

Agenda

Item #4



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

To: Commission Members
From: Jonathan Wayne, Executive Director
Date: July 21, 2009
Re: Final Adoption of Major Substantive Rules

On March 26, 2009, the Ethics Commission provisionally adopted changes to Chapter 3 of the Commission's Rules:

- Chapter 3, Section 5(3)(F) – permitting the Commission to exercise its own judgment in deciding whether a reported independent expenditure was made to support or to oppose a candidate, if the expenditure was not accurately reported to the Commission
- Chapter 3, Section 7(2)(B)(2-A) – requiring a Maine Clean Election Act candidate who has received matching funds for a primary election and who has won the election to return any unspent matching funds after the primary election, so that they are not used in the general election race
- Chapter 3, Section 7(2)(C) – requiring campaigns who have purchased personal property or equipment with Maine Clean Election Act funds to sell the property or equipment for fair market value after the election and to return the proceeds to the Commission. The Commission specified that if the campaign sells the property or equipment to a candidate or a member of the candidate's immediate family or campaign staff, the campaign must recover at least 75% of the original purchase price.

Because the rules are major substantive, the Commission's amendments were reviewed by the Maine Legislature.

In Resolve Chapter 90, the Legislature authorized the Commission to finally adopt the rule amendments if the Commission reduced the minimum amount that must be received from the sale of property or equipment purchased with Maine Clean Election Act funds from 75% to 40%. The amendments are attached for your consideration, with the change directed by the Legislature.

The resolve was finally adopted by the Legislature on June 2, 2009 and signed by the Governor on June 4, 2009. Thank you.

94-270

COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES

Chapter 3:

MAINE CLEAN ELECTION ACT AND RELATED PROVISIONS

SECTION 5. DISTRIBUTION OF FUNDS TO CERTIFIED CANDIDATES
[SUBSECTIONS 1, 2, AND 4 OMITTED]

3. **Matching Fund Provision**

A. **General.** The Commission will authorize immediately an allocation of matching funds to certified candidates in accordance with the Act when the Commission determines that the eligibility for receipt of matching funds has been triggered [§1125(9)].

B. **Matching Fund Computation Involving Only Certified Candidates**

(1) For each certified candidate, the Commission will:

(a) add to the initial distribution amount for that election:

(i) the sum of any matching funds previously provided for that election, and

(ii) the sum of independent expenditures made in support of each certified candidate; and

(b) subtract the sum of independent expenditures made in opposition to each certified candidate.

(2) The Commission will compare the final computed amounts and will immediately authorize a matching fund allocation equal to the difference to the certified candidate with the lesser amount.

(3) In computations involving only certified candidates, the Commission will not use seed money raised or unspent funds remaining after a primary election in computing the amount of matching funds.

C. **Matching Fund Computation Based on Nonparticipating Candidates'**

Receipts or Expenditures. In races in which there is at least one certified and one nonparticipating candidate, and the matching fund computation is triggered by the financial activity of nonparticipating candidate, including any independent expenditures in support of the nonparticipating candidate:

(1) The Commission will first determine the applicable amount for the nonparticipating candidate

- (a) by adding:
 - (i) the sum of the nonparticipating candidate's expenditures, obligations and in-kind contributions, or the sum of the nonparticipating candidate's cash and in-kind contributions and loans, including surplus or unspent funds carried forward from a previous election to the current election, whichever is greater, and
 - (ii) the sum of independent expenditures made in support of the same nonparticipating candidate; and
 - (b) by subtracting the sum of independent expenditures made in opposition to the same nonparticipating.
- (2) The Commission then will determine the applicable amount for the certified candidate
- (a) by adding:
 - (i) the amount of the initial distribution for that election;
 - (ii) the sum of independent expenditures made in support of the certified candidate;
 - (iii) the sum of matching fund allocations already provided to the certified candidate; and
 - (iv) the amount of:
 - a) any seed money raised by an enrolled certified candidate in a primary or special election or by a replacement candidate in a general election; or
 - b) any unspent funds carried forward from the primary election to the subsequent general election by an enrolled certified candidate in a general election; or
 - c) any seed money raised and, if applicable, any other distribution received prior to the general election distribution by an unenrolled certified candidate in a general or special election; and
 - (b) by subtracting the sum of independent expenditures made in opposition to the same certified candidate.
- (3) The Commission will compare the final computed amounts and, if the amount for the certified candidate is less than the amount for the nonparticipating candidate, will immediately authorize a matching fund allocation equal to the difference to the certified candidate.

- D. **Matching Fund Computation Not Involving a Nonparticipating Candidate.** In races in which there are two or more certified candidates and at least one nonparticipating candidate,
- (1) if the matching fund computation is triggered by an independent expenditure in support of or opposition to a certified candidate, and
 - (2) the campaign totals, including independent expenditures, of any nonparticipating candidate in the race are equal to or less than the campaign totals, including independent expenditures, of at least one certified candidate in the race; then
 - (3) the matching fund computation must be completed according to the procedure in paragraph B of this subsection.
- E. The Commission will make computations promptly upon the filing of campaign finance reports and independent expenditure reports.
- F. To prevent the abuse of the Matching Fund Provision, the Commission will not base any calculation on independent expenditures that, although containing words of express advocacy, also contain other words or phrases that have no other reasonable meaning than to contradict that the express advocacy. The Commission is not bound by a statement in an independent expenditure report that the disclosed payment was made in support or in opposition to a candidate. For example, expenses related to a communication saying, "Vote for John Doe -- he's incompetent and inexperienced," will not be considered a communication in support of John Doe in the calculation of matching funds.
- G. **Matching Fund Cap.** Matching funds are limited to 2 times the amount originally distributed to a certified candidate from the Fund for that election. Certified candidates are not entitled to cumulative matching funds for multiple opponents.
- H. **Other.** Any distribution based on reports and accurate calculations at the time of distribution is final, notwithstanding information contained in subsequent reports.
- I. **Coordination with Other State Agencies.** The Commission will coordinate with the Office of the Controller and other relevant State agencies to implement a mechanism for the distribution of Fund revenues to certified candidates that is expeditious, ensures public accountability, and safeguards the integrity of the Fund.
- J. **Disbursements with No Campaign Value.** If a privately financed candidate has received monetary contributions which are disbursed in ways that do not in any way influence the nomination or election of the candidate, those receipts will not be considered by the Commission in calculating matching funds for his or her opponent. Such disbursements may include repaying a loan received by the candidate, refunding a contribution to a contributor, or transferring funds to a party or political committee for purposes that do not relate to the candidate's race.

SECTION 7. RECORD KEEPING AND REPORTING [SUBSECTION 1 OMITTED]

2. Reporting by Participating and Certified Candidates

- A. **General.** Participating and certified candidates must comply with applicable reporting requirements set forth in Title 21-A, chapter 13, subchapter II [§1017].
- B. **Return of Matching Fund Advances and Unspent Fund Revenues.** Matching fund advance revenues that have not been authorized for spending and unspent Fund revenues shall be returned to the Fund as follows:
- (1) **Unauthorized Matching Funds.** Candidates must return all matching fund advance revenues for which no spending authorization was issued prior to an election to the Commission by check or money order payable to the Fund within 2 weeks following the date of the election.
 - (2) **Unspent Fund Revenues for Unsuccessful Primary Election Candidates.** Upon the filing of the 42-day post-primary election report for a primary election in which a certified candidate was defeated, that candidate must return all unspent Fund revenues to the Commission by check or money order payable to the Fund, except that a gubernatorial candidate may be allowed to reserve up to \$2,000 in order to defray expenses associated with an audit by the Commission.
- (2-A) Unspent Matching Funds for Successful Primary Election Candidates. Upon the filing of the 42-day post-primary election report for a primary election in which a certified candidate was successful, that candidate must return any unspent matching funds received for the primary election. Matching funds received for the primary election may not be used for campaign expenditures for the general election.
- (3) **Unspent Fund Revenues for All General and Special Election Candidates.** Upon the filing of the 42-day post-election report for a general or special election, all candidates must return all unspent Fund revenues to the Commission by check or money order payable to the Fund, except that a gubernatorial candidate may be allowed to reserve up to \$3,500 in order to defray expenses associated with an audit by the Commission.
- C. **Liquidation of Property and Equipment.** Property and equipment that is not exclusive to use in a campaign (e.g., computers and associated equipment, etc.) that has been purchased with Maine Clean Election Act funds loses its campaign-related purpose following the election. Such property and equipment purchased for \$50 or more must be liquidated at its fair market value and the proceeds thereof reimbursed to the Maine Clean Election Fund as unspent fund revenues in accordance with the schedule in paragraph B above. Candidates may not return unsold property or equipment to the Commission.
- (1) The liquidation of campaign property and equipment may be done by sale to another person or purchase by the candidate.

- (2) Liquidation must be at the fair market value of the property or equipment at the time of disposition. Fair market value is determined by what is fair, economic, just, equitable, and reasonable under normal market conditions based upon the value of items of similar description, age, and condition as determined by acceptable evidence of value. A campaign's sale of property or equipment through an on-line commercial auction shall be considered by the Commission as a factor in favor of determining that the campaign has recovered the fair market value of the property or equipment.

- (3) If the campaign sells the property or equipment to the candidate or a member of the candidate's immediate family or campaign staff, the campaign must receive at least 40% of the original purchase price.

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Resolve, Regarding Legislative Review of Portions of Chapter 3: Maine Clean Election Act and Related Provisions - Matching Funds and Property and Equipment, a Major Substantive Rule of the Commission on Governmental Ethics and Election Practices

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, the Maine Revised Statutes, Title 5, chapter 375, subchapter 2-A requires legislative authorization before major substantive agency rules may be finally adopted by the agency; and

Whereas, the above-named major substantive rule has been submitted to the Legislature for review; and

Whereas, immediate enactment of this resolve is necessary to record the Legislature's position on final adoption of the rule; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore, be it

Sec. 1 Adoption. Resolved: That final adoption of portions of Chapter 3: Maine Clean Election Act and Related Provisions - matching funds and property and equipment, a provisionally adopted major substantive rule of the Commission on Governmental Ethics and Election Practices that has been submitted to the Legislature for review pursuant to the Maine Revised Statutes, Title 5, chapter 375, subchapter 2-A, is authorized if the rule regarding the minimum amount that must be received from the resale of property and equipment purchased using Maine Clean Election Act funds is reduced from 75% to 40%.

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.

For your reference

5 MRSA § 8072. LEGISLATIVE REVIEW OF MAJOR SUBSTANTIVE RULES

As provided in section 8071, major substantive rules are subject to an increased level of rule-making requirements. The rule-making requirements of subchapter II for routine technical rules apply to the adoption of major substantive rules, except that the 120-day period for adoption and the 150-day period for approval as to form and legality under section 8052, subsection 7, paragraphs A and B apply to provisional adoption of major substantive rules, not final adoption. In addition to the other rule-making requirements, every major substantive rule is also subject to legislative review as provided in this section. [1995, c. 463, §2 (NEW) .]

1. Preliminary adoption of major substantive rules. An agency proposing a major substantive rule other than an emergency rule, after filing the notice of proposed rulemaking required by section 8052, shall proceed with rule-making procedures to the point of, but not including, final adoption. At that point, known in this section as "provisional adoption," the agency shall file the provisionally adopted rule and related materials with the Secretary of State as provided in section 8056, subsection 1, paragraph B and submit the rule to the Legislature for review and authorization for final adoption as provided in this section. The rule has legal effect only after review by the Legislature followed by final adoption by the agency.

[1997, c. 196, §2 (AMD) .]

2. Submission of materials. At the time an agency provisionally adopts a rule, the agency shall submit to the Executive Director of the Legislative Council 20 copies of:

A. The full text of the rule provisionally adopted by the agency with new language underlined and with language to be deleted from any existing rule stricken through but clearly legible; [1995, c. 463, §2 (NEW) .]

B. A concise summary of the content of the rule and a description and a copy of any existing rule the agency proposes to amend or repeal; [1995, c. 463, §2 (NEW) .]

C. A statement of the circumstances that require the rule; [1995, c. 463, §2 (NEW) .]

D. A statement of the economic impact of the rule on the State and its residents; and [1995, c. 463, §2 (NEW) .]

E. Any other information required by law. [1995, c. 463, §2 (NEW) .]

[1995, c. 463, §2 (NEW) .]

3. Assignment to committee of jurisdiction. Upon receipt of the required copies of the provisionally adopted rule and related information, the Executive Director of the Legislative Council shall immediately forward the materials to the Secretary of the Senate and the Clerk of the House for placement on the Advance Journal and Calendar and distribution to a committee as provided in this subsection. The secretary and clerk shall jointly suggest reference to a joint standing committee of the Legislature that has jurisdiction over the subject matter of the proposed rule and shall provide for publication of that suggestion in the Advance Journal and Calendar first in the Senate and then in the House of Representatives no later than the next legislative day following receipt. After floor action on referral of the rule to committee is completed, the Secretary of the Senate and the Clerk of the House of Representatives shall send copies of the rule and related information to each member of that committee. Each rule submitted for legislative review must be reviewed by the appropriate joint standing committee at a meeting called for that purpose in accordance with legislative rules. A committee may review more than one rule and the rules of

more than one agency at a meeting. The committee shall notify the affected agency of the meeting on its proposed rules.

[1995, c. 574, §2 (AMD) .]

4. Committee review. The committee shall review each provisionally adopted rule and, in its discretion, may hold public hearings on that rule. A public hearing under this subsection must be advertised in the same manner as required by legislative rules then in effect for advertisement of public hearings on proposed legislation. The committee's review must include, but is not limited to, a determination of:

- A. Whether the agency has exceeded the scope of its statutory authority in approving the provisionally adopted rule; [1995, c. 463, §2 (NEW) .]
- B. Whether the provisionally adopted rule is in conformity with the legislative intent of the statute the rule is intended to implement, extend, apply, interpret or make specific; [1995, c. 463, §2 (NEW) .]
- C. Whether the provisionally adopted rule conflicts with any other provision of law or with any other rule adopted by the same or a different agency; [1995, c. 463, §2 (NEW) .]
- D. Whether the provisionally adopted rule is necessary to fully accomplish the objectives of the statute under which the rule was proposed; [1995, c. 463, §2 (NEW) .]
- E. Whether the provisionally adopted rule is reasonable, especially as it affects the convenience of the general public or of persons particularly affected by it; [1995, c. 463, §2 (NEW) .]
- F. Whether the provisionally adopted rule could be made less complex or more readily understandable for the general public; [1995, c. 537, §7 (AMD) .]
- G. Whether the provisionally adopted rule was proposed in compliance with the requirements of this chapter and with requirements imposed by any other provision of law; and [1995, c. 537, §7 (AMD) .]
- H. For a rule that is reasonably expected to result in a significant reduction in property values, whether sufficient variance provisions exist in law or in the rule to avoid an unconstitutional taking, and whether, as a matter of policy, the expected reduction is necessary or appropriate for the protection of the public health, safety and welfare advanced by the rule. [1995, c. 537, §8 (NEW) .]

[1995, c. 537, §§7, 8 (AMD) .]

5. Committee recommendation. After reviewing the rule, the committee shall recommend:

- A. That the Legislature authorize the final adoption of the rule; [1995, c. 463, §2 (NEW) .]
- B. That the Legislature authorize the final adoption of a specified part of the rule; [1995, c. 463, §2 (NEW) .]
- C. That the Legislature authorize the final adoption of the rule with certain specified amendments; or [1995, c. 463, §2 (NEW) .]
- D. That the final adoption of the rule be disapproved by the Legislature. [1995, c. 463, §2 (NEW) .]

The committee shall notify the agency proposing the rule of its recommendation. When the committee makes a recommendation under paragraph B, C or D, the notice must contain a

statement of the reasons for that recommendation.

[1995, c. 463, §2 (NEW) .]

6. Draft legislation. When the committee recommends that a rule be authorized in whole or in part by the Legislature, the committee shall instruct its nonpartisan staff to draft a bill authorizing the adoption of all or part of the rule and incorporating any amendments the committee desires.

[1995, c. 463, §2 (NEW) .]

7. Consideration by the Legislature. No later than 30 days before statutory adjournment of the Legislature as provided in Title 3, section 2 each joint standing committee of the Legislature shall submit to the Secretary of the Senate and the Clerk of the House of Representatives the committee's report on agency rules the committee has reviewed as provided in this section. The report must include a copy of the rule or rules reviewed, the committee's recommendation concerning final adoption of the rule or rules, a statement of the reasons for a recommendation to withdraw or modify the rule or rules and draft legislation for introduction in that session that is necessary to implement the committee's recommendation. A committee may decline to include in its report recommendations covering any rules submitted to it later than 5:00 p.m. on the 2nd Friday in January of the year in which the rules are to be considered by the committee. If, before adjournment of the session at which a rule is reviewed, the Legislature fails to act on all or part of any rule submitted to it for review in accordance with this section, an agency may proceed with final adoption and implementation of the rule or part of the rule that was not acted on.

[2005, c. 586, §1 (AMD) .]

8. Final adoption; effective date. Unless otherwise provided by law, final adoption of a rule by an agency must occur within 60 days of the effective date of the legislation approving that rule or of the adjournment of the session at which that rule is reviewed if no legislation is enacted. Finally adopted rules must be filed with the Secretary of State as provided in section 8056, subsection 1, paragraph B and notice must be published as provided in section 8056, subsection 1, paragraph D. An agency rule authorized by the Legislature becomes effective 30 days after filing with the Secretary of State or at a later date specified by the agency.

[1995, c. 463, §2 (NEW) .]

9. Consideration at special session. If appropriate, the committee recommendation regarding an agency rule or rules may be submitted to and considered by a special session of the Legislature.

[1995, c. 463, §2 (NEW) .]

SECTION HISTORY

1995, c. 463, §2 (NEW). 1995, c. 537, §§7,8 (AMD). 1995, c. 574, §2 (AMD). 1997, c. 196, §2 (AMD). 2005, c. 586, §1 (AMD).

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