When a political action committee or party committee makes an expenditure for a communication to voters for the purpose of influencing the election of a clearly identified candidate, the amount spent to influence that candidate's election must be specified on the regularly filed campaign finance report of the committee, regardless whether the communication expressly advocates for the election or defeat of the candidate. If a single expenditure influences the election of more than one candidate, the political action committee or party committee shall itemize the amount spent per candidate.
8. Payments made or obligations incurred solely for the purpose of conducting activities to determine whether an individual should become a candidate are not expenditures if the individual does not become a candidate. Examples of such activities include, but are not limited to, conducting a poll, telephone calls, and travel. The individual shall keep records of all such payments and obligations. If the individual becomes a candidate, the payments made or obligations incurred are expenditures and are subject to the reporting requirements of 21-A M.R.S.A. §1017. Such expenditures must be disclosed in the first report filed by the candidate or the candidate's authorized campaign committee, regardless of the date when the funds were expended, in accordance with the Commission's procedures for reporting expenditures.

Payments made for activities indicating that an individual has decided to become a candidate for a particular office are expenditures. Examples of such activities include, but are not limited to: using general public political advertising to publicize his or her

intention to campaign for office; hiring staff or consultants for campaign activities; raising funds in excess of what could reasonably be expected to be used for exploratory activities; making or authorizing statements that refer to him or her as a candidate; or taking action to qualify for the ballot.

9. **Exception to Disclaimer Requirements for Certain Handbills, Campaign Signs, and Internet or E-Mail Communications**

For purposes of applying the exclusions listed in Title 21-A, section 1014, subsection 6, paragraphs A through C, the following terms have the following meanings:

- A. “Cost” includes all payments or obligations incurred, and the value of all goods and services received, for the purpose of creating, designing, preparing or distributing the communications.
- B. “Internet or e-mail communication” means any communication transmitted over the Internet, including but not limited to: sending or forwarding electronic messages; social networking; providing a hyperlink or other direct access to another person’s website; creating, maintaining or hosting a website or blog; placing material on another person’s website; and any other form of communication distributed over the Internet.
- C. “Acting independently of and without authorization by a candidate, candidate’s authorized campaign committee, party committee, political action committee or ballot question committee or an agent [thereof]” means acting without any suggestion, request, direct or indirect authorization or compensation or reimbursement from any such candidate, committee or agent.

10. **Press Exemption.** In order for the costs of preparing and disseminating a news story, commentary, or editorial to be exempt from the definitions of expenditure under the press exemption [§§ 1012(3)(B)(1) & 1052(4)(B)(1)], the following criteria must be met:

- A. the names of the persons or entities who own, control and operate the broadcasting station or publication are identified within the publication or otherwise made known to the public; and
- B. the broadcasting station or publication is not owned or controlled by any political party, political action committee or ballot question committee and is not owned or controlled by any candidate for state, county or municipal office whose candidacy, election campaign, or opponent is a subject of the news story, commentary or editorial, or by the authorized campaign committee of such a candidate, or by a member of such a candidate’s immediate family.

In addition to the above criteria, to qualify as a periodical publication, including one in electronic form on the Internet, or a newspaper or magazine, a publication (i) must have been disseminating news stories, commentaries or editorials on a variety of topics to the general public on a periodic basis for at least the previous twelve months, or (ii) must have a record of disseminating news stories, commentaries or editorials on a variety of topics to the general public or other objective indicators that the publication will continue to be published on a periodic basis beyond the election cycle during which the press exemption is claimed.

For purposes of this section, broadcasting station includes a cable television system.

11. **Shared Expenditures by Candidates.** When two or more candidates have jointly purchased a communication to voters or another good or service, a candidate will not be considered to have received an in-kind contribution if the cost is allocated among the candidates in proportion to the benefit received by each candidate.
12. **Disclosure of top funders in paid communications.** If an entity makes an independent expenditure in excess of \$250 to influence a candidate's election, the communication is required to contain the entity's top three funders under Title 21-A, section 1014, subsection 2-B.
 - A. The disclosure included in a cable television or broadcast television communication must conform with those portions of federal regulations 47 CFR §73.1212(a)(2)(ii) and 47 CFR §76.1615(a) which regulate text size and duration of sponsorship information. Specifically
 - (1) the font size must be equal to or greater than four percent of the vertical picture height, and
 - (2) the text must appear for not less than four seconds.
 - B. For communications listed in Title 21-A, section 1014, subsection 2-B with a visual aspect other than television or video communications, the statement of funders must appear in a font size that is 12-point or larger.
 - C. If the communication is funded by a political action committee that is a separate or segregated fund as defined in Title 21-A, section 1052, subsection (5)(A)(1), but not a separate legal entity, the top three funders to be listed are the top three funders of the legal entity (corporation, membership organization, cooperative or labor or other organization) that established the fund.
 - D. If the communication is funded by a political action committee that is fully funded or controlled by another political action committee or legal entity, the top three funders to be listed are the top three funders of that entity that fully funds or controls the political action committee.
 - E. For any other political action committee that does not fall within the parameters of paragraphs C or D, the top three funders are the contributors who have given the top three aggregate contributions, as defined in Title 21-A, section 1052(3), during the time period specified in Title 21-A, section 1014, subsection 2-B, paragraph A.

Communications for which including the statement required by Title 21-A, section 1014, subsection 2-B would be impossible or impose an unusual hardship due to their format or medium are exempt from the requirements of that section.

13. **Activities by employees of a political party.** If an employee of a party committee designs, produces or disseminates a communication to voters expressly advocating for or against a candidate or otherwise is covered by the disclosure requirements of Title 21-A, section 1014, those activities will be presumed to be within the scope of his or her employment. A portion of the employee's compensation will be deemed an expenditure by the party committee for purposes of the disclosure and financial reporting requirements of 21-A M.R.S.A. §§ 1014, 1017-A and 1019-B. The employee or party committee may rebut the presumption by submitting evidence that the employee acted without the authorization of the party committee's officers or management or that the activities are unrelated to the employee's work responsibilities.