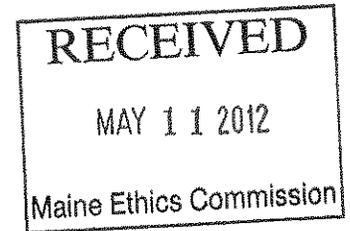




MPA Maine Press Association

May 11, 2012



VIA HAND DELIVERY

Mr. Jonathan Wayne
Executive Director
State of Maine
Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, ME 04333

Re: Maine Press Association Comments on Revised Rule Interpreting Press Exception

Dear Jonathan:

The Maine Press Association provides these comments on the revised rule interpreting the “press exception” in Chapter 1, Section 7, sub-section 10 of the Rules of the Commission on Governmental Ethics and Election Practices (“Ethics Commission”). The MPA, representing the state’s newspaper industry, consists of the majority of the weekly and daily papers across the state.

In Maine campaign finance law, the distribution of “any news story, commentary, or editorial” by “the facilities of any broadcasting station, newspaper, magazine or other periodical publication” is exempt from campaign finance reporting requirements. 21-A M.R.S. § 1012(3)(B)(1). The statute also requires that the communication be made by an entity with a proper press function – that is, the facilities are not “owned or controlled by any political party, political committee, a candidate, or a candidate’s immediate family.” In this case, the Ethics Commission proposes a rule interpreting this “press exception” to the definition of “expenditure,” particularly with respect to Internet publishers.

Maine statute closely follows the federal law press exception, which is codified at 2 U.S.C. 431(9)(B)(i)¹ and also in rule at 11 CFR §100.73 and §100.132.² The “media exception,” as it is described in federal regulations, recognizes the “unfettered right of the newspapers, television

¹ Congress exempted from the definition of “expenditure” and “contribution” costs associated with “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee or candidate.” 2 U.S.C. 431(9)(B)(i).

² “Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication is not a contribution unless the facility is owned or controlled by any political party, political committee, or candidate, in which case the costs for a news story: (a) that represents a bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility; and (b) That is part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not a contribution.” 11 CFR §100.73 (for expenditures) and 11 CFR §100.132 (for contributions).

networks, *and other media* to cover and comment on political campaigns.” H.R. Rep. No. 93-1239, 93d Congress, 2d Session at 4 (1974). Similarly, as the Supreme Court has noted, “It is not the intent of Congress in [FECA]...to limit or burden in any way the First Amendment freedoms of the press and association. Thus, the exclusion assures the unfettered right of newspapers, TV networks, and other media to cover and comment on political campaigns.” *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 250 (1986)(citing H.R. Rep. No. 93-129 at P.4 (1974)).

To determine whether the media exception applies, the Federal Election Commission (“FEC”) has traditionally applied a two-step analysis. First, the FEC determines whether the entity engaging in the activity is a “press entity” as described by the Act and FEC regulations. Second, in determining the scope of the exemption, the FEC considers: 1) whether the press entity is owned or controlled by a political party, political committee, or candidate; and 2) whether the press entity is acting as a press entity in conducting the activity at issue, i.e. whether it is acting in its “legitimate press function.” *See* Federal Register, Vol. 71, No. 70, p. 18607, April 12, 2006.

In its 2006 amendments, the FEC clarified that the media exception “applies to media entities that cover or carry news stories, commentary, and editorials on the Internet, just as it applies to media entities that cover or carry news stories, commentary, and editorials in traditional media.” The FEC also clarified that the media exception “protects news stories, commentaries, and editorials no matter in what medium they are published.” *See id.* at 18608.

The FEC has extended this protection to bloggers that cover and carry news stories, commentaries, or editorials. *See* Advisory Opinion 2005-16. However, the FEC has extended this protection to bloggers and others who communicate on the Internet only if it determines that they are providing a “periodical publication.” “Periodical publication” was originally defined by the FEC to mean “a publication in bound pamphlet form appearing at regular intervals...and containing articles of news, information, or entertainment.” However, the FEC now recognizes a more dynamic, modern definition of “periodical,” and explains that the media exception “ought not be construed rigidly to deny the media exemption to entities who update their content on a frequent, but perhaps not fixed, schedule.” *See* Federal Register, Vol. 71, No. 70, p. 18610, April 12, 2006.

The MPA again supports the clarification of the statute, including the requirement that the owner or operator of the publication be identified within the publication or otherwise be made known to the public. The public must be able to evaluate the credibility of the authors and published materials and understand potential conflicts of interest. Another factor, among others, that could be considered by the Ethics Commission when determining whether the publishing entity is an eligible press entity is whether it is registered as a corporation, business, or non-profit corporation.

Additionally, the MPA supports the requirement that the publication must disseminate information to the public periodically, which is in its essence journalistic in nature. Importantly, the underlying statute and the federal law require this periodic publication. The published information must not be a stagnant post that is not regularly updated. It must have a regular following of readers. The periodic nature of the communication is important, so various political entities do not arise around the time of elections for the sole purpose of affecting elections without any accountability and without the traditional protections of press publications.

Importantly, the MPA believes that the language of the proposed rule does not go too far and prohibit certain online and offline publishing activities that are protected under the federal law and the First Amendment. These activities include express advocacy and programming that may be biased or

balanced. Even coordination between a press entity and a candidate or political party has been determined by the FEC to be irrelevant in determining whether the press exception applies. *Id.* at 18609.

Therefore, the MPA supports the Ethics Commission new rule in Chapter 1, Section 7, sub-section 10. Thank you for the opportunity to provide comments on these proposed Ethics Commission rule amendments.

Sincerely,

/s/

Michael J. Dowd,
Editor-in-Chief, Bangor Daily News
President, Maine Press Association