



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

To: Commission Members
From: Jonathan Wayne, Executive Director
Date: November 27, 2012
Re: Additional Information Concerning Statutory Proposals

Response by Commission Staff to Comments by Maine Citizens for Clean Elections

On November 21, the Commission received a letter from John Brautigam on behalf of the Maine Citizens for Clean Elections (MCCE). The Commission staff agrees with many of the MCCE's points, and we believe that our proposed changes to the PAC registration statute (21-A M.R.S.A. § 1053) and other provisions will improve the accountability of PAC officers and managers and will minimize the risk that key PAC personnel are misidentified on PAC registration forms.

In our experience, most PACs correctly identify their decision-makers and officers on their registration form. Nevertheless, under current laws and procedures, there remains some risk that PACs may list someone in a registration statement as a decision-maker or officer who ultimately did not make decisions for the PAC or have managerial authority over the PAC. This is never acceptable, but in practice it can result from a variety of factors, such as

- a misunderstanding or miscommunication at the time the PAC registers;
- changes in someone's personal circumstances during the months or years after a registration is filed, which causes them to withdraw from the PAC, combined with a failure by the PAC to amend its registration form.

The Commission staff understands the value of *a presumption* in the Commission Rules that someone named as a PAC decision-maker or officer has been involved in spending decisions for the PAC. However, we caution the Commission that there could be downsides to adopting any rule that would irrevocably lock the Commission into concluding that someone named in a PAC registration participated in every spending decision by the PAC. To reach fair and correct decisions in enforcement proceedings in the coming years, the Commission needs the discretion to consider all relevant evidence concerning who was – and was not – involved in particular activities of a PAC.

Changes to Proposed Statutes

In the past 1 ½ days, the staff has received comments from Commissioner Matheson and Counsel Phyllis Gardiner. We have not had sufficient time to digest all of the comments. We have attached some pages with revisions highlighted in blue for your consideration. (On printed copies, they appear as a darker shade of gray.)

At your meeting tomorrow, we would appreciate your consideration of the statutes that have been presented to you. If any further changes are needed after consideration of Ms. Gardiner's and Commissioner Matheson's points, we would present them to you at the December 19 meeting.

The Commission staff wishes to withdraw from the proposal:

- the proposed requirement that independent spenders disclose contributions received to fund the communications (Section 1019-B) and
- proposed changes to the BQC statute (Section 1056-B).

The Commission staff has not had time to implement these changes:

- renumbering Section 1053, as suggested by Commissioner Matheson
- adding factors that the Commission would consider in assessing penalties under Sections 1062-A(1) and 1062-B
- reviewing the proposal for correct uses of “shall” and “must.”

Thank you.

21A § 1017. Reports by candidates

1. Federal candidates. (REPEALED)

2. Gubernatorial candidates. A treasurer of a candidate for the office of Governor shall file reports with the commission as follows. Once the first required report has been filed, each subsequent report must cover the period from the end date of the prior report filed.

A. In any calendar year, other than a gubernatorial election year, in which the candidate or the candidate's political committee has received contributions in excess of \$1,000 or made or authorized expenditures in excess of \$1,000, reports must be filed no later than 11:59 p.m. on July 15th of that year and January 15th of the following calendar year. These reports must include all contributions made to and all expenditures made or authorized by or on behalf of the candidate or the candidate's treasurer as of the end of the preceding month, except those covered by a previous report.

B. Reports must be filed no later than 11:59 p.m. on the 42nd day before the date on which an election is held and must be complete as of the 49th day before that date. If a report was not filed under paragraph A, the report required under this paragraph must cover all contributions and expenditures through the 49th day before the election.

C. Reports must be filed no later than 11:59 p.m. on the 11th day before the date on which an election is held and must be complete as of the 14th day before that date.

D. Contributions aggregating \$1,000 or more from any one contributor or single expenditures of \$1,000 or more made after the 14th day before the election and more than 24 hours before 11:59 p.m. on the day of the election must be reported within 24 hours of those contributions or expenditures. The treasurer is not required to include in this report expenditures for overhead expenses. As used in this paragraph, "overhead expenses" includes, but is not limited to, rent, services from utilities, taxes, insurance premiums or similar overhead expenses.

Under current law, candidates are required to disclose expenditures over \$1,000 made during the 13 days before an election. During this period, PACs, party committees, and gubernatorial candidates sometimes spend money on overhead or administrative expenses that do not directly relate to advocacy for or against a candidate or ballot question (e.g., rent, utilities, taxes, and insurance premiums). To reduce the burden on campaign committees during this very busy period, the Commission staff proposes excluding these expenses from 24-hour reporting during the last 13 days before the election. Under current law, the public is able to access this information 42 days after the election, when PACs, party committees, and candidates file their full campaign finance reports.

E. Reports must be filed no later than 11:59 p.m. on the 42nd day after the date on which an election is held and must be complete for the filing period as of the 35th day after that date.

F. Unless further reports will be filed in relation to a later election in the same calendar year, the disposition of any surplus or deficit in excess of \$100 shown in the

1. Details of records. The treasurer of a party committee shall record a detailed account of:

- A. All expenditures made to or on behalf of a candidate, campaign or committee;
- B. The identity and address of each candidate, campaign or committee;
- C. The office sought by a candidate and the district the candidate seeks to represent, for candidates that a party committee has made an expenditure to or on behalf of; and
- D. The date of each expenditure.

2. Receipts. The treasurer of a party committee shall retain a vendor invoice or receipt stating the particular goods or services purchased for every expenditure in excess of \$50.

3. Record of contributions. The treasurer of a party committee shall keep a record of all contributions to the committee, by name and mailing address, of each donor and the amount and date of the contribution. This subsection does not apply to aggregate contributions from a single donor of \$50 or less in an election. When any donor's contributions to a party committee exceed \$50, the record must include the aggregate amount of all contributions from that donor.

21A § 1018. Reports by party committees

- 1. State committee; federal reports. (REPEALED)**
- 2. Party committee. (REPEALED)**

21A § 1018-B. Recounts of elections

1. Reporting. Candidates who are involved in a recount of an election shall file a report 90 days after the election containing itemized accounts of cash, goods and services received for the recount and payments made by the candidate for the recount. The reports must be made on forms prepared and sent by the commission. Persons donating services to the candidate are required to provide the candidate with an estimate of the value of the services donated. Political action committees and party committees making expenditures for a candidate's recount shall identify on their regularly filed reports that the expenditures were made for the purposes of a recount.

2. Limitations. **After an election, C**andidates may receive donations without limitation for purposes of a recount ~~from party committees and caucus campaign committees and from attorneys, consultants and their firms that are donating their services without reimbursement.~~ Candidates may not spend revenues received under Chapter 14 for recount expenditures.

2. Rebutting presumption. A person presumed under this section to have made an independent expenditure may rebut the presumption by filing a signed written statement with the commission within 48 hours of making the expenditure stating that the cost was not incurred with the intent to influence the nomination, election or defeat of a candidate, supported by any additional evidence the person chooses to submit. The commission may gather any additional evidence it deems relevant and material and must determine by a preponderance of the evidence whether the cost was incurred with intent to influence the nomination, election or defeat of a candidate.

3. Report required; content; rules. (REPEALED)

4. Report required; content; rules. A person, party committee, political committee or political action committee that makes independent expenditures aggregating in excess of \$100 during any one candidate's election shall file a report with the commission. In the case of a municipal election, the report must be filed with the municipal clerk.

A. A report required by this subsection must be filed with the commission according to a reporting schedule that the commission shall establish by rule that takes into consideration existing campaign finance reporting requirements. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A.

B. A report required by this subsection must contain an itemized account of each expenditure aggregating in excess of \$100 in any one candidate's election, the date and purpose of each expenditure and the name of each payee or creditor. The report must state whether the expenditure is in support of or in opposition to the candidate and must include, under penalty of perjury, as provided in Title 17-A, section 451, a statement under oath or affirmation whether the expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate or an authorized committee or agent of the candidate.

Deleted
requirement
to disclose
contributors

C. A report required by this subsection must be on a form prescribed and prepared by the commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form. The commission may adopt procedures requiring the electronic filing of an independent expenditure report, provided that the commission receives the statement made under oath or affirmation set out in paragraph B by the filing deadline and the commission adopts an exception for persons who lack access to the required technology or the technological ability to file reports electronically. The commission may adopt procedures allowing for the signed statement to be provisionally filed by facsimile or electronic mail, provided that the report is not considered complete without the filing of the original signed statement.

5. Exclusions. An independent expenditure does not include:

A. An expenditure made by a person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents;

21A § 1053. Registration [replaces prior section 1053]

Every political action committee shall file periodic registration statements with the Commission to disclose the treasurer, officers, decision-makers, fundraisers and form of organization of the committee, and shall amend those registrations as required by this section to provide updated disclosures. A registration statement is not timely filed unless it is properly signed and contains all the information required in this section.

1. Deadlines to file and amend registrations. Political action committees must register and file amendments with the Commission according to the following schedule.

A. Every political action committee, as defined under section 1052, subsection 5, paragraph A, subparagraph (1) or (4) that makes expenditures in the aggregate in excess of \$1,500 and every political action committee, as defined under section 1052, subsection 5, paragraph A, subparagraph (5), that makes expenditures in the aggregate in excess of \$5,000 shall register with the commission within 7 days of exceeding the applicable amount.

B. A committee shall amend the registration within 10 days of a change in the information which committees are required to disclose under this section.

C. The committee must file an updated registration form between January 1st and March 1st of each year in which a general election is held. The commission may waive the updated registration requirement for newly registered political action committees or other registered political action committees if it determines that the requirement would cause an administrative burden disproportionate to the public benefit of the updated information.

2. Disclosure of treasurer and officers. Each committee must have a treasurer and a principal officer. The same individual may not serve in both positions. The registration form must be signed by the treasurer and principal officer. The registration must contain the names and addresses of the following individuals:

A. the treasurer of the committee;

B. a principal officer of the committee and any other individuals who have accepted officer positions within the committee;

C. any other individuals who are primarily responsible for making decisions for the committee;

D. the individuals who are primarily responsible for raising funds or obtaining the financing for the committee;

E. any other candidates or Legislators who have a significant role in making decisions or obtaining financing or funds for the committee.

3. Other disclosure requirements. The registration must also include the following information:

- A. a statement indicating the specific candidates, categories of candidates, or campaigns which the committee expects to support or oppose;
- B. if the committee is formed to promote a single candidate, the name of that candidate;
- C. the form or structure of the organization, such as voluntary association, membership organization, corporation, or any other structure by which the committee functions, and the date of origin or incorporation of the organization;
- D. if the committee is controlled by, or is an assumed name for, another organization, the name and address of the other organization;
- E. any additional information reasonably required by the commission to monitor the activities of political action committees in this State under this subchapter.

4. Acknowledgement of responsibilities

The commission shall send a statement of responsibilities and liabilities to the treasurer, principal officer, and any other individual named in the committee's registration as an officer, or decision-maker within 5 days of receiving the committee's registration. The statement shall serve as notification of the responsibilities of the committee to comply with the financial reporting, recordkeeping, and other specific legal requirements of this chapter and the commission's rules and the personal liability of the treasurer, principal officer, other officers and decision-makers for civil penalties assessed against the committee. The individual receiving the statement shall acknowledge acceptance of these responsibilities and liabilities by signing the statement and returning it to the commission within 10 days of receiving the statement. The commission shall notify the committee of any individual who has failed to return the signed statement. Failure to return the signed statement is a violation of this subchapter for which a civil penalty of \$100 may be assessed. This section shall also apply to individuals named in annual or amended registration statements who have not previously submitted an acknowledgement statement for the committee with the commission.

The Commission staff proposes replacing the current PAC registration statute to reorganize it and expand the disclosure requirements. The re-organization would have the effect of highlighting when registrations and amendments are due.

In some cases, the treasurer for a PAC is someone who is responsible for keeping the books of the PAC but who has little decision-making authority within the PAC. The Commission staff suggests that PACs be required to report an individual as the "principal officer" of the PAC other than the treasurer. The Commission would send important correspondence to the principal officer, as well as the treasurer.

The Commission staff proposes a new requirement that the PAC's treasurer, principal officer, other officers, and primary decision-makers would sign a written acknowledgement that they understand the basic responsibilities for the PAC and that they are liable for any penalties assessed against the PAC. The staff believes these written acknowledgements could serve several goals:

21A § 1054. Appointment of treasurer; depository

Any political action committee required to register under section 1053 must appoint a treasurer before registering with the commission. ~~The treasurer shall retain, for a minimum of 4 years, all receipts, including cancelled checks, of expenditures made in support of or in opposition to a campaign, political committee, political action committee, referendum or initiated petition in this State.~~

~~If the committee receives or spends, or expects to receive or spend, more than \$25,000 for the purpose of influencing a campaign, the committee shall deposit its campaign funds in an account in a financial institution. The campaign funds must be segregated from, and may not be commingled with, any other funds. After receiving or spending more than \$25,000 to influence a campaign, all funds contributed to the committee or received by the committee for the purpose of influencing a campaign must be deposited in the account and all of the committee's expenditures to influence the election must be financed through the account. If the committee is controlled by or affiliated with another organization, the organization may pay its employees to influence the election through its own treasury, rather than through the separate account of the committee.~~

After conducting recent investigations into allegations concerning PACs, the Commission staff supports a requirement that PACs segregate their funds in a separate account in a bank, credit union, or other financial institution. The Commission proposes a threshold of \$25,000 to allow multi-purpose advocacy organizations which are involved to a moderate extent in a ballot question or candidate election to avoid the administrative burden of a separate bank account.

Segregating financial activity in a separate account will encourage more accurate financial reporting by the committees, because the activity in the account should mirror the transactions that the committee is required to disclose in campaign finance reports. If the PAC is the subject of an investigation by the Commission, the segregation of campaign funds will promote efficient investigations. The Commission staff proposes in sections 1056-B and 1057 below that the committee would be required to keep bank account statements for four years.

21A § 1055-A. Political communications to influence a ballot question

1. Communications to influence ballot question elections. Whenever a person makes an expenditure exceeding \$500 expressly advocating for or against an initiative or referendum that is on the ballot through broadcasting stations, cable television systems, newspapers, magazines, campaign signs or other outdoor advertising facilities, publicly accessible sites on the Internet, direct mails or other similar types of general public political advertising or through flyers, handbills, bumper stickers and other nonperiodical publications, the communication must clearly and conspicuously clearly state the name and address of the person who made or financed the expenditure for the communication.

2. Exceptions. The following forms of political communication do not require the name and address of the person who made or authorized the expenditure for the communication because the name or address would be so small as to be illegible or infeasible: clothing, envelopes and stationery, small promotional items, tickets to fundraiser, and electronic media advertisements where compliance with this section would be impracticable due to size or character limitations and similar items determined by the commission to be too small and unnecessary for the disclosures required by this section. "Small promotional items" includes but is not limited to, ashtrays, badges and badge holders, balloons, campaign buttons, coasters, combs, emery boards, erasers, glasses, key rings, letter openers, matchbooks, nail files, noisemakers, paper and plastic cups, pencils, pens, plastic tableware, 12-inch or shorter rulers and swizzle sticks.

The staff proposes consideration of a legal requirement that paid communications to promote or oppose a ballot question must contain a clear statement of who is paying for them. The objective of the proposal is to ensure that the public is provided with adequate information concerning who is funding campaign messages. Most organizations include such statements voluntarily, but the staff proposes that this should be a legal requirement.

*Because this requirement could be subject to a constitutional court challenge, the staff recommends further consultation between the Commission and its counsel concerning the constitutionality of the proposal. Until 1999, Maine law contained a similar, but more onerous, requirement. In that year, the U.S. District Court struck down a requirement applying to political action committees in *Yes for Life PAC v. Webster*. Because of subsequent court decisions upholding financial disclosure and disclaimer requirements, the Commission staff proposes a new, more limited requirement.*

Our proposal would apply only to paid communications that expressly advocate support or opposition of a question on the ballot. The staff proposes the \$500 threshold to minimize the burden on individuals unconnected to political advocacy organizations who spend small amounts of their personal funds to express their support or opposition to a ballot question. This threshold is prudent to avoid over-regulation of personal expression by individuals and to strengthen the statute in case of a legal challenge.

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.

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.

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.

21A § 1062-B. Failure to keep records

A committee that fails to keep records required by this chapter may be assessed a civil penalty of up to \$5,000.

PACs and BQCs are required to keep certain records for four years. These records are necessary in case the Commission needs to investigate the compliance of the PAC or BQC. Failure by a PAC or BQC to keep the required records could result in the inability of the State to verify whether the public received accurate campaign finance disclosure. Under current law, there is no penalty for failing to keep records. The Commission proposes a penalty of up to \$5,000 for not keeping required records.

21A § 1062-C. Financial responsibility for penalties

The treasurer and principal officer are jointly and severally liable with the committee for any penalties assessed against the committee for violations of this chapter and chapter 14. In addition, the Commission may assess all or part of a penalty against any other officer of the committee or person making decisions for the committee who is directly responsible for the violation. Notwithstanding section 1004-B of subchapter 1, in deciding whether to report an individual to the Attorney General for collection of the penalty, the commission may consider, among other things, whether the violation was intentional, the violation was the result of an error by a vendor, and the individual had actual knowledge of the action that constituted the violation.

This provision clarifies that the Commission may seek to collect penalties assessed against PACs and BQCs from the committee's treasurers and other key personnel. This proposal is designed to encourage more personal responsibility for compliance with PAC and BQC requirements. It also resolves an ambiguity in Maine campaign finance law that could be relevant if the Commission needed to file a collection action in the courts to collect a civil penalty against a PAC or BQC.