



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

Additional Materials  
 Agenda Item #2  
 June 25, 2014

To: Commissioners  
 From: Jonathan Wayne, Executive Director  
 Date: June 24, 2014  
 Re: Staff Response to Request for Waiver of Penalties by National Organization for Marriage

Late yesterday, the Commission received a letter from legal counsel for the National Organization for Marriage (NOM) dated June 23, 2014 requesting a waiver of \$50,250 in penalties recommended by the Commission staff on April 9, 2014 and accepted by the Commission on May 28, 2014. These penalties included \$250 for failure to register as a ballot question committee and the following penalties totaling \$50,000 for the late filing of campaign finance reports.

Civil Penalties Recommended by Commission Staff						
Filing Deadline	# of days late (as of the date of this report)	Amount of Contributions or Expenditures (whichever is greater)	Percentage	Penalty (if no maximum applied)	Statutory Maximum (in effect as of 9/12/2009)	Penalty Recommended by Commission Staff
10/23/2009 (11-day pre-election report)	1,629	\$1,590,000	1%	\$25,901,100	\$10,000	\$10,000
10/24/2009 (24-hour report)	1,628	\$100,000	1%	\$1,628,000	\$10,000	\$10,000
10/27/2009 (24-hour report)	1,625	\$40,000	1%	\$650,000	\$10,000	\$5,000
10/28/2009 (24-hour report)	1,624	\$160,000	1%	\$2,598,400	\$10,000	\$10,000
10/30/2009 (24-hour report)	1,622	\$40,000	1%	\$648,800	\$10,000	\$5,000
12/15/2009 (42-day post-election report)	1,576	\$340,500	1%	\$5,366,280	\$10,000	\$10,000

The staff recommended reducing by 50% the penalties for two reports due October 27 and 30, 2009, because those reports contained a smaller amount of financial activity.

#### **Timing of NOM's Request for a Waiver**

On April 9, 2014, the Commission staff emailed and mailed to NOM's counsel the attached letter notifying NOM of the findings of violations and civil penalties totaling \$50,250 that the staff intended to recommend for the Commission's May 28, 2014 meeting. The notice requested that NOM respond within 27 days by May 6, 2014. The notice accompanied the staff's investigative report, which explained the basis for the recommended penalties and even anticipated arguments that NOM might make requesting a waiver (pages 36-37 of the investigative report).

On May 6, 2014, NOM responded with a 12-page letter-memo. NOM argued against the findings of violation, but did not address the proposed penalties. At the Commission's May 28, 2014 meeting, NOM's attorney and executive director did not request a waiver. At the conclusion of the May 28, 2014 meeting, the Commission voted to accept the penalties recommended by the Commission staff.

The Commission has discretion to consider NOM's request for a penalty waiver if you wish, notwithstanding the lateness of NOM's submission, since the decision is not final until the Commission adopts a written determination.

#### **Substance of NOM's Request for a Waiver**

NOM asserts an "error by the Commission" as grounds for a waiver of penalties in this case, but this is a misquote of the statute. Title 21-A, section 1062-A(2)(B) defines "mitigating circumstances" to include "an error by the commission staff" -- i.e., circumstances in which a filer has missed a deadline or failed to file a report on time because of a staff error. No such error has even been alleged in this case.

Contrary to NOM's assertion, the penalties recommended by staff did *not* accrue during the entire time period of this investigation, as NOM contends on p. 1 of its June 23 letter.

Rather, the preliminary penalties increased quickly (because of the very large amount of unreported activity) and reached the \$10,000 statutory maximum for each report between October 24 and December 18, 2009 – more than four years ago.

<b>Filing Deadline</b>	<b>Type of report</b>	<b>NOM's Contributions to Stand for Marriage Maine</b>	<b>Daily Penalty (Activity in Report Multiplied by 1%)</b>	<b>Date on which Penalty Reached \$10,000 Maximum</b>
10/23/09	11-day pre-election	\$1,590,000	\$15,900.00	10/24/09
10/24/09	24-hour report	\$100,000	\$1,000.00	11/03/09
10/27/09	24-hour report	\$40,000	\$400.00	11/21/09
10/28/09	24-hour report	\$160,000	\$1,600.00	11/04/09
10/30/09	24-hour report	\$40,000	\$400.00	11/24/09
12/15/09	42-day post-election	\$340,500	\$3,405.00	12/18/09

So, the preliminary penalty for each late report under the statute was \$10,000 – regardless whether the investigation took four months or four years.

Even though the investigation was only just beginning in the fall of 2009, NOM was well aware of the Commission’s interpretation of the legal requirements triggering the obligation to register and file reports as a ballot question committee based on the response to litigation that NOM initiated barely three weeks after the Commission voted to undertake the investigation. Moreover, on October 28, 2014, the U.S. District Court denied NOM’s motion for a temporary restraining order, finding “no vagueness” in 21-A M.R.S. § 1056-B(2-A)(B) and concluding that NOM was unlikely to prove that §1056-B(2-A)(C) was unconstitutionally vague. *National Org. for Marriage v. McKee*, 666 F.Supp.2d 193, 211, 212 (D. Me. 2009).

Facts gathered during this investigation also show that during the month of October, 2009 (i.e., after the Commission had voted to undertake its investigation), NOM raised and spent \$1,440,000 on the Maine referendum campaign through its contributions to the Stand for Marriage Maine PAC. NOM made its own strategic decision not to file as a ballot question committee, knowing the risks that the Commission would ultimately determine

that it should have registered and filed reports and would impose penalties under the formula set out in statute.

Thank you for your consideration of this memo.



STATE OF MAINE  
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04333-0135

April 9, 2014

**By E-Mail and Express Mail**

Kaylan L. Phillips, Esq.  
ActRight Legal Foundation  
209 West Main Street  
Plainfield, IN 46168-1117

Dear Ms. Phillips,

I write on behalf of the staff of the Maine Commission on Governmental Ethics and Election Practices concerning our investigation of the 2009 financial activities of the National Organization for Marriage (NOM). On October 1, 2009, the Commission directed its staff to investigate whether NOM was required to register and to file campaign finance reports as a ballot question committee. The enclosed investigative report contains the staff's analysis and recommendations.

We intend to present the matter to the members of the Commission at their regularly scheduled meeting on Wednesday, May 28, 2014. The meeting will take place beginning at 9:00 a.m. at its office at 45 Memorial Circle, in Augusta, Maine.

**Findings of Violations and Penalties Recommended by Staff**

The recommendations of the staff of the Commission are set out on pages 31-37 of the investigative report. These are subject to change based on any additional information received by the Commission concerning NOM's activities in 2009.

Based on the evidence gathered in the investigation, the Commission staff recommends that the Commission reach the following conclusions of law:

- A. NOM violated 21-A M.R.S.A. § 1056-B by receiving contributions aggregating in excess of \$5,000 for purposes of initiating or promoting the 2009 people's veto referendum and failing to register and file campaign finance reports as a ballot question committee.
- B. The donations received by NOM in response to solicitations distributed by electronic mail from NOM to its subscribers and members during the period from May through at least September, 2009 constituted "contributions" under 21-A M.R.S.A. § 1056-B(2-A)(B) and/or (C).

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- C. The donations received by NOM from several major donors, such as Donors #2, 9, 10, 11 and 12, during the period from May through November, 2009, constituted "contributions" under 21-A M.R.S. §§ 1056-B(2-A)(B) and/or (C).

At this time, the Commission staff intends to recommend the assessment of civil penalties totaling \$50,250 for the violations, as discussed on pages 35-37 of the report.

### **NOM's Opportunity to Respond**

NOM and its attorneys are welcome to respond to the staff's recommendations in writing and to attend the meeting to address the Commissioners in person. If you wish to respond in writing, please submit the response no later than May 6, 2014 to allow adequate time for the Commission staff to prepare a reply and for the Commissioners to consider the evidence gathered.

### **Documents and Confidentiality**

I have attached a chart of documents that the Commission staff intends to provide to the Commissioners along with the investigative report, and a CD containing the documents in a .pdf format. If there are any other documents that you believe the Commission should consider in the course of reviewing the investigative report, please identify them.

The chart indicates whether the documents qualify as "investigative working papers" under subsection 3-A of the Commission's investigations statute (21-A M.R.S.A. § 1003). If you disagree with our designations of which documents on the attached list qualify as confidential investigative working papers, please let us know. If you believe that any portion of the Commission staff's investigative report needs to be redacted because it contains confidential information, please let us know that as well.

The chart also notes whether the documents have been number-stamped by ActRight Legal Foundation or the Office of the Maine Attorney General. Based on the advice of our Counsel, the Commission staff has number-stamped the following documents for ease of future reference:

- NOM emails dated Nov. 4, 2009 (Doc. ##1189-90), Nov. 24, 2009 (Doc. ##1191-92), Sept. 4, 2009 (Doc. ##1166-1168), Oct. 2, 2009 (Doc. ##1169-73), Oct. 9, 2009 (Doc. ##1174-79), Oct. 15, 2009 (Doc. ##1180-81), Oct. 22, 2009 (Doc. ##1182-83), Oct. 30, 2009 (Doc. ##1184-88);
- a script, invoice, and statement of amount due prepared by ccAdvertising (Doc. ##1195-99);

Kaylan L. Phillips, Esq.  
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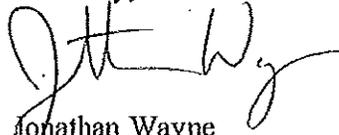
- a chart of donations from NOM's major donors in 2009 (Attachment B to your April 3, 2013 letter) (Doc. ##1193-94); and
- a thank you note from Brian Brown to Donor #11 (Doc. #1200).

The stamped documents are included on the CD that you will receive by express mail.

Also, it appears that the detailed budgets for NOM's 2009 Maine and New Jersey campaigns that were attached to the August 11, 2009 version of the National Strategy for Winning the Marriage Battle (confirmed by Brian Brown on pages 26-27 of his deposition transcript), were not numbered previously. So, we have numbered them 143A and 143B.

If you have questions concerning how the Commission will consider this matter or the confidentiality of any of the documents listed on the enclosed chart, please direct them to Assistant Attorney General Phyllis Gardiner.

Sincerely,



Jonathan Wayne  
Executive Director

cc: Commission Counsel, Assistant Attorney General Phyllis Gardiner

## 21-A MRSA § 1062-A. FAILURE TO FILE ON TIME

**1. Registration.** A political action committee required to register under section 1052-A or 1053-B or a ballot question committee required to register under section 1056-B that fails to do so or that fails to provide the information required by the commission for registration may be assessed a fine of no more than \$2,500. In assessing a fine, the commission shall consider, among other things, whether the violation was intentional, the amount of campaign and financial activity that occurred before the committee registered, whether the committee intended to conceal its campaign or financial activity and the level of experience of the committee's volunteers and staff.

[ 2013, c. 334, §30 (AMD) .]

**2. Campaign finance reports.** A campaign finance report is not timely filed unless a properly signed or electronically submitted copy of the report, substantially conforming to the disclosure requirements of this subchapter, is received by the commission by 11:59 p.m. on the date it is due. Except as provided in subsection 6, the commission shall determine whether a required report satisfies the requirements for timely filing. The commission may waive a penalty in whole or in part if it is disproportionate to the level of experience of the person filing the report or to the harm suffered by the public from the late disclosure. The commission may waive the penalty in whole or in part if the commission determines the failure to file a timely report was due to mitigating circumstances. For purposes of this section, "mitigating circumstances" means:

A. A valid emergency of the committee treasurer determined by the commission, in the interest of the sound administration of justice, to warrant the waiver of the penalty in whole or in part; [1999, c. 729, §9 (AMD).]

B. An error by the commission staff; or [1999, c. 729, §9 (AMD).]

C. Other circumstances determined by the commission that warrant mitigation of the penalty, based upon relevant evidence presented that a bona fide effort was made to file the report in accordance with the statutory requirements, including, but not limited to, unexplained delays in postal service or interruptions in Internet service. [2007, c. 443, Pt. A, §38 (AMD).]

[ 2009, c. 190, Pt. A, §29 (AMD) .]

**3. Basis for penalties.** The penalty for late filing of a report required under this subchapter is a percentage of the total contributions or expenditures for the filing period, whichever is greater, multiplied by the number of calendar days late, as follows:

A. For the first violation, 1%; [1995, c. 483, §21 (NEW).]

B. For the 2nd violation, 3%; and [1995, c. 483, §21 (NEW).]

C. For the 3rd and subsequent violations, 5%. [1995, c. 483, §21 (NEW).]

Any penalty of less than \$10 is waived.

Violations accumulate on reports with filing deadlines in a 2-year period that begins on January 1st of each even-numbered calendar year. Waiver of a penalty does not nullify the finding of a violation.

A report required to be filed under this subchapter that is sent by certified or registered United States mail and postmarked at least 2 days before the deadline is not subject to penalty.

A required report may be provisionally filed by transmission of a facsimile copy of the duly executed report to the commission, as long as an original of the same report is received by the commission within 5 calendar days thereafter.

[ 2007, c. 443, Pt. A, §39 (AMD) .]

**4. Maximum penalties.** The maximum penalty under this subchapter is \$10,000 for reports required under section 1056-B or section 1059, except that if the financial activity reported late exceeds \$50,000, the maximum penalty is 1/5 of the amount reported late.

[ 2011, c. 389, §49 (AMD) .]

**5. Request for a commission determination.** If the commission staff finds that a political action committee has failed to file a report required under this subchapter, the commission staff shall mail a notice to the treasurer of the political action committee within 3 business days following the filing deadline informing the treasurer that a report was not received. If a political action committee files a report required under this subchapter late, a notice of preliminary penalty must be forwarded to the treasurer of the political action committee whose report is not received by 11:59 p.m. on the deadline date, informing the treasurer of the commission staff finding of violation and preliminary penalty calculated under subsection 3 and providing the treasurer with an opportunity to request a determination by the commission. A request for determination must be made within 14 calendar days of receipt of the commission's notice. A principal officer or treasurer requesting a determination may either appear in person or designate a representative to appear on the principal officer's or treasurer's behalf or submit a sworn statement explaining the mitigating circumstances for consideration by the commission. A final determination by the commission may be appealed to the Superior Court in accordance with Title 5, chapter 375, subchapter 7 and the Maine Rules of Civil Procedure, Rule 80C.

[ 2013, c. 334, §31 (AMD) .]

**6. Final notice of penalty.** After a commission meeting, notice of the final determination of the commission and the penalty, if any, imposed pursuant to this subchapter must be sent to the principal officer and the treasurer of the political action committee.

If a determination is not requested, the preliminary penalty calculated by the commission staff is final. The commission staff shall mail final notice of the penalty to the principal officer and to the treasurer of the political action committee. A detailed summary of all notices must be provided to the commission.

[ 2009, c. 302, §9 (AMD) .]

**7. List of late-filing committees.** The commission shall prepare a list of the names of political action committees that are late in filing a report required under section 1059, subsection 2, paragraph B, subparagraph (1) or section 1059, subsection 2, paragraph C or D within 30 days of the date of the election and shall make that list available for public inspection.

[ 2007, c. 443, Pt. A, §41 (AMD) .]

**8. Failure to file.** A person who fails to file a report as required by this subchapter within 30 days of the filing deadline is guilty of a Class E crime, except that, if a penalty pursuant to

subsection 8-A is assessed and collected by the commission, the State may not prosecute a violation under this subsection.

[ 2003, c. 628, Pt. A, §8 (AMD) .]

**8-A. Penalties for failure to file report.** The commission may assess a civil penalty for failure to file a report required by this subchapter. The maximum penalty for failure to file a report required under section 1056-B or section 1059 is \$10,000.

[ 2009, c. 190, Pt. A, §31 (AMD) .]

**9. Enforcement.** A penalty assessed pursuant to this section that has not been paid in full within 30 days after issuance of a notice of the final determination may be enforced in accordance with section 1004-B.

[ 2009, c. 302, §10 (RPR) .]



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To: Commissioners  
From: Jonathan Wayne, Executive Director  
Date: June 24, 2014  
Re: Staff Response to Application by National Organization for Marriage for a Stay

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Late yesterday, the Commission received a letter from legal counsel for the National Organization for Marriage (NOM) dated June 23, 2014 applying to the Commission for a stay of the effect of the proposed Commission determination.

The Maine Administrative Procedure Act (APA) provides, in 5 M.R.S. § 11004, that the application for a stay of an agency decision “shall ordinarily be made first to the agency, which may issue a stay upon a showing of irreparable injury to the petitioner, a strong likelihood of success on the merits, and no substantial harm to adverse parties or to the general public.” It is premature for NOM to apply for a stay before the Commission has adopted its final decision, and before the Commission has issued any order directing NOM to pay penalties or to register and file campaign finance reports. If, *after* voting to adopt a final written determination and order, the Commission decides to address NOM’s application, the staff recommends that the Commission consider the following points in applying the three-part test set forth in 5 M.R.S. § 11004.

### **Irreparable Injury**

To grant a stay under § 11004, the Commission has to find that implementation of its order will cause irreparable injury to NOM. NOM is a national organization that, at least through 2012, received \$7 to \$9 million in revenues each year. It is difficult to see how payment of a \$50,250 penalty could cause irreparable injury to an organization of this magnitude. NOM is a sophisticated organization that is familiar with campaign finance reporting requirements generally. The registration form required for ballot question

committees is very simple to complete, as the U.S. District Court found. *National Org. for Marriage v. McKee*, 765 F.Supp.2d 38, 46 (D. Me. 2011). The proposed order would require NOM to file one consolidated financial report reflecting campaign activity in 2009. As recognized by the U.S. District Court, this reporting obligation is not onerous. *Id.* at 47.

Finally, NOM has presented no evidence in this case demonstrating a reasonable probability that disclosure of donors' names will subject those donors to threats, harassment, reprisals or retaliation (*see* draft determination at pp. 18-19). The only support offered by NOM for this part of its request for a stay is a citation to dissenting and concurring judicial opinions and an article written in 2009 about the California Prop 8 campaign.

#### **Likelihood that NOM will Succeed on the Merits**

To grant a stay, the Commission has to find that NOM has a strong likelihood of success on the merits of an appeal. The APA provides the following grounds for reversal of an agency decision on appeal, pursuant to 5 M.R.S. § 11007(4), none of which are likely to be found in this case:

- the constitutionality of the ballot question committee statute has been litigated and resolved by the federal courts, and the Commission's application of the statute is not contrary to its plain meaning (§ 11007(4)(C)(1)),
- the Commission's determination is within the scope of its statutory authority (§ 11007(4)(C)(2)),
- the Commission's decision is not based upon an unlawful procedure, as NOM acknowledges in its application for a stay (§ 11007(4)(C)(3)),
- NOM has presented no evidence in support of its late claim of bias (§ 11007(4)(C)(4)),
- the investigative record contains substantial evidence to support the Commission's proposed findings and conclusions (§ 11007(4)(C)(5)), and
- the Commission's decision (as proposed) is not arbitrary or capricious and reflects no abuse of discretion by the Commission (§ 11007(4)(C)(6)).

In October 2009, when the Commission was considering whether to conduct an investigation in response to Fred Karger's request, NOM had reportedly spent only \$250,000 on the Maine referendum campaign and the Commission had virtually no factual information available concerning NOM's practices of raising funds from major donors. The fact that two former commissioners voted against the motion to initiate an investigation does not cast doubt on the validity of a Commission decision issued four and a half years later following an extensive investigation that revealed a wealth of information not known to the Commission or its staff on October 1, 2009.

### **Harm to the General Public**

To grant a stay, the Commission has to find that suspending its order pending resolution of NOM's appeal would cause no substantial harm to the general public. The purpose of disclosure laws is to provide the general public with important information as to who is spending money to influence their vote on a referendum question. The fact that no referendum election is pending at this point does not diminish the public's right to know. The public also has an interest in seeing campaign finance laws enforced. A stay of the Commission's proposed order would only further delay the disclosure of information that should have been disclosed to the public in 2009.

Thank you for your consideration of this memo.

## **5 MRSA § 11004. STAY**

The filing of a petition for review shall not operate as a stay of the final agency action pending judicial review. Application for a stay of an agency decision shall ordinarily be made first to the agency, which may issue a stay upon a showing of irreparable injury to the petitioner, a strong likelihood of success on the merits, and no substantial harm to adverse parties or the general public. A motion for such relief may be made to the Superior Court, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial, or that the action of the agency did not afford the relief which the petitioner had requested. In addition, the motion shall show the reasons for the relief requested and the facts relied upon, which facts, if subject to dispute, shall be supported by affidavits. Reasonable notice of the motion shall be given to all parties to the agency proceeding. The court may condition relief under this rule upon the posting of a bond or other appropriate security, except that no bond or security shall be required of the State or any state agency or any official thereof. [1977, c. 551, §3 (NEW).]

### **SECTION HISTORY**

1977, c. 551, §3 (NEW).

## 5 MRSA § 11007. MANNER AND SCOPE OF REVIEW

**1. Schedule.** The court, upon request or its own motion, shall set a schedule for the filing of briefs by the parties and for oral argument.

[ 1977, c. 551, §3 (NEW) .]

**2. Review by court.** Except where otherwise provided by statute or constitutional right, review shall be conducted by the court without a jury.

[ 1977, c. 551, §3 (NEW) .]

**3. Judgment.** The court shall not substitute its judgment for that of the agency on questions of fact.

[ 1977, c. 551, §3 (NEW) .]

**4. Decision.** The court may:

A. Affirm the decision of the agency; [1977, c. 551, §3 (NEW).]

B. Remand the case for further proceedings, findings of fact or conclusions of law or direct the agency to hold such proceedings or take such action as the court deems necessary; or [1977, c. 551, §3 (NEW).]

C. Reverse or modify the decision if the administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by bias or error of law;

(5) Unsupported by substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion. [1977, c. 551, §3 (NEW).]

[ 1977, c. 551, §3 (NEW) .]

### SECTION HISTORY

1977, c. 551, §3 (NEW).