

To: Administrative Procedure Officer
Office of the Secretary of State

From: Jonathan Wayne, Executive Director

Date: April 8, 2005

Re: Amendments to Chapters 1 and 3 (Major Substantive)
Statement of Factual and Policy Basis for Amendments and
Summary and Response to Comments

Chapter 1, Section 6 – Contributions and Other Receipts

Factual and Policy Basis: in the 2004 elections, the Commission staff received many informal questions about what constitutes an in-kind contribution (a good or service donated to a candidate or political committee). In responding to those questions, the staff referred the questioners to the statutory definition of “contribution” (21-A M.R.S.A. §1012(2)(A)) and offered the best guidance that it could. The Commission has adopted Subsections 6(1), (3), (4), and (5) to clarify that the following are contributions: loans (except loans from a financial institution in Maine made in the ordinary course of business); goods and services provided at a cost that is less than the usual and customary charge; extensions of credit by vendors that are outside the customary practice of the vendor; and an employer’s provision of services by employees during paid work-time.

Under 21-A M.R.S.A. §1017(5), candidates must report the occupation and “principal place of business” of each individual contributing more than \$50 during an election. Political action committees (PACs) are under a similar requirement. In the 2004 elections, many Maine Clean Election Act candidates apparently were unaware that this requirement might apply to seed money contributions. Also, many traditionally financed

candidates did not report the required employment information, or reported the town in which the contributor's employer was situated rather than the contributor's employer. The Commission recognizes that some contributors are reluctant or unwilling to release information about their employment. The Commission has adopted Subsection 6(2) to clarify that: the requirement applies both to seed money and traditional contributions; that "principal place of business" means the contributor's employer; that candidates and PACs are required by the Election Law to make a reasonable effort to obtain the contributor's employment information; and that if a contributor has not supplied the information in response to a request from the candidate, the candidate should report "information requested" to indicate that the candidate has fulfilled the statutory duty to request the information.

Following the 2004 primary elections, the Commission was asked whether cash, goods, and services received by candidates for a recount of an election are considered contributions that must be reported and are subject to the contribution limitations. The Commission proposed adding new Subsections 6(6) and 7(7) to Chapter 1, providing that cash, goods and services donated or purchased for a recount would *not* be considered campaign contributions and expenditures.

Comments: the President of the Senate, Beth Edmonds, objected to proposed Subsections 6(6) and 7(7) because they would exempt contributions and expenditures made in connection with recounts from disclosure in campaign finance reports. The Maine Citizen Leadership Fund commented that removing recounts from the statutory definition of contribution and expenditure exceeds the scope of the Commission's rule-making authority. It believes contributions for a recount should be reported and should be subject to the contribution limitations on candidates.

With respect to proposed Subsection 6(2), Representative Thomas B. Saviello commented that the requirement to report employment information for contributors giving more than \$50 should not apply to seed money contributions. The Kennebunkport Democratic Party Committee commented that it was burdensome on party committees to

be required to collect employment information for contributors who have given more than \$50.

The Commission did not receive any comments on Subsections 6(1), and 6(3) - (5).

Response to Comments: the Commission has chosen not to adopt Subsections 6(6) and 7(7) and, instead, intends to propose legislation that would address the issue of recounts. The Commission has adopted Subsection 6(2) because it is consistent with 21-A M.R.S.A. §1017(5), under which candidates must report the occupation and principal place of business of each individual contributing more than \$50 during an election. The proposed rule would not apply to party committees, which have a higher threshold of \$200 for reporting the employment information of contributors.

Chapter 1, Subsection 7(3) – Timing of Reporting Expenditures

Factual and Policy Basis: following the 2004 elections, many candidates commented that independent expenditure reports were filed so close to the general election that candidates received matching funds too late to be useful. In order to clarify when expenditures must be reported, the Commission has adopted Subsection 7(3). Paragraphs A and B state that the following actions constitute an expenditure that must be reported, regardless of whether any payment has been made: the placement of an order with a vendor for a good or service, the signing of a contract for a good or a service, or the delivery of a good or the performance of a service.

Paragraph C clarifies that *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). If the expenditure involves more than one candidate election, the report must include an allocation of the value of the goods and services to each of those candidate elections. The Commission deliberately chose the language “is required to determine the value of goods and services”, rather than “is required to make his or her best efforts to determine”. The Commission also did not adopt language permitting independent spenders to make

estimates of the value of goods and services. Taken together, these drafting choices reflect the Commission's intent to require independent spenders to determine the *actual* value of the goods and services *at the time the order is made or an agreement is made*.

Comments: the Maine Citizen Leadership Fund stated its support for the proposed rule. It suggested that reserving print space or broadcast time for advertising should be listed among the actions in paragraphs A and B that constitute an expenditure and must be reported. It also recommended that one proposed sentence *not* be adopted: "Negotiations and discussions with a vendor do not constitute an expenditure, as long as no order has been placed and no agreement has been made." The Maine Citizen Leadership Fund commented that attempting to define what is not an expenditure will encourage strategic behavior to avoid crossing the threshold of what is an expenditure. It suggested the insertion of a sentence: "design, production, and dissemination of a political communication may entail multiple expenditures triggering multiple reporting deadlines."

The Maine Democratic Party expressed concern that proposed Paragraphs A and B would cause confusion and the improper issuance of matching funds. In particular, the party showed concern about a situation in which an expenditure is made to design a communication in support of a candidate, the candidate's opponent consequently receives matching funds, but the communication is never actually printed or distributed to voters.

The Alliance for Maine's Future requested a clarification as to how a political action committee ought to amend its disclosure if it reports an estimated expenditure before the actual cost is known, and the actual cost as later determined differs from the estimated amount that was initially reported.

Rep. Thomas B. Saviello commented that an expenditure should be reported only when the service is received, not when the agreement is made. He raised the circumstance where a candidate might report an expenditure for the printing of signs when the signs are

ordered, and the signs are not delivered before the election because of an error by a vendor.

Response to Comments: the Commission declined to include the reserving of print space or broadcast time as an expenditure primarily due to concern for how to handle the plausible circumstance in which the Commission authorizes matching funds based upon a candidate or party committee's reservation of broadcast time and then the reservation is canceled. The Commission accepted the suggestion to delete language stating that negotiations and discussions with a vendor do not constitute an expenditure but declined to add a new statement that design, production, and dissemination of a political communication may entail multiple reporting deadlines. These issues may be addressed in a guidance memo or reporting handbook published by the Commission in the future.

The Commission appreciates the concern expressed by the Maine Democratic Party regarding the payment of matching funds based on literature that is designed but never actually distributed to voters. The Commission is open to further consideration of the potential problem, but believes that the adopted rule is the best strategy for encouraging the earlier reporting of independent expenditures.

The comment by the Alliance for Maine's Future appears to be resolved by the Commission's deletion of the proposed sentence permitting filers to report an estimated value of expenditures.

In the circumstance raised by Rep. Saviello, if a vendor did not deliver goods or services and was not paid by a candidate, there would be no requirement to report an expenditure. If the expenditure had been already reported by the time the order was canceled, the candidate would be free to amend the earlier report and spend campaign funds on other goods or services.

Chapter 1, Subsection 7(4) – Advance Purchases of Goods and Services for the General Election

Factual and Policy Basis: in the 2002 elections, a Maine Clean Election Act candidate brought suit against the Commission for matching funds because his general election opponent had purchased goods and services before the primary election. The court held that if the Commission determined that the goods and services purchased by the opponent before the primary election were used for the general election, the goods and services should be counted as general election receipts for the purposes of calculating whether the plaintiff was owed matching funds.

In February 2004, the Commission provisionally adopted a major substantive rule to address the issue. In a resolve (Filing No. H-835) dated March 31, 2004, the Legislature directed the Commission to amend the proposed rule to provide that if a preponderance (more than 50%) of consulting services, literature or advertising purchased before the primary election is used for the general election, then the Maine Clean Election Act opponent is entitled to a corresponding amount of matching funds. The Legislature also directed that the rule could not be effective until January 1, 2005. The Commission has now revised and re-adopted Chapter 1, Subsection 7(4) and Chapter 3, Subsection 5(4) to conform to the Legislature’s directive, and re-submits the rules for the Legislature’s consideration.

Comments: the President of the Senate commented that the section would be made stronger by exempting items that could be used in either the primary or general election, such as lawn signs or palm cards.

The Maine Democratic Party suggested that purchasers be required to allocate what portions of goods and services purchased will be used during the primary versus the general election, and report these expenditures separately. The party also suggested replacing the word “preponderance” with “majority.”

Response to Comments: in response to the comment by Senate President Beth Edmonds, the Commission notes that in its 2004 rule-making it exempted lawn signs. When the Legislature reviewed the rule, however, it deleted the exemption for lawn signs. Because the Legislature has spoken through its resolve on what policy should be codified in the Commission's rules, the Commission declines to adopt the changes proposed by these commenters. The adopted rule is major substantive, and all interested parties will have an opportunity to influence the Legislature's consideration of the rule.

Chapter 1, Subsections 7(5) and (6) – Other Expenditure Issues

Factual and Policy Basis: the Commission has moved the definition of “in-kind contribution” from former Subsection 5(5) to new Subsection 1(12) so that all definitions are grouped together.

In the 2004 elections, the Commission staff received informal complaints by candidates that opponents were buying goods and services through their personal funds or credit cards and not reporting the expenditures until a later reporting period when the campaign reimbursed the candidate. To encourage earlier reporting of these expenditures, the Commission adopted Subsection 7(5) requiring that if a candidate uses personal funds or a credit card to buy goods and services, the expenditure should be reported when the goods and services are bought rather than when the campaign reimburses the candidate.

In response to candidates' concerns that reporting of expenditures was burdensome because of the requirement to report every bank fee and purchase of gasoline for vehicles, the Commission has adopted Subsection 7(6) which would allow candidates to aggregate those amounts when reporting them to the Commission.

Comments: the Commission received no comments on these amendments to the rules.

Chapter 1, Subsection 7(7) – Expenditures for Recounts

Please see discussion of Chapter 1, Section 6(6).

Chapter 1, Subsection 10(3) – Reports of Independent Expenditures: Reporting Schedules

Factual and Policy Basis: under Paragraph 10(3)(A), independent expenditures totaling more than \$100 per candidate but not greater than \$250 must be reported according to the regular campaign finance reporting deadlines for PACs and state party committees. In the 2004 elections, most independent expenditures totaling between \$100 and \$250 per candidate were reported six days before or 42 days after the election. Candidates who deserved to receive matching funds based on these reports complained that these reporting deadlines were too late. In response to the complaints, the Commission has amended Paragraph 10(3)(A), which maintains the previous filing deadlines for independent expenditures between \$100 and \$250 per candidate, except that expenditures made in the last 11 days must reported within 24 hours.

Under Paragraph 10(3)(B), independent expenditure reports totaling *more* than \$250 per candidate in an election must continue to be filed within 24 hours of the expenditure (at all times). In response to concerns that matching funds payments were delayed by the late filing of independent expenditures reports, the Commission has adopted additional questions that must be answered by PACs, party committees, and others that file independent expenditure reports within the last seven days before an election. These questions are designed to verify when the independent spender placed an order for goods or services, or entered into an agreement to buy the goods and services, and to verify that the independent expenditure reports were filed promptly in relation to these events. The Commission is hopeful that the additional information provided by PACs and party committees in the last week before the election will assist the Commission in verifying that independent expenditures – if more than \$250 per candidate – were reported within 24 hours of the placement of an order or entering into an agreement.

Comments: the Maine Democratic Party expressed concern about expenditures for the design of literature that is never printed and distributed to voters. It also questioned the value of the information that would be provided in response to some of the proposed questions in Paragraph 10(3)(B). In addition, the Maine Conservation Voters Action

Fund questioned the value of some of the information requested in the proposed questions.

The Maine Citizen Leadership Fund commented that Paragraph A as initially proposed by the Commission complicated the filing schedule for reporting independent expenditures between \$100 and \$250, and that the Commission may wish to maintain the former filing schedule. Michele and Joseph Greenier made a similar comment.

The Alliance for Maine's Future requested clarification of how PACs should report each incremental independent expenditure after the PAC's total spending per candidate exceeded the \$100 and \$250 threshold amounts.

The Kennebunkport Democratic Party Committee commented that the proposed rule requiring the reporting of independent expenditures over \$250 within 24 hours was burdensome.

Response to Comments: in response to the comments made by the Maine Democratic Party and the Maine Conservation Voters Action Fund concerning proposed Paragraph B, the Commission has eliminated one of the proposed questions (the date on which a vendor first contacted the vendor) and modified another proposed question (the approximate date when the vendor began providing design or any other services).

In response to the comments by the Maine Citizen Leadership Fund and the Greeniers, the Commission amended the proposed Paragraph A and has maintained the previous filing schedule for independent expenditures between \$100 and \$250 per candidate with the single change that in the last 11 days before an election the expenditures must be reported within 24 hours.

In response to the comments by the Alliance for Maine's Future, the Commission has inserted language clarifying how to report incremental expenditures that increase the total spent per candidate above the \$100 and \$250 thresholds. The Commission also intends

to publish reporting handbooks for PACs and party committees that will include additional guidance.

The comment by the Kennebunkport Democratic Party Committee may have been based upon a misunderstanding, because the proposed amendments did not change the reporting schedule for independent expenditures greater than \$250 per candidate.

Chapter 1, Subsection 10(4) – Reports of Independent Expenditures: Multi-Candidate Expenditures

In the 2004 elections, the Commission had occasion to consider how independent spenders should allocate the total cost of voter guides and other multi-candidate communications among the candidates listed in the communications. To address this issue, the Commission has adopted Subsection 10(4), which requires the independent spender to allocate the cost in *rough* proportion to the benefit received by each candidate.

When an independent spender can estimate the number of voters in each legislative district who will receive the communication, Paragraph 10(4)(A) requires that the total cost be allocated in rough proportion to those numbers of voters in each district who will receive the communication. If the spender cannot determine in which legislative districts recipients of the communication reside, the spender may allocate the cost evenly among the districts in which voters are likely to receive the communication.

Paragraph 10(4)(B) provides that a candidate named in multi-candidate communications should not be counted in the allocation if voters in the candidate's electoral division will not receive the communication.

Paragraph 10(4)(C) as initially proposed required independent spenders to consider any disproportionate treatment given to candidates in the communications when allocating the communication's total cost among the candidates.

Comments: the Maine Citizen Leadership Fund, the Maine Democratic Party, and the Alliance for Maine’s Future objected to Paragraph 10(4)(C) as initially proposed. All three organizations commented that independent spenders would have difficulty allocating the total cost based upon this consideration.

The Alliance for Maine’s Future commented that Subsections 10(4) and 10(5) (discussed below) must avoid the constitutional defect of vagueness, and that restrictions on political speech have been upheld in constitutional law decisions such as Buckley v. Valeo and McConnell v. FEC only if the restrictions are narrowly defined.

Response to Comments: the Commission adopted Subsection 10(4) to provide guidance to independent spenders about how to allocate a multi-candidate expenditure in reports filed with the Commission and to promote the fair distribution of matching funds triggered by multi-candidate expenditures. The basic concept underlying Subsection 10(4) – that the allocation should be based on the *benefit received* by each candidate – is based on regulations in other jurisdictions. *See, e.g.*, 11 Code of Federal Regulations 106.1(a); *and* 911 Code of Massachusetts Regulations 2.11(4). The Commission has attempted to make this requirement workable for independent spenders by requiring an allocation that is only *roughly* proportional to the relative benefits received by the candidates and by permitting independent spenders to allocate the total cost of a communication evenly among the candidates in those circumstances in which it is not practical to base the allocation on numbers of voters in each district receiving the communication. To further avoid burdensome requirements on filers, the Commission has adopted a revised Paragraph 10(4)(C) that permits *the Commission* to perform a re-allocation based upon the different treatment of candidates within the communication if a candidate files a request for matching funds.

The Commission also redrafted the first sentence of Subsection 10(4) to clarify that an allocation is only necessary if more than \$100 is spent per candidate.

Chapter 1, Subsection 10(5) – Presumption for Communications Distributed Within 21 Days of Election

Factual and Policy Basis: in 2003, the Legislature enacted 21-A M.R.S.A. §1019-B(1)(B), under which an expenditure made to design, produce or disseminate a communication that names or depicts a clearly identified candidate and that is disseminated during the 21 days before an election in a race involving a Maine Clean Election Act candidate will be presumed to be an independent expenditure. Prior to the passage of this provision, only communications that expressly advocated the election or defeat of a candidate were considered independent expenditures. In response to questions raised in the months leading up to the 2004 general election, the Commission has adopted Subsection 10(5) to offer independent spenders guidance on how to interpret the 21-day presumption in §1019-B(1)(B). The Paragraphs within Subsection 10(5) which were the subject of comments are discussed below.

Chapter 1, Paragraph 10(5)(B) – Communications and Activities Not Covered by the 21-Day Presumption

In Paragraph 10(5)(B), the Commission has listed certain categories of communications and activities which are excluded from the definition of “expenditure” in 21-A M.R.S.A. §1012(3)(B). Because these are not considered expenditures under the Election Law, Paragraph 10(5)(B) clarifies that these communications and activities will *not* be presumed to be independent expenditures under §1019-B(1)(B).

Comment: in Paragraph 10(5)(B) as it was initially proposed for public comment, the Commission contemplated excluding four other categories of communications from the 21-day presumption:

- voting records and legislative scorecards, if the communications do not expressly advocate the election or defeat of any candidate and the communication describes the voting records of 25 or more Legislators of more than one political party;
- oral conversations between two individuals;

- candidate forums and debates, if the organizer of the forum has given all candidates an equal opportunity to participate, the organizer of the forum has treated all candidates in a neutral fashion, and the materials distributed by the organizer of the forum are not intended to influence the nomination or election of any candidate; and
- the payment by a party committee of the costs of preparation, display or mailing or other distribution of a party candidate listing.

The Commission received comments from Senate President Beth Edmonds, the Maine Citizen Leadership Fund, and the Maine State Employees Association objecting to the proposed exclusion for voting records and legislative scorecards. The President of the Senate commented that voting records that rate Legislators based on votes *do* advocate for the election or defeat of a candidate. The Maine Citizen Leadership Fund and the Maine State Employees Association commented that the exclusion conflicted with §1019-B(1)(B). The Maine Citizen Leadership Fund also objected to the proposed exclusion for oral conversations between two individuals. It suggested that instead of containing an enumerated list of exclusions, Paragraph 10(5)(B) should refer generally to the exclusions in 21-A M.R.S.A. §1012(3)(B).

The Maine Democratic Party supported a specific list of excluded communications and activities, but noted that it may be premature to include in the list an exclusion for “party candidate listing”, which is a term the Commission proposed in LD 1500 currently under consideration by the Legislature.

The Alliance for Maine’s Future (AMF) recommends that the Commission adopt a rule regarding voter guides that is similar to the Federal Election Commission policy described in a determination in Matter Under Review #5342. AMF states that the federal policy allows corporations and labor unions to spend general treasury funds on voter

guides – even if they are not neutral – provided that they do not expressly advocate the election or defeat of a candidate. Further, AMF believes that the proposed rule interpreting §1019-B(1)(B) is ambiguous.

Response to Comments: the Commission recognizes that valuable, factual information can be provided to voters in legislative scorecards and voter guides. Nevertheless, it has not adopted the proposed exclusions for these communications, and has elected instead to highlight them as a possible issue for legislative action in a letter to the co-chairs of the Joint Standing Committee on Legal and Veterans Affairs.

Section 1019-B(1)(B) provides that the presumption applies to *any* communication distributed in the 21 days before an election naming a clearly identified candidate in a race involving a Maine Clean Election Act candidate. If the party making the expenditure believes that a communication was not intended to influence the election or defeat of a candidate, it must file a rebuttal statement with the Commission. The Commission may gather any evidence it deems relevant and must determine by a preponderance of evidence whether the communication was intended to influence the election. The Commission director recommended the view that it seemed inconsistent with this statutory scheme for the Commission to decide *as a category* that voter guides or legislative scorecards naming more than 25 candidates should not be subject to the presumption. Based on testimony before the Commission at 2004 meetings and some of the comments received in the rule-making, there appears to be some body of opinion that in some cases voter guides and legislative scorecards *are* intended to influence the election, even if others disagree with the proposition.

For similar reasons, the Commission has chosen *not* to exclude oral conversations between two individuals and candidate forums from the 21-day presumption. The Commission has also chosen not to adopt the exclusion for party candidate listings, for reasons recommended by the Maine Democratic Party. The Commission has chosen, however, to list specific exclusions because it believes that the list has value as guidance to the public.

With regard to the concerns expressed about ambiguity, vagueness, and overbreadth: in adopting Subsection 10(5), the Commission is attempting to interpret 21-A M.R.S.A. §1019-B(1)(B) in a way that is consistent with the Legislature’s apparent goal in enacting the statutory provision. The intention of the Legislature was that third-party expenditures on communications naming candidates in the last 21 days before an election should be reported and should trigger matching funds – even if the communications do not contain express advocacy. Bringing these “issue ads” into the regulated realm of disclosure is consistent with Congressional action in the Bipartisan Campaign Reform Act, which was upheld in the McConnell decision. If private groups believe that §1019-B(1)(B) is vague or overbroad, the current legislative session represents an opportunity for them to urge the Legislature to make the statute more narrow or specific.

Chapter 1, Paragraph 10(5)(E) – 21-Day Presumption: Date of Dissemination

Factual and Policy Basis: in the fall of 2004, an issue arose before the Commission regarding whether literature mailed by a vendor in Louisiana was “disseminated” within the 21 days before an election. In deciding that issue, the Commission members expressed a preference for interpreting the date of a communication’s dissemination as the date on which the communication was *mailed, delivered, or broadcast* to voters – rather than the date on which voters *received* the communication. The Commission has adopted this interpretation in Paragraph 10(5)(E).

Comment: the Senate President recommended that when printed literature is mailed to voters, the date of dissemination should be the date of the postmark on the literature.

Response to Comments: the Commission has adopted the suggestion regarding the postmark date.

Chapter 1, Paragraph 10(5)(F) – Organizations Receiving Communications and Distributing them to Voters

Factual and Policy Basis: in the 2004 elections, the Commission was asked how the Commission would apply the 21-day presumption in situations in which an organization received printed communications from another organization at no cost or at a discount and then distributed the communications to voters within the 21-day period. Initially, the Commission proposed a Paragraph 10(5)(F) under which the organization distributing the literature directly to voters must report both its own distribution costs *and* the value of the communications it distributed (even though those communications were created or purchased by the other organization).

Comments: the Alliance for Maine’s Future (AMF) commented that the standard as originally proposed by the Commission was unworkable, would lead to double-reporting, and would rely on reporting by organizations that are unaware of the Commission’s requirements.

Response to Comments: in response to the AMF’s comments, the Commission amended the proposed rule to permit the value of the printed materials to be reported by *either* organization. Nevertheless, the Commission believes it is the responsibility of all organizations involved to understand and comply with the law.

Chapter 1, Section 10(5)(G) – Opportunity to Seek Early Determination by Commission

Factual and Policy Basis: in order to assist independent spenders in complying with the 21-day presumption, the Commission adopted Paragraph 10(5)(G). Under this provision, if a person wishes to distribute a communication in the last 21 days before an election naming a candidate and the person believes that the communication is *not* intended to influence the election, the person may submit a rebuttal statement to the Commission *before* distributing the communication. The resulting informal advice or Commission determination would assist the person in deciding whether or not to distribute the

communication, and, if the communication is distributed, whether an independent expenditure report is required.

Comments: the Maine Democratic Party commented that for pre-publication screening of communications to be a viable option, the proposed rule should include a provision that any communication submitted for early determination will be kept confidential by the Commission.

Responses to Comments: the Commission did not adopt the amendment proposed by the Party because the Commission must abide by the Freedom of Access Law (1 MRSA §§ 401- 410), and that statute does not exempt such communications from the definition of public record. In most matters regulated by the Commission, persons are free to seek informal advice from the Commission staff confidentially, but documents retained in the possession of the Commission or its staff are subject to public inspection.

Determinations by the Commission members regarding pre-distribution communications must be made through public meetings.

Chapter 1, Section 12 – Campaign Contributions During Legislative Session

Factual and Policy Basis: under Title 1 M.R.S.A. §1015(3)(B), legislators and other individuals may not accept contributions from lobbyists, lobbyist associates, and their employers during the legislative session. The prohibition also applies to indirect acceptance of contributions through a political action committee, political committee, political party, or otherwise. The Commission staff frequently receives informal questions regarding the prohibition.

To respond to these questions, the Commission has adopted Chapter 1, Section 12. Subsection 1 clarifies that the ban on lobbyist contributions during a legislative session applies both to “traditional” private campaign contributions and to seed money contributions received by Maine Clean Election Act candidates. Subsections 2 and 3 have been adopted to clarify *some* of the indirect contributions that are prohibited through

political action committees. Subsection 2 states that during the legislative session, PACs that are closely associated with a Legislator – such as a leadership PAC or a legislative caucus PAC – may not intentionally accept a contribution from a lobbyist, lobbyist associate, or employer, unless the contributions are segregated in a fund that is not used to influence the election or defeat of any incumbent Legislators. Subsection 3 clarifies that during the legislative session, an organization that employs a lobbyist may not make a contribution through a political action committee with which the organization is affiliated or direct that the affiliated political action committee make a contribution to a Legislator.

Comments: Rep. Thomas B. Saviello commented that Section 12 should be amended to clarify whether the prohibition on lobbyist contributions applies during a special session. He also commented that lobbyists should be permitted to make contributions during a legislative session if the contributions are from their personal funds.

Response to Comments: while the Commission understands that many Maine Clean Election Act candidates perceive seed money contributions to be a special type of donation, they can be used for any campaign purpose and they appear to meet the definition of “contribution” in 21-A M.R.S.A. §1012(1). Therefore, the Commission does not see a basis for excluding them from the statutory prohibition on lobbyist contributions during legislative session. The prohibition in Title 1 M.R.S.A. §1015(3)(B) applies “during any period of time in which the Legislature is convened before final adjournment.” This covers special sessions, and in future guidebooks and educational materials the Commission will highlight that the prohibition applies to special sessions.

Chapter 3, Former Section 1 – Definitions

Factual and Policy Basis: as part of a routine technical rule change, the Commission has moved the definitions section of the Ethics Commission rules from Chapter 3 to Chapter 1 in order to clarify that the definitions are to be applied to the entire body of the Commission’s rules.

Comments: the Commission received no comments on the proposed deletion of the definitions from Chapter 3.

Chapter 3, New Section 1 – Applicability

Factual and Policy Basis: when it was first adopted, Chapter 3 of the Commission’s rules primarily applied to candidates participating in the Maine Clean Election Act (MCEA). As the rules have been amended, they now apply to traditionally financed candidates and political committees spending money in races involving MCEA candidates. The Commission has modified this Section to clarify that the applicability of Chapter 3 extends beyond candidates participating in the MCEA to traditionally financed candidates and political committees.

Comments: the Commission received no comments on this amendment.

Chapter 3, Subsection 2(2) – Procedures for Participation/Content of Declaration of Intent

Factual and Policy Basis: candidates who intend to participate in the Maine Clean Election Act must file a Declaration of Intent putting the public and their opponents on notice that they intend to qualify for MCEA funding by collecting \$5 qualifying contributions. To ease the filing burden on candidates, the Ethics Commission has deleted the requirement that the Declaration be notarized.

Comments: the Commission received no comments on the proposed deletion.

Chapter 3, Subsection 2(3) – Seed Money Restrictions

Factual and Policy Basis: in the last two elections, the Ethics Commission has been called upon to consider whether goods and services that were contributed to prospective MCEA candidates prior to their certification complied with the seed money restrictions. Under these restrictions, contributions may be accepted from individuals only, and the maximum amount a contributor may give is \$100. For example, in the 2002 gubernatorial elections, the question arose whether candidate Jonathan Carter had

received an in-kind contribution of polling information that violated the seed money restrictions. In Paragraph 2(3)(A), the Commission clarified that the seed money restrictions apply to *both* cash and in-kind contributions.

In addition, in past elections a number of prospective MCEA candidates requested waivers of the seed money restrictions pursuant to Paragraph 2(3)(E) after they accepted contributions that did not fully comply with the restrictions. For example, some candidates unintentionally contributed more than \$100 to their own campaigns. In these cases, the Commission generally has granted the waivers, because the candidates acted in good faith and the non-compliance was minor. The Commission has adopted a few modifications to Paragraph 2(3)(E) so that the rule reflects past determinations of the Commission granting waivers of the seed money restrictions.

Title 21-A M.R.S.A. §1122(9) states that “[t]o be eligible for certification, a candidate may collect and spend only seed money contributions.” In 2004, the Commission denied a request for certification by a candidate for the Maine House of Representatives because she received a bank loan to cover campaign expenses before she was certified as a Maine Clean Election Act candidate. Even though §1122(9) seemed to restrict her to collecting and spending only \$500 in seed money as a House candidate, her campaign finance report indicated that she spent \$976.50 for campaign goods and services, and obligated another \$1,625.

The Commission has adopted Paragraph 2(3)(F) to clarify that during the qualifying period loans may not be accepted by prospective Maine Clean Election Act candidates and to help prevent candidates from attempting to obtain loans during the qualifying period which could complicate their efforts to qualify for public funds.

Comments: the Commission did not receive any comments regarding this provision.

Chapter 3, Subsection 2(4) – Qualifying Contributions

Factual and Policy Basis: under 21-A M.R.S.A. §1122(7)(A), qualifying contributions are defined as: “a donation ... [o]f \$5 in the form of a check or a money order payable to the fund in support of a candidate ... [m]ade by a registered voter within the electoral division for the office a candidate is seeking ...” Because some individuals use a bank account with a business name (*e.g.*, “Dave’s Barber Shop”) to pay for personal expenses, candidates have submitted \$5 qualifying contributions to the Commission drawn on business accounts. In almost all of these cases, the candidates involved have *not* needed to rely on the business checks to reach the required number of qualifying contributions. To address the issue, the Commission has adopted Paragraph 2(4)(D) which provides that a business check is permissible as a qualifying contribution if the individual’s name also appears in the name of the account, or if the candidate supplies a written statement (*e.g.*, an e-mail or handwritten note) by the business owner that the account is used for personal expenses.

In the course of collecting qualifying contributions, many candidates have asked whether two family members living in the same household may make qualifying contributions by writing a combined check for more than \$5. The Commission has adopted Paragraph 2(4)(E) to clarify under what circumstances this is permitted.

The Commission has modified Paragraph 2(4)(H) to clarify that, in order to be certified, candidates must submit by the end of the qualifying period either the original receipt and acknowledgment forms signed by the individuals making the \$5 contributions, or photocopies of the forms if the original forms have been submitted to the municipal clerk. The Commission staff proposed this rule to clarify the procedures for qualifying for MCEA funding and to ensure that no qualifying contributions are accepted after the end of the qualifying period.

Comments: no comments were received regarding the proposed amendments to Subsection 2(4).

Chapter 3, Section 3 – Certification of Participating Candidates

Factual and Policy Basis: in the 2004 elections, four candidates encountered some difficulty qualifying for public funds under the MCEA because they did not submit the Request for Certification form. To ease the paperwork burden on candidates, the Commission has deleted portions of Paragraphs (3)(1)(A) and former Paragraph 3(1)(B). This will allow the Commission in future elections to omit the Request for Certification form, which primarily functioned merely as a cover sheet for the other papers that are submitted to the Commission.

The Commission has modified Paragraph 3(1)(B) to state that candidates who do not submit the required number of original qualifying contributions within the qualifying period will not be certified. The Commission believes this policy is compelled by 21-A M.R.S.A. §1125(5)(B). It has adopted the rule to clarify that qualifying contributions that are submitted to the Commission after the end of the qualifying period will *not* count toward the eligibility requirements.

In the 2004 elections, the Ethics Commission reviewed candidates' requests for certification in the order in which they were received, pursuant to Paragraph 3(1)(C). The Commission has modified the Paragraph to give priority to candidates who are in a contested primary election. Since most candidates submit their requests for certification around April 15, the Commission believes that it is more urgent to make initial MCEA payments to candidates who are in a contested primary election in early June.

The Commission has deleted from Subsection 3(6) some restrictions on how MCEA funds may be spent, and moved the restrictions to a new Section 6.

Comments: the Commission received no comments on the amendments to Section 3.

Chapter 3, Subparagraphs 5(3)(B)(5) and (6) – Matching Funds/Interpreting Language in a Communication

Factual and Policy Basis: when PACs and party committees report having made an independent expenditure on a communication to support or oppose a candidate, the Commission takes the reported expenditure at face value when calculating matching funds to candidates under the MCEA. On rare occasions, however, the Commission may be called upon to consider whether matching funds should be paid based on unreported expenditures or expenditures for communications that use words in support of a particular candidate yet convey a message opposed to that candidate. For example, in a 2004 special election anonymous campaign literature purportedly in support of a candidate was mailed into the Biddeford legislative district. The literature attributed unpopular social views to the candidate, so the expenditure arguably was mailed to defeat the candidate. To address similar but rare cases, the Commission proposed Subparagraphs 5(3)(B)(5) and (6) to clarify that the Commission may use its discretion to determine whether a communication was in support of a candidate, in opposition to a candidate, or neutral.

Comments: Senate President Beth Edmonds objected to proposed Subparagraphs 5(3)(B)(5) and (6) out of a concern that allowing such discretion would create uncertainty and unpredictability for organizations designing literature and advertising. The Maine Democratic Party suggested that the Commission specify what factors the Commission might use in determining whether a particular communication is in support of or in opposition to a candidate.

Response to Comments: the Commission did not adopt proposed Subparagraph 5(3)(B)(6). The Commission did adopt a minor amendment to Subparagraph 5(3)(B)(5), however, to clarify the existing rule regarding treatment of situations in which purportedly *pro*-candidate literature was clearly designed to oppose the candidate.

Chapter 3, Paragraph 5(3)(F) – Matching Funds/Disbursements with No Campaign Value

Factual and Policy Basis: matching funds are based on “the sum of a candidate’s expenditures or obligations, or funds raised or borrowed, whichever is greater” (21-A M.R.S.A. §1122(9)). In the 2004 elections, traditionally financed candidates with MCEA opponents complained that if they received cash contributions or loans and used the cash receipts for some purpose other than to purchase campaign goods (*e.g.*, to repay a loan, refund a contribution to a contributor, or transfer funds to a party or political committee) those receipts should not be counted in the calculation of whether the opponent is entitled to matching funds. For example, if a traditional candidate lends her campaign \$3,000 and the campaign repays \$1,000 to the candidate, traditional candidates have argued that after the \$1,000 repayment, only \$2,000 should be counted as a receipt for matching funds purposes. The Commission agrees with the proposed policy, and has adopted it in Paragraph 5(3)(F).

Comments: the Commission did not receive any comments about this provision of the proposed rule.

Chapter 3, Subsection 5(4) – Advance Purchases of Goods and Services for the General Election

Please see factual and policy basis, comments, and response regarding Chapter 1, Subsection 7(4).

Chapter 3, Section 6 – Limitations on Campaign Expenses

Factual and Policy Basis: this section interprets Title 21-A M.R.S.A. §1125(6), which states that Maine Clean Election Act funds must be used for campaign-related purposes. The Commission has moved Subsections 6(1) – (3) from former Subsection 4(6).

In addition, the Commission has adopted three other restrictions in response to events in the 2004 elections. In the 2004 election cycle, the Commission was asked whether it was permissible for a MCEA candidate to use MCEA funds to purchase audiovisual materials

such as videotapes and to sell them for a profit to generate more funds for the campaign. The MCEA requires that a “participating candidate must limit the candidate’s campaign expenditures and obligations ... to the revenues distributed to the candidate from the fund.” (21-A M.R.S.A. §1125(6)) Based on this restriction, the Commission ruled that the candidate may not use MCEA funds to purchase goods to sell at a profit. The Commission has adopted Subsection 6(4) which codifies this ruling.

Leading up to the 2004 general election, the Commission staff received dozens of informal questions regarding whether MCEA funds could be used to thank supporters or voters through an election-night party, or through thank-you notes or advertising. The Commission has adopted Subsection 6(5), which would place maximum amounts on MCEA funds that could be spent on these purposes and which would allow candidates to spend additional personal funds on these expenses. The rationale for the adopted rule is that post-election party and thank-you messages are accepted campaign expenses, and candidates participating in the MCEA may have an expectation that they can use publicly funded campaign money on these uses. The Commission seeks to balance this expectation against the public’s interest in ensuring that public funds distributed under the MCEA are not spent needlessly or frivolously.

In the 2004 elections, a small number of candidates used MCEA funds to pay for civil penalties for late filing. The Commission believes this is an inappropriate use of public funds, and participating candidates should be required to pay late filing fees from private funds.

The proposed rule issued for public comment included a Subsection 6(7) prohibiting the use of MCEA funds on expenses for a recount of an election. This proposal was in response to testimony received in 2004 that MCEA funds should be used only for the purposes of influencing a candidate’s election, and not a legal proceeding to determine the results of the election.

Comments: the Maine Citizen Leadership Fund made minor suggestions on the wording of Subsections 6(3) and 6(4), and objected to the inclusion of Subsection 6(7) regarding recounts.

Response to Comments: the Commission altered the language of Subsections 6(3) and 6(4) to make them clearer, and did not adopt proposed Subsection 6(7).

Chapter 3, Section 7 – Record Keeping and Reporting

Factual and Policy Basis: in the 2004 elections, the Commission observed that a small number of MCEA candidates made large expenditures on salary and compensation. One particularly large expense was for a payment by a campaign to the candidate's brother. In order to verify in future elections that salary and compensation expenditures are for legitimate campaign-related services, the Commission initially proposed a detailed, month-by-month record-keeping requirement for large salary and compensation expenses made by MCEA candidates.

Comments: Senate President Beth Edmonds commented that the proposed requirement would impose an unnecessary burden on candidates.

Response to Comments: the Commission did not adopt the proposed rule.

Chapter 3, Section 8 – Recounts, Vacancies, Write-In Candidates, Special Elections

Factual and Policy Basis: in the 2004 elections, some replacement candidates complained that Paragraph 8(2)(B) only permitted them 30 days beginning on the fourth Monday in July in which to collect the required number of qualifying contributions. To lengthen the qualifying period, the Commission has modified this paragraph to permit the collection of qualifying contributions beginning at the time of the candidate's nomination.

In response to questions asked by candidates, the Commission adopted in 2004 a policy that write-in candidates should be encouraged to register and file reports with the

Commission, and that write-in candidates may not participate in the MCEA unless they become the nominee of a political party. The Commission further adopted the policy that candidates who are opposed only by write-in candidates will be presumed to be in an unopposed election, unless they present evidence that a write-in opponent has received or spent substantial campaign funds. The Commission has adopted these policies in Subsection 8(3).

Comments: no comments were received regarding this subsection.

Other Comments

In addition to comments made regarding the specific provisions noted above, Representative Patrick Flood suggested that:

- the amount of Maine Clean Election Act funds given to legislative candidates should be increased to \$6,000 for a candidate for House of Representatives;
- traditionally financed candidates should be held to a limit of spending \$6,000; and
- independent expenditures should be prohibited in legislative races.

Clinton Collamore commented that if the requirements for participating in the Maine Clean Election Act become too complicated, candidates may choose not to participate.

Response to Comments: because limiting expenditures implicates first amendment rights and the amount of MCEA payments are set by statute, the changes suggested by Rep. Flood exceed what the Commission could adopt through the rule-making process. The Commission appreciates Mr. Collamore's concern, but believes these rule changes are necessary and should not discourage participation in the public funding program.

Changes to Candidate Reporting Forms

Factual and Policy Basis: as part of this major substantive rulemaking, the Commission has provisionally adopted several changes to its campaign finance reporting forms for candidates. The changes to the form for Maine Clean Election Act candidates include:

- permitting candidates to indicate with a check-box on the cover page that there was no financial activity for the period;

- eliminating Schedule A which MCEA candidates have found confusing (all receipts for the reporting period would be reported directly onto the Schedule F summary page);
- eliminating the columns on Schedule B for different categories of expenditures (reducing the math performed by candidates and relying on more detailed expenditure codes to track candidates' spending); and
- simplifying the Schedule F Summary Schedule (formerly Schedule G) to eliminate unnecessary math and to enable the schedule to show the actual cash balance and the amount of remaining funds which the MCEA candidate is authorized to spend.

The changes to the form for the traditionally financed candidates include:

- permitting candidates to indicate with a check-box on the cover page that there was no financial activity for the period;
- eliminating the Schedule A (Summary of Cash Contributions);
- eliminating the Schedule A-1 (Summary of In-Kind Contributions);
- eliminating the columns on Schedule B for different categories of expenditures (reducing the math performed by candidates and relying on detailed expenditure codes to track candidates' spending);
- simplifying the Schedule C for loans by combining the three parts into one;
- eliminating the former Schedule D for Pledges;
- consolidating the Schedule C for Loans, and Schedule E (now D) for Unpaid Obligations onto a single page; and
- simplifying the Schedule F Summary Schedule (condensing it to a single sheet with one column).

Comments: Representative Patrick Flood commented that the form for traditional candidates should include the deadlines for the accelerated reports required for traditionally financed candidates with Maine Clean Election Act opponents.

Response to Comments: the Commission has declined to make the insertion because traditional candidates are not required to file the accelerated reports, if they are not in a race with a MCEA opponent.