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

MEMORANDUM

To: Commissioners

From: Jonathan Wayne, Executive Director

Date: November 11, 2020

Subject: Proposed Rulemaking

Rule-Making Procedures

The Maine Clean Election Act (MCEA) directs the Commission to adopt rules to ensure effective implementation of the Act. 21-A M.R.S. § 1126. The Commission's rules concerning the MCEA comprise Chapter 3 of the Commission's rules. In § 1126, the MCEA designates the rules as "major substantive." This means that the Commission is required to submit them to the Legislature for authorization before they can become final and take effect.

The Commission staff proposes conducting a rulemaking to address two issues that arose in the 2020 election. We have attached two proposed amendments. This memo explains the rationale for the amendments.

Initiating a rulemaking means you would decide to accept comments from the public on proposed amendments (attached). Generally, the Commission receives comments on proposed rule amendments in writing and through a public hearing. We invite comments by letter delivered through our email notification service and by U.S. Mail to a list of interested persons. After receiving comments on the proposed amendments, your options would be

- adopt the rule amendments as initially proposed,
- adopt a modified version of the amendments, or
- take a wait-and-see approach and decline to adopt any amendments at all.

If you approve of initiating a rulemaking, we would suggest the following timing:

- initiating the rulemaking at your November 18 meeting by inviting public comments,
- holding a public hearing by zoom to receive comments at your December 18 meeting,
- if you decide to adopt any amendments, you would adopt them at your January 2021 meeting for submission to the Maine Legislature for its authorization during the First Regular Session of the 130th Legislature.

Switching Offices and Running as a Maine Clean Election Act Candidate

In order to qualify for MCEA funding, a candidate must declare his or her intent to qualify for the funding on the Commission's forms. At that point, the candidate is considered to be a "participating candidate," as defined in the MCEA. 21-A M.R.S. § 1122(6). To receive MCEA funding, the participating candidate must demonstrate support by collecting a minimum number of $5 qualifying contributions during the qualifying period, which for legislative candidates is January 1 - April 20 of the election year. If the candidate qualifies to receive MCEA funding, the candidate is a "certified candidate" as that term is defined in 21-A M.R.S. § 1122(1).

The design of the MCEA recognizes that candidates need to rely on some campaign funds prior to qualifying for MCEA funding. For this purpose, they are allowed to collect limited "seed money" contributions: donations of up to $100 from individuals only (rather than from PACs, party committees, or businesses):[1]

> *Contribution limits for participating candidates.* Subsequent to becoming a candidate as defined by section 1, subsection 5 and prior to certification, a participating candidate may not accept contributions, except for seed money contributions. A participating candidate must limit the candidate's total seed money contributions to the following amounts:
>
> A. Two hundred thousand dollars for a gubernatorial candidate;
>
> B. Three thousand dollars for a candidate for the State Senate; or
>
> C. One thousand dollars for a candidate for the State House of Representatives.

[1] The term "seed money contribution" is defined in 21-A M.R.S. § 1122(9).

21-A M.R.S. § 1125(2-A) (emphasis added). The MCEA seed money statute goes on to say that "A participating candidate who has accepted contributions or made expenditures that do not comply with the seed money restrictions may petition the commission to remain eligible for certification as a Maine Clean Election Act candidate." 21-A M.R.S. § 1125(2-A)(B). The Commission has adopted a rule setting out the conditions under which the Commission may grant an exception to a participating candidate who has accepted contributions that did not comply with seed money restrictions. Chapter 3, § 2(3)(F) of the Commission's rules.

In 2020, the Commission staff was approached by a candidate for the Maine House of Representatives who had already begun receiving contributions as a traditionally financed candidate that did not comply with the seed money restrictions and who wanted to run for the State Senate as an MCEA candidate. (Some of these contributions were from sources other than individuals and exceeded $100 per contributor.) In the spirit of providing candidates with access to this voter-approved public funding program, the Commission staff permitted the candidate to qualify for MCEA funding based on the interpretation of the underlined sentence on the previous page that the candidate was not a "participating candidate" at the time he received the non-compliant contributions. We believe a rule amendment would be appropriate to set policy on this question for future cases.

In our attached proposed amendment, if a candidate has accepted contributions as a traditionally financed candidate that do not comply with seed money restrictions, the candidate may petition the Commission to qualify for Maine Clean Election Act funding for a *different* office at least one month before the certification deadline on two conditions:

- if the candidate disposes of non-compliant contributions in accordance with written guidance from the Commission, and
- the candidate has received sufficient contributions, or portions thereof, that comply with seed money restrictions to pay for all expenditures made prior to petitioning the Commission.

Obligating Goods and Services before Qualifying for Sufficient MCEA Funding

In the course of answering questions and providing advice to candidates, the Commission staff hears about various commercial arrangements between candidates and campaign vendors. Some vendors require payment before entering into an agreement to provide goods or services. Other vendors are open to, and may encourage, candidates to commit to a certain number of mailings or other paid services before the candidate is able to pay for them.

The MCEA program is a system of full public financing. Candidates in the program may not supplement their MCEA funds with personal funds or campaign contributions to pay for campaign goods or services. General election candidates receive an initial payment for the election and may qualify to receive up to eight supplemental payments if they continue to collect additional qualifying contributions.

In 2020, the Commission staff became aware of several cases in which a candidate obligated themselves to purchase services from a mailhouse *prior to* having qualified for sufficient supplemental MCEA funding to pay for those services. Later, these candidates experienced difficulty in qualifying for supplemental payments to pay the vendor. This put the candidate in a difficult position. The candidates either needed to cancel services they had agreed to or hustle under pressure to qualify for supplemental payments because they had entered into these obligations.

To prevent such situations in the future, the Commission staff believes it is worth considering a rule that would prohibit a candidate from entering into an obligation to pay for goods or services prior to qualifying for supplemental payments of MCEA funding sufficient to pay for those goods or services.

The Commission staff anticipates that the Commission may receive positive and negative comments concerning this proposed amendment. The Commission may receive feedback that this is a reasonable requirement for a voluntary public financing system that encourages responsible financial management by candidates. Others may view this as an unnecessary limit

on the ability of publicly funded candidates to enter into the same commercial arrangements as traditionally financed candidates. The Commission staff knows of at least six candidates (out of about 200 certified candidates) in the 2020 general election who created difficulties for themselves by obligating goods or services prior to having qualified for sufficient supplemental payments,

Thank you for your consideration of these proposed amendments.

94-270 COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES

Chapter 3: MAINE CLEAN ELECTION ACT AND RELATED PROVISIONS

SECTION 1. APPLICABILITY

This chapter applies to candidates running for Governor, State Senator and State Representative who choose the alternative campaign financing option established by the *Maine Clean Election Act* for elections to be held beginning in the year 2000. Candidates participating in the *Maine Clean Election Act* must comply with these rules and all other applicable election and campaign laws and regulations. Some sections in this chapter also apply to and impose obligations on privately financed candidates and political committees that raise contributions and make expenditures in races involving *Maine Clean Election Act* candidates.

SECTION 2. PROCEDURES FOR PARTICIPATION

1. **Declaration of Intent**. A participating candidate must file a Declaration of Intent within five days of collecting qualifying contributions. The Commission will provide a form for this purpose.

2. **Content**. The Declaration of Intent must include the following information:

   A. an affirmation that the candidate is seeking certification as a *Maine Clean Election Act* candidate;

   B. an affirmation that the candidate understands that any qualifying contributions collected more than five days before filing the Declaration of Intent will not be counted toward the eligibility requirement;

   C. an affirmation that the candidate has not accepted any contributions, except for seed money contributions, after becoming a candidate;

   D. an affirmation that the candidate has disposed of any campaign surplus before becoming a candidate for the new election, as required by paragraph 3 (D) [Campaign Surplus] of this section;

   E. an affirmation that if the candidate has any campaign deficit, that the candidate will not accept contributions to repay that deficit as a participating candidate or certified candidate, except that the candidate may forgive any campaign loans to himself or herself made during any previous campaigns;

   F. an affirmation that the candidate will continue to comply with applicable seed money restrictions and other requirements of the Act including, but not limited to, procedures for collecting qualifying contributions;

   G. an affirmation that the candidate has read and will comply with the Commission's guidelines on permissible expenditures; and

H. authorization by the candidate for the Commission, its agents or representatives to conduct financial audits of the candidate's campaign financial records and account(s).

3. **Seed Money Restrictions**

A. **General**. After becoming a candidate and before certification, a participating candidate may collect and spend only seed money contributions. The restrictions on seed money contributions apply to both cash and in-kind contributions.

B. **Total Amount**

(1) A participating candidate must limit the candidate's total seed money contributions to the following amounts:

(a) two hundred thousand dollars for a gubernatorial candidate;

(b) three thousand dollars for a candidate for the State Senate; or

(c) one thousand dollars for a candidate for the State House of Representatives.

(2) Notwithstanding any other provision of this chapter, a candidate may carry forward to a new candidacy of that candidate campaign equipment or property, subject to the reporting requirements of Title 21-A, chapter 13 [Campaign Reports and Finances].

(3) The Commission periodically will review these limitations and, through rulemaking, revise these amounts to ensure effective implementation of the Act.

C. **Required seed money for gubernatorial candidates.** *[Repealed.]*

D. **Campaign surplus**. A candidate who has carried forward campaign surplus according to Title 21-A, chapter 13, subchapter II [§1017(8) and §1017(9)], and who intends to become a participating candidate, must dispose of campaign surplus in accordance with the requirements of Title 21-A, chapter 13, subchapter II [§1017(8)]; provided, however, that a candidate may carry forward only those portions of campaign surplus that comply with the provisions of this Act regarding seed money contributions [§§ 1122(9) and 1125(2)]. Any campaign surplus (excluding campaign equipment or property) carried forward under this provision will be counted toward that candidate's total seed money limit.

INFORMATIONAL NOTE: The Commission will provide educational materials to all former candidates who have a campaign surplus describing the requirement that individuals must dispose of campaign surplus to remain eligible for participation as a *Maine Clean Election Act* candidate.

E. **Return of Contributions Not in Compliance with Seed Money Restrictions**. A participating candidate who receives a contribution exceeding the seed money per donor restriction or the total amount restriction must immediately return the contribution and may not cash, deposit, or otherwise use the contribution.

F. **Case-by-Case Exception**. A participating candidate who has accepted contributions or made expenditures that do not comply with seed money restrictions may petition the Commission to remain eligible for certification as a *Maine Clean Election Act* candidate. The Commission may approve the petition and restore a candidate's eligibility for certification if the candidate successfully establishes all of the following criteria:

(1) the failure to comply was the result of an unintentional error;

(2) the candidate immediately returned all contributions that did not comply with seed money restrictions or paid for goods or services contributed that did not comply with seed money restrictions;

(3) the candidate petitioned the Commission promptly upon becoming aware of the unintentional error; and

(4) the failure to comply did not involve expenditures by the participating candidate significantly in excess of seed money total amount restrictions or otherwise constitute systematic or significant infractions of seed money restrictions.

G. **Loans during qualifying period.** After becoming a candidate and prior to certification, accepting a loan from any source including a financial institution and spending money received in the form of a loan, are violations of the seed money restrictions of the Act.

H. **Seed money donors.** A seed money contributor may also make a qualifying contribution to the same candidate provided that the contributor otherwise meets the requirements for making a qualifying contribution.

I. **Personal funds to open bank account.** A candidate may deposit personal funds of the candidate in a campaign account in order to meet the opening deposit requirements of the financial institution. If a financial institution requires a minimum balance to keep an account open or to avoid fees, the candidate may maintain personal funds in the account for that sole purpose at the minimum amount necessary to satisfy the terms of the financial institution. These funds will not be considered an in-kind contribution to the candidate's campaign or commingling of personal and campaign funds, provided that the candidate does not spend these funds for purposes of promoting the candidate's nomination or election.

J. **Accepting traditional campaign contributions before seeking Maine Clean Election Act funding.** If a candidate has accepted contributions as a traditionally financed candidate that do not comply with seed money restrictions:

(1) The candidate is ineligible to qualify for Maine Clean Election Act funding for the same office.

(2) The candidate may petition the Commission to qualify for Maine Clean Election Act funding for a different office at least one month before the certification deadline if the candidate disposes of non-compliant contributions in accordance with written guidance from the Commission and the candidate has received sufficient

contributions, or portions thereof, that comply with seed money restrictions to pay for all expenditures made prior to petitioning the Commission.

. . .

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~~.~~ and;

8. not enter into an obligation to pay for campaign goods or services prior to qualifying for Fund revenues sufficient to pay for those goods or services.

. . .