MEMORANDUM

To: Commissioners
From: Jonathan Wayne, Executive Director
Date: April 15, 2019
Subject: Final Adoption of 2018 Amendments to Chapter 3 of Commission Rules:
Recounts and Litigation affecting Maine Clean Election Act Candidates

The Commission staff recommends finally adopting changes to Chapter 3 of the Ethics
Commission Rules, as authorized by the Maine Legislature last month.

2018 Rulemaking
In the spring of 2018, the Commission received questions from candidates for Governor
concerning how they could finance their campaigns if ranked choice voting delayed the
results of the primary elections for weeks or months. One of the concerns was the potential
for a recount after the June 2018 primary election.

On March 28, 2018, the Commission decided to invite comments on proposed amendments
drafted by agency staff. On April 2, 2018, the Commission staff distributed a mailing which
invited comments from interested parties. A public hearing was held on April 15, 2019, although
no comments were offered at the hearing.

The Commission received no written comments during the comment period, but the Commission
did receive an email question from one of the Maine Clean Election Act candidates for
Governor asking how the campaign could pay for the services of an attorney if the candidate
were involved in a court proceeding after the June 2018 primary election.

On May 30, 2018, the Commission adopted amendments to both Chapters 1 and 3 of the
Commission Rules. The Chapter 1 changes did not require legislative approval and took effect
last year. Because the amendments to Chapter 3 were major substantive, they required approval by the Maine Legislature. The Chapter 3 amendments (attached) are summarized below in this memo.

The Commission staff presented the Chapter 3 amendments at a public hearing on January 23, 2019. During March 2019, the Maine Legislature authorized the Commission to finally adopt the amendments without any changes. Please refer to Resolves, Chapter 6, which is attached.

**Summary of Amendments to Chapter 3 of Ethics Commission Rules**

*Recounts before the Secretary of State - Chapter 3, Section 9(1)*

Since the early 2000s, the Commission has had a rule concerning Maine Clean Election Act candidates in recounts (Chapter 3, Section 9(1)), but it addressed only one narrow question: whether an MCEA candidate could spend a general election payment if a recount proceeding was pending to determine the result of the candidate’s primary election.

To make Chapter 3, Section 9(1) more comprehensive, in May 2018 the Commission provisionally incorporated policies which the Legislature enacted thirteen years ago in 21-A M.R.S.A. § 1018-B. Under this statute, candidates may not use any unspent MCEA funds to pay for the costs of a recount (*e.g.*, hiring an attorney), but they could receive free legal services or cash contributions to engage in the recount. The Commission also included in Chapter 3, Section 9(1) the statutory deadline for when the Commission must make payments to candidates for the general election. Under 21-A M.R.S.A. § 1127(7)(C)), the Commission must make payments to general election candidates “no later than 3 days after the primary election results are certified.”

*Court Litigation – Chapter 3, Section 9(6)*

During the rulemaking, the Commission received a question seeking to clarify how candidates could pay for litigation costs if there was a court proceeding challenging the ranked choice voting law or the results of the primary election. The Commission
provisionally adopted Chapter 3, Section 9(6), which relied on the policies that the Legislature had enacted in 21-A M.R.S.A. § 1018-B concerning recounts. If there were litigation in court to challenge election results, MCEA candidates could receive legal services or cash contributions to participate in the litigation. Donors would be bound by the same contribution limits that applied to contributors before the election, except that:

- there would be no limitation on the amount that party committees and the PACs of the legislative caucuses could provide, and
- attorneys, consultants and their firms could donate their services without limit.

Thank you for your consideration of this agenda item.
SECTION 9.  RECOUNTS, VACANCIES, WRITE-IN CANDIDATES, SPECIAL ELECTIONS

1.  Recounts. Certified candidates may not spend Fund revenues for purposes of a recount or a court challenge to the results of a recount, but they may receive donations for these purposes in accordance with 21-A M.R.S.A. § 1018-B. The Commission will make the initial distribution for the general election no later than three days after the Secretary of State submits the tabulation of primary election results to the Governor in accordance with Title 21-A, section 722. [§1125(7)(C)] After a primary election, if there is a recount governed by Title 21-A, chapter 9, subchapter III, article III [§737-A], the primary election winner may spend Fund revenues consistent with and either the leading candidate or the 2nd-place candidate is a certified candidate, the following provisions will apply:

A.  If the margin between the leading candidate and the 2nd-place candidate is less than 1% of the total number of votes cast in that race and a recount is presumed necessary, the certified candidate immediately must halt the expenditure of revenues disbursed to the candidate from the Fund upon receiving notice of the recount until the recount is complete.

B.  If the recount results in a changed winner, the certified candidate who originally received the disbursement must return any unspent distributions from the Fund to the Commission, payable to the Fund. If the new winner is a certified candidate, the Commission will distribute the applicable disbursement amount to the candidate.

C.  If the margin between the leading candidate and 2nd-place candidate is 1% or greater of the total number of votes cast in that race and the 2nd-place candidate requests a recount, the leading candidate, if a certified candidate, is not required to freeze expenditures of the disbursement.

D.  If the recount results in a changed winner, the certified candidate must return any unspent distributions from the Fund to the Commission, payable to the Fund. If the new winner is a certified candidate, the Commission will distribute the applicable disbursement amount to the candidate.

2.  Death, Withdrawal, or Disqualification of a Candidate During Campaign

A.  Death, Withdrawal, or Disqualification Before Primary Election. If a candidate dies, withdraws, or is disqualified before the primary election, the Commission will establish a qualifying period during which any replacement candidate may become a participating candidate, collect qualifying contributions, and apply to become a certified candidate.
B. **Death, Withdrawal, or Disqualification After the Primary Election and before 5:00 p.m. on the 2nd Monday in July Preceding the General Election.** If a candidate dies, withdraws, or is disqualified before 5:00 p.m. on the 2nd Monday in July preceding the general election, any replacement candidate will have a qualifying period from the time of the candidate’s nomination until 30 days after the 4th Monday in July as a participating candidate to collect qualifying contributions and request certification.

C. **Death, Withdrawal, or Disqualification after 5:00 p.m. on the 2nd Monday in July Preceding the General Election.** If a candidate dies, withdraws, or is disqualified after 5:00 p.m. on the 2nd Monday in July preceding the general election, the Commission will establish a qualifying period during which any replacement candidate may become a participating candidate, collect qualifying contributions, and apply to become a certified candidate.

D. **Replacement Candidates Who Are Participating Candidates.** Any replacement candidate choosing to become a participating candidate must otherwise comply with the requirements of this chapter and the Act including, but not limited to, seed money limits and qualifying contribution requirements. The Commission will notify any replacement candidates of the opportunity to participate in the Act and the procedures for compliance with this chapter during a special election.

3. **Write-In Candidates**

A. Write-in candidates are subject to the registration requirements of Title 21-A M.R.S.A. §1013-A and the campaign finance reporting requirements of §1017, as soon as they qualify as a nominee pursuant to 21-A M.R.S.A §723, file a declaration of write-in candidacy with the Secretary of State pursuant to 21-A M.R.S.A. §722-A, or receive contributions or make expenditures with the intent of qualifying as a candidate in the primary or general election, whichever first occurs.

B. Write-in candidates may not participate in the Maine Clean Election Act, except as provided in paragraph C.

C. A write-in candidate in a primary election who becomes a party’s nominee may participate in the Maine Clean Election Act for the general election. The Commission will establish a qualifying period during which the candidate may become a participating candidate, collect qualifying contributions, and apply to become a certified candidate.

D. A candidate who is participating in the Maine Clean Election Act and who has no opponent listed on the ballot will be presumed to be in an uncontested election even if there are one or more individuals running as write-in candidates. The participating candidate may rebut this presumption by presenting evidence to the Commission that the write-in opponent(s) received or spent substantial campaign funds. Based upon the evidence presented, the Commission may make a determination that it is a “contested election” and make a distribution of public funds to the participating candidate on that basis.
4. **Special Election When One or More Candidates Desire to Become Certified Candidates.** If a vacancy occurs in the office of Governor, Senator, or Representative because an incumbent dies, resigns, becomes disqualified, or changes residence to another electoral division, and a special election will be held to fill the vacant office, the following provisions apply:

   A. The Commission, in consultation with the Secretary of State, will establish a qualifying period during which any candidate in a special election may decide to become a participating candidate, collect qualifying contributions, and apply to become a certified candidate; and

   B. Any candidate in a special election must otherwise comply with the requirements of this chapter and the Act including, but not limited to, seed money limits and qualifying contribution requirements. The Commission will notify any candidates of the opportunity to participate in the Act and the procedures for compliance with this chapter during a special election.

5. **Return of Unspent Fund Revenues.** Any time a certified candidate withdraws, is disqualified, or dies before an election, the candidate or the candidate’s agent must return to the Commission all unspent amounts distributed to the candidate by check or money order payable to the fund, within 2 weeks of the termination of the candidacy.

6. **Challenges to Election Results in Court.** If the results of an election are challenged in a court proceeding, a certified candidate may solicit and accept donations to finance attorneys fees or other litigation costs. The donations must be within the limitations of section 1015, except that no limitation applies to donations from party committees and caucus campaign committees and from attorneys, consultants and their firms that are donating their services without reimbursement. The Commission may adopt procedures for the financial disclosure of these activities.

   ...
Resolve, Regarding Legislative Review of Portions of Chapter 3: Maine Clean Election Act and Related Provisions, 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, 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.

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