ACLU MAINE
AMERICAN CIVIL LIBERTIES UNION
OF MAINE FOUNDATION

121 Middle Street, Suite 301
Portland, Maine 04101
T/ (207) 774-5444
F/ (207) 774-1103
www.aclumaine.org

March 9, 2012

Walter F. McKee, Chair
Maine Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, Maine 04333

Re: Comments on Proposed Rulemaking

To the Commission:

On behalf of the ACLU of Maine, I wish to first extend our thanks for the invitation to comment on your proposed rules governing internet publishers and low-cost expenditures. As you are probably aware, I represent Dennis Bailey in litigation, along with ACLU of Maine President John M.R. Paterson, Esq., against the Commission relating to these very issues. A more detailed elaboration of our views on the need to protect internet news publishers and the right to anonymous speech can be found in the court filings in that case. I will confine my comments here, to the extent possible to a response to the Commission's actual proposal.

First, we should note our approval that the Commission is interested in updating its rules and practices to take account of the important role that internet communications plays in the creation and distribution of ideas, including political ideas. As your staff has no doubt shared, the Federal Election Commission engaged in a similar process in 2006, which led the development of its own set of rules and guidance regarding internet speech.

Second, while the internet is a new medium with new challenges and opportunities for both users and regulators, the U.S. Supreme Court has made it clear that "there is no basis for qualifying the level of First Amendment scrutiny that should be applied to this

medium." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). In other words, the government may not impose burdens on internet writers and publishers that are not imposed on those who communicate through traditional media.

Third, the Commission's proposal does not go far enough in satisfying this mandate. Maine currently exempts the publication of news stories, editorials, and commentary when they are published through radio, television, newspapers, magazines and other periodicals. 21-A M.R.S.A. §§1012(3)(B)(1) and 1052(4)(B)(1). The Commission proposes to extend that exemption to "periodical publication" in electronic form, but only subject to a narrow set of requirements that are not applied, for example, to news publications made over radio. Nothing in Maine law requires a newspaper or television station to publish for a year before receiving an exemption, nor should that requirement be applied to internet publishers. Also, there is no requirement that the author or publisher of a magazine identify themselves or avoid pseudonyms, and Maine should not make that requirement of internet publishers.

Fourth, when it comes to the regulation of internet publication, the Commission would do well to begin with the proposition acknowledged by the FEC: "the vast majority of Internet communications are, and will remain, free from campaign finance regulation." Internet Communications, 71 Fed. Reg. 18589 (2006). Regulation of speech on the internet is fraught with peril, for both the speakers themselves, who are often caught up in regulations that they do not understand, and for regulators, who should anticipate finding their efforts challenged in court.

Fifth, the reason why caution and restraint in the regulation of internet speech makes the most sense goes to the heart of the Commission's mission: insuring that political debates and elections are conducted fairly. The internet is, perhaps, the greatest tool for making our elections more fair. Candidates and commentators alike can widely publish their views at extremely low cost, which mitigates the need for high-dollar fundraising. And, those publications are passively available to the general public—the public can access only the websites that it wants and can avoid being subjected to unwanted or unrequested

publication. The Commission should do more to encourage internet publication, and more confusing regulation is not the answer. In light of this, the ACLU of Maine recommends that proposed Chapter 1, Section 7(10): Press Exemption be rewritten to make it clear that news stories, editorials and commentary published on the internet is exempt from the definition of "expenditure" and "contribution".

Six, while a number of courts have upheld the constitutionality of "paid for" disclosure requirements in facial attacks, the courts have made it clear that those requirements are still potentially subject to as-applied First Amendment challenges. Disclosure requirements directly interfere with a person's right to publish anonymously or under a pseudonym. Anonymous and pseudonymous speech have been a part of American political discourse since before the founding period, and the Supreme Court has repeatedly observed that a person generally has the right to decide for themselves whether or not to disclose their name. For example, in *McIntyre v. Ohio*, the Supreme Court stated:

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of ones privacy as possible. Whatever the motivation may be . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

514 U.S. 334, 341-42 (1995).

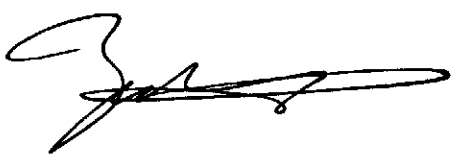
Anonymous speech makes some people uncomfortable (especially the subject of such speech). But that discomfort is the price we pay to live in a country where people decide

for themselves what to say and what to believe, as free as possible from government involvement in the matter. The Supreme Court in *McIntyre* went on to note that, "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Id.* at 356.

Seventh, the government's interest in requiring disclosure diminishes as the dollar amount of the expenditure diminishes, and at some point the government's interest is outweighed by the individual's interest in anonymity. Among the government's interests that support disclosure requirements are the prevention of corruption and the appearance of corruption. The ACLU of Maine believes that it is exceedingly unlikely that any political candidate would be corrupted by an independent expenditure of less than $1000. That amount, rather than $100 proposed and included in current law, seems like a much more reasonable threshold for subjecting an individual's speech to government regulation. In the recent litigation between the Commission and the National Organization for Marriage, the amount in question was more than $1 million. The ACLU of Maine believes that the lower-cost speech can, and should, be left to the marketplace of ideas to regulate.

If there is anything further that the ACLU of Maine can provide to assist in your deliberations, please do not hesitate to ask.

Very truly yours,



Zachary L. Heiden, Esq.
Legal Director