



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

MEMORANDUM

To: Commission
From: Jonathan Wayne, Executive Director
Date: July 14, 2023
Subject: Final Adoption of Rule Amendments

The Commission staff recommends finally adopting changes to the Commission's rules that were the subject of a rulemaking initiated in October 2022. At a meeting on December 21, 2022, after considering comments from the public, the Commission provisionally adopted amendments that would establish the following policies:

Chapter 2, sections 2 and 6 – When the Commission holds a formal hearing, its procedures for providing notice to interested parties and the standard for admissible evidence would be consistent with the Maine Administrative Procedure Act.

Chapter 3, section 2(4)(N) – After a candidate seeking Maine Clean Election Act (MCEA) funding has submitted qualifying contributions to the Commission in the form of a check or money order, the Commission would not return the qualifying contributions to the candidate.

Chapter 3, section 7(5) – A candidate could not spend MCEA funds on post-election parties, consistent with a 2017 statutory change to 21-A M.R.S. § 1125(6).

Chapter 3, section 9(2) – If a replacement candidate wishes to participate in the MCEA program, the period for collecting qualifying contributions would begin when the Secretary of State receives a notice of withdrawal or declares a vacancy. The Commission would establish the end of the qualifying period. Replacement candidates are individuals who seek a position on the ballot when another candidate has withdrawn, dies, or becomes disqualified.

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After a primary election, replacement candidates are nominated at a local caucus of party members. These nominations are sometimes contested.

Because these amendments were major substantive, in January 2023 the Commission submitted the amendments to the Legislature for its authorization. In the 2023 Resolves, Chapter 21 (attached), the Legislature authorized the Commission to finally adopt the first three amendments but directed that the last amendment relating to the qualifying period for replacement candidates be removed from the rulemaking. The Legislature addressed this topic statutorily through a bill which was enacted as Public Law, Chapter 211 (attached). In the new law, the Legislature enacted the qualifying period proposed by the Commission but made an exception to the Commission's general policy of not returning qualifying contributions. The Legislature directed that if a person seeking to replace a party nominee has collected qualifying contributions and then fails to win their party's nomination at the caucus, the Commission should return the qualifying contributions to the contributors unless the contributor authorizes the deposit of the qualifying contributions into the Maine Clean Election Fund. Chapter 211 required the Commission to adopt a rule on qualifying procedures for replacement candidates. The Commission staff expects to include this in a routine technical rulemaking that it will propose at the Commission's August 2023 meeting.

The Commission staff recommends that the Commission finally adopt the first three amendments relating to the procedures for formal hearings, the general policy of not returning qualifying contributions, and post-election parties. We have attached to this memo:

- Chapter 21 of the 2023 Resolves, which authorizes final adoption of the provisionally adopted rules, except for Chapter 3, section 9(2),
- the three amendments that are ready for final adoption,
- P.L. 2023, Chapter 211, which establishes a qualifying period in statute and directs the adoption of routine technical rules, and
- the statements of factual and policy basis for the provisionally adopted amendments, for your reference.

Thank you for your consideration of these amendments.

STATE OF MAINE

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IN THE YEAR OF OUR LORD
TWO THOUSAND TWENTY-THREE

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H.P. 242 - L.D. 391

Resolve, Regarding Legislative Review of Portions of Chapter 2: Hearing Procedures and Portions of Chapter 3: Maine Clean Election Act and Related Provisions, Major Substantive Rules 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, major substantive rules have 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 rules; 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 2: Hearing Procedures and portions of Chapter 3: Maine Clean Election Act and Related Provisions, provisionally adopted major substantive rules of the Commission on Governmental Ethics and Election Practices that have been submitted to the Legislature for review pursuant to the Maine Revised Statutes, Title 5, chapter 375, subchapter 2-A, is authorized only if the change in Chapter 3, Section 9, subsection 2 regarding death, withdrawal or disqualification of a candidate during a campaign, which allows for the qualifying period for replacement candidates to begin when the Secretary of State receives a notice of withdrawal or declares a vacancy and for the commission to establish the end of the qualifying period, is removed.

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

SECTION 1. SCOPE

These procedures shall be applicable to hearings before the Maine Commission on Governmental Ethics and Election Practices which have been called to consider any matter within the Commission's statutory authority. They shall be construed to secure the just, speedy and inexpensive determination of such matters in the public interest.

SECTION 2. NOTICE

1. ~~Due notice of public hearings shall be given by publishing such notice in appropriate newspapers and notifying those whose conduct or report is the subject of the hearing at least 10 days prior to the hearing provided as set forth in the Maine Administrative Procedure Act, 5 M.R.S. § 9052.~~
2. ~~The notice shall specify the time and place of the hearing and matters to be considered at the hearing.~~

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SECTION 6. GENERAL EVIDENCE

1. ~~Evidence which is relevant and material to the subject matter of the hearing and is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible. However, the Maine Rules of Evidence shall apply to the introduction of verbal hearsay evidence in the same manner as at a civil trial. Evidence which is irrelevant, immaterial or unduly repetitious shall be excluded. Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs. The Commission may exclude irrelevant or unduly repetitious evidence.~~
2. Commission Evidence. Any results of Commission investigations or data gathered during Commission investigations may be introduced into the record by the Commission. The Commission may also present such other evidence as it deems appropriate.
3. Official Notice. The Commission may, at any time, take official notice of relevant laws, official regulations and transcripts of other Commission hearings, judicially recognizable facts, generally recognized facts of common knowledge to the general public and physical, technical or scientific facts within its specialized knowledge. The Commission shall include in any final written decision those facts of which it took official notice unless those facts are included in the transcript of the record.

4. Documentary and Real Evidence. All documents, materials and objects offered in evidence as exhibits shall be numbered or otherwise identified. Documentary evidence may be received in the form of copies or excerpts if the original is not readily available.
5. Objections. All objections to rulings of the presiding officer regarding evidence or procedure and the grounds therefor shall be timely stated during the course of the hearing. If during the course of or after the close of the hearing and during its deliberations the Commission determines that the ruling of the presiding officer was in error, it may reopen the hearing or take such other action as it deems appropriate to correct such error.
6. Offer of Proof. An offer of proof may be made in connection with an objection to a ruling of the presiding officer excluding or rejecting any testimony or question on cross-examination. Such offer of proof shall consist of a statement of the substance of the proffered evidence or that which is expected to be shown by the answer of the witness.

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Chapter 3: MAINE CLEAN ELECTION ACT AND RELATED PROVISIONS

SECTION 2. PROCEDURES FOR PARTICIPATION

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4. **Qualifying Contributions**

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N. Returns of qualifying contributions. Qualifying contributions submitted to the Commission in the form of check or money order are not returnable nor refundable. If the Commission receives a request from a contributor for the return of an online qualifying contribution because the contributor made a duplicate contribution or some other error, the Commission may, in its sole discretion, forward the request to the contractor that supports the online service if the return would be feasible within the timing and other constraints of the contractor.

SECTION 7. LIMITATIONS ON CAMPAIGN EXPENSES

A certified candidate shall:

1. limit the candidate's campaign expenditures and obligations to the applicable Clean Election Act Fund distribution amounts;
2. not accept any contributions unless specifically authorized in writing to do so by the Commission in accordance with the Act [§1125(2) and §1125(13)];
3. use revenues distributed from the Fund only for campaign-related purposes as outlined in guidelines published by the Commission, and not for personal or any other use;
4. not use revenues distributed from the Fund to purchase goods to sell for profit;
5. not spend more than the following amounts of Fund revenues on ~~post-election parties~~, thank you notes, or advertising to thank supporters or voters:
 - A. \$250 for a candidate for the State House of Representatives;
 - B. \$750 for a candidate for the State Senate; and
 - C. \$2,500 by a gubernatorial candidate.

The candidate may also use his or her personal funds for these purposes;

6. not use revenues distributed from the Fund for the payment of fines, forfeitures, or civil penalties, or for the defense of any enforcement action of the Commission; and
7. not make any payment of more than \$50 in cash. Payments of more than \$50 in *Maine Clean Election Act* funds must be made by check, debit or credit card or wire transfer.

STATE OF MAINE

IN THE YEAR OF OUR LORD

TWO THOUSAND TWENTY-THREE

S.P. 113 - L.D. 247

An Act Regarding Replacement Candidates Under the Maine Clean Election Act

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 21-A MRSA §1125, sub-§1, as amended by PL 2019, c. 323, §27, is further amended to read:

1. Declaration of intent. A participating candidate shall file a declaration of intent to seek certification as a Maine Clean Election Act candidate and to comply with the requirements of this chapter. The declaration of intent must be filed with the commission prior to or during the qualifying period, except as provided in subsection 11 or 11-A, according to forms and procedures developed by the commission. Qualifying contributions collected more than 5 business days before the declaration of intent has been filed will not be counted toward the eligibility requirements in subsection 3 or 3-A.

Sec. 2. 21-A MRSA §1125, sub-§4, as amended by PL 2009, c. 363, §4, is further amended to read:

4. Filing with commission. A participating candidate must submit qualifying contributions, receipt and acknowledgement forms, proof of verification of voter registration and a seed money report to the commission during the qualifying period according to procedures developed by the commission, except as provided under subsection 11 or 11-A.

Sec. 3. 21-A MRSA §1125, sub-§11, as enacted by IB 1995, c. 1, §17, is amended to read:

11. Other procedures. The commission shall establish by rule procedures for qualification, certification, disbursement of fund revenues and return of unspent fund revenues for races involving special elections; or recounts, vacancies, withdrawals or replacement candidates.

Sec. 4. 21-A MRSA §1125, sub-§11-A is enacted to read:

11-A. Vacancies, withdrawals or replacement candidates. If a candidate dies, withdraws or is disqualified before an election, the qualifying period for any replacement

candidate begins when the Secretary of State receives a notice of withdrawal or declares a vacancy, whichever occurs earlier. The commission shall establish by rule the end of the qualifying period for a replacement candidate and procedures for certification, disbursement of fund revenues and return of unspent fund revenues for races involving vacancies, withdrawals or replacement candidates. Qualifying contributions collected by a replacement candidate under this subsection may not be deposited into the fund until the replacement candidate has been nominated and, if the replacement candidate is not officially nominated, the commission shall return the qualifying contributions to the contributors, unless the contributor authorizes the deposit of the qualifying contribution into the fund. Rules of the commission adopted under this subsection are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

Sec. 5. 21-A MRSA §1126, as amended by PL 2001, c. 465, §7, is further amended to read:

§1126. Commission to adopt rules

The commission shall adopt rules to ensure effective administration of this chapter. These rules must include but ~~must~~ may not be limited to procedures for obtaining qualifying contributions, certification as a Maine Clean Election Act candidate, circumstances involving special elections, ~~vacancies~~, recounts, ~~withdrawals or replacements~~, collection of revenues for the fund, distribution of fund revenue to certified candidates, return of unspent fund disbursements, disposition of equipment purchased with clean election funds and compliance with the Maine Clean Election Act. Rules of the commission required by this section are major substantive rules as defined in Title 5, chapter 375, subchapter ~~H-A~~ 2-A.



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To: Administrative Procedure Officer, Office of the Maine Secretary of State
From: Jonathan Wayne, Executive Director
Date: January 9, 2023
Re: Amendments to Chapter 2 of the Commission's Rules (94-270 C.M.R. Chapter 2)

STATEMENT OF FACTUAL AND POLICY BASIS FOR AMENDMENTS AND SUMMARY AND RESPONSE TO COMMENTS

Chapter 2, §§ 2 & 6(1) – Procedures for Commission Hearings

Factual and policy basis for amendments: Chapter 2 of the Commission's rules sets out procedures for conducting hearings. The Commission is authorized to hold hearings on complaints concerning legislative ethics and appeals of staff determinations on Maine Clean Election Act funding. 1 M.R.S. § 1013(2), 21-A M.R.S. § 1125(14)(B). In addition, when facts are disputed or a witness' credibility is in question, the Commission has held discretionary hearings on matters of campaign finance compliance. The Commission's hearings are considered "adjudicatory proceedings" as defined in the Maine Administrative Procedure Act (APA). 5 M.R.S. § 8002(1). Consequently, the hearing procedures in the APA apply to Commission hearings. 5 M.R.S. § 9051(1).

The Commission last amended its Chapter 2 rules in 1998. In this rulemaking, the Commission proposed updates to these rules to conform them to the Maine APA.

Chapter 2, § 2 addresses the Commission's procedures for providing notices of hearings. The Commission proposed eliminating the mandatory newspaper publication for *all* hearings, and instead conforming its notice procedures to the APA. In practice, the Commission provides notices to persons whose legal rights, duties and privileges are at issue by U.S. Mail and electronic mail, and sends an email notice to all persons who have signed up to receive notifications of Commission meetings.

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Chapter 2, § 6(1) addresses the standards for the admissibility of evidence in Commission hearings. Currently, this subsection sets out a standard that is slightly different than the APA. The proposed amendments were intended to eliminate the potential argument in future hearings that the Commission intentionally adopted a standard that is different than the APA. Adopting the APA language will provide the Commission with the latitude to accept verbal hearsay into evidence, which is permissible under the APA. For reasons of expediency or to expand the scope of information that may be considered, there are situations in which the Commission may wish to admit a statement that was made outside of a hearing as recounted by a hearing witness. This could eliminate the need to call additional witnesses when the sworn testimony of the hearing witness is viewed as reliable.

Comments received: The Maine Citizens for Clean Elections (MCCE) submitted a November 29, 2022 letter supporting the Commission’s proposed changes. The MCCE stated that in the age of internet communications, notices by means other than newspaper publication can be appropriate. The MCCE also indicated that the proposed evidentiary standards would be helpful to those participating in Commission proceedings, especially those who do not have the benefit of legal counsel.

Commission’s response to comments: The Commission considered the comments submitted and provisionally adopted the rule amendments to Chapter 2 as proposed.



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To: Administrative Procedure Officer, Office of the Maine Secretary of State
From: Jonathan Wayne, Executive Director
Date: January 9, 2023
Re: Amendments to Chapter 3 of the Commission's Rules (94-270 C.M.R. Chapter 3)

STATEMENT OF FACTUAL AND POLICY BASIS FOR AMENDMENTS AND SUMMARY AND RESPONSE TO COMMENTS

Chapter 3, Maine Clean Election Act and Related Provisions

§ 2(4) - Qualifying Contributions

Factual and policy basis for amendment: Candidates collect \$5 qualifying contributions (QCs) and submit them to the Commission in order to qualify for Maine Clean Election Act (MCEA) funding. A QC is not a general campaign donation to the candidate. Rather, it is a payment by a Maine voter to the Maine Clean Election Fund to demonstrate the voter's support for the candidate's qualification to receive MCEA funding. The QCs are deposited in the Maine Clean Election Fund to partially underwrite the costs of the program.

Candidates may collect QCs by check, cash (which the candidate converts to a money order), or online. When the candidates are ready to qualify for the MCEA program or to receive supplemental payments, the candidate submits the QCs and accompanying documentation to the Commission. The department staff reviews the QCs and documents to make sure they meet technical requirements to be considered valid. Most QCs are found to be valid, but some are invalid for a variety of reasons.

As soon as the Commission staff reviews a candidate's submission of QCs, the checks and money orders are delivered to the State's central accounting office for deposit into the Maine Clean Election Fund. Many Maine residents balance their checkbooks. The Commission has found that if the Commission holds on to checks too long, candidates inquire why the department

has not deposited their supporters' checks. Also, the Commission believes it is a responsible practice not to have the checks and money orders in its custody too long.

Every election year, a few candidates request that the checks or money orders be returned to them if these payments are not going to be counted toward MCEA funding. In 2022, the Commission received exactly two such requests. Because the Commission arranges for the prompt deposit of the checks and money orders after its review, the department's internal policy has been the Commission may not return the checks or money order to the candidates.

The Commission proposed a new § 2(4)(N) to its Chapter 3 rules that would formalize this policy. The current practice of promptly depositing checks and money orders maximizes the Commission's efficiency in making payments to candidates. To hold a subset of checks or money orders within the office after the staff's review for possible return to candidates would add a layer of administrative burden that would reduce the department's efficiency in performing its core duties. Given the tens of thousands of QCs the Commission receives, that investment of time would not be justified by a few requests from candidates for the return of their QCs. While \$5 is a meaningful amount to some contributors, it is still a small amount compared to the staff time of holding QCs within the Commission's office for possible return to candidates.

Comments received: The Maine Citizens for Clean Elections (MCCE) submitted a November 29, 2022 letter supporting the Commission's proposed amendment and acknowledging the administrative burden to implement refunds of QCs.

Commission's response to comments: The Commission considered the comments submitted and provisionally adopted the rule amendment as proposed.

§ 7 – Limitations on Campaign Expenses

Factual and policy basis for amendment: In 2017, 21-A M.R.S. § 1125(6) was amended by the Legislature to prohibit candidates from spending MCEA funds on post-election parties. P.L. 2017, Ch. 31. The Commission proposed an amendment to bring its Chapter 3 rule in line with the statute.

Comments received: No comments were received concerning this change.

Commission's response to comments: The Commission provisionally adopted the rule amendment as proposed.

§ 9(2) – Recounts, Vacancies, Write-In Candidates, Special Elections

Factual and policy basis for amendment: After qualifying for the ballot, some candidates withdraw due to health, family, or other reasons. In a typical election year, around 30 party nominees withdraw after the primary election in June or early July, and are replaced by other candidates who are nominated at a local party caucus.

Since the mid-2000's, the Commission's rule, Chapter 3, § 9(2), stated that the qualifying period for the post-primary replacement candidates began when the candidates were nominated at their local party caucus, which is often held around the third week of July. In recent election years, the Commission received feedback that replacement candidate should be able to begin qualifying for MCEA funds earlier. The Commission proposed to amend Chapter 3, § 9(2) to allow for an earlier qualifying period.

Comments received: In its November 29, 2022 letter, the MCCE supported the proposed amendment. Shawn Roderick, representing the Senate Republican Caucus, commented at a November 30, 2022 public meeting and in email comments dated December 10, 2022 that the Commission should consider allowing the qualifying period to start once the replacement candidate registers with the Commission. Sean Smith, representing the House Democratic Campaign Committee, suggested in a December 11, 2022 letter that replacement candidates be permitted to collect QCs once the Secretary of State declares a vacancy and the candidate registers with the Commission.

Commission's response to comments: To address the comments from the legislative caucuses, the Commission provisionally adopted an amendment stating that the qualifying period will begin when the Secretary of State receives a notice of withdrawal or declares a vacancy and that the Commission will establish the end of the qualifying period.