

Agenda

Item #9



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

To: Commissioners
From: Jonathan Wayne, Executive Director
Date: July 18, 2012
Re: Proposed Adoption of Chapter 1 Rule Amendments

Thank you for considering whether to adopt changes to the Commission Rules proposed by the Commission staff. The staff appreciates all of the comments received and has considered them in making a final proposal.

Chronology

January 25, 2012	Commissioners agreed to accept public comment on a number of amendments proposed by staff (Proposal 1)
March 28, 2012	Commissioners agreed to accept public comment on a revised version of the proposed rule interpreting the press exception (Proposal 2)
May 30, 2012	Commissioners agreed to accept public comment on <u>another</u> revision of the proposed rule interpreting the press exception (Proposal 3)

Materials for this Agenda Item

I have attached to this cover memo (in order) :

- Final proposal – this is the final version of rule amendments proposed by the Commission staff for adoption at the July 25, 2012 meeting. We appreciate that you may wish to adopt a modified version of this proposal, but we are referring to it as “Final” to distinguish it from the three earlier sets of amendments proposed by the staff.
- Basis statement – as part of the rulemaking process, the Commission is required to complete a statement of the factual and policy basis for the adopted rules, which summarizes the comments received and responds to them. The staff has

prepared a lengthy document in draft form. This is provided to you as background for the final proposal, in case you would like to refer to it. If you wish to suggest any improvements or edits to the basis statement, please let us know.

- Proposal 1 (multiple topics), and comments received on Proposal 1
- Proposal 2 (press exception only), and comments received on Proposal 2
- Proposal 3 (press exception only), and comments received on Proposal 3

Suggested Priorities

The rulemaking covers a number of topics. We believe the two topics that most deserve your attention are:

- Exploratory activities – Chapter 1, Sections 6(10) and 7(8)
- Press Exception – Chapter 1, Section 7(10)

Thank you for your consideration of the proposed rule amendments.

Final Proposal

Chapter 1: PROCEDURES

SUMMARY: This Chapter describes the nature and operation of the Commission, and establishes procedures by which the Commission's actions will be governed.

SECTION 1. DEFINITIONS

In addition to the definitions provided in Title 21-A, chapters 1, 13, and 14, the following definitions shall apply to the rules of the Commission, unless the context otherwise requires:

...

11-A. Influence. "Influence" means to promote, support, oppose or defeat.

SECTION 4. INITIATION OF PROCEEDINGS

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2. Election Campaign Reporting and Maine Clean Election Act Violations

- A. Report Review.** The Commission staff will review all reports filed pursuant to 21-A M.R.S.A., chapters 13 and 14 to verify compliance with the reporting requirements set by statute or rule. Notice of any omission, error, or violation will be given by mail to the filer and a copy of the notice and any other communication made to or from the filer relating to the problem(s) will be placed in the filer's record. The Commission staff will establish a reasonable time period for the filer to remedy any omission or error. If the filer fails to respond within that time frame, the Commission staff may extend the time period within which the filer must comply or place the matter on the agenda of the next Commission meeting, along with all documents relating to the case. Additionally, any apparent violations or occurrences of substantial nonconformance with the requirements of the law will be placed on the agenda of the next meeting.
- B. Late Reports and Registrations.** Where required by statute, notice of failure to file a required report will be timely sent by Commission staff. When a report or registration is filed late, the Director's recommendations will be based on the following considerations:
- (1) Lateness of report or registration,
 - (2) Reason for lateness,
 - (3) Kind of report (more stringent application for pre-election reports),
 - (4) Amount of campaign funds not properly reported,

- (5) Previous record of the filer,
- (6) Good faith effort of the filer to remedy the matter; and
- (7) Whether the late filing had an effect on a certified candidate's eligibility for matching funds.

- C. ~~Reports of noncompliance with the provisions of the campaign registration and reporting laws or the Maine Clean Election Act that may come to the attention of the Commission staff from any source other than review of the reports filed will be reported to the Commission Chair. Any person (as defined in 21-A M.R.S.A. §1001) may make an official complaint or request for a Commission investigation or determination by filing a signed written request at the Commission's office, setting forth such facts with sufficient details as are necessary to specify the alleged violation. A copy of the signed request may be filed by facsimile or by electronic mail, provided that the original signed request is submitted to the Commission. Statements should be made upon personal knowledge. Statements which are not based upon personal knowledge must identify the source of the information which is the basis for the request, so that respondents and Commission staff may adequately respond to the request. A copy of any such written request will be promptly mailed to the candidate or organization alleged to have violated the statutory requirements. The Director may conduct preliminary fact finding to prepare a matter for presentation to the Commission. The Director, in consultation with Counsel, will prepare a summary of staff findings and recommendations for inclusion on the agenda. An official request will be placed on the agenda of the next Commission meeting.~~
- D. An oral report of a violation, or a written request containing insufficient detail to specify the violation charged, does not constitute an official request for a Commission determination, and a person registering such a complaint will be so notified.
- E. The signature of a person authorized to sign a report or form constitutes certification by that person of the completeness and accuracy of the information reported. The use of a password in filing an electronic report constitutes certification of the completeness and accuracy of the report.

3. Lobbyist Disclosure Procedures

- A. ~~**Report Review.** The Commission staff will monitor all filings made pursuant to 3 M.R.S.A. §311 *et seq.* for timeliness, legibility, and completeness. The staff will send the lobbyist a notice of any apparent reporting deficiency, including failure to use prescribed forms. The notice will include a request that the deficiency be corrected within 15 business days of the notice. If remedy is not made, it will be noted on the agenda of the next Commission meeting. The Commission may reject reports that are incomplete or illegible.~~

Report Review. The Commission staff will review lobbyist registrations and monthly reports for compliance with disclosure requirements. The Commission staff will establish a reasonable deadline by which a lobbyist must remedy any apparent omission or error. If the lobbyist fails to respond by the deadline, the

Commission staff may extend the deadline by which the lobbyist must comply or may place the matter on the agenda of a Commission meeting. Additionally, the Commission staff may place on the agenda of a Commission meeting any substantial violation of the disclosure requirements, regardless of whether the lobbyist has remedied the violation.

- B. **Late Registrations and Reports.** Notice will be given by mail to any lobbyist whose registration, or monthly disclosure report, or annual report is delinquent is late. In the case of a late monthly report, the notice must be mailed within 7- business days following the filing deadline for the report. In the case of late- annual reports and registrations, the notice must be mailed within 15 business- days following the filing deadline. The notice must include a statement- specifying the amount assessed. A penalty of \$100 will be assessed the lobbyist- for every month that a monthly disclosure report is late and a penalty of \$200- will be assessed the lobbyist and employer for every month a registration or- annual report is filed late. The Commission and its staff shall follow the notice and penalty procedures set out in 3 M.R.S.A. § 319(1). For purposes of 3 M.R.S.A. §319(1), the month will end on the 15th day of the month following the month in which a report was due. Any failure to submit a required report, registration, or penalty fee will be noted on the Commission agenda.
- C. **Suspensions.** The Commission may suspend any person from lobbying who fails to file a required report or pay an assessed fee. A notice of the suspension must be mailed to the lobbyist by U.S. Certified Mail within three days following the suspension. Reinstatement will occur on the date the required report or payment is received in the Commission office. A notice of the reinstatement must be mailed to the lobbyist by U.S. Certified Mail or given directly to the lobbyist within three days following receipt of the required report or payment.
- D. **Request for Penalty Waiver.** A lobbyist may request a waiver of any late penalty the lobbyist incurs. The request must be made in writing to the Commission and must state the reason for the delinquency. Any such request must be noted on the agenda of the next Commission meeting. Only the Commission may grant penalty waivers.
- E. **Request for Waiver of Nonsession Reporting Requirement.** A lobbyist may request a waiver of the monthly nonsession reporting requirement set forth in 3 M.R.S.A. §317(4) if the lobbyist does not expect to be engaged in lobbying when the Legislature is not in session. The Director is authorized to provisionally grant such waivers pending approval by the Commission. Provisional waivers may be granted only where a request is properly filed, the statement properly completed, and where there is no apparent reason to doubt the statement is true. During the period in which the waiver is effective, reports will not be required. If lobbying is resumed during the period for which the waiver was granted, the lobbyist must file a monthly disclosure report for the month or months lobbying was conducted.
- F. **Faxing Duly Executed Lobbyist Registration, Reports.** Any registration or report required by 3 M.R.S.A. chapter 15 may be provisionally filed by transmission of a facsimile copy of the duly executed report to the Commission, provided that the original of the same report is received by the Commission within 5 calendar days thereafter.

4. **Matters Outside the Commission's Jurisdiction.** If the Director and Counsel are in agreement that the subject matter of a request for an investigation is clearly outside the jurisdiction of the Commission, the staff may forward the request to the appropriate authority or return it to the person who made the request, provided that the staff notifies the Commission members of the action at the next Commission meeting.

SECTION 6. CONTRIBUTIONS AND OTHER RECEIPTS

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10. Funds or services received solely for the purpose of conducting activities to determine whether an individual should become a candidate are not contributions if the individual does not become a candidate. Examples of such activities include, but are not limited to, conducting a poll, telephone calls, and travel. The individual shall keep records of all such funds or services received. If the individual becomes a candidate, the funds or services received are contributions and are subject to the reporting requirements of 21-A M.R.S.A. § 1017. The amount and source of such funds or the value of services received must be disclosed in the first report filed by the candidate or the candidate's authorized campaign committee, regardless of the date when the funds or services were received, in accordance with the Commission's procedures for reporting contributions.

Funds or services used by an individual for activities indicating that he or she has decided to become a candidate for a particular office are contributions. Examples of such activities include, but are not limited to: using general public political advertising to publicize his or her intention to campaign for office; hiring staff or consultants for campaign activities; raising funds in excess of what could reasonably be expected to be used for exploratory activities; making or authorizing statements that refer to him or her as a candidate; or taking action to qualify for the ballot.

SECTION 7. EXPENDITURES

1. **Expenditures by Consultants, Employees, and Other Agents of a Political Campaign.** Each expenditure made on behalf of a candidate, political committee, or political action committee by any person, agency, firm, organization, etc., employed or retained for the purpose of organizing, directing, managing or assisting the candidate, the candidate's committee, or the political action committee must be reported separately by the candidate or committee as if made or incurred by the candidate or committee directly. The report must include the name of the third party vendor or payee to whom the expenditure was made, the date of the expenditure, and the purpose and amount of the expenditure. It is not sufficient to report only the total retainer or fee paid to the person, agency, firm, organization, etc., if that retainer or fee was used to pay third party vendors or payees for campaign-related goods and services.
2. **Expenditures by Political Action Committees.** In addition to the requirements set forth in 21-A M.R.S.A. § 1060(4), the reports must contain the purpose of each expenditure and the name of each payee and creditor.

3. **Timing of Reporting Expenditures**

- A. Placing an order with a vendor for a good or service; signing a contract for a good or service; the delivery of a good or the performance of a service by a vendor; or a promise or an agreement (including an implied one) that a payment will be made constitutes an expenditure, regardless whether any payment has been made for the good or service.
- B. Expenditures must be reported at the earliest of the following events:
- (1) The placement of an order for a good or service;
 - (2) The signing of a contract for a good or service;
 - (3) The delivery of a good or the performance of a service by a vendor;
 - (4) A promise or an agreement (including an implied one) that a payment will be made; or
 - (5) The making of a payment for a good or service.
- C. At the time the duty to report an expenditure arises, the person submitting the report is required to determine the value of goods and services to be rendered (preferably through a written statement from the vendor) and to report that value as the amount of the expenditure. If the expenditure involves more than one candidate election, the report must include an allocation of the value to each of those candidate elections.

4. ~~Advance Purchases of Goods and Services for the General Election~~

- A. ~~Consulting services, or the design, printing or distribution of campaign literature or advertising, including the creation and broadcast of radio and television advertising, contracted or paid for prior to the primary election must be received prior to the primary election in order to be considered primary election expenditures.~~
- B. ~~If the Commission receives a complaint stating that a candidate or a committee purchased goods or services before a primary election for use in the general election, the Commission may request that the candidate or committee distinguish which of the goods and services were used in the primary election and which were used in the general election.~~
5. All campaign-related payments made with the personal funds or credit card of the candidate or an individual authorized by the candidate must be reported as expenditures in the reporting period during which the payment to the vendor or payee is made. The candidate must report the name of the vendor or payee to whom the payment was made, the date of the expenditure, and the purpose and amount of the expenditure. When the expenditure is reported, the candidate should indicate the person who made the payment by entering "Paid by [name of candidate or supporter]" in the remarks section of the expenditure schedule. It is not sufficient to report only the name of the candidate or authorized individual to whom reimbursement was made and the total amount of the

reimbursement. If a Maine Clean Election Act candidate or an individual authorized by the candidate uses his or her personal funds to make an expenditure on behalf of the candidate, the campaign candidate or the individual must be reimbursed the candidate within the same reporting period.

6. Multiple expenditures for bank fees and for vehicle travel may be reported in an aggregate amount, provided that the candidate or committee identifies the time period of the expenditures in the remarks section of the report.
7. When a political action committee or party committee makes an expenditure for a communication to voters for the purpose of influencing the election of a clearly identified candidate, the amount spent to influence that candidate's election must be specified on the regularly filed campaign finance report of the committee, regardless whether the communication expressly advocates for the election or defeat of the candidate. If a single expenditure influences the election of more than one candidate, the political action committee or party committee shall itemize the amount spent per candidate.
8. Payments made or obligations incurred solely for the purpose of conducting activities to determine whether an individual should become a candidate are not expenditures if the individual does not become a candidate. Examples of such activities include, but are not limited to, conducting a poll, telephone calls, and travel. The individual shall keep records of all such payments and obligations. If the individual becomes a candidate, the payments made or obligations incurred are expenditures and are subject to the reporting requirements of 21-A M.R.S.A. § 1017. Such expenditures must be disclosed in the first report filed by the candidate or the candidate's authorized campaign committee, regardless of the date when the funds were expended, in accordance with the Commission's procedures for reporting expenditures.

Payments made for activities indicating that an individual has decided to become a candidate for a particular office are expenditures. Examples of such activities include, but are not limited to: using general public political advertising to publicize his or her intention to campaign for office; hiring staff or consultants for campaign activities; raising funds in excess of what could reasonably be expected to be used for exploratory activities; making or authorizing statements that refer to him or her as a candidate; or taking action to qualify for the ballot.

9. **Exception to Disclaimer Requirements for Certain Handbills, Campaign Signs, and Internet or E-Mail Communications**

For purposes of applying the exclusions listed in Title 21-A, section 1014, subsection 6, paragraphs A through C, the following terms have the following meanings:

- A. "Cost" includes all payments or obligations incurred, and the value of all goods and services received, for the purpose of creating, designing, preparing or distributing the communications.
- B. "Internet or e-mail communication" means any communication transmitted over the Internet, including but not limited to: sending or forwarding electronic messages; social networking; providing a hyperlink or other direct access to another person's website; creating, maintaining or hosting a website or blog;

placing material on another person's website; and any other form of communication distributed over the Internet.

C. "Acting independently of and without authorization by a candidate, candidate's authorized campaign committee, party committee, political action committee or ballot question committee or an agent [thereof]" means acting without any suggestion, request, direct or indirect authorization or compensation or reimbursement from any such candidate, committee or agent.

10. Press exemption. In order for the costs of preparing and disseminating a news story, commentary, or editorial to be exempt from the definitions of expenditure under the press exemption [§§ 1012(3)(B)(1) & 1052(4)(B)(1)], the following criteria must be met:

A. the names of the persons or entities who own, control and operate the broadcasting station or publication are identified within the publication or otherwise made known to the public; and

B. the broadcasting station or publication is not owned or controlled by any political party, political action committee or ballot question committee and is not owned or controlled by any candidate for state, county or municipal office whose candidacy, election campaign, or opponent is a subject of the news story, commentary or editorial, or by the authorized campaign committee of such a candidate, or by a member of such a candidate's immediate family.

In addition to the above criteria, to qualify as a periodical publication, including one in electronic form on the Internet, or a newspaper or magazine, a publication (i) must have been disseminating news stories, commentaries or editorials on a variety of topics to the general public on a periodic basis for at least the previous twelve months, or (ii) must have a record of disseminating news stories, commentaries or editorials on a variety of topics to the general public or other objective indicators that the publication will continue to be published on a periodic basis beyond the election cycle during which the press exemption is claimed.

For purposes of this section, broadcasting station includes a cable television system.

~~SECTION 9. ACCELERATED REPORTING SCHEDULE~~

~~1. **General.** In addition to other reports required by law, any candidate for Governor, State Senator or State Representative who is not certified as a Maine Clean Election Act candidate under Title 21-A §1121 *et seq.*, and who has a certified candidate as an opponent in an election must comply with the following reporting requirements on forms prescribed, prepared, and provided by the Commission.~~

~~INFORMATIONAL NOTE: Title 21-A §1017 prescribes reporting requirements for candidates.~~

~~2. **Trigger Report.** Any candidate subject to this section, who receives, spends or obligates more than the primary or general election distribution amounts for a Maine Clean Election Act candidate opponent in the same race, must file with the Commission, within~~

48 hours of such receipt, expenditure, or obligation, a report detailing the candidate's total campaign contributions, receipts, expenditures and obligations to date. The Commission will notify all candidates who have an opposing certified candidate of the applicable distribution amounts and of the trigger report requirement.

3. ~~A nonparticipating candidate who is required to file a report under subsection 2 shall file no later than 5:00 p.m.:~~

A. ~~a report on the 42nd day before the date on which an election is held that is complete as of the 44th day before that date;~~

B. ~~for gubernatorial candidates only, a report on the 25th day before the date on which an election is held that is complete as of the 27th day before that date; and~~

C. ~~a report on the 18th day before the date on which an election is held that is complete as of the 20th day before that date; and~~

D. ~~a report on the 6th day before the date on which an election is held that is complete as of the 8th day before that date.~~

4. ~~**24 Hour Report.** Any candidate who is required to file a trigger report must file an updated report with the Commission reporting single expenditures of \$1,000 or more by candidates for Governor, \$750 by candidates for State Senator, and \$500 by candidates for State Representative made after the 14th day before any election and more than 24 hours before 11:59 p.m. on the date of that election. The report must be submitted to the Commission within 24 hours of those expenditures.~~

5. ~~**Filing by Facsimile or Electronic Means.** For purposes of this section, reports may be filed by facsimile or by other electronic means acceptable to the Commission, and such reports will be deemed filed when received by the Commission provided that the original of the same report is received by the Commission within 5 calendar days thereafter.~~

SECTION 10. REPORTS OF INDEPENDENT EXPENDITURES

1. **General.** Any person, party committee, political committee or political action committee that makes an independent expenditure aggregating in excess of \$100 per candidate in an election must file a report with the Commission according to this section.
2. **Definitions.** For purposes of this section, the following phrases are defined as follows:
 - A. "Clearly identified," with respect to a candidate, has the same meaning as in Title 21-A, chapter 13, subchapter II.
 - B. "Expressly advocate" means any communication that
 - (1) uses phrases such as "vote for the Governor," "reelect your Representative," "support the Democratic nominee," "cast your ballot for the Republican challenger for Senate District 1," "Jones for House of Representatives," "Jean Smith in 2002," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates

described as Pro-Life or Pro-Choice, "vote against Old Woody," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Pick Berry," "Harris in 2000," "Murphy/Stevens" or "Canavan!"; or

- (2) is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate.

C. "Independent expenditure" has the same meaning as in Title 21-A §1019-B. Any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents is considered to be a contribution to that candidate and is not an independent expenditure.

3. **Reporting Schedules.** Independent expenditures must be reported to the Commission in accordance with the following provisions:

A. Independent expenditures aggregating in excess of \$100 per candidate per election made by any person, party committee, political committee or political action committee must be reported to the Commission in accordance with the following reporting schedule, unless required to be reported according to the schedule in paragraph B.

~~(1) Quarterly Reports. Quarterly reports must be filed by 5:00 p.m. on:~~

~~(a) January 15th and be complete as of December 31st;~~

~~(b) April 10th and be complete as of March 31st;~~

~~(c) July 15th and be complete as of June 30th; and~~

~~(d) October 5th and be complete as of September 30th.~~

~~(1-A) 60-Day Pre-Election Report. A report must be filed by 5:00 p.m. on the 60th day before the election is held and be complete as of the 61st day before the election.~~

~~(2)(1-B) 11-Day Pre-Election Report. A report must be filed by 5:00 p.m. on the 14th 11th day before the election is held and be complete as of that day the 14th day before the election.~~

If the total of independent expenditures made to support or oppose a candidate exceeds \$100, each subsequent amount spent to support or oppose the candidate must be reported as an independent expenditure according to the schedule in this paragraph or paragraph B.

B. Independent expenditures aggregating in excess of \$250 per candidate made during the sixty days before an election must be reported within two calendar days of those expenditures.

[NOTE: WHEN THE CUMULATIVE AMOUNT OF EXPENDITURES TO SUPPORT OR OPPOSE A CANDIDATE EXCEEDS \$250, AN INDEPENDENT EXPENDITURE REPORT MUST BE FILED WITH THE COMMISSION WITHIN TWO DAYS OF GOING OVER THE \$250 THRESHOLD.

FOR EXAMPLE, IF AN INDIVIDUAL, ORGANIZATION OR COMMITTEE MAKES THREE EXPENDITURES OF \$100 IN SUPPORT OF A CANDIDATE ON SEPTEMBER 8TH, SEPTEMBER 13TH, AND SEPTEMBER 29TH, FOR AN ELECTION ON NOVEMBER 6, 2012, AN INDEPENDENT EXPENDITURE REPORT MUST BE FILED BY OCTOBER 1ST. THE THIRD EXPENDITURE OF \$100 MADE THE CUMULATIVE TOTAL OF EXPENDITURES EXCEED \$250 AND THE TWO-DAY REPORTING REQUIREMENT WAS TRIGGERED ON SEPTEMBER 29TH. THE REPORT MUST INCLUDE ALL THREE EXPENDITURES.

AFTER SEPTEMBER 29TH, IF THAT INDIVIDUAL, ORGANIZATION OR COMMITTEE MAKES ADDITIONAL EXPENDITURES TO SUPPORT THAT CANDIDATE, THE REQUIREMENT TO FILE AN INDEPENDENT EXPENDITURE REPORT WITHIN TWO DAYS WILL APPLY ONLY IF THE CUMULATIVE TOTAL SPENT AFTER SEPTEMBER 29TH EXCEEDS \$250. FOR EXAMPLE, IF THE INDIVIDUAL, ORGANIZATION OR COMMITTEE MAKES TWO PAYMENTS OF \$200 TO PROMOTE THE CANDIDATE ON OCTOBER 8TH AND OCTOBER 13TH, ANOTHER INDEPENDENT EXPENDITURE REPORT MUST BE FILED BY OCTOBER 15TH DISCLOSING THOSE TWO EXPENDITURES.]

Independent expenditures aggregating in excess of \$100 per candidate made after the 14th day before an election must be reported within one calendar day of those expenditures.

For purposes of the filing deadlines in this paragraph, if the expenditure relates to a legislative or gubernatorial election and the filing deadline occurs on a weekend, holiday, or state government shutdown day, the report must be filed on the deadline. If the expenditure relates to a county or municipal election, the report may be filed on the next regular business day.

- C. Reports must contain information as required by Title 21-A, chapter 13, subchapter II (§§ 1016-1017-A), and must clearly identify the candidate and indicate whether the expenditure was made in support of or in opposition to the candidate. Reports filed after the eighth day before an election must include the following information:
1. the date on which the person making the expenditure placed the order with the vendor for the goods or services;
 2. the approximate date when the vendor began providing design or any other services in connection with the expenditure;
 3. the date on which the person making the expenditure first learned of the total amount of the expenditure; and

4. a statement why the expenditure could not be reported by the eighth day before the election.
- D. A separate 24-Hour Report is not required for expenditures reported in an independent expenditure report.
- E. An independent expenditure report may be provisionally filed by facsimile or by electronic mail to an address designated by the Commission, as long as the facsimile or electronic copy is filed by the applicable deadline and an original of the same report is received by the Commission within five calendar days thereafter.

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SECTION 13. REPORTS OF COMMUNICATIONS BY MEMBERSHIP ORGANIZATIONS OR CORPORATIONS

When a membership organization or corporation is required under 21-A M.R.S.A. § 1019-A to file a report of a communication to members or shareholders, the organization or corporation must file the following reports by 11:59 p.m. on the following deadlines:

1. A report must be filed on the 42nd day before the election is held and be complete as of the 49th day before the election.
2. A report must be filed on the 11th day before the election is held and be complete as of the 14th day before the election.
3. A report must be filed on the 42nd day after the election is held and be complete as of the 35th day after the election.

Basis Statement



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

To: Administrative Procedure Officer
Office of the Secretary of State of Maine

From: Jonathan Wayne, Executive Director

Date: July ___, 2012

Re: Routine Technical Amendments to Chapter 1 of the Commission's Rules
(94-270 C.M.R. Chapter 1)

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

Chapter 1, Section 1(11-A) – Definitions

Factual and Policy Basis: In the 2011 session, the Legislature added a new definition for the term “influence” in 21-A M.R.S.A. § 1012. The Commission is adding that term in the definitional section of the rules to be consistent with the statute.

Comments: The Commission did not receive comments concerning this proposed amendment.

Chapter 1, Section 4(2)(C) – Procedures for Complaints and Requests for Investigation

Factual and Policy Basis: The proposed rule clarifies the process for filing complaints and requests for investigation with the Commission. It requires complaints and requests for investigations to be signed, allows them to be filed by facsimile or by e-mail, provided that the original complaint or request is submitted to the Commission. The rule also allows the Executive Director to gather preliminary factual information to present the matter to the Commission, as is permitted in another section of the Commission's Rules (Chapter 1, Section

5(1)). The Commission staff would no longer be required to disclose to the Chair every report of non-compliance that may come to the attention of the staff from outside sources.

Comments: Michele and Joseph Greenier commented in a letter received March 9, 2012. The Greeniers proposed insertions to Section 4(2)(C) (“and/or request for an Audit”) (“for presentation to the Commission”) (“with 100% full disclosure of the investigation on the agenda, for the public’s right to know) and deletions (“electronic mail”) (“preliminary”).

The Greeniers also proposed a number of policy changes to Section 4(2), relating to notification to a candidate of a complaint filed against him or her, requirements involving the preservation of documents, changes to investigative procedures, procedures for recusal of Commissioners, and report certification requirements.

Response by Commission: The rulemaking process for administrative agencies is governed by the Administrative Procedure Act (Title 5, Chapter 375, Subchapter 2). Two important steps in the process are: (1) that the agency provide notice to the public of exactly those rules being considered for amendment, and (2) that the public has an opportunity to comment on the proposed rule changes. An agency is not permitted to adopt rule amendments on topics or provisions which were not part of the proposed rule amendments.

Regarding the policy additions the Greeniers proposed, these areas were not included in the rule amendments proposed by the Commission. Therefore, the Commission will not respond to these comments as part of this rulemaking.

Regarding the Greeniers’ proposed insertions and deletions to Section 4(2)(C), the first two proposed additions would be redundant while the latter would represent a procedural change which may have a deleterious effect on the Commission’s investigative process. The two proposed deletions would, in turn, be unnecessarily restrictive and not reflective of the actual investigative stage contemplated by the rule amendment.

Chapter 1, Section 4(3) – Procedures for Handling Reporting Deficiencies by Lobbyists

Factual and Policy Basis: The Commission proposed amending the Commission’s rules to clarify the procedure for how the Commission handles deficient reporting by lobbyists and to allow the Commission staff to place on the Commission’s agenda substantial violations of the disclosure requirements, regardless of whether the lobbyist remedied the report.

Comments: Regarding Section 4(3), the Greeniers suggested adding the annual report to the Commission staff’s review, retaining the specific deadline of 15 business days for lobbyists to comply with requests to correct deficiencies, deleting the staff’s discretion to extend the deadline, requiring the matter to be placed on the agenda if the report is not remedied by the deadline, and increasing the required fines for violations.

The Greeniers also proposed a number of policy changes regarding lobbyists that were not included in the rule amendments proposed by the Commission. Accordingly, the Commission has no response for those comments.

Response by the Commission: The annual report is a summary of the monthly reports filed by a lobbyist. The electronic filing system aggregates the data in the monthly reports and displays the summarized data in a single annual report at the end of the lobbying year. The Commission staff’s review of the monthly reports will be a sufficient check of compliance with the lobbyist disclosure requirements, as any changes to the monthly reports that are made as a result of the staff review will be automatically reflected in the annual report. The Commission believes it is appropriate to give its staff the discretion to set shorter time limits for lobbyists to fix deficiencies when appropriate for less complex matters, while also allowing for longer limits when appropriate under unusual or unforeseen circumstances. Penalties for late filed registrations and reports are set by statute and cannot be changed by a rule.

Chapter 1, Sections 6(10) & 7(8) – Testing the Waters

Factual and Policy Basis: The Commission’s proposed amendments clarify how campaign finance reporting requirements apply to individuals who engage in financial activity when

deciding whether to become a candidate. The proposed rule is based on 11 Code of Federal Regulations §§ 100.72 & 100.131, which regulates candidates for federal office. Under this approach,

- Individuals could receive and spend funds for the purpose of determining whether to become a candidate. These funds would not be considered reportable contributions and expenditures, unless the individual decided to run.
- If the individual decides to run, the funds received and spent would be considered contributions and expenditures that the candidate would be required to disclose in their first campaign finance report.

Comments: The Maine Citizens for Clean Elections (MCCE) made the following comments at a public hearing on February 28, 2012 as well as written comments received March 12, 2012.

1. Once a person receives a contribution (gift) for the purpose of influencing an election, under current definition, it is considered a “contribution” and the Commission has authority to treat the recipient as a “candidate” to whom all the limitations and reporting requirements of law apply.

2. Candidates could attempt to “game the system” and side-step contribution limits and reporting requirements by claiming the donor did not intend to influence the election. It is no more difficult to know the donor’s intent early on in the exploratory phase than it is later in the campaign.

3. Contribution limits should not be waived at any point and should apply during all phases of a campaign. There is adequate statutory authority to consider any gift received by a person relating to that person’s possible candidacy as a contribution subject to existing contribution limits.

4. There should be a “bright line” test for when reporting is required. A specific dollar threshold should be established that triggers the requirement to report. The amount should be different for House, Senate and gubernatorial campaigns. The seed money amounts could provide a guide to establish these thresholds.

Michele and Joseph Greenier commented in a letter received March 9, 2012. The Greeniers oppose Section 6(10) as currently drafted. Instead, they suggest requiring all funds or services received by a candidate exploring entering an election for public office be reported in campaign finance reports.

Response by the Commission:

A person is required to file campaign finance reports under 21-A M.R.S.A. § 1017 if he or she is a “candidate.” The term candidate is roughly defined in 21-A M.R.S.A. §1(20) to mean a person who has qualified for the ballot through the petition process or has received contributions or made expenditures *with the intent to qualify for the ballot*. The Commission agrees that it should be alert to potential game-playing by individuals who know that they intend to run, but there are situations in which an individual is considering running and could be genuinely unsure whether they will ultimately attempt to qualify for the ballot.

With regard to whether the Commission may apply the contribution limits in 21-A M.R.S.A. §§ 1015(1) & (2) during the exploratory phase, the Commission’s Counsel has advised the staff that this restriction would need to be made in statute (rather than by rule). Accordingly, the Commission staff intends to address this issue in a legislative proposal to the Commission later this year for possible introduction during the 2013 legislative session.

The Commission declines to adopt the suggestion of a bright line test for when reporting is required (such as a specific dollar amount of spending). The Commission appreciates the suggestion, but is concerned that any specific dollar amount would be arbitrary and potentially difficult to defend. The statutes being interpreted are based on the purpose of the contributor and the candidate in receiving cash or services, and in making expenditures. So, the list of activities in the adopted rule that indicate a decision to run are based on the nature of the candidate’s activity, rather than a specific amount of spending.

The Commission declines to adopt the approach urged by the Greeniers. The purpose of the proposed rule is to allow a reasonable amount of latitude to individuals who are considering a run for office the opportunity to do so without being subject to the full campaign finance reporting requirements prior to making a decision to run. Once the decision to run is made, the individual will have to report the financial activity that took place in the exploratory phase. If the individual decides not to run, the public's interest in knowing the source of funds for the individual's exploratory efforts and the value of disclosure in deterring corruption are both lessened.

Chapter 1, Section 7(4) – Using Primary Funds to Pay for General Election Goods and Services

Factual and Policy Basis: When first enacted, the Maine Clean Election Act program contained a matching funds provision which was intended to equalize the amount of resources that candidates in the same race had at their disposal. The Commission occasionally received complaints from candidates that their opponents had circumvented this equalization by using their campaign funds before the primary election to purchase advertising or other services for the general election. The Commission adopted Chapter 1, Section 7(4) to address when purchases made with primary election funds would be considered expenditures for the primary or general election. Since the payment of matching funds has been eliminated from the MCEA program, the Commission has deleted this provision from the Commission's rules.

Comments: Michele and Joseph Greenier commented in a letter received March 9, 2012. The Greeniers object to the deletion of Section 7(4) and propose retaining the sub-section in its entirety.

The Greeniers also propose a number of policy changes regarding treatment and reporting of expenditures in Section 7 generally that were not included in the rule amendments proposed by the Commission. Accordingly, the Commission has no response for those comments.

Response by the Commission: Section 7(4) was added to the Commission Rules in order to make the matching funds payments under the Maine Clean Election Act (MCEA) program operate more effectively. Since matching funds have been eliminated from the MCEA program, there is no longer a need to determine whether goods and services were used in the primary or general election. Moreover, this provision never prohibited candidates from purchasing goods or services in the primary election that would be used in the general. It was simply a means to determine whether an MCEA candidate qualified for matching funds.

Chapter 1, Section 7(8) – Testing the Waters

Factual and Policy Basis: Please see Factual and Policy Basis for Chapter 1, Section 6(10).

Comments: Michele and Joseph Greenier commented in a letter received March 9, 2012. The Greeniers objected to the entire proposed sub-section and proposed instead that all expenditures for the purpose of conducting activities to determine whether an individual should become a candidate should be reportable and reported within 5 days.

Response by the Commission: The Commission declines to adopt the approach urged by the Greeniers. The public's interest in knowing the types and amounts of expenditures for the individual's exploratory efforts and the value of disclosure in deterring corruption are both lessened if the individual does not actually run for public office.

Chapter 1, Section 7(9) – Exception to Disclaimer Requirements for Certain Handbills, Campaign Signs, and Internet or E-Mail Communications

Factual and Policy Basis: In Chapter 389 of the Public Laws of 2011, the Maine Legislature enacted certain exceptions to the “paid for” (disclaimer) requirement for paid communications to voters. (21-A M.R.S.A. § 1014(6)) The exceptions were for low-cost handbills, campaign signs, and internet or e-mail communications by individuals acting independently of political campaigns and committees. The Commission has adopted Chapter 1, Section 7(9) to interpret the new statutory exceptions.

Comments: The Maine Citizens for Clean Elections made the following comments at a public hearing on February 28, 2012 as well as written comments received March 12, 2012.

1. Instead of drafting a new definition of “independent,” the Commission could use the current language in Section 10(2)(C).

2. The MCCE suggested the following revision of the proposed rule for clarity and simplicity:

No disclaimer is required of any handbill, campaign sign or internet or email communication costing less than \$100 if it is produced and distributed without any suggestion, request, direct or indirect authorization or compensation from any candidate or committee or agent thereof.

This exemption does not apply to any handbill, campaign sign or internet or email communication made by any person who is required to register or file campaign finance reports with the Commission.

The American Civil Liberties Union of Maine (ACLU of Maine) commented in a letter received March 10, 2012. The ACLU of Maine believes the governmental interest in disclosure diminishes as the dollar amount of the expenditure decreases. The reporting threshold for independent expenditures should be set at \$1,000 rather than the proposed \$100, reasoning “it is exceedingly unlikely that any political candidate would be corrupted by an independent expenditure of less than \$1000.”

Michele and Joseph Greenier commented in a letter received March 9, 2012. The Greeniers, without further explanation, indicated that they object to the entirety of Section 7(9).

Response by the Commission: The Commission agrees with the suggestion by the MCCE that the rule can be simplified. The statute itself does not, for the most part, require any clarification or explanation, except in three areas: what is included in the terms “cost” and “internet or e-mail communication” and what does “acting independently” mean. The Commission has revised the proposed rule in Chapter 1, Section 6(9) by deleting the original proposed text in its entirety and replacing it with definitions of “cost,” “internet or e-mail communication” and “acting independently.”

The suggestion by the ACLU of Maine to increase the dollar threshold below which disclosure is not required is beyond the Commission’s rulemaking authority. The Legislature has established that threshold to be \$100. The threshold can only be changed by amending the statute.

As the Greeniers did not specify any reasons for their suggestion to delete the proposed rule, the Commission cannot formulate a response.

Chapter 1, Section 7(10) – Press Exemption

Factual and Policy Basis: In Maine campaign finance law, broadcasting stations and publications which periodically distribute news stories, editorials, or commentaries are exempt from campaign finance reporting requirements. This exception is found in the definition of “expenditure” for candidates and political committees. (21-A M.R.S.A. §§ 1012(3)(B)(1) & 1052(4)(B)(1)) The Maine press exemption is based closely on a similar exemption enacted by the U.S. Congress into federal law in 1974. (2 U.S.C § 431(9)(B)(i)) The press exemption is important, because it allows publishers of news and commentary to present to the public news reports and viewpoints concerning candidates, without the fear that they will be entangled in campaign finance regulations, such as the duty to file independent expenditure reports or financial reports as a political action committee.

In the course of this rulemaking, the Commission has invited comments on three different versions of a proposed rule interpreting the statute:

- Proposal 1, circulated for public comment on February 7, 2012 – this version set out five criteria which would be required for internet publications to be exempt
- Proposal 2, circulated for public comment on April 3, 2012 – this version modified some of the criteria listed in Proposal 1, and applied the criteria to broadcasting stations and publications in general – not just internet publications
- Proposal 3, circulated for public comment on June 1, 2012 – this version included new language relating to the issue of broadcasting stations or publications owned or controlled by a candidate or members of the immediate family of the candidate.

After considering all three rounds of comment, the Commission adopted a modified version of the rule on July 25, 2012. The adopted version was intended to be simpler than the previous proposals. It keeps three components of the previously proposed rules:

1. In order to be exempt from campaign finance regulation, the names of the persons who own or control a broadcasting station or publication must be identified in the publication or otherwise made known to the public.
2. If a broadcasting station or publication is owned by a candidate or a member of the candidate's immediate family, news stories, commentaries, and editorials about election races other than the one in which the candidate is running will be exempt. For example, if a weekly newspaper in York County wishes to editorialize about legislative races in Southern Maine, its editorials will be exempt, even though the granddaughter of the paper's owner is a candidate for school board in Presque Isle, Maine.
3. To qualify as a periodical publication, a publication must have been disseminating news stories, commentaries, or editorials on a variety of topics for at least 12 months, or must have a record that objectively indicates that the publication will continue to publish beyond the election cycle during which the presumption is claimed. The Commission believes this is important to distinguish periodic publishers of news and commentaries from publications that pop up close to an election and seek to circumvent disclosure and disclaimer laws by claiming to be a press entity.

The Commission had proposed a requirement that – in order to be exempt from regulation – the broadcast station or publication, and those who own, control or operate such entities, must not have received any compensation (other than advertising revenue) from a candidate, political party, or other type of political committee. This provision did receive some support by some of the organizations that provided comments, because it was consistent with the independent nature of most press entities. The Commission decided to delete this requirement from the adopted rule in order to simplify the rule, and because the prohibition against receiving compensation does not appear in the statutory exemption. In addition, if a candidate or political committee compensates a publication, broadcasting station or its owners or operators for news or commentary to influence a particular election, the candidate or committee already has an obligation to include that expenditure in campaign finance reports filed with the Commission.

The Commission had also proposed in Proposal 3 of the rule that bona fide news stories that are part of a pattern of campaign-related news accounts should be exempt, similar to a regulation adopted by the Federal Election Commission (FEC). The Commission has decided not to adopt this provision for reasons appearing on the next page of this statement.

Comments by the Maine Press Association

The Maine Press Association (MPA) commented on all three Proposals of the rule on behalf of the newspaper industry in Maine. The MPA is, overall, supportive of the proposed rule.

With respect to Proposal 1, the MPA submitted written comments dated March 12, 2012 supporting the rule, but suggested that in order to be considered the press, a publication must have a certain threshold of original content (25%) created by the publisher.

In written comments on Proposal 2 dated May 11, 2012, the MPA described the press exception in federal statute and regulation, and how it has been interpreted by the Federal Election Commission. The MPA supported the requirement that publication be periodic (*i.e.*, regularly updated and not a one-time publication): “[t]he published information must not be a stagnant post that is not regularly updated. . . . The periodic nature of the communication is important, so various political entities do not arise around the time of elections for the sole purpose of affecting elections without any accountability and without the traditional protections of press publications.” The MPA supported the requirement that the owner or operator of the publication be identified within the publication or otherwise be known to the public, so that members of the public may evaluate the credibility of the authors and understand potential conflicts of interest.

With respect to Proposal 3, the MPA suggested that bona fide news stories that are part of a pattern of campaign-related news accounts should be exempt, similar to a regulation adopted by the Federal Election Commission (FEC). It supported interpreting broadcast station to exempt cable television operators. The MPA suggested that proposed Subparagraph 7(10)(c)(ii) is unnecessary given the proposed wording in Subparagraph 7(10)(c)(i).

Response by Commission to Comments by MPA

The Commission has not adopted the suggestion that the Commission require a certain quotient of original content in order to qualify for the press exemption. This is an important distinction within the news industry but has less relevance as a factor in determining whether an organization should be exempt from campaign finance regulation. The final Proposal of the rule has been restructured and eliminates the provision which the MPA found to be redundant.

Although the Commission received some comments approving of language similar to the FEC rule, the Commission has not incorporated elements of the FEC rule into the Commission's proposed rule because:

- The proposed provision would exempt news stories or editorials concerning a candidate – even when the owner of a publication was the candidate who was the subject of the news story or editorial. This may not be consistent with the intent of the Maine Legislature in declining to exempt candidate-owned media.
- Judging whether a news story was “part of a pattern of campaign-related news coverage that provides reasonably equal coverage to all opposing candidates” could involve the Commission in making difficult judgments about the content of news stories.
- The proposed test of a pattern of news coverage with equal treatment of candidates is not well-grounded in the language of Maine's statutory press exception.

Comments by the Maine Association of Broadcasters

The Maine Association of Broadcasters (MAB) submitted comments on Proposals 2 and 3 of the proposed rule. The MAB represents radio and television stations in Maine.

With respect to Proposal 2, it commented through a May 7, 2012 e-mail that the MAB does not object to the proposed rule, but recommends that the rule and underlying statute be amended to encompass cable television and other electronic programming.

Concerning Proposal 3, the MAB commented in writing on July 3, 2012 that “[i]t would be unreasonable to expect that a broadcast station, e.g., with a long history of news coverage of

elections, should suddenly be subject to a news blackout on all candidate races simply because a principal of the station is involved in one particular race.” It supported exempting new stories that are part of a pattern of campaign-related news accounts, similar to the FEC rule. It recommended interpreting “broadcast station” to mean other purveyors of video programming, such as cable television.

Response by Commission to MAB’s Comments

In its adopted rule, the Commission has interpreted broadcast station to include cable television systems. The Commission has also adopted the concept that if a news organization is owned or controlled by the candidate or an immediate family member of a candidate, its news coverage and commentaries concerning other races would be exempt. It has declined to adopt the FEC test of “pattern of news accounts/reasonablyequal coverage” for reasons set out on page 13.

Comments from the American Civil Liberties Union of Maine

The American Civil Liberties Union of Maine submitted comments concerning Proposal 1 in a letter dated March 10, 2012. The ACLU of Maine commented that “government may not impose burdens on internet writers and publishers that are not imposed on those who communicate through traditional media.” The organization recommends, in a general way, the approach taken by the Federal Election Commission in 2006 that makes the vast majority of Internet sites free of campaign finance regulation. The ACLU of Maine suggested that the Commission should do more to encourage internet publication, and more confusing regulation is not the answer. Anonymous political speech has an honorable tradition and should be protected. The ACLU of Maine believes that the lower-cost speech can, and should, be left to the marketplace of ideas to regulate.

Response by Commission to the Comments of the ACLU of Maine

The Commission rewrote Proposal 1 of the rule in response to the ACLU’s comments. The rule adopted by the Commission does not single out internet publishers for additional criteria and applies the same criteria to internet and “traditional” publishers.

In 2011, the Commission proposed – and the Maine Legislature enacted – a new statutory exception to the disclaimer requirement for individuals who engage in internet and e-mail activities costing less than \$100, acting independently of candidates, political parties, and others. (21-A M.R.S.A. § 1014(6)) One result of this exception is that an individual could put together a low-cost website about politics or elections without being required to identify themselves.

The Commission declines to adopt a policy on internet activities by individuals similar to the one adopted by the Federal Election Commission in 2006 because it could deprive Maine voters of information concerning who is influencing them in the election and could undermine contribution limits enacted directly by Maine voters. Under the FEC policy for websites created by individuals, an individual may spend an unlimited amount in developing and posting an anonymous website at the request of a candidate, and the expenditure does not constitute a contribution to the candidate (www.fec.gov/pages/brochures/internetcomm.shtml).

Comments by the Maine Heritage Policy Center

The Maine Heritage Policy Center (MHPC) commented on Proposal 3 only, in a letter dated July 6, 2012. The MHPC believes that the statutory press exemptions for broadcasting stations and publications embody an obsolescent view of what is news and a news organization. It suggests that the Commission is headed for stormy First Amendment weather if it bases its rule on these statutory provisions and tries to parse who or what qualifies as “press.” The MHPC has entered the news business, although its news website, the Maine Wire, has been derided as not a “real” news organization. The MHPC states that the Commission is embroiled in a lawsuit concerning anonymous speech, and the MHPC supports the position of the plaintiff (Dennis Bailey). It states that “*Any* regulation that implicates political speech should be done with fear and trembling and anonymous speech should be protected.” The MHPC objects to the final paragraph of the proposed rule, because it attempts to define who is a periodical publication based on timing and practice.

Response by the Commission to Comments by the MHPC

It is the job of the Commission to apply and interpret the Maine Revised Statutes relating to campaign finance reporting. The rule adopted by the Commission clarifies that newer media such as internet publications and cable television operators are exempt from campaign finance regulation to the same extent as traditional media. The Commission's interpretation of the candidate ownership issue is intended to take a *deregulatory* approach with respect to news media, in order to protect the flow of information to Maine voters. Under the Commission's rule, the Maine Wire would be exempt as a periodic publisher of news and commentary. As noted above, the Commission proposed an exception to the disclaimer requirement that will facilitate low-cost websites by developers who wish to remain anonymous.

Comments by Maine Values, LLC

Maine Values, LLC, (MV) the owner of Maine Today Media (publisher of the *Portland Press Herald*, *Kennebec Journal*, and *Morning Sentinel*) submitted comments on July 6, 2012 through the law firm of Drummond Woodsum. Its comments included the following points:

- A major purpose of the First Amendment of the U.S. Constitution is to protect the free discussion of governmental affairs. Federal courts have recognized the critical role of the press in our society in providing a forum for public debate on candidates and elections. The exemption for the press in the Federal Election Campaign Act exists so that the public has access to and can participate in important political discussions. The Federal Election Commission has recognized that it is part of the normal press function to feature or to investigate the competing claims of parties, campaigns, and interest groups. When a press entity is operating within the sphere of its traditional press functions, administrative regulation of the press should be kept at a minimum.
- If a newspaper were not covered by the press exception, it could be required to file independent expenditure reports, to include disclaimers in its news stories and editorials, or to file financial reports as a political action committee. Also, because newspapers regularly receive press releases from candidates inviting the papers to cover certain story ideas, the communication between campaign and publisher about prospective stories could be considered coordinated with a candidate or her agents, creating a contribution to

the candidate. This potential regulation by the State of Maine could create a significant chilling effect on the newspaper's speech, which would reduce the amount of information available to the public.

- Federal courts have recognized that when speech is being regulated, the regulated parties should know what is required of them so that they may act accordingly. Courts have also held that precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. Complex regulations on campaign speech that are difficult to apply may function, in practice, as the equivalent of prior restraint, giving an administrative agency power analogous to licensing laws.
- When courts review the constitutionality of campaign finance laws, disclosure and disclaimer requirements are evaluated with “exacting scrutiny.” The government must be able to show that there is a substantial relation between the disclosure requirement and a sufficiently important governmental interest. When organizations make independent expenditures to advocate for or against candidates, the courts have recognized an “informational interest” in identifying the speakers behind politically oriented messages. Disclosing the identity and constituency of a speaker engaged in political speech enables the electorate to make informed decisions and give proper weight to different speakers and messages. Limits on contributions or expenditures are subject to the higher level of strict scrutiny.
- Commentary and editorials are a longstanding component of traditional press activities. The press exemption in statute does not distinguish between news stories and commentaries and editorials, so there is no basis for the Commission to make such a distinction in its rule.
- The only constitutionally permissible content-based distinction that the Commission should make is one between:
 - endorsements that expressly advocate a vote for or against a candidate (which may be regulated); and
 - all other news, commentary, or editorials (which should not be subject to regulation)

In the case of editorials which expressly advocate for or against a candidate, the only interest which can justify regulating the editorial is the informational interest of the public in identifying the speakers behind politically oriented messages. The Commission's rule could satisfy this interest by requiring the editorial to include the names of the persons who own or control the broadcasting station or publication.

- If a general interest newspaper such as those owned by MaineToday Media were required to report an expenditure associated with an endorsement or editorial (*e.g.*, in an independent expenditure report or a PAC report), it is very hard to see how it could quantify the expenditure. Most costs of publishing a newspaper are unrelated to an election and would not be subject to regulation. If the endorsement or editorial were not published, something else would be published in its place. The endorsement or editorial does not result in an increased cost in paper, ink, computers, office space, telephones, etc. There is no way to allocate the salary of employees such as a reporters, editorial, printer, newspaper delivery person, etc. The Commission should make clear in its rule that the cost of an editorial/endorsement should not be considered an expenditure unless the costs involved are above and beyond normal operating costs.
- The Commission should not attempt to regulate news stories, commentaries, editorials, or endorsements by candidate-owned newspapers concerning candidates running in different or unrelated electoral races. MV believes the currently proposed rules could be read to impinge on a newspaper publishing editorials or commentary “on candidate races wholly unrelated to [the] owner or family member of the owner of the newspaper.” MV supports an interpretive rule clarifying “that when a broadcasting facility is owned or controlled by a candidate, or a candidate’s immediate family, ‘the costs of a news story, commentary, or editorial about other candidates not in the same race as the candidate’ is not an expenditure.”
- In general, the Commission’s campaign finance jurisdiction extends to candidates for state, county and certain municipal offices – not candidates for federal office. It should clarify that the term “candidate” as used in the press exemption applies only to candidates for state, county, or municipal offices.

- The term “immediate family” in Section 1(20) of the Election Law was first defined in 1985 to include a spouse, parents, children, and siblings. It has been broadened over time to include relatives as grand-children, step-grandchildren, and half-sister of a person’s spouse. Such a broad definition is desirable for different aspects of the state’s election process (e.g., assistance for voters with absentee ballots; withdrawal of a candidate who has become incapacitated; and preserving the anonymity of a voter to protect their physical safety). There is no reason to apply this broad definition to limit the press exemption, however. Given the constitutional protections of the press, it is not rational for all of a publication’s news stories, editorials, and commentaries to lose the exemption, just because someone with an attenuated familial connection to a candidate decides to run for office. This would unconstitutionally impinge on the right of the newspaper to discuss candidates and elections. The Commission should narrow the term “immediate family” to be include only a candidate’s “spouse or domestic partner.”
- MV supports the proposed provision requiring the identification of persons who own or control a broadcasting station or publication because it furthers the public interest in identifying the speakers behind politically oriented messages.
- The phrase “reasonably equal coverage to all opposing candidates” should not be used because it impermissibly intrudes on the editorial judgment of the publication. MV proposes “reasonable coverage” as an alternative.
- MV supports the last paragraph of the proposed rule (requiring 12 months of publication or a record that objectively indicates continual publication beyond the election cycle) because it furthers the informational interest and prevents circumvention.

In its comments, MV proposed a modified rule that reflects the above comments.

Response by Commission to Comments by Maine Values, LLC

The Commission agrees that the First Amendment provides a high degree of protection for the press and that the Commission should interpret and apply Maine statutes to comply with constitutional limitations that the courts would find acceptable. On the whole, the Commission

should take a deregulatory approach with the press to minimize any risk that it is over-regulating this important forum for political discussion.

The Commission agrees with the suggestion that the Commission’s rule should clarify that the term “candidate,” as used in the press exception, applies to state, county, and municipal candidates. That approach is consistent with the limitations in the Commission’s jurisdiction over campaign finance reporting and is reflected in the adopted rule.

The Commission also agrees with the view that the term “immediate family” has been expanded over time between 1985 and 2007, with the possible unintended result of narrowing the exemption in state law for the press. As a matter of policy, it does not make sense that a news story or editorial should potentially trigger registration and reporting obligations simply because a distant relative of the publication’s owner (e.g., step-grandchild) is a candidate. The Commission staff intends to draft legislation addressing this issue that the staff would present to the Commissioners later this year for possible inclusion in legislation for the 2013 legislative session.

The Commission declines to incorporate in the Commission’s rule the suggestion that only express advocacy may be regulated, because that limitation is not based on the statutory press exemption.

Comments by Rep. James Parker

Representative James Parker commented by email on June 6, 2012 to Proposal 3 of the proposed rule. Rep. Parker warned against that the influence the owner of a publication could exert in a race in which the owner’s spouse was running, by favoring the owner’s spouse and controlling coverage of the spouse’s opponents. He cites the ownership of newspapers in the First Congressional District of Maine by the husband of a candidate, and suggested that this should not be allowed without full disclosure.

Response by Commission to Comments of Rep. James Parker

The Commission agrees that news stories, commentary and editorials about a candidate in a newspaper owned by the candidate's spouse should not be exempt. However, federal candidates are not subject to the Commission's jurisdiction -- they must file campaign finance reports in accordance with the statutes and rules administered by the Federal Election Commission.

Comments by the Maine Citizens for Clean Elections

With respect to Proposal 1, the Maine Citizens for Clean Elections (MCCE) made comments at a public hearing on February 28, 2012 and submitted written comments dated March 20, 2012.

The organization stated that it

- supports a clear but limited bona fide exception that is appropriate for a variety of new media.
- supports the five proposed criteria, except that the prohibition against the broadcasting station or publication accepting compensation from candidates, party committees, or others should not be limited to circumstances where the committee is trying to influence the election. (The adopted rule does not contain this proposed prohibition on accepting compensation, as noted above.)
- suggests that the first sentence of paragraph 10 is redundant since these items are already exempt by function of the definition of expenditure elsewhere in the rule and statute. It suggests that the first sentence clarify that the rule addresses what kinds of internet periodical publications fall under the exception.

With regard to Proposal 2, the Maine Citizens for Clean Elections expressed its support for the required identification of the broadcast station's owners and operators. The MCCE questioned the paragraph prohibiting the publication from being reimbursed by a candidate, political party or other political group. (That provision is not included in the adopted rule, for reasons discussed above.) The MCCE agrees with the last paragraph of the proposed rule, requiring 12 months of publication or a record that suggests continued publication beyond the current election cycle.

Regarding Proposal 3, the MCCE submitted comments dated July 6, 2012. The organization stated that it did not understand the necessity of the proposed prohibition on publications' acceptance of compensation from candidates, political parties, and others. The MCCE found one part of the rule to be redundant. The MCCE supported interpreting "broadcast station" to include cable television operators, programmers, and producers.

Response by Commission to comments by the MCCE

The provisions of the proposed rule which the MCCE found to be unnecessary or redundant were not adopted.

Comments by the New England Cable and Television Telecommunications Association

The New England Cable and Telecommunications Association (NECTA) recommends that the Maine press exception should apply to operators and programmers of cable television.

Response by Commission to Comments by NECTA

The adopted rule interprets the press exception to apply to cable television systems.

Comments by Michele and Joseph Greenier

Michele and Joseph Greenier commented on Proposal 1 in a letter received March 9, 2012. The Greeniers, without further explanation, indicate they object to the entirety of the then-proposed Section 7(10).

Response by the Commission to Comments by the Greeniers

The Commission has adopted a rule to provide guidance to broadcasting stations, publications, and candidates concerning how the Commission will interpret the press exemption.

Chapter 1, Section 9 – Schedule for Accelerated Reports

Factual and Policy Basis: When the Maine Clean Election Act (MCEA) program was enacted, it required traditionally financed candidates with an MCEA opponent to file additional “accelerated reports” to facilitate the matching funds component of the program. This reporting requirement was written in statute (21-A M.R.S.A. § 1017(3-B)) *and* in the Commission’s rules. Because the payment of matching funds was declared unconstitutional in the courts, earlier this year the Legislature removed the accelerated reporting requirement from the statute. Accordingly, the Commission proposes deleting the accelerated reporting schedule from the Commission’s rules, as well.

It is important to note that the elimination of the accelerated reporting requirement does not eliminate 24-hour reporting by candidates. During the last 13 days before an election, all candidates (regardless of how they are financing their campaigns) are required by statute to report contributions and expenditures of more than \$1,000 within 24 hours. (21-A M.R.S.A. § 1017(2)(D)) & 1017(3-A)(C)) This is not affected by the Commission’s rule amendment.

Comments: The Maine Citizens for Clean Elections, at the public hearing on February 28, 2012 as well as in written comments received March 12, 2012, recognized the rationale for eliminating the accelerated reporting schedule. However, they suggested that the Commission monitor the existing reporting requirements closely in the 2012 elections to see whether the public would benefit from additional reporting by traditionally financed candidates.

Response by the Commission: The Commission will monitor the adequacy of the reporting requirement during the 2012 elections and, as it has in the past, will seek the perspective of organizations, candidates, political committees, and others in developing proposed statutory amendments after the November election.

Chapter 1, Section 10(3) – Schedule for Independent Reports

Factual and Policy Basis: The current rule on the reporting schedule for independent expenditures contains four quarterly reports, a pre-election report due on the 14th day before an election for independent expenditures aggregating more than \$100 but not more than \$250 per candidate not previously reported in a quarterly report, a report for expenditures over \$250 made within the 60 days before an election, and a report for expenditures over \$100 made within the 13 days before an election. The Commission's proposed rule simplifies the reporting schedule in two ways: by eliminating the quarterly reports and by changing the deadline for the pre-election report. Quarterly reports would be replaced by a single report due on the 60th day before a primary or general election, which would disclose all independent expenditures over \$100 made more than 60 days before the election. This will still provide the public with information about those spending money to influence an election well in advance of the election. In practice, it is very unusual for independent expenditures to be made more than 60 days before a state election in Maine. The pre-election report would be due on the 11th day before the election, aligning this report with the filing schedule that already exists for PACs and party committees and reducing the filing deadline confusion that currently exists.

Also, the proposed rule would permit the filing of an independent expenditure report by e-mail or fax, provided that the Commission receives the original report within five calendar days.

Comments: The Maine Citizens for Clean Elections had no objections to the changes in the reporting schedule. However, they did raise a policy concern that the public does not receive vitally important information about the source of the funds for the expenditure. Currently, there is no requirement that this information be disclosed. The MCCE also suggested that PACs and others making independent expenditures be required to disclose large contributions in the period just before an election, as candidates are required to do.

Michele and Joseph Greenier objected to the deletion of the quarterly reporting requirement and suggested that all independent expenditures be reported quarterly. They also said that all quarterly reports must be signed by the person making the expenditure.

Response by the Commission: The policy suggestion of the MCCE (that independent spenders disclose any contributions received for purposes of the independent expenditure) cannot be addressed by the Commission in rulemaking. The content for these reports is established by statute.

The Commission declines to adopt the approach urged by the Greeniers. The proposed schedule of 60- and 11-day pre-election reports corresponds to the pattern of when independent expenditures are actually made in relation to an election. The Commission believes the rule change will produce a significant benefit from reduced confusion regarding deadlines while still providing the general public with important information about independent expenditures in a timely manner. Currently, all independent expenditure reports must contain a sworn statement by the person who made the expenditure that it was made without cooperation or coordination with the candidate.

Chapter 1, Section 13 – Reports of Membership Communications

Factual and Policy Basis: When a membership organization (*e.g.*, a labor union or a trade association) spends money on a communication to its members expressly advocating for or against a candidate, those expenses are exempt from the statutory definition of the term “expenditure.” As a result, the organizations do not need to file independent expenditure reports and these communications are not counted toward the \$5,000 threshold for the organization to qualify as a PAC.

Nevertheless, if a membership organization spends \$50 or more to promote or oppose a candidate’s election through distributing communications to its members, it may be required to file a financial report with the Commission under a special reporting requirement for membership organizations and corporations in 21-A M.R.S.A. § 1019-A. The Commission is required by 21-A M.R.S.A. § 1019-A to adopt a rule setting out a reporting schedule for membership communications.

Comments: The Maine Citizens for Clean Elections supported adopting a schedule; however, they suggested an 11-day pre-election report rather than a 3-day pre-election report.

Response by the Commission: The Commission agrees with the MCCE and has revised the rule to replace the 3-day pre-election report with an 11-day pre-election report.

First Proposal

(Multiple Topics)

Chapter 1: PROCEDURES

SUMMARY: This Chapter describes the nature and operation of the Commission, and establishes procedures by which the Commission's actions will be governed.

SECTION 1. DEFINITIONS

In addition to the definitions provided in Title 21-A, chapters 1, 13, and 14, the following definitions shall apply to the rules of the Commission, unless the context otherwise requires:

...

11-A. Influence. "Influence" means to promote, support, oppose or defeat.

SECTION 4. INITIATION OF PROCEEDINGS

...

2. Election Campaign Reporting and Maine Clean Election Act Violations

- A. **Report Review.** The Commission staff will review all reports filed pursuant to 21-A M.R.S.A., chapters 13 and 14 to verify compliance with the reporting requirements set by statute or rule. Notice of any omission, error, or violation will be given by mail to the filer and a copy of the notice and any other communication made to or from the filer relating to the problem(s) will be placed in the filer's record. The Commission staff will establish a reasonable time period for the filer to remedy any omission or error. If the filer fails to respond within that time frame, the Commission staff may extend the time period within which the filer must comply or place the matter on the agenda of the next Commission meeting, along with all documents relating to the case. Additionally, any apparent violations or occurrences of substantial nonconformance with the requirements of the law will be placed on the agenda of the next meeting.
- B. **Late Reports and Registrations.** Where required by statute, notice of failure to file a required report will be timely sent by Commission staff. When a report or registration is filed late, the Director's recommendations will be based on the following considerations:
- (1) Lateness of report or registration,
 - (2) Reason for lateness,
 - (3) Kind of report (more stringent application for pre-election reports),
 - (4) Amount of campaign funds not properly reported,

- (5) Previous record of the filer,
- (6) Good faith effort of the filer to remedy the matter; and
- (7) Whether the late filing had an effect on a certified candidate's eligibility for matching funds.

- C. ~~Reports of noncompliance with the provisions of the campaign registration and reporting laws or the Maine Clean Election Act that may come to the attention of the Commission staff from any source other than review of the reports filed will be reported to the Commission Chair.~~ Any person (as defined in 21-A M.R.S.A. §1001) may make an official complaint or request for a Commission investigation ~~or determination~~ by filing a signed written request at the Commission's office, setting forth such facts with sufficient details as are necessary to specify the alleged violation. A copy of the signed request may be filed by facsimile or by electronic mail, provided that the original signed request is submitted to the Commission. Statements should be made upon personal knowledge. Statements which are not based upon personal knowledge must identify the source of the information which is the basis for the request, so that respondents and Commission staff may adequately respond to the request. A copy of any such written request will be promptly mailed to the candidate or organization alleged to have violated the statutory requirements. The Director may conduct preliminary fact finding to prepare a matter for presentation to the Commission. The Director, in consultation with Counsel, will prepare a summary of staff findings and recommendations for inclusion on the agenda. An official request will be placed on the agenda of the next Commission meeting.
- D. An oral report of a violation, or a written request containing insufficient detail to specify the violation charged, does not constitute an official request for a Commission determination, and a person registering such a complaint will be so notified.
- E. The signature of a person authorized to sign a report or form constitutes certification by that person of the completeness and accuracy of the information reported. The use of a password in filing an electronic report constitutes certification of the completeness and accuracy of the report.

3. Lobbyist Disclosure Procedures

- A. ~~**Report Review.** The Commission staff will monitor all filings made pursuant to 3 M.R.S.A. §311 *et seq.* for timeliness, legibility, and completeness. The staff will send the lobbyist a notice of any apparent reporting deficiency, including failure to use prescribed forms. The notice will include a request that the deficiency be corrected within 15 business days of the notice. If remedy is not made, it will be noted on the agenda of the next Commission meeting. The Commission may reject reports that are incomplete or illegible.~~

Report Review. The Commission staff will review lobbyist registrations and monthly reports for compliance with disclosure requirements. The Commission staff will establish a reasonable deadline by which a lobbyist must remedy any apparent omission or error. If the lobbyist fails to respond by the deadline, the

Commission staff may extend the deadline by which the lobbyist must comply or may place the matter on the agenda of a Commission meeting. Additionally, the Commission staff may place on the agenda of a Commission meeting any substantial violation of the disclosure requirements, regardless of whether the lobbyist has remedied the violation.

- B. **Late Registrations and Reports.** Notice will be given by mail to any lobbyist whose registration, or monthly disclosure report, or annual report is delinquent is late. In the case of a late monthly report, the notice must be mailed within 7 business days following the filing deadline for the report. In the case of late annual reports and registrations, the notice must be mailed within 15 business days following the filing deadline. The notice must include a statement specifying the amount assessed. A penalty of \$100 will be assessed the lobbyist for every month that a monthly disclosure report is late and a penalty of \$200 will be assessed the lobbyist and employer for every month a registration or annual report is filed late. The Commission and its staff shall follow the notice and penalty procedures set out in 3 M.R.S.A. § 319(1). For purposes of 3 M.R.S.A. §319(1), the month will end on the 15th day of the month following the month in which a report was due. Any failure to submit a required report, registration, or penalty fee will be noted on the Commission agenda.
- C. **Suspensions.** The Commission may suspend any person from lobbying who fails to file a required report or pay an assessed fee. A notice of the suspension must be mailed to the lobbyist by U.S. Certified Mail within three days following the suspension. Reinstatement will occur on the date the required report or payment is received in the Commission office. A notice of the reinstatement must be mailed to the lobbyist by U.S. Certified Mail or given directly to the lobbyist within three days following receipt of the required report or payment.
- D. **Request for Penalty Waiver.** A lobbyist may request a waiver of any late penalty the lobbyist incurs. The request must be made in writing to the Commission and must state the reason for the delinquency. Any such request must be noted on the agenda of the next Commission meeting. Only the Commission may grant penalty waivers.
- E. **Request for Waiver of Nonsession Reporting Requirement.** A lobbyist may request a waiver of the monthly nonsession reporting requirement set forth in 3 M.R.S.A. §317(4) if the lobbyist does not expect to be engaged in lobbying when the Legislature is not in session. The Director is authorized to provisionally grant such waivers pending approval by the Commission. Provisional waivers may be granted only where a request is properly filed, the statement properly completed, and where there is no apparent reason to doubt the statement is true. During the period in which the waiver is effective, reports will not be required. If lobbying is resumed during the period for which the waiver was granted, the lobbyist must file a monthly disclosure report for the month or months lobbying was conducted.
- F. **Faxing Duly Executed Lobbyist Registration, Reports.** Any registration or report required by 3 M.R.S.A. chapter 15 may be provisionally filed by transmission of a facsimile copy of the duly executed report to the Commission, provided that the original of the same report is received by the Commission within 5 calendar days thereafter.

4. **Matters Outside the Commission's Jurisdiction.** If the Director and Counsel are in agreement that the subject matter of a request for an investigation is clearly outside the jurisdiction of the Commission, the staff may forward the request to the appropriate authority or return it to the person who made the request, provided that the staff notifies the Commission members of the action at the next Commission meeting.

SECTION 6. CONTRIBUTIONS AND OTHER RECEIPTS

10. Funds or services received solely for the purpose of conducting activities to determine whether an individual should become a candidate are not contributions if the individual does not become a candidate. Examples of such activities include, but are not limited to, conducting a poll, telephone calls, and travel. The individual shall keep records of all such funds or services received. If the individual becomes a candidate, the funds or services received are contributions and are subject to the reporting requirements of 21-A M.R.S.A. § 1017. The amount and source of such funds or the value of services received must be disclosed in the first report filed by the candidate or the candidate's authorized campaign committee, regardless of the date when the funds or services were received, in accordance with the Commission's procedures for reporting contributions.

Funds or services used by an individual for activities indicating that he or she has decided to become a candidate for a particular office are contributions. Examples of such activities include, but are not limited to: using general public political advertising to publicize his or her intention to campaign for office; hiring staff or consultants for campaign activities; raising funds in excess of what could reasonably be expected to be used for exploratory activities; making or authorizing statements that refer to him or her as a candidate; or taking action to qualify for the ballot.

SECTION 7. EXPENDITURES

1. **Expenditures by Consultants, Employees, and Other Agents of a Political Campaign.** Each expenditure made on behalf of a candidate, political committee, or political action committee by any person, agency, firm, organization, etc., employed or retained for the purpose of organizing, directing, managing or assisting the candidate, the candidate's committee, or the political action committee must be reported separately by the candidate or committee as if made or incurred by the candidate or committee directly. The report must include the name of the third party vendor or payee to whom the expenditure was made, the date of the expenditure, and the purpose and amount of the expenditure. It is not sufficient to report only the total retainer or fee paid to the person, agency, firm, organization, etc., if that retainer or fee was used to pay third party vendors or payees for campaign-related goods and services.
2. **Expenditures by Political Action Committees.** In addition to the requirements set forth in 21-A M.R.S.A. §1060(4), the reports must contain the purpose of each expenditure and the name of each payee and creditor.

3. **Timing of Reporting Expenditures**

- A. Placing an order with a vendor for a good or service; signing a contract for a good or service; the delivery of a good or the performance of a service by a vendor; or a promise or an agreement (including an implied one) that a payment will be made constitutes an expenditure, regardless whether any payment has been made for the good or service.
- B. Expenditures must be reported at the earliest of the following events:
 - (1) The placement of an order for a good or service;
 - (2) The signing of a contract for a good or service;
 - (3) The delivery of a good or the performance of a service by a vendor;
 - (4) A promise or an agreement (including an implied one) that a payment will be made; or
 - (5) The making of a payment for a good or service.
- C. At the time the duty to report an expenditure arises, the person submitting the report is required to determine the value of goods and services to be rendered (preferably through a written statement from the vendor) and to report that value as the amount of the expenditure. If the expenditure involves more than one candidate election, the report must include an allocation of the value to each of those candidate elections.

4. ~~Advance Purchases of Goods and Services for the General Election~~

- ~~A. Consulting services, or the design, printing or distribution of campaign literature or advertising, including the creation and broadcast of radio and television advertising, contracted or paid for prior to the primary election must be received prior to the primary election in order to be considered primary election expenditures.~~
 - ~~B. If the Commission receives a complaint stating that a candidate or a committee purchased goods or services before a primary election for use in the general election, the Commission may request that the candidate or committee distinguish which of the goods and services were used in the primary election and which were used in the general election.~~
5. All campaign-related payments made with the personal funds or credit card of the candidate or an individual authorized by the candidate must be reported as expenditures in the reporting period during which the payment to the vendor or payee is made. The candidate must report the name of the vendor or payee to whom the payment was made, the date of the expenditure, and the purpose and amount of the expenditure. When the expenditure is reported, the candidate should indicate the person who made the payment by entering "Paid by [name of candidate or supporter]" in the remarks section of the expenditure schedule. It is not sufficient to report only the name of the candidate or authorized individual to whom reimbursement was made and the total amount of the

reimbursement. If a Maine Clean Election Act candidate or an individual authorized by the candidate uses his or her personal funds to make an expenditure on behalf of the candidate, the ~~campaign candidate~~ or the individual must be reimbursed the candidate within the same reporting period.

6. Multiple expenditures for bank fees and for vehicle travel may be reported in an aggregate amount, provided that the candidate or committee identifies the time period of the expenditures in the remarks section of the report.
7. When a political action committee or party committee makes an expenditure for a communication to voters for the purpose of influencing the election of a clearly identified candidate, the amount spent to influence that candidate's election must be specified on the regularly filed campaign finance report of the committee, regardless whether the communication expressly advocates for the election or defeat of the candidate. If a single expenditure influences the election of more than one candidate, the political action committee or party committee shall itemize the amount spent per candidate.
8. Payments made or obligations incurred solely for the purpose of conducting activities to determine whether an individual should become a candidate are not expenditures if the individual does not become a candidate. Examples of such activities include, but are not limited to, conducting a poll, telephone calls, and travel. The individual shall keep records of all such payments and obligations. If the individual becomes a candidate, the payments made or obligations incurred are expenditures and are subject to the reporting requirements of 21-A M.R.S.A. § 1017. Such expenditures must be disclosed in the first report filed by the candidate or the candidate's authorized campaign committee, regardless of the date when the funds were expended, in accordance with the Commission's procedures for reporting expenditures.

Payments made for activities indicating that an individual has decided to become a candidate for a particular office are expenditures. Examples of such activities include, but are not limited to: using general public political advertising to publicize his or her intention to campaign for office; hiring staff or consultants for campaign activities; raising funds in excess of what could reasonably be expected to be used for exploratory activities; making or authorizing statements that refer to him or her as a candidate; or taking action to qualify for the ballot.

9. Exception to Disclaimer Requirements for Certain Handbills, Campaign Signs, and Internet or E-Mail Communications

A. Definitions.

For purposes of this section, the following terms have the following meanings:

- (1) "Internet or e-mail communication" means any communication transmitted over the Internet, including but not limited to: sending or forwarding electronic messages; social networking; providing a hyperlink or other direct access to another person's website; creating, maintaining or hosting a website or blog; placing material on another person's website; and any other form of communication distributed over the Internet.

(2) “cost of the communication” means all disbursements of money made or obligations incurred to create, design, prepare, or distribute the communication, and the value of all goods or services which have been provided for the purpose of creating, designing, preparing, or distributing the communication.

B. Exemption for Certain Handbills, Campaign Signs, and Internet and E-Mail Communications.

(1) Under Title 21-A, chapter 13, subchapter II [§ 1014(6)], a handbill, campaign sign or Internet or e-mail communication is exempt from the disclosure requirements of § 1014 if the total cost of the communication is less than \$100 and the communication was produced and distributed independently of and without the authorization by a candidate or the candidate’s authorized campaign committee, a political party committee, a political action committee, a ballot question committee, or their agents.

(2) In determining whether a handbill, campaign sign, or Internet or e-mail communication was produced and distributed independently of and without authorization by a candidate, committee or their agents, the Commission will consider whether:

(a) the handbill, campaign sign, or Internet or e-mail communication was created, designed, prepared, or distributed at the suggestion or request of, or with the direct or indirect authorization of, a candidate or the candidate’s authorized campaign committee, a political party committee, a political action committee, a ballot question committee, or their agents;

(b) the individuals who created, designed, prepared, or distributed the handbill, campaign sign, or Internet or e-mail communication have been compensated or reimbursed for expenditures by a candidate or the candidate’s authorized campaign committee, a political party committee, a political action committee, a ballot question committee, or their agents for the purpose of influencing the candidate or ballot question election that is the subject of the communication; and

(c) at the time of the creation of the handbill, campaign sign or Internet or e-mail communication, the individuals who created, designed, prepared, or distributed the communication were required to file campaign finance reports with the Commission or to register with the Commission under Title 21-A, chapter 13.

10. Press exemption. The costs incurred in preparing or publishing a news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication are exempt from the definitions of expenditure, under Title 21-A, chapter 13, subchapters II and IV [§§ 1012(3)(B)(1) & 1052(4)(B)(1)].

This exemption applies to the costs for a "periodical publication" in electronic form distributed on the Internet that meets the following criteria:

- a. the publication either (i) has been gathering and disseminating news stories, commentaries or editorials on a variety of topics to the general public on a periodic basis for a period of at least the previous twelve months, or (ii) if it has been publishing on the Internet for a period of less than twelve months, has a record of gathering and disseminating news stories, commentaries or editorials on a variety of topics to the general public that indicates that the persons or entities who own, control and operate the publication have the intention to continue publishing on a periodic basis beyond the election cycle during which the media exemption is claimed;
- b. the names of the persons or entities who own, control and operate the publication are identified within the publication;
- c. the names of the authors, editors and other individuals responsible for the content of the publication are identified within the publication;
- d. none of the individuals or entities described in paragraphs b and c of this subsection are being compensated for or reimbursed for expenditures relating to the publication by a candidate, candidate's authorized campaign committee, political party committee, political action committee, or ballot question committee, or their agents for the purpose of influencing the candidate or ballot question election that is the subject of the news story, commentary, or editorial; and
- e. the facilities are not owned or controlled by any political party, political committee, candidate or candidate's immediate family.

~~SECTION 9. ACCELERATED REPORTING SCHEDULE~~

~~1. **General.** In addition to other reports required by law, any candidate for Governor, State Senator or State Representative who is not certified as a Maine Clean Election Act candidate under Title 21-A §1121 *et seq.*, and who has a certified candidate as an opponent in an election must comply with the following reporting requirements on forms prescribed, prepared, and provided by the Commission:~~

~~INFORMATIONAL NOTE: Title 21-A §1017 prescribes reporting requirements for candidates.~~

~~2. **Trigger Report.** Any candidate subject to this section, who receives, spends or obligates more than the primary or general election distribution amounts for a Maine Clean Election Act candidate opponent in the same race, must file with the Commission, within 48 hours of such receipt, expenditure, or obligation, a report detailing the candidate's total campaign contributions, receipts, expenditures and obligations to date. The Commission will notify all candidates who have an opposing certified candidate of the applicable distribution amounts and of the trigger report requirement.~~

3. ~~A nonparticipating candidate who is required to file a report under subsection 2 shall file no later than 5:00 p.m.:~~

A. ~~a report on the 42nd day before the date on which an election is held that is complete as of the 44th day before that date;~~

B. ~~for gubernatorial candidates only, a report on the 25th day before the date on which an election is held that is complete as of the 27th day before that date; and~~

C. ~~a report on the 18th day before the date on which an election is held that is complete as of the 20th day before that date; and~~

D. ~~a report on the 6th day before the date on which an election is held that is complete as of the 8th day before that date.~~

4. ~~**24-Hour Report.** Any candidate who is required to file a trigger report must file an updated report with the Commission reporting single expenditures of \$1,000 or more by candidates for Governor, \$750 by candidates for State Senator, and \$500 by candidates for State Representative made after the 14th day before any election and more than 24 hours before 11:59 p.m. on the date of that election. The report must be submitted to the Commission within 24 hours of those expenditures.~~

5. ~~**Filing by Facsimile or Electronic Means.** For purposes of this section, reports may be filed by facsimile or by other electronic means acceptable to the Commission, and such reports will be deemed filed when received by the Commission provided that the original of the same report is received by the Commission within 5 calendar days thereafter.~~

SECTION 10. REPORTS OF INDEPENDENT EXPENDITURES

1. **General.** Any person, party committee, political committee or political action committee that makes an independent expenditure aggregating in excess of \$100 per candidate in an election must file a report with the Commission according to this section.

2. **Definitions.** For purposes of this section, the following phrases are defined as follows:

A. "Clearly identified," with respect to a candidate, has the same meaning as in Title 21-A, chapter 13, subchapter II.

B. "Expressly advocate" means any communication that

(1) uses phrases such as "vote for the Governor," "reelect your Representative," "support the Democratic nominee," "cast your ballot for the Republican challenger for Senate District 1," "Jones for House of Representatives," "Jean Smith in 2002," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Woody," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s),

such as posters, bumper stickers, advertisements, etc. which say "Pick Berry," "Harris in 2000," "Murphy/Stevens" or "Canavan!"; or

- (2) is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate.

C. "Independent expenditure" has the same meaning as in Title 21-A §1019-B. Any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents is considered to be a contribution to that candidate and is not an independent expenditure.

3. **Reporting Schedules.** Independent expenditures must be reported to the Commission in accordance with the following provisions:

A. Independent expenditures aggregating in excess of \$100 per candidate per election made by any person, party committee, political committee or political action committee must be reported to the Commission in accordance with the following reporting schedule, unless required to be reported according to the schedule in paragraph B.

~~(1) Quarterly Reports. Quarterly reports must be filed by 5:00 p.m. on:~~

~~(a) January 15th and be complete as of December 31st;~~

~~(b) April 10th and be complete as of March 31st;~~

~~(c) July 15th and be complete as of June 30th; and~~

~~(d) October 5th and be complete as of September 30th.~~

~~(1-A) 60-Day Pre-Election Report. A report must be filed by 5:00 p.m. on the 60th day before the election is held and be complete as of the 61st day before the election.~~

~~(2)(1-B) 11-Day Pre-Election Report. A report must be filed by 5:00 p.m. on the 14th 11th day before the election is held and be complete as of that day the 14th day before the election.~~

If the total of independent expenditures made to support or oppose a candidate exceeds \$100, each subsequent amount spent to support or oppose the candidate must be reported as an independent expenditure according to the schedule in this paragraph or paragraph B.

B. Independent expenditures aggregating in excess of \$250 per candidate made during the sixty days before an election must be reported within two calendar days of those expenditures.

[NOTE: WHEN THE CUMULATIVE AMOUNT OF EXPENDITURES TO SUPPORT OR OPPOSE A CANDIDATE EXCEEDS \$250, AN INDEPENDENT EXPENDITURE REPORT MUST BE FILED WITH THE COMMISSION WITHIN TWO DAYS OF GOING OVER THE \$250 THRESHOLD.]

FOR EXAMPLE, IF AN INDIVIDUAL, ORGANIZATION OR COMMITTEE MAKES THREE EXPENDITURES OF \$100 IN SUPPORT OF A CANDIDATE ON SEPTEMBER 8TH, SEPTEMBER 13TH, AND SEPTEMBER 29TH, FOR AN ELECTION ON NOVEMBER 6, 2012, AN INDEPENDENT EXPENDITURE REPORT MUST BE FILED BY OCTOBER 1ST. THE THIRD EXPENDITURE OF \$100 MADE THE CUMULATIVE TOTAL OF EXPENDITURES EXCEED \$250 AND THE TWO-DAY REPORTING REQUIREMENT WAS TRIGGERED ON SEPTEMBER 29TH. THE REPORT MUST INCLUDE ALL THREE EXPENDITURES.

AFTER SEPTEMBER 29TH, IF THAT INDIVIDUAL, ORGANIZATION OR COMMITTEE MAKES ADDITIONAL EXPENDITURES TO SUPPORT THAT CANDIDATE, THE REQUIREMENT TO FILE AN INDEPENDENT EXPENDITURE REPORT WITHIN TWO DAYS WILL APPLY ONLY IF THE CUMULATIVE TOTAL SPENT AFTER SEPTEMBER 29TH EXCEEDS \$250. FOR EXAMPLE, IF THE INDIVIDUAL, ORGANIZATION OR COMMITTEE MAKES TWO PAYMENTS OF \$200 TO PROMOTE THE CANDIDATE ON OCTOBER 8TH AND OCTOBER 13TH, ANOTHER INDEPENDENT EXPENDITURE REPORT MUST BE FILED BY OCTOBER 15TH DISCLOSING THOSE TWO EXPENDITURES.]

Independent expenditures aggregating in excess of \$100 per candidate made after the 14th day before an election must be reported within one calendar day of those expenditures.

For purposes of the filing deadlines in this paragraph, if the expenditure relates to a legislative or gubernatorial election and the filing deadline occurs on a weekend, holiday, or state government shutdown day, the report must be filed on the deadline. If the expenditure relates to a county or municipal election, the report may be filed on the next regular business day.

- C. Reports must contain information as required by Title 21-A, chapter 13, subchapter II (§§ 1016-1017-A), and must clearly identify the candidate and indicate whether the expenditure was made in support of or in opposition to the candidate. Reports filed after the eighth day before an election must include the following information:
1. the date on which the person making the expenditure placed the order with the vendor for the goods or services;
 2. the approximate date when the vendor began providing design or any other services in connection with the expenditure;
 3. the date on which the person making the expenditure first learned of the total amount of the expenditure; and
 4. a statement why the expenditure could not be reported by the eighth day before the election.

- D. A separate 24-Hour Report is not required for expenditures reported in an independent expenditure report.
- E. An independent expenditure report may be provisionally filed by facsimile or by electronic mail to an address designated by the Commission, as long as the facsimile or electronic copy is filed by the applicable deadline and an original of the same report is received by the Commission within five calendar days thereafter.

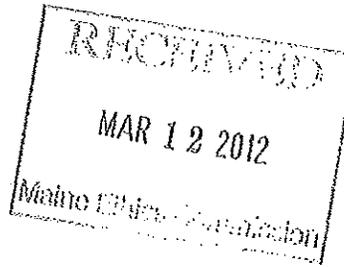
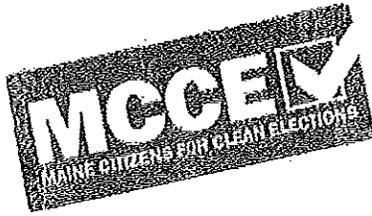
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SECTION 13. REPORTS OF COMMUNICATIONS BY MEMBERSHIP ORGANIZATIONS OR CORPORATIONS

When a membership organization or corporation is required under 21-A M.R.S.A. § 1019-A to file a report of a communication to members or shareholders, the organization or corporation must file the following reports by 11:59 p.m. on the following deadlines:

1. A report must be filed on the 42nd day before the election is held and be complete as of the 49th day before the election.
2. A report must be filed on the 3rd day before the election is held and be complete as of the 5th day before the election.
3. A report must be filed on the 42nd day after the election is held and be complete as of the 35th day after the election.

First Round of Comments



March 10, 2012

Jonathan Wayne
 Executive Director
 Commission on Governmental Ethics and Election Practices
 135 State House Station
 Augusta, ME 04333-0135

Re: Proposed Rule 2012-P10 and 2012-P11

Dear Director Wayne:

On behalf of Maine Citizens for Clean Elections ("MCCE") we appreciate the opportunity to submit these comments on proposed rules number 2012-P10 and 2012-P11.

MCCE is a nonpartisan organization that has been advocating for the full and effective implementation of the Maine Clean Election Act since it was passed in 1996. As part of its mission MCCE works for reform that is inclusive, fair, just, consistent with constitutional values, fiscally responsible, and workable.

General Comments:

We believe that the following principles should guide the Commission whenever it considers possible changes to the rules governing the MCEA system and other campaign finance and reporting regulations:

- Keep true to the spirit of the laws, whether passed by the legislature or by initiative;
- Regarding the amount and timing of disclosure, be guided by the strong public interest in access to all information at the time and in the format when it is of the most use to the public;
- Keep the rules clear to help ensure high compliance;
- Make every effort to ensure that changing technologies and the evolving use of new media don't create gaps in the disclosure system;
- Beware of the unprecedented national trend to thwart the principles of disclosure and cloak more and more campaign activity in secrecy.

Member Organizations

AARP Maine, Common Cause Maine, EqualityMaine, League of Women Voters of Maine, League of Young Voters, Maine AFL-CIO, Maine Council of Churches, Maine People's Alliance/Maine People's Resource Center, Maine State Employees Association/SEIU Local 1989, Maine Women's Lobby, NAACP-Portland, Sierra Club Maine Chapter

P.O. Box 18187, Portland, ME 04112 ♦ info@mainecleanelections.org

Jonathan Wayne
March 9, 2012
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Specific Comments:

1. Reporting Schedule for Independent Expenditures.

We have no objection to replacing the quarterly reports with a 60-day pre-election report, since there are few if any independent expenditures during the rest of the campaign cycle. We also do not object to moving the reporting deadline from 14 days to 11 days for clarity and simplicity.

Our single greatest concern with the current reporting system for independent expenditures is that the public often does not receive information about the true source of the funds for the expenditure – information which we believe is vitally important to an informed public.

We are not suggesting that there is a need for additional reporting when a single person makes an expenditure from his or her own funds, or when a committee makes an expenditure from a single pool containing funding commingled from a variety of sources. When, however, a person or committee is acting as a conduit for a contributor who has earmarked their contribution to be spent in a particular way, the public has an interest in knowing the true source of the funds and the nature of the earmarking. Without this, the disclosure of the expenditures alone is hollow and even misleading. We would ask that the rules regarding accelerated reporting of independent expenditures address these scenarios so that the public has information not only about the money that is spent but the source of the funds – at least where the funds can be traced to one source.

We believe accelerated contribution reporting by PACs and those making independent expenditures is feasible. Under current rules, candidates must engage in accelerated reporting of large contributions toward the end of a campaign. There is no reason this rule could not be applied to others engaged in electoral advocacy.

2. Expanding the “press exemption” to internet publishers of news and commentary.

We support a clear but limited bona fide press exception that is appropriate for the variety of new media now common in campaigns.

The draft rule sets forth a five-part test for determining whether an internet-based publication should be entitled to the press exemption. We believe the five-part test is generally appropriate, except under part “d.” we do not believe that the “purpose” test should be required. If the person or entity publishing the item is being compensated or reimbursed by a candidate or committee, etc., that should be enough. There is no need to also prove that the purpose was to influence an election.

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As a matter of drafting, the first sentence of paragraph 10 seems redundant and potentially confusing. Those items are already exempt by function of the definition of expenditure elsewhere in the rule (and statute). For clarity this section of the rules should be limited to laying out the test for what kind of "internet periodical publications" are entitled to the expenditure exception.

3. "Testing the waters" provisions for "contributions" and "expenditures".

Where a contributor gives a gift for the purpose of influencing the election, it is a "contribution" under the current statutory definition. 21-A M.R.S.A. 1012 (2)(A)(1). Once that occurs, the Commission has authority to treat the recipient as a "candidate" and apply all the limitations and reporting requirements in the law.

We are concerned that candidates are tempted to "game the system" – side-stepping contribution limits and reporting requirements on the grounds that the donor supposedly is not intending to influence the election, or the recipient supposedly is still only exploring a possible candidacy. While there is some subjectivity in the test, there is nothing about the exploratory phase that makes it more difficult to discern the donor's intent than it would be later in the campaign. Thus, complaints that the test is unclear should be taken with a grain of salt.

As the Commission considers a new rule for exploratory activities, we would suggest that reporting requirements and contribution limits may be analyzed separately. While we think there is some rationale for waiving campaign finance reporting requirements during the "exploratory" or "testing the waters" phase (especially when a person ultimately chooses not to run for office), we do not see any rationale for waiving contribution limits. Simply put, we think contribution limits should apply during all phases of the campaign – even the earliest. And we think there is adequate authority for considering any gift to a person that relates to that person's possible candidacy to be a "contribution" subject to the limits – regardless of when that gift is received.

For reporting requirements, we would favor a "bright line" test. For purposes of clarity, we would suggest that the Commission establish a dollar amount of campaign finance activity beyond which reporting is necessarily required. This is preferable to the factor set forth in the draft rule – "what could reasonably be expected to be used for exploratory activities". There should be different dollar amounts for House, Senate and Gubernatorial campaigns. The seed money amounts in the MCFA might provide a good guide to what these exploratory amounts should be.

Jonathan Wayne
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4. Disclaimer exemption for certain expenditures less than \$100 made independent of any candidate or campaign.

We support this rule and offer only a few comments.

First, rather than a new definition of "independent," perhaps the definition set forth in Rules Ch. 1 at Section 10 (2)(C) could be used. Although the context is somewhat different, there may be some value in having only one definition to which all stakeholders could become accustomed.

Second, perhaps the rule could be redrafted with greater clarity and simplicity. For example:

No disclaimer is required of any handbill, campaign sign or internet or email communication costing less than \$100 if it is produced and distributed without any suggestion, request, direct or indirect authorization or compensation from any candidate or committee or agent thereof.

This exemption does not apply to any handbill, campaign sign or internet or email communication made by any person who is required to register or file campaign finance reports with the Commission.

5. Repeat of accelerated reporting schedule for non-MCEA candidates.

We acknowledge the rationale for changing this reporting requirement in light of the elimination of matching funds, but we note that the information previously reported for purposes of calculating matching funds also had value to the general public. We do not propose any changes to the draft rule, but ask that the existing reporting requirements be closely monitored in the 2012 election cycle to determine whether the public would benefit from any additional reporting by privately funded candidates in the future.

6. Membership Communications reporting schedule.

We support the adoption of a schedule, but ask whether it should be parallel with the other reporting requirements which are triggered 11 days before the election rather than three days before as proposed.

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7. Circulation Form for Qualifying Contributions.

We have no objection to giving Commission staff more flexibility in devising a clear and straightforward qualifying contribution form. We believe, however, that there is an important public purpose served by verifying whether the circulator was paid or a volunteer, and that the forms were signed in the circulator's physical presence. Eliminating those requirements would be a concern for us. At the very least, if this revision is approved we would appreciate the opportunity to work with the staff on a revised form.

8. Using MCEA Funds for Vehicle Travel Reimbursement.

We support and welcome this change as it will enhance transparency regarding the use of MCEA funds for travel – one area where record keeping and reporting are somewhat more complicated compared to the more straightforward purchase of goods and services.

Thank you again for considering these comments. We look forward to continuing to work with you and the Commission.

Sincerely yours,



John Brautigam



121 Middle Street, Suite 301
Portland, Maine 04101
T/ (207) 774-5444
F/ (207) 774-1103
www.aclumaine.org

March 9, 2012

Walter F. McKee, Chair
Maine Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, Maine 04333

Re: Comments on Proposed Rulemaking

To the Commission:

On behalf of the ACLU of Maine, I wish to first extend our thanks for the invitation to comment on your proposed rules governing internet publishers and low-cost expenditures. As you are probably aware, I represent Dennis Bailey in litigation, along with ACLU of Maine President John M.R. Paterson, Esq., against the Commission relating to these very issues. A more detailed elaboration of our views on the need to protect internet news publishers and the right to anonymous speech can be found in the court filings in that case. I will confine my comments here, to the extent possible to a response to the Commission's actual proposal.

First, we should note our approval that the Commission is interested in updating its rules and practices to take account of the important role that internet communications plays in the creation and distribution of ideas, including political ideas. As your staff has no doubt shared, the Federal Election Commission engaged in a similar process in 2006, which led the development of its own set of rules and guidance regarding internet speech.

Second, while the internet is a new medium with new challenges and opportunities for both users and regulators, the U.S. Supreme Court has made it clear that "there is no basis for qualifying the level of First Amendment scrutiny that should be applied to this

Because Freedom Can't Protect Itself

medium.” *Reno v. ACLU*, 521 U.S. 844, 870 (1997). In other words, the government may not impose burdens on internet writers and publishers that are not imposed on those who communicate through traditional media.

Third, the Commission’s proposal does not go far enough in satisfying this mandate. Maine currently exempts the publication of news stories, editorials, and commentary when they are published through radio, television, newspapers, magazines and other periodicals. 21-A M.R.S.A. §§1012(3)(B)(1) and 1052(4)(B)(1). The Commission proposes to extend that exemption to “periodical publication” in electronic form, but only subject to a narrow set of requirements that are not applied, for example, to news publications made over radio. Nothing in Maine law requires a newspaper or television station to publish for a year before receiving an exemption, nor should that requirement be applied to internet publishers. Also, there is no requirement that the author or publisher of a magazine identify themselves or avoid pseudonyms, and Maine should not make that requirement of internet publishers.

Fourth, when it comes to the regulation of internet publication, the Commission would do well to begin with the proposition acknowledged by the FEC: “the vast majority of Internet communications are, and will remain, free from campaign finance regulation.” Internet Communications, 71 Fed. Reg. 18589 (2006). Regulation of speech on the internet is fraught with peril, for both the speakers themselves, who are often caught up in regulations that they do not understand, and for regulators, who should anticipate finding their efforts challenged in court.

Fifth, the reason why caution and restraint in the regulation of internet speech makes the most sense goes to the heart of the Commission’s mission: insuring that political debates and elections are conducted fairly. The internet is, perhaps, the greatest tool for making our elections more fair. Candidates and commentators alike can widely publish their views at extremely low cost, which mitigates the need for high-dollar fundraising. And, those publications are passively available to the general public—the public can access only the websites that it wants and can avoid being subjected to unwanted or unrequested

publication. The Commission should do more to encourage internet publication, and more confusing regulation is not the answer. In light of this, the ACLU of Maine recommends that proposed Chapter 1, Section 7(10): Press Exemption be rewritten to make it clear that news stories, editorials and commentary published on the internet is exempt from the definition of "expenditure" and "contribution".

Six, while a number of courts have upheld the constitutionality of "paid for" disclosure requirements in facial attacks, the courts have made it clear that those requirements are still potentially subject to as-applied First Amendment challenges. Disclosure requirements directly interfere with a person's right to publish anonymously or under a pseudonym. Anonymous and pseudonymous speech have been a part of American political discourse since before the founding period, and the Supreme Court has repeatedly observed that a person generally has the right to decide for themselves whether or not to disclose their name. For example, in *McIntyre v. Ohio*, the Supreme Court stated:

[A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

514 U.S. 334, 341-42 (1995).

Anonymous speech makes some people uncomfortable (especially the subject of such speech). But that discomfort is the price we pay to live in a country where people decide

for themselves what to say and what to believe, as free as possible from government involvement in the matter. The Supreme Court in *McIntyre* went on to note that, "Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent." *Id.* at 356.

Seventh, the government's interest in requiring disclosure diminishes as the dollar amount of the expenditure diminishes, and at some point the government's interest is outweighed by the individual's interest in anonymity. Among the government's interests that support disclosure requirements are the prevention of corruption and the appearance of corruption. The ACLU of Maine believes that it is exceedingly unlikely that any political candidate would be corrupted by an independent expenditure of less than \$1000. That amount, rather than \$100 proposed and included in current law, seems like a much more reasonable threshold for subjecting an individual's speech to government regulation. In the recent litigation between the Commission and the National Organization for Marriage, the amount in question was more than \$1 million. The ACLU of Maine believes that the lower-cost speech can, and should, be left to the marketplace of ideas to regulate.

If there is anything further that the ACLU of Maine can provide to assist in your deliberations, please do not hesitate to ask.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Zachary L. Heiden', with a stylized flourish at the end.

Zachary L. Heiden, Esq.

Legal Director



MPA Maine Press Association

March 12, 2012

VIA E-MAIL & HAND DELIVERY

Mr. Jonathan Wayne
Executive Director
State of Maine
Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, ME 04333

Re: Maine Press Association Comments on Proposed Rule Amendments to Chapters 1 and 3 of the Commission's Rules

Dear Jonathan:

The Maine Press Association provides these comments on the proposed rule amendments to Chapters 1 and 3 of the Rules of the Commission on Governmental Ethics and Election Practices ("Ethics Commission"). The MPA, representing the state's newspaper industry, consists of more than 40 weekly and daily papers across the state.

In Maine campaign finance law, "news media which periodically publish news stories, editorials, or commentaries are exempt from campaign finance reporting requirements." Specifically, sub-section 10 of Section 7 of Chapter 1 proposes a rule interpreting this "press exception" to the definition of "expenditure" in Ethics Commission rules, particularly with respect to Internet publishers.

The MPA supports this clarification of the statute. However, we also propose that some language regarding the creation of original content be inserted into the definition of "periodical publication." Gathering and disseminating news articles is not the same as creating your own, and the creation of content -- in whatever form -- is the core definition of the "press." The MPA suggests that language to the effect that original news content must be created by and attributed to the press organization in order to qualify for the "press exception" (i.e. no re-writing press releases). Specifically, the rule should have a minimum percentage of original content requirement—e.g. 25%.

Therefore, the MPA suggests the following new criterion in Chapter 1, Section 7, sub-section 10:

"the publication must be composed of at least 25% original content;"

Thank you for the opportunity to provide comments on these proposed Ethics Commission rule amendments.

Sincerely,

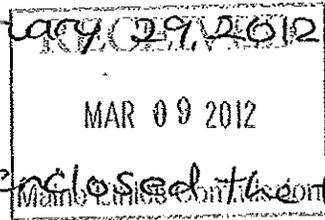
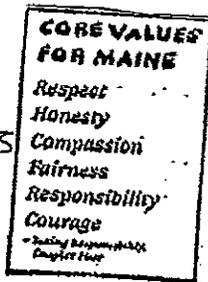
/s/

Michael J. Dowd,
Editor-in-Chief, Bangor Daily News
President, Maine Press Association

To: Commission on Governmental Ethics and Election Practices

Re: Invitation to Comment on Proposed Rule Amendments

Public Hearing held on Wednesday, February 29, 2012
at 9:00 am. under Agenda Item #4



As Concerned Citizens, we have enclosed the following comments:
Chapter 1: SECTION 4. INITIATION OF PROCEEDINGS

2 C. "Any person may make an official complaint

① Add: and/or request for an Audit for a Commission investigation...

"A copy of the signed request may be filed by facsimile or by

② Cross off: electronic mail, because e-mails are not included in the files and Agendas, and e-mails don't include signatures, unlike a fax is signed and telephone number is disclosed. There have been secret, undisclosed emails, between Executive Director and Lawfirm which the content is unethical. All previous e-mails must be in candidate files and disclosed under FOA and the public's right to know.

③ Add: The Ethics Commission must never destroy faxes, as this violates the Freedom of Access laws. It was explained, this happened in the Candidate Katz investigation, that the fax was destroyed.

④ Add: The candidate(s) shouldn't be entitled to the complaint, until after all the interviews are conducted by the Executive Director and the staff. The interviews must be documented in writing, including questions asked, to avoid past errors. The interviews must include: Candidate, Campaign Staff, Treasurer, Vendors and Complainant (not excluded, as in our complaint.) All interviews must be included in the investigation and Agenda, as public information (not hidden from the public).

⑤ Add: The staff must disclose their names and signatures, regarding Findings of Fact. The

To: Commission on Governmental Ethics and Election Practices
(cont)

Findings of Fact must be based on facts, not fabrications by the candidate, to get away with violations of the MCEA. The Executive Director must fully investigate complaints, based on the merits and proof provided.

⑥ "The Director may conduct."

Cross off: preliminary

fact finding.

Add: for

presentation to the Commission."

⑦ "The Director, in consultation with Counsel, will prepare a summary of staff findings and recommendations"

Cross off: for inclusion

Add: "with 100% full disclosure of the investigation on the Agenda, for the public's right to know."

⑧ Add: In requests for investigations, where there are direct conflicts of interest with the Chair and/or members of the Commission, the individual as an obligation to recuse themselves immediately on the record and inform the Executive Director of recusal in writing. If the Chair and/or members of the Commission have direct conflicts of interest (i.e. their clients or business partners) they must recuse themselves. The remaining Commissioners must appoint an Interim Chair until the investigation is completed, to prevent conflicts of interest.

2E ⑨ Cross off: "The signature of a person to"

Add: The Treasurer and Candidate must sign all Campaign reports, for completeness and accuracy. There must be a hard copy of all reports, in the candidates files, for public inspection.

To Commission on Governmental Ethics and Election Practices (cont)

2E ⑨ cont

Cross off: the rest of 2E.

Additional Information:

The campaign finance reports must be physically signed by the Treasurer and the Candidate, within 5 days after emailed to the Commission. The purpose for signing reports is to hold the Treasurer and candidate jointly responsible for the accuracy of the reports. This would prevent the practice of appointing a Treasurer in name only, with no intention of the Treasurer filing the campaign reports. This would assist the Ethics Commission in determining the candidates who are filing their own reports, as the Treasurer. It would assist in enforcing the new rule that candidates can't act as their own Treasurer. In some past investigations, Treasurers were not interviewed or required to attend Commission meetings for violations of MCEA. Treasurers must be held accountable for campaign reports, including testifying at the Ethics Commission, so both the Candidate and Treasurer are held accountable for violations, including both being fined, if violations have occurred. How can this Commission stop violations of MCEA, if you don't hold Treasurers and Candidates accountable and responsible for filing false finance reports? The MCE funds are the people's money and the public expects the Commission to enforce its rules and laws, in every investigation.

3. Lobbyist Disclosure Procedures

A. Report Review. The Commission staff will review lobbyist registration

Cross off: and "monthly reports"

Add: and annual reports

③

To: Commission on Governmental Ethics and Election Practices
(cont)

"for compliance with disclosure requirements..."

"The Commission staff will establish a reasonable deadline

Add: of 15 days

which a lobbyist must remedy any apparent omission or error. If the lobbyist fails to respond by the deadline,

Cross off: the Commission staff may extend the deadline by which the lobbyist must comply or may place the

Add: it will be on the agenda of the next Commission meeting, with fines for the violation.

Cross off: "Additionally, the Commission staff... remedied the violation."

Additional Information: If a lobbyist refuses to comply with the first deadline, chances are they won't comply with the second deadline either. A deadline means a time certain, not keep extending the deadline, until the lobbyist decides to comply.

Add: Lobbyists must sign a hard copy of all reports and mail to Ethics Commission, within 5 days of filing reports. As a matter of public record, any lobbyist who resigns must do so in a written statement to the Ethics Commission, the moment they stop lobbying, (not three months later). A phone call is not acceptable notice, it must be in writing. No lobbyist may be hired or appointed as head of any State Agency.

B. Late Registrations and Reports

"Notice will be given by mail to any lobbyist who registration

Cross off: or

Add, monthly disclosure reports or annual report

To: Commission on Governmental Ethics and Election Practices
(Cont)

is late"

Add: A penalty of \$200.00 will be assessed for first month late and \$300.00 for each month afterwards that reports are late.

Additional Information: It must be specified in the rules what the penalties will be if they choose to file late reports. If the penalty is not specifically stated in the rules, then what incentive do lobbyists have to file reports in a timely manner? This Commission waives too many penalties for violations. It sends a strong message that the Ethics Commission is not enforcing the MCEA and they lose credibility and the public's trust. Lobbyists are professional, well paid individuals who must follow the rules and the laws. The role of this commission must be to encourage good behavior and stop violations of the MCEA. By the Commission having its own penalties, this goes directly against the intent of "clean elections" to be clean. In addition, the Lobbyists are praised at the legislature for their institutional knowledge, but we understand they have to be reminded to file their reports on time, at the Ethics Commission. Lobbyists are professionals and they should need reminding to file reports on time, as this is a waste of time and resources of state money, especially in these tough, economic times.

C. Suspensions. "The Commission may suspend...
Cross off: report or pay an assessed fee.

Add: all reports and annual report or pay a fine.

To: Commission on Governmental Ethics and Election Practices (cont)

F. Faking Duly Executed Lobbyist Registration Reports

"Any registration or report required by 3 MRSA Chapter 15 may be provisionally filed by transmission of a facsimile copy

Add: and backed up in the U.S. Mail by an original signed and dated reports and annual reports, to the Commission within 5 days.

SECTION 6 CONTRIBUTIONS AND OTHER RECEIPTS

10. Cross off: "Funds or services received solely for the purpose of conducting activities to determine whether an individual should become a candidate are not contributions if the individual whether an individual should become a candidate are not contributions... accordance with the Commission's procedure for reporting contributions."

... Cross off: "Funds or services used by an individual for activities indicating that he or she has decided... as a candidate or taking action to qualify for the ballot."

Add: Any funds or services used by a candidate whether they run for office or not, is considered a contribution and must be reported in campaign finance reports.

Additional Information: The moment candidates collect money, they have 5 days to report it to the Ethics Commission. Then this Section 6 should be identical. By taking money, you make a commitment to run for office.

TB: Commission on Governmental Ethics and Election Practices
(cont)

SECTION 7. EXPENDITURES

1. "Expenditures by Consultants, Employees, and other Agents of a Political Campaign. Each expenditure made on behalf of a candidate, political committee or... or assisting the candidate"

Cross off, the candidates committee,

Add: and

"or the political action committee must be reported separately by"

Cross off: candidate

Add: Treasurer

"or incurred by the candidate or committee directly,

Cross off "the report must include the name of the third party vendor... or payee for campaign-related goods and services,

Add: Section 7 1 A as follows:

All expenditures for candidates must be made exclusively by the Candidate and reported to the Treasurer, immediately. No third party vendors are allowed.

Additional Information:

No candidate should go 100 miles out of their District, to purchase political signs, by a Vendor, to avoid paying sales taxes, to the State of Maine. There must be no vendors involved in designing signs and/or traveling thousands of miles for primary and general election, for free. It gives an unfair advantage, to these candidates

To: Commission on Governmental Ethics and Election Practices
(cont)

Who deliberately circumvent the Maine Clean Election laws and financially it saves these candidates thousands of dollars in campaign related goods and services and cheats the taxpayers of Maine by not paying sales taxes. These practices gives an unfair advantage, over the opponents who follow the MCEA and pay sales taxes on goods and services. The moment the Ethics Commission is notified, in writing that sales taxes are not being paid, in any campaign and/or campaign finance reports, the Commission must request the Treasurer(s) to amend the campaign finance reports, to correct violations. In addition, the Ethics Commission must contact the Maine Revenue Service to report non-payment of sales taxes, in any campaign and obtain proof that the sales taxes are paid to Maine Revenue Services, by proof of cancelled check.

3 Timing of Reporting Expenditures

Add: Under A & B: Candidates must not pick up any order without paying for it. If sales taxes are not on the Invoice, then immediately request an amended Invoice, prior to paying for goods and/or services, to insure sales taxes are paid. All candidates must sign invoices, as proof of delivery.

Additional Information: This will prevent candidates from claiming they didn't know sales taxes were

To: Commission on Governmental Ethics and Election Practices
(cont)

paid for campaign signs, in previous election.

4. Advance Purchases of Goods and Services for the General Election

This section has been entirely crossed off. We object to this, because it will allow candidates to purchase goods in one campaign (i.e. primary), to use in the general election. We are requesting this section to be reinstated.

6. Cross off: this entire section

Add: All expenditures, including bank fees and travel must be paid in both the primary and general election, not at the end of the campaign. There are candidates who wait until the end of the campaign and attempt to use up all of the campaign funds by fudging the travel log, to pay themselves when in fact, they are paying their volunteers (without naming them in campaign reports). When the Ethics Commission finds that travel is not accounted for as campaign expense (due to lack of documentation), then candidates must reimburse the Ethics Commission. When the Auditor determines mileage is not authorized, the candidate must return the Clean Elections money, no matter who the candidate is.

To: Commission on Governmental Ethics and Election Practices (cont)

8. Cross off: The entire two paragraphs

Add: All money expended for political office is construed as an expenditure, whether a candidate ultimately runs or not for public office, within 5 days.

Additional Information: Within 5 days of

collecting signatures and donations, candidates must report this activity to the Ethics Commission. This is no different than what is already in the rules.

9. Exception to Disclaimer Requirements for Certain Handbills, Campaign Signs and Internet or E-Mail Communications

Cross off: The entire Section 9 A & B

10. Press Exemption

Cross off: The entire Section 10

Section 10 REPORTS OF INDEPENDENT EXPENDITURES

3. Reporting Schedules

(1) Quarterly Reports

We object to crossing off Quarterly Reports and request that this section be reinstated.

Cross off: (1-A) and (1-B) and paragraph

below it regarding independent expenditures

Additional Information: Quarterly reports assure that receipts won't be lost and the public's right to know regarding expenditures throughout the campaign.

To: Commission on Governmental Ethics and Election Practices (cont)

Add: All independent expenditures must be reported Quarterly and signed and dated by the individual who made the expenditure.

Chapter 3:

Section 6. LIMITATIONS ON CAMPAIGN EXPENSES

A. certified candidate must:

1. "Limit the candidates campaign expenditures and obligations to the applicable Clean Election Act Fund distribution amounts"

Add: and must not overspend MCE funds.

5. Cross off: This section must be crossed off After an election is over, there is no need to spend anymore of the taxpayers money.

Add: Candidates may use their own money to send thank you notes.

Section 7. RECORD KEEPING AND REPORTING

1. Cross off: Participating and Certified

Add: All

"candidates and their treasurers must comply with applicable record keeping requirements."

Add: The commission must require the return of MCE funds, under Title 21 -A.

B. Meal Expenses

Cross off: This section must be crossed off.

C. Vehicle Travel Expenses

Add (at the very end) "expenses for which reimbursement are (11) made" on Mandatory Travel Log.

To: Commission on Governmental Ethics and Election Practices (cont)

C. Vehicle Travel Expenses (cont)

(1) Amount of Reimbursement

Cross off: The entire Section 1.

Add: Reimbursement must be the standard rate prescribed by the State of Maine. A volunteer is only entitled to \$100.00 reimbursement, in the primary and \$100.00, in the general election.

(2) Contents of Records. "For each trip for which reimbursement is made, a record must be maintained showing the

Add: mileage start and end odometer reading.

The mileage must be maintained in the mandatory mileage log, with

4 the dates of travel, the number of miles traveled, ... The person seeking the reimbursement must have recorded the details of the campaign travel

Add: on the same day, for accuracy of the records.

Cross off: contemporaneously with the travel or within two calendar days afterward.

Add: The candidate and the Treasurer must sign the Travel Log, as proof of accuracy, of the record.

2. Reporting by Participating and Certified Candidates.

A. General.

Cross off: Participating and certified candidates

Add: All candidates must go by their real names,

"and must comply with applicable reporting..."

To: Commission on Governmental Ethics and Election Practices (cont)

In Conclusion, we have enclosed our recommendations, to the Ethics Commission, to strengthen the MCEA. Our concerns are that there are candidates, especially those in the last election cycle, who are not complying with the Maine Clean Election Act, are overspending and not properly documenting mileage on the Travel Log. We contend the travel log must be mandatory and the Odometer Reading (start and end) should be recommended, it should be required. As a state, we must be frugal with the taxpayer's money, to protect the integrity of clean elections. For many years, the Ethics Commission used to be extremely strict, in enforcing the laws and rules. A case in point is the Chris McCarthy case, in which an Independent was fined \$10,000 (approximately), but in the last few years, candidates appear to make their own deals and a \$100.00 fine is reduced 50% to \$50.00. This sends the message to candidates that you can break as many laws as you want and the maximum fine is \$50.00. There are candidate(s) that should reimburse the Ethics Commission for overspending, not paying taxes (sales taxes) and unaccountable reimbursement of travel and the Commission refuses to do their job. By not enforcing the MCE Act and rules, it sends the wrong message, that the Ethics Commission doesn't enforce the Act. It's time the Ethics Commission, enforces the MCEA and does their job, for the people of Maine.

(13)

Concerned Citizens,
Michele Greenier
Joseph Greenier

Second Proposal

(Press Exception)

94-270 COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES

Chapter 1: PROCEDURES

SUMMARY: This Chapter describes the nature and operation of the Commission, and establishes procedures by which the Commission’s actions will be governed.

SECTION 7. EXPENDITURES

...

10. Press exemption. In order for the costs of preparing and disseminating a news story, commentary, or editorial to be exempt from the definitions of expenditure under the press exemption [§§ 1012(3)(B)(1) & 1052(4)(B)(1)], the following criteria must be met:
- a. the names of the persons or entities who own, control and operate the broadcasting station or publication are identified within the publication or otherwise made known to the public;
 - b. none of the individuals or entities described in paragraph a of this subsection is being compensated for or reimbursed for expenditures by a candidate, candidate’s authorized campaign committee, political party, political action committee, or ballot question committee, or their agents, except in exchange for providing advertising time or space to the candidates or committees; and
 - c. the broadcasting station or publication is not owned or controlled by any political party, political committee (including a candidate’s authorized campaign committee, political action committee or ballot question committee), candidate or candidate’s immediate family.

In addition to the above criteria, to qualify as a periodical publication, including one in electronic form on the Internet, or a newspaper or magazine, a publication (i) must have been disseminating news stories, commentaries or editorials on a variety of topics to the general public on a periodic basis for at least the previous twelve months, or (ii) must have a record of disseminating news stories, commentaries or editorials on a variety of topics to the general public that objectively indicates that the publication will continue to be published on a periodic basis beyond the election cycle during which the press exemption is claimed.

Second Round of Comments



May 11, 2012

Jonathan Wayne
Executive Director
Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, ME 04333-0135

Re: Proposed Rule 2012-P10 and 2012-P11

Dear Director Wayne:

On behalf of Maine Citizens for Clean Elections ("MCCE"), thank you for the opportunity to submit these additional comments on the "press exemption" language circulated last month.

MCCE is a nonpartisan organization that has been advocating for the full and effective implementation of the Maine Clean Election Act since it was passed in 1996. MCCE also supports effective disclosure and transparency in campaign funding as vital to our democratic process.

Subparagraph a. of the draft dated April 3, 2012 provides that the person who owns, controls or operates a broadcasting station or publication must be identified to the public in order for the press exemption to be available. We support this requirement as necessary to ensure effective disclosure. While there is a place for some anonymous speech, allowing an anonymously owned entity to avail itself of the press exemption is contrary to the long history of this exemption in state and federal law. Any other approach would leave a large loophole in the disclosure system.

Subparagraph b. of the draft provides that the entities, who own, control or operate the broadcasting station or publication may not be reimbursed for the publication at issue. As a technical matter, we doubt that the situation would often arise where reimbursement is paid *directly to the owners*, as opposed to reimbursement the broadcasting station or publication itself. More fundamentally, where there is reimbursement paid to the broadcasting station or publication, *it is the reimbursement itself that is the expenditure*, not the act of publication, which is nothing more than the fulfillment of a contract. Perhaps this point could be clarified.

Subparagraph c. provides that a broadcasting station or publication owned by an interested party may not utilize the press exemption. We support this provision, and note that it is already a feature of Title 21-A. See 21-A M.R.S.A. §1012(3)(B)(1).

Member Organizations

AARP Maine, Common Cause Maine, EqualityMaine, League of Women Voters of Maine, League of Young Voters, Maine AFL-CIO, Maine Council of Churches, Maine People's Alliance/Maine People's Resource Center, Maine State Employees Association/SEIU Local 1989, Maine Women's Lobby, NAACP-Portland, Sierra Club Maine Chapter

P.O. Box 18187, Portland, ME 04112 • info@mainecleanelections.org

Finally, MCCE also supports the last paragraph of the revised “press exemption.” This is a reasonable attempt to make clear what kind of new media are encompassed by the exemption. Certainly a one-time post on a web site should not be considered a “periodical” within the meaning of Title 21-A. The standard set forth in the draft considers whether there have been periodic publication on a variety of topics – both factors which we believe are relevant and reasonably intended to distinguish the general media from publications which are exclusively directed at a campaign. We do not believe the latter type of publication should receive a blanket exemption from reporting.

Thank you again for considering these comments. We recognize that this is a complex and evolving area of law, and we commend the Commission for a very reasonable attempt to secure the public’s interest in full disclosure of all relevant communications.

We look forward to continuing to work with you and the Commission.

Sincerely yours,

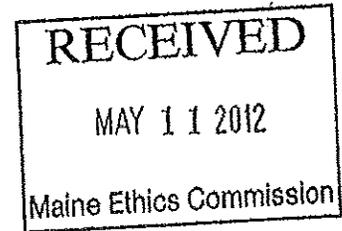
A handwritten signature in cursive script that reads "John Brautigam". The signature is written in black ink and is positioned below the text "Sincerely yours,".

John Brautigam



MPA Maine Press Association

May 11, 2012



VIA HAND DELIVERY

Mr. Jonathan Wayne
Executive Director
State of Maine
Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, ME 04333

Re: Maine Press Association Comments on Revised Rule Interpreting Press Exception

Dear Jonathan:

The Maine Press Association provides these comments on the revised rule interpreting the "press exception" in Chapter 1, Section 7, sub-section 10 of the Rules of the Commission on Governmental Ethics and Election Practices ("Ethics Commission"). The MPA, representing the state's newspaper industry, consists of the majority of the weekly and daily papers across the state.

In Maine campaign finance law, the distribution of "any news story, commentary, or editorial" by "the facilities of any broadcasting station, newspaper, magazine or other periodical publication" is exempt from campaign finance reporting requirements. 21-A M.R.S. § 1012(3)(B)(1). The statute also requires that the communication be made by an entity with a proper press function – that is, the facilities are not "owned or controlled by any political party, political committee, a candidate, or a candidate's immediate family." In this case, the Ethics Commission proposes a rule interpreting this "press exception" to the definition of "expenditure," particularly with respect to Internet publishers.

Maine statute closely follows the federal law press exception, which is codified at 2 U.S.C. 431(9)(B)(i)¹ and also in rule at 11 CFR §100.73 and §100.132.² The "media exception," as it is described in federal regulations, recognizes the "unfettered right of the newspapers, television

¹ Congress exempted from the definition of "expenditure" and "contribution" costs associated with "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee or candidate." 2 U.S.C. 431(9)(B)(i).

² "Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication is not a contribution unless the facility is owned or controlled by any political party, political committee, or candidate, in which case the costs for a news story: (a) That represents a bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility; and (b) That is part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not a contribution." 11 CFR §100.73 (for expenditures) and 11 CFR §100.132 (for contributions).

networks, *and other media* to cover and comment on political campaigns.” H.R. Rep. No. 93-1239, 93d Congress, 2d Session at 4 (1974). Similarly, as the Supreme Court has noted, “It is not the intent of Congress in [FECA]...to limit or burden in any way the First Amendment freedoms of the press and association. Thus, the exclusion assures the unfettered right of newspapers, TV networks, and other media to cover and comment on political campaigns.” *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 250 (1986)(citing H.R. Rep. No. 93-129 at P.4 (1974)).

To determine whether the media exception applies, the Federal Election Commission (“FEC”) has traditionally applied a two-step analysis. First, the FEC determines whether the entity engaging in the activity is a “press entity” as described by the Act and FEC regulations. Second, in determining the scope of the exemption, the FEC considers: 1) whether the press entity is owned or controlled by a political party, political committee, or candidate; and 2) whether the press entity is acting as a press entity in conducting the activity at issue, i.e. whether it is acting in its “legitimate press function.” *See* Federal Register, Vol. 71, No. 70, p. 18607, April 12, 2006.

In its 2006 amendments, the FEC clarified that the media exception “applies to media entities that cover or carry news stories, commentary, and editorials on the Internet, just as it applies to media entities that cover or carry news stories, commentary, and editorials in traditional media.” The FEC also clarified that the media exception “protects news stories, commentaries, and editorials no matter in what medium they are published.” *See id.* at 18608.

The FEC has extended this protection to bloggers that cover and carry news stories, commentaries, or editorials. *See* Advisory Opinion 2005-16. However, the FEC has extended this protection to bloggers and others who communicate on the Internet only if it determines that they are providing a “periodical publication.” “Periodical publication” was originally defined by the FEC to mean “a publication in bound pamphlet form appearing at regular intervals...and containing articles of news, information, or entertainment.” However, the FEC now recognizes a more dynamic, modern definition of “periodical,” and explains that the media exception “ought not be construed rigidly to deny the media exemption to entities who update their content on a frequent, but perhaps not fixed, schedule.” *See* Federal Register, Vol. 71, No. 70, p. 18610, April 12, 2006.

The MPA again supports the clarification of the statute, including the requirement that the owner or operator of the publication be identified within the publication or otherwise be made known to the public. The public must be able to evaluate the credibility of the authors and published materials and understand potential conflicts of interest. Another factor, among others, that could be considered by the Ethics Commission when determining whether the publishing entity is an eligible press entity is whether it is registered as a corporation, business, or non-profit corporation.

Additionally, the MPA supports the requirement that the publication must disseminate information to the public periodically, which is in its essence journalistic in nature. Importantly, the underlying statute and the federal law require this periodic publication. The published information must not be a stagnant post that is not regularly updated. It must have a regular following of readers. The periodic nature of the communication is important, so various political entities do not arise around the time of elections for the sole purpose of affecting elections without any accountability and without the traditional protections of press publications.

Importantly, the MPA believes that the language of the proposed rule does not go too far and prohibit certain online and offline publishing activities that are protected under the federal law and the First Amendment. These activities include express advocacy and programming that may be biased or

balanced. Even coordination between a press entity and a candidate or political party has been determined by the FEC to be irrelevant in determining whether the press exception applies. *Id.* at 18609.

Therefore, the MPA supports the Ethics Commission new rule in Chapter 1, Section 7, sub-section 10. Thank you for the opportunity to provide comments on these proposed Ethics Commission rule amendments.

Sincerely,

/s/

Michael J. Dowd,
Editor-in-Chief, Bangor Daily News
President, Maine Press Association

From: suzanne@mab.org
Sent: Monday, May 07, 2012 2:02 PM
To: Wayne, Jonathan
Subject: Press exception

Hi Jonathan,

I've spent most of the morning wrestling with the proposed rule interpreting the press exception (your memo of April 3, 2012). I don't have any objections to the proposal, except that the rule and the underlying statute need to be amended (as I know you've proposed before) to include cable TV - as well as other electronic programming services such as AT&T's U-Verse, which, while not now available in Maine, may be at some point, and which are not, strictly speaking, "cable TV" services. Perhaps "electronic media outlet" is a more appropriate and encompassing term.

Otherwise, I see no problem with the proposed rule, from our perspective.

Thanks for the opportunity to comment.

Best regards,

-
Suzanne D. Goucher
President & CEO
Maine Association of Broadcasters
69 Sewall St., Augusta, ME 04330
207-623-3870

Third Proposal

(Press Exception)

94-270 COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES

Chapter 1: PROCEDURES

SECTION 7. EXPENDITURES

...

10. Press exemption. In order for the costs of preparing and disseminating a news story, commentary, or editorial to be exempt from the definitions of expenditure under the press exemption [§§ 1012(3)(B)(1) & 1052(4)(B)(1)], the following criteria must be met:

- a. the names of the persons or entities who own, control and operate the broadcasting station or publication are identified within the publication or otherwise made known to the public;
- b. the broadcasting station or publication and the individuals or entities described in paragraph a of this subsection are not compensated for or reimbursed for expenditures by a candidate, candidate's authorized campaign committee, political party, political action committee, or ballot question committee, or their agents, except in exchange for providing advertising time or space to the candidates or committees; and
- c. the broadcasting station or publication is not owned or controlled by any political party, political action committee or ballot question committee and is not owned or controlled by any candidate, or authorized campaign committee of the candidate, who is a subject of the news story, commentary, or editorial, or by a member of the immediate family of such a candidate; except that
 - i. the cost of a bona fide news story appearing in a publication of general circulation or on a broadcasting station that is part of a pattern of campaign-related news coverage that provides reasonably equal coverage to all opposing candidates, is not an expenditure; and
 - ii. the cost of commentary and editorials about other candidates who are not in the same race as the candidate is not an expenditure.

In addition to the above criteria, to qualify as a periodical publication, including one in electronic form on the Internet, or a newspaper or magazine, a publication (i) must have been disseminating news stories, commentaries or editorials on a variety of topics to the general public on a periodic basis for at least the previous twelve months, or (ii) must have a record of disseminating news stories, commentaries or editorials on a variety of topics to the general public that objectively indicates that the publication will continue to be published on a periodic basis beyond the election cycle during which the press exemption is claimed.

Third Round of Comments



MPA Maine Press Association

July 6, 2012

VIA E-MAIL

Mr. Jonathan Wayne
Executive Director
State of Maine
Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, ME 04333

**Re: Maine Press Association Comments on June 1, 2012 Revised Rule
Interpreting Press Exception**

Dear Jonathan:

The Maine Press Association provides these comments on the revised rule interpreting the “press exception” in Chapter 1, Section 7, sub-section 10 of the Rules of the Commission on Governmental Ethics and Election Practices (“Ethics Commission”), provided in the Ethics Commission’s June 1, 2012 Invitation to Comment. Please consider these comments as supplemental to the comments filed with the Commission on March 12, 2102 and May 11, 2102. The MPA, representing the state’s newspaper industry, consists of the majority of the weekly and daily papers across the state.

The Invitation to Comment from the Ethics Commission requests comments on three aspects of the rule:

- (1) If a broadcast station or publication were owned by a candidate or an immediate family member of the candidate, should the costs of news stories or editorials be exempt if they relate to election races other than the one in which the candidate-owner is running?
- (2) Should the Commission adopt a rule similar to the attached Federal Election Commission (“FEC”) rule that the costs of bona fide news stories are exempt if they are part of a pattern of campaign-related news accounts that provides reasonably equal coverage to all candidates in the race?
- (3) Can the Commission’s rule interpret the statutory phrase “broadcast station” to exempt cable television operators, programmers and producers (as the FEC has)?

Taking these questions out-of-order, the MPA strongly supports Question 2 (and new rule sub-§10(c)(i)) and reaffirms its position that the Ethics Commission closely follow the FEC’s rules and

guidance on these issues. As long as an entity produces “bona fide” journalism regarding a candidate or candidates as part of a regular periodic pattern of journalism, it should be exempt from the prohibition on being owned or controlled by the immediate family member of a candidate.

Next, Question 1 (and new rule sub-§10(c)(ii)) is not necessary in nearly all instances where Question 2 (new rule sub-§10(c)(i)) applies, which makes an exemption for races other than the one in which the candidate-owner is running redundant. However, the MPA does maintain that the “cost of commentary and editorials about other candidates who are not in the same race as the candidate” [who owns or whose family owns the publication] should not be an expenditure for purposes of campaign finance law.

Finally, as noted above, the MPA strongly supports following the FEC guidance and, therefore, interpreting the statutory phrase, “broadcast station,” to include cable television operators, programmers, and producers within the press exception.

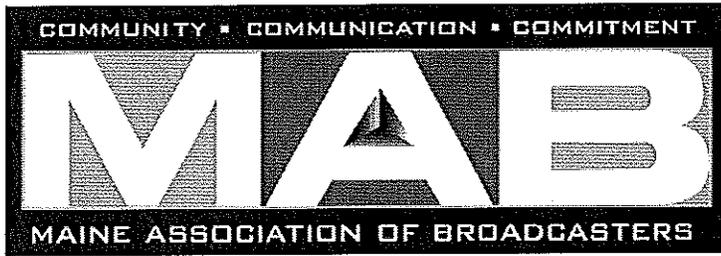
As we stated in our May 11, 2012 letter, the MPA believes that the language of the proposed rule does not prohibit certain online and offline publishing activities that are protected under the federal law and the First Amendment. These activities include express advocacy and programming that may be biased or balanced. Even coordination between a press entity and a candidate or political party has been determined by the FEC to be irrelevant in determining whether the press exception applies. *See* Federal Register, Vol. 71, No. 70, p. 18609, April 12, 2006.

Therefore, the MPA supports the Ethics Commission newly revised rule in Chapter 1, Section 7, subsection 10. Thank you for the opportunity once again to provide comments on these proposed Ethics Commission rule amendments.

Sincerely,

/s/

Michael J. Dowd,
Editor-in-Chief, Bangor Daily News
President, Maine Press Association



69 Sewall St., Suite 2
Augusta, Maine 04330
Ph. 207-623-3870
Fax 207-621-0585
www.mab.org

July 3, 2012

COMMENTS of Suzanne Goucher, President & CEO, Maine Association of Broadcasters, concerning a rulemaking concerning the news exemption from campaign finance regulation

Submitted to the Maine Commission on Governmental Ethics and Election Practices

In this rulemaking proceeding, the Commission asks for comments on the following three topics, each of which will be addressed in turn.

(1) If a broadcast station or publication were owned by a candidate or an immediate family member of the candidate, should the costs of news stories or editorials be exempt if they relate to election races other than the one in which the candidate-owner is running?

Yes. It would be unreasonable to expect that a broadcast station, e.g., with a long history of news coverage of elections should suddenly be subject to a "news blackout" on all candidate races simply because a principal of the station is involved in one particular race.

(2) Should the Commission adopt a rule similar to the attached Federal Election Commission (FEC) rule that the costs of bona fide news stories are exempt if they are part of a pattern of campaign-related news accounts that provides reasonably equal coverage to all candidates in the race?

Yes.

(3) Can the Commission's rule interpret the statutory phrase "broadcast station" to exempt cable television operators, programmers and producers (as the FEC has)?

Yes, the Commission can and should interpret "broadcast station" to mean other purveyors or distributors of video programming. Further, the Commission should seek, in the next legislative session, to amend sections of statute referring to the duties and obligations of "broadcast stations" to clarify that those duties and obligations also extend to cable television.

The Maine Association of Broadcasters appreciates the opportunity to comment in this matter.

###

We the people of Maine...

THE MAINE HERITAGE POLICY CENTER
Center for Constitutional Government

www.mainepolicy.org

P.O. Box 7829
Portland, Maine 04112

July 6, 2012

Tel: 207.321.2550
Fax: 207.773.4385

VIA ELECTRONIC MAIL
AND REGULAR MAIL

Mr. Jonathan Wayne
Executive Director
Maine Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, ME 04333

Re: Comment on Proposed Rules Interpreting 21-M.R.S.A. §§ 1012(3)(B)(1) &
1052(4)(B)(1)

Dear Mr. Wayne:

Thank you for inviting the Maine Heritage Policy Center to comment on the proposed rule concerning reporting exemptions for news organizations. MHPC is a research and educational organization whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited and constitutional government, individual freedom, and traditional American values all for the purpose of providing public policy solutions that benefit the people of Maine.

The proposed rule is of considerable interest to MHPC. We have expressed our concerns regarding campaign finance laws for some time and as you know, I served as local counsel in *Cushing v. McKee, et als.*, which struck down Maine's matching funds statute after the U.S. Supreme Court decided *Bennett/McComish* last summer. While we generally view campaign disclosure in a positive light, MHPC is also concerned that political speech be as free from government burdens as possible. This is why we entered *Cushing v. McKee*: because matching funds were being used by Maine and other states in a vain attempt to equalize candidates. As you know, the Supreme Court in *Bennett/McComish* held that there is no compelling state interest in equalizing outcomes and that the Arizona matching funds statute unduly burdened the non-participating candidate's First Amendment free speech rights. We therefore believe that states should tread very lightly when it comes to electoral contribution and expenditure regulation and indeed all matters that implicate political speech.

Mr. Jonathan Wayne

July 6, 2012

Page 2

As to the specifics of the proposed rule, I would first observe that 21-M.R.S.A. §§ 1012(3)(B)(1) and 1052(4)(B)(1) embody an obsolescent if not obsolete view of what is news and a news organization. The wrenching technological changes underway scramble older conceptions of what is a “news story”, a “broadcasting station”, a “newspaper” or even the definition of “journalist”. Terrestrial radio and TV and even cable are rapidly migrating to the Internet even as the cost of creating streaming broadcasts has dramatically declined. Average citizens have entered the “news business” – much to the chagrin of traditional media. Courts have recognized the trend. In *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011), Boston police arrested a man for using his cell phone video camera to film police arresting a man on Boston Common. In the ensuing section 1983 action, Judge Lipez observed:

It is of no significance that the present case . . . involves a private individual, and not a reporter, gathering information about public officials. The First Amendment right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public’s right of access to information is coextensive with that of the press. *Houchins*, 438 U.S. at 16 (Stewart, J., concurring) (noting that the Constitution “assure[s] the public and the press equal access once government has opened its doors”); *Branzburg*, 408 U.S. at 684 (“[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”). . . . *Moreover, changes in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper. Such developments make clear why the news-gathering protections of the First Amendment cannot turn on professional credentials or status.*

Id. at 83-84 (emphasis added). While the court in *Glik* dealt with news gathering, the same cautions doubtless apply to news and editorial dissemination.

Therefore, I would suggest that the Commission is headed for stormy First Amendment weather to the extent it bases any rule on 21-M.R.S.A. §§ 1012(3)(B)(1) and 1052(4)(B)(1) and then tries to parse who or what qualifies as “press”. As you know, MHPC has itself entered the news business, operating its *Maine Wire* service with considerable success. The *Maine Wire* has been derided in some quarters for not being a “real” news organization – a view that is out of step with law and fact.

As to expenditure disclosure aspects of the rule, while MHPC generally supports campaign disclosure, it does so with the continuing caveat that such disclosure not crowd the First Amendment. As the Supreme Court opined in *Buckley v. Valeo*, “compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” The Ethics Commission is currently embroiled in a lawsuit concerning disclosure and anonymous political speech. You should know that MHPC supports the plaintiff’s position

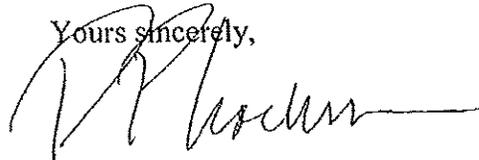
Mr. Jonathan Wayne
July 6, 2012
Page 3

in this suit. *Any* regulation that implicates political speech should be done with fear and trembling and anonymous political speech should be protected.

With these cautions in mind, I note that the proposed rule in its final paragraph attempts to qualify who or what is a "periodical publication", a "newspaper" or a "magazine". We do not think it is government's place to determine who or what qualifies – whether based on timing or practice. Unless I am misreading the statute and proposed rule, should one not be "qualified", then any news story or editorial would be a reportable expenditure. This simply takes matters too far. In fact, it is not apparent to me how one would write a rule defining the "press" – or, indeed, whether one should.

In conclusion, MHPC has serious reservations about the proposed rule and believes that it would be ripe for legal challenge were it to be adopted and enforced by the Commission.

Yours sincerely,

A handwritten signature in black ink, appearing to read "D. Crocker", written over the typed name below.

David P. Crocker

DPC/mbs
cc: Mr. J. Scott Moody

COMMENTS OF MAINE VALUES LLC ON PROPOSED
RULE RELATING TO THE PRESS EXEMPTION

Maine Values, LLC, the owner of Maine Today Media, which publishes the *Portland Press Herald*, *Kennebec Journal* and *Morning Sentinel*, among others, submits the following comments on the proposed rule relating to the “press exemption.” In recognition of the first amendment values at stake, that exemption makes clear that news stories, commentaries, and editorials distributed through any newspaper are excluded from the definition of expenditures regulated by the campaign finance laws. The exemption contains an exception, however, for newspapers “owned or controlled by any...candidate or candidate’s immediate family” and it is this exception that the proposed rule seeks to clarify.

Maine Values welcomes and appreciates the staff’s efforts to clarify the Commission’s approach to regulating at the vital intersection of the first amendment and the campaign finance laws. We wholeheartedly endorse staff’s description of the importance of the press exemption generally:

“The press exemption is important, because it allows publishers of news and commentary to present to the public news reports and viewpoints concerning candidates, without the fear that they will be entangled in campaign finance regulations.”

In recognition of the importance of this concern, staff has identified several ways in which the absence of a press exemption could present difficult first amendment concerns: (i) independent expenditure reporting; (ii) disclaimer requirements; and (iii) PAC reporting. In addition to these concerns, we note that because any “expenditure” made in consultation or coordination with a campaign is deemed a “contribution,” 21-A M.R.S.A. § 1015(5), given the nature of political campaigns the mere possibility that complaints and demands for investigations by the Commission into communications between a newspaper and a campaign could arise has a

significant chilling effect on the newspaper's speech. That concern is compounded by the breadth of the definition of "immediate family," which goes far beyond any identifiable state interest.

Finally, it is important to bear in mind the long-standing principle that a candidate and candidate's spouse cannot constitutionally be subject to any expenditure limits. *Buckley v. Valeo*, 424 U.S. 1, 51-58. In *Buckley* the Supreme Court made clear that a candidate, "no less than any other person, has a First Amendment right to engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates." Accordingly, the Court held that a limitation on personal expenditures by a candidate "clearly and directly" interfered with "constitutionally protected freedoms." *Id.*

These comments first set out some generally applicable first amendment principles. We then discuss some of the specific provisions of existing law and the proposed amendments in the first amendment context and provide textual comments on the language of the proposed rule. Finally, we propose a modified rule for the Commission's consideration. Overall, the proposed rule is a step in the right direction, particularly its attempt to exempt news stories and races not involving a candidate who owns a newspaper, but it requires further development and clarification. In particular, the continuing attempt to regulate editorial speech presents at least two distinct challenges, especially in light of *Buckley's* prohibition against regulating expenditures by candidates: (i) there doesn't appear to be any compelling state interest in regulating editorials by candidates (or their immediate family) as long as the editorial includes a disclosure of the newspaper's ownership; and (ii) there is no reasonable way to determine the amount of a so-called "expenditure" in the context of typical newspaper operations; the exemption for "use of offices, telephones, computers and similar equipment when that use does

not result in additional cost to the provider” should be read to exclude any possibility that the normal editorial process would somehow constitute some kind of “expenditure” subject to regulation. *See* 21-A M.R.S.A. § 1012(3) (B) (9). Similarly, the proposed rule’s clarification of the exception to news stories that provide “reasonably equal” coverage to all candidates is an invitation to complaints and litigation; it is overly broad and vague and should be changed to simply “reasonable coverage.”

GENERAL COMMENTS REGARDING THE FIRST AMENDMENT AND THE PRESS EXEMPTION

The Supreme Court recently issued a unanimous decision making clear that “[w]hen speech is involved, rigorous adherence” by governmental agencies to two connected but discrete due process concerns is necessary to ensure that protected speech is not chilled: (1) “that regulated parties should know what is required of them so they may act accordingly” and (2) that regulatory “precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” *FCC v. Fox Television Stations, Inc*, Slip. Op at * 12, 567 U.S. ____ (June 21, 2012). Complex regulations on campaign speech that are difficult to apply in practice “function as the equivalent of prior restraint giving [an administrative agency] power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit.” *Citizen’s United v. FEC*, 130 S.Ct. 876, 896 (2010).

The statutory press exemption found in Maine’s campaign finance laws has historically ensured that Maine’s long standing institutional press can serve the role envisioned by this country’s founders to advance “discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.” *Mills v. Alabama*, 384 U.S. 214, 218 (1966). To avoid Maine’s

campaign finance laws operating as a prior restraint on the press, the Commission should clarify and expand the press exemption to the campaign finance laws.

1. Constitutional limitations on the Commission's regulations

Content-based distinctions on speech are subject to strict scrutiny, and only campaign speech that is subject to “no reasonable interpretation other than as an appeal to vote for or against a specific candidate” meets a sufficiently definite standard that it may be subject to some government imposed limits. *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 470 (2007); *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 66-67 (1st Cir. 2011) (“*NOM I*”). Expenditure or contribution limits are also subject to strict scrutiny, whereas disclosure disclaimer requirements are subject to “exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.” *NOM I*, 649 F.3d at 66.

With regard to dollar limits and disclosure of contributions, the Supreme Court has recognized two “sufficiently important” state interests justifying regulation: an “anti-corruption” interest and an “anti-circumvention interest.” The first embraces not only express or implied quid pro quo arrangements, but also the threat of undue influence by large donors over elected officials, or the appearance of it, which undermines public confidence in the integrity and fairness of the electoral system. *Buckley v. Valeo*, 424 U.S. 1, 26-29 (1976); *see also Nixon v. Shrink Missouri PAC*, 528 U.S.377, 389 (2000)(“In speaking of improper influence and opportunities for abuse ... we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”). The second interest is furthered by measures designed to prevent evasion or

circumvention of legitimate campaign finance restrictions, so that individuals or organizations may not undermine valid contribution limits indirectly. *See* Buckley, 414 U.S. at 46-47.

When dealing with the regulation of independent expenditures rather than contributions, the Courts have also recognized an informational interest “in identifying the speakers behind politically oriented messages” because disclosing the identity and constituency of a speaker engaged in political speech “enables the electorate to make informed decisions and give proper weight to different speakers and messages.” *NOM I*, 649 F.3d at 57.

2. The history and purpose of Maine’s press exemption to campaign finance regulations

Maine’s statutory press exemption is modeled on, and substantially similar to, the federal statutory press exemption in many ways. *Compare* 21-A M.R.S.A. § 1012(3)(B)(1) *with* 2 U.S.C. § 431(9)(B)(i). Because Maine’s press exemption is based on the federal press exemption, the federal legislative history helps inform Maine’s statute.

When Congress added the media exception in 1974, it indicated that the exemption was intended to make clear that campaign finance regulation would not “limit or burden in any way the First Amendment freedoms of the press and of association. Thus the exclusion assures the unfettered right of the ... media to cover and comment on political campaigns.” H. Rep. No. 93-943, 93d Congs., 2d Sess. at 4 (1974); see also *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (discussing rationale for media exception). This special protection of press freedoms is justified not because of any special privilege the press enjoys, but because press entities serve a critical role in our society as a forum for public debate. *Id.*; see generally *Mills v. Alabama*, 384 U.S. 214 (1966).

The Supreme Court first extensively dealt with the question of press activity in conflict with a campaign finance law in *United States v. CIO*, 335 U.S. 106 (1948). There, although the

statute did not expressly exempt the press, the Court looked to legislative history to conclude that the statute had not been intended to reach activities of the press such as the publication of a weekly periodical urging union members to vote for a particular candidate. *Id.* at 120 (“[I]t is clear that Congress was keenly aware of the constitutional limitations on legislation and of the danger of the invalidation by the courts of any enactment that threatened abridgment of the freedoms of the First Amendment.”). The holding in *CIO* was reiterated by the Court in *Mills*, when the Supreme Court struck down Alabama’s campaign finance statute prohibiting newspaper editorials published on election day that urged readers to vote for a candidate:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars, to play an important role in the discussion of public affairs.

Mills, 384 U.S. at 218 (citations omitted).

Recognizing the important societal and constitutional purpose served by an independent press, the courts have consistently strengthened first amendment protections where the press has been the vehicle by which public discourse of items of political importance has occurred. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (constitutionalizing protections for certain potentially libelous speech); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down a “right of access” statute that interfered with the editorial judgment of news editors).

Likewise, courts have recognized that the news media is exempted from campaign finance regulation in order to preserve its critically important role in covering elections. The exemption exists, not for the journalists themselves, but so that the public has access to and can participate in important political discussions. *See generally Mills*, 384 U.S. 214. As a result,

courts have recognized that an administrative agency enforcing campaign finance laws is without jurisdiction to investigate traditional press entities acting within their proper press function. *See The Readers Digest Ass'n. v. Fed. Elections Comm'n.*, 509 F.Supp. 1210 (S.D.N.Y. 1981); *Fed. Elections Comm'n v. Phillips Publ'g.*, 517 F.Supp. 1308 (D.D.C. 1981). This proper press function includes editorials and opinion pieces. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 712 (Kennedy, J., dissenting) (“It is beyond peradventure that the media could not be prohibited from speaking about candidate qualifications.”); *McConnell*, 540 U.S. at 156 n.51 (“Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a *benefit* on the candidate”); *id.* at 355 (Rehnquist, C.J., dissenting in part) (doubting “the Court would seriously contend that we must defer to Congress’ judgment if it chose to reduce the influence of political endorsements in federal elections”).

As the FEC recognized in response to a complaint that ABC, CBS, NBC, *The New York Times*, *The Washington Post* and the *Los Angeles Times* were making illegal corporate campaign contributions because of their commentary about political candidates, the media exemption allows the press to continue to serve the important role of election coverage.

It is clearly a part of the normal press function to attend to the competing claims of parties, campaigns and interest groups and to choose which to feature, investigate or address in news, editorial and opinion coverage of political campaigns. The question of whether a news organization may have credulously or recklessly accepted and reported the claims of one political party or candidate is the type of inquiry which the courts have held to be foreclosed by the [Federal Election Campaign Act]’s media exemption.

In re ABC, CBS, NBC, New York Times, Los Angeles Times and Washington Post, et al. Matter Under Review 4929, 5006, 5090 and 5117 at 4 (Fed. Elections Comm’n Dec. 20, 2000)

(available at <http://eqs.sdrdc.com/eqsdocs/000011BC.pdf>). Indeed, the first amendment guarantee of a free press “‘has its fullest and most urgent application’ to speech uttered during a

campaign for political office.” *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

Maine’s press exemption, like the federal press exemption, recognizes that burdensome regulation of the news media would muzzle “one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.” *Mills*, 384 U.S. at 219. This nation was founded on the idea that “[t]he liberty of the press is ... essential to the nature of a free state,” *McConnell v. FEC*, 540 U.S. 93, 286 n. 17 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting 4 W. Blackstone, Commentaries on the Laws of England 151 (1769)), and a free press is “one of the greatest bulwarks of liberty.” *Id.* at 286 (quoting 1 J. Elliot, Debates on the Federal Constitution 335 (2d ed. 1876)). When a press entity is operating within the sphere of its traditional press function, administrative inquiry should be kept at a minimum “since there is a danger [that] further [administrative] inquiry would impinge upon First Amendment freedoms.” *Fed. Elections Comm’n v. Phillips Publ’g.*, 517 F.Supp. 1308,1314 (D.D.C. 1981).

Other States have recognized that they are without authority to treat commentary and editorials as expenditures or contributions. Maryland’s campaign finance laws contain no express press exemption whatsoever. Nonetheless, when issuing guidance in 2010 addressing “the circumstances under which the broadcast of political discussion or commentary by a candidate or prospective candidate would amount to an in-kind contribution by the broadcaster,” the Maryland Attorney General looked to federal law in order to imply a press exemption into Maryland’s statutes, and limit any inquiry into a press entity’s performance of traditional press functions:

In light of the more than 35 years’ experience of courts and the FEC in interpreting a media exception consistent with the First Amendment, federal law probably offers the

most useful guidance on the issue you have asked about. In line with that guidance, we would advise that, in considering possible misconduct relating to the coverage of political discussion by a candidate or potential candidate, the focus should remain on activity by the media outlet that appears to be inconsistent with its ordinary press or broadcast function.

95 Md. Op. Att'y Gen. 110 (2010). (A copy is attached for your convenience).

SPECIFIC ISSUES RAISED BY THE PROPOSED RULE

The proposed rule is complex since it seeks to clarify an exception to an exemption. The general rule is that the costs of press stories and editorials are not “expenditures” unless the newspaper is owned by a candidate or a candidate’s immediate family member. The proposed rule clarifies the exception by preserving the exemption from the definition of “expenditure” for a) “the costs of a bona fide news story appearing in a publication of general circulation...that is part of a pattern of campaign-related news coverage that provides reasonably equal coverage to all opposing candidates;” and (b) “the costs of commentary and editorials about other candidates not in the same race as the candidate.” These proposed exceptions unfortunately do not include all the circumstances where newspaper articles or editorials should be exempt, and even the two proposed areas of clarification present vagueness and overbreadth problems.

1. The Commission should not attempt to create a content-based distinction between “bona fide news story” and “commentary or editorial.”

The current statutory text does not provide any distinction between, nor a basis on which to create a distinction between, the terms “news story, commentary, or editorial,” and the Commission should not attempt to do so by regulation. Commentary and editorials are a longstanding component of the proper press function of a traditional press entity such as a newspaper. The only content-based distinction that the Commission should make with regard to newspapers is one between “endorsements” that are subject to “no reasonable interpretation

other than as an appeal to vote for or against a specific candidate” and all other news, commentary, or editorials, which should not be subject to any regulation.

In every American election since George Washington’s uncontested bid for the presidency in 1789, the press has reported on the candidates’ qualifications for office, distributing commentary that often attacks one candidate and favors another. See John Allen Hendricks & Shannon K. McCraw, *Coverage of Political Campaigns*, in *American Journalism: History, Principles, Practices* 181 (W. David Sloan & Lisa Mullikin Par-cell eds., 2002).

Court’s have recognized that regulations that encroach on the editorial autonomy of newspapers must withstand strict scrutiny. In *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court struck down “right of access” laws intended to encourage diverse viewpoints in the media, refusing to “intru[de] into the function of editors” by interfering with “the exercise of editorial control and judgment.” *Id.* at 258. The Court ruled that “[t]he choice of material to go into a newspaper ... and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment,” adding that “[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.” *Id.*; see also *CBS v. Democratic National Committee*, 412 U.S. 94, 117 (1973) (plurality opinion) (“[t]he power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers — and hence advertisers — to assure financial success; and, second, the journalistic integrity of its editors and publishers”); *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 391 (1973) (“we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however controversial”).

Mindful of this constitutional interest in “ensur[ing] that the law does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events,” several federal statutes have drawn a distinction between “the media industry” and other entities “that are not involved in the regular business of imparting news to the public.” *McConnell*, 540 U.S. at 208. Campaign finance statutes have likewise recognized the “unique role that the press plays in informing and educating the public, offering criticism, and providing a forum for discussion and debate.” *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 667 (1990); *id.* at 712 (Kennedy, J., dissenting) (“It is beyond peradventure that the media could not be prohibited from speaking about candidate qualifications.”); *McConnell*, 540 U.S. at 156 n.51 (“Congress could not regulate financial contributions to political talk show hosts or newspaper editors on the sole basis that their activities conferred a *benefit* on the candidate”).

The law is clear that the only constitutionally permissible content-based distinction with regard to candidate elections involves express advocacy – statements subject to “no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Fed. Election Comm'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 470 (2007) (“*WRTL*”). Because it is clear that the Commission cannot regulate news stories, commentary or editorials that do not meet the *WRTL* standard, the Commission should issue an interpretative rule that makes clear that the “costs,” whatever they are, of any news story, commentary or editorial that is subject to any reasonable interpretation as something other than an “appeal to vote for or against a specific candidate” is not an expenditure subject to regulation.

And even in the case of an editorial expressly advocating the election or defeat of a candidate in this context, the requirement that a candidate or member of a candidate’s immediate family who owns a newspaper will, unlike every other newspaper owner, be subject to campaign

finance laws presents serious first amendment questions. First, the disparity of treatment and regulation of the content of speech can only be justified if there is a compelling state interest being furthered in the least restrictive way possible. Since the only interest sought to be furthered here is the informational interest, it can plainly be furthered without subjecting the speaker to the campaign finance laws—if “the names of the persons or entities who own, control and operate the broadcasting station or publication are identified within the publication or otherwise made known to the public” then the government’s informational interest “in identifying the speakers behind politically oriented messages ... enable[ing] the electorate to make informed decisions and give proper weight to different speakers and messages” is fully protected. Any interest the State seeks to further through disclosure, accordingly, can be furthered by a much narrower requirement than compliance with the reporting obligations that might otherwise be triggered. Second, as we now show, attempts to quantify the costs of any editorial endorsements cannot as a practical matter meet the potential vagueness and overbreadth problems they present.

2. The Commission should issue an interpretative rule determining that the “costs of preparing and disseminating a news story, commentary, or editorial” by a newspaper covers only the additional costs incurred by the paper above and beyond its normal operating costs.

For newspapers of general interest and broad circulation such as those owned by Maine Today Media, which include Maine’s largest-circulation newspapers as well as Maine’s longest-running newspapers, it is not at all clear what costs the newspaper would need to track and report if it ceased to receive the protection of the press exemption. It is clear that most of the costs associated with a newspaper would not be expenditures subject to regulation. *See, e.g.*, 21-A M.R.S.A. §§ 1012(3)(B)(6) and 1052(4)(B)(6) (“Any communication by any person that is not made for the purpose of influencing the nomination for election, or election, of any person

to state or county office” is not an expenditure). The majority of the news stories, commentary and editorials are not about politics or elections at all. An even smaller percentage is actually subject to an interpretation that would meet the *WRTL* standard, or the 1012(3)(B)(6) and 1052(4)(B)(6) standards.

With respect to actual endorsements, if a large newspaper carries a single editorial that expressly advocates for the election or defeat of an identified candidate, and hence might be deemed an “expenditure” within the meaning of the campaign finance laws, it is hard to see how any such “expenditure” could be quantified. If the editorial or endorsement were not published, something else would be published in its place, so there would be no increased cost in the paper or ink, the costs of computers, office space, telephones, etc. Furthermore, there is no way to allocate the salary of employees such as a reporter, editor, printer, newspaper delivery person or others with regard to an individual endorsement. Since 21-A M.R.S.A. § 1012(3)(B)(9) provides that “[t]he use of offices, telephones, computers and similar equipment [is not an expenditure] when that use does not result in additional cost to the provider,” the Commission should make clear that the cost of an editorial/endorsement should not be considered an “expenditure” unless the costs involved are above and beyond normal operating costs. Any other interpretation raises significant first amendment issues.

3. The Commission should clarify that the term “candidate” as used in the press exemption applies only to certain candidates for state, county or municipal office.

The term “candidate” is defined by statute to include federal candidates. 21-A M.R.S.A. § 1(5). It is clear, however, that press stories about *federal* candidates are not contemplated by the statute or regulations. *See* 21-A M.R.S.A. §§ 1012(3)(B)(6) and 1052(4)(B)(6) (“Any communication by any person that is not made for the purpose of influencing the nomination for election, or election, of any person to state or county office” is not an expenditure). *See also*

21-A M.R.S.A. § 1011 (campaign reporting requirements apply to “candidates for all state and county offices); 21-A M.R.S.A. § 1051 (PAC reporting applies to elections of state, county or municipal officers). To avoid any possible future disputes, however, we urge the Commission to make clear in its rule that the exception to the press exemption for broadcast facilities or publications “owned or controlled by any candidate” carries with it the limitation “owned or controlled by any candidate for state, county or municipal office.”

Similarly, the Commission should not attempt to regulate a publications’ endorsement of candidates in races other than that in which the candidate-owner is running for office, as the proposed rule suggests. Just as the Legislature could not have intended that a long-running newspaper owned by the stepgrandchild of a federal candidate would lose the protections of the media exemption with regard to news stories, commentary or editorials about state, county or municipal candidates, the Legislature could also not have intended that a newspaper owned by the stepgrandchild of a municipal candidate in one municipality would lose the protections of the media exemption with regard to news stories, commentary or editorials about candidates running for unrelated offices in different municipalities or other unrelated state or county offices.

In narrowing Maine’s press exemption for press entities owned by a candidate or a candidate’s immediate family (broadly defined), the Legislature could not have meant to regulate the legitimate press function of the press entity regarding every other candidate race occurring in the state. Commentary and editorial, even outright endorsement, is part of the proper press function of a newspaper. *McConnell*, 540 U.S. at 355 (Rehnquist, C.J., dissenting in part) (doubting “the Court would seriously contend that we must defer to Congress’ judgment if it chose to reduce the influence of political endorsements in federal elections”). Newspapers, as part of their traditional proper press function, have historically engaged in this practice of

providing editorial endorsements of candidates. Since at least the 1800 presidential race, American newspapers have endorsed candidates and provided commentary praising their favored candidate (and often denigrating the opponent). Edward J. Larson, *The Tumultuous Election of 1800, America's First Presidential Campaign: A Magnificent Catastrophe* 206-07 (2008). In every American presidential election, newspapers have played an important role by advocating for endorsed candidates. See, e.g., *Endorsements through the Ages*, <http://www.nytimes.com/interactive/2008/10/23/opinion/20081024-endorse.html> (reprinting *New York Times* presidential endorsements from 1860 to the present).

The current language of the press exemption could arguably be read to impinge on the proper press function of a newspaper in regard to issuing editorials or commentary on candidate races wholly unrelated to owner or family member of the owner of the newspaper, and the resulting ambiguity could impermissibly censor the speaker or “compel[] the speaker to hedge and trim.” *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 52 (1st Cir. 2011) cert. denied, 132 S. Ct. 1635, 182 L. Ed. 2d 233 (U.S. 2012).

For this reason, the Commission should adopt an interpretive rule clarifying that when a broadcasting facility is owned or controlled by a candidate, or a candidate's immediate family, “the cost of a news story, commentary or editorial about other candidates not in the same race as the candidate” is not an expenditure.

4. The Commission shall narrow the term “immediate family” as used in the press exemption in order to avoid a constitutional defect.

In 2007, when Maine narrowed its press exemption by treating press entities owned or controlled by a candidate’s immediate family in the same manner as those owned or controlled by a candidate, the Legislature did not intend to upset the traditional role of Maine’s institutional press in covering Maine’s elections. *See* P.L. 2007 c. 443. The change was originally proposed as part of a larger amendment that sought to limit the ability Maine Clean Election candidates to use public money to reimburse the candidate or the candidate’s immediate family members for professional services provided to the campaign. L.D. 1854 (123rd Legis. 2007). The change to the press exemption was never discussed or debated on the floor, or in the committee record.

The use in 2007 of the extraordinarily broad definition of “immediate family” to narrow Maine’s press exemption is neither narrowly tailored nor substantially related to any governmental interest. Maine statute’s definition of “immediate family,” 21-A M.R.S.A. §1(20), was originally adopted in 1985 to cover only a spouse, parents, children and siblings. The definition was broadened in 1993 to include “in-laws and guardians,” then again in 1997 to include “stepparent, stepchild, stepsister, stepbrother,” again in 2001 to include “grandparent, grandchild, stepgrandparent and stepgrandchild,” and again in 2007 to include “domestic partner.” This broad definition is necessary and desirable for many parts of the law, which by way of non-exhaustive example: provide voter anonymity to protect the physical safety of an immediate family member, 21-A M.R.S.A. §22(3); allow an immediate family member to file a certificate with the secretary of state to withdraw a candidate who is permanently and continuously incapacitated by catastrophic illness, 21-A M.R.S.A. §374-A(1)(B); and permit a voter to designate an immediate family member to pick up an absentee ballot, 21-A M.R.S.A. §§ 753-A-753-C.

There is no reason, however, to apply this broad definition to limit the press exemption in the context of campaign expenditures. Apart from the overbroad assumption that anyone with any tangential familial connection to a candidate will necessarily support that candidate, the only state interest conceivably implicated is the same informational interest that applies to a candidate. But the context is critically different, since requiring a newspaper owned by a member of a candidate's immediate family which publishes an endorsement of that candidate's opponent to become subject to the campaign finance laws as a result of the relationship is, to put it charitably, somewhat irrational.

A court generally will not address a constitutional challenge to a definition, but instead will look to the substantive burdens imposed as a result of that definition. *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 40 (1st Cir. 2012) (*NOM II*). Under the broad definition of immediate family member, if the stepgrandchild of the owner of a long-running newspaper decides to run for office, then news stories, commentary and editorials that are within the proper press function and historic practice of that long-running newspaper would suddenly become expenditures subject to regulation. That result simply cannot be squared with the first amendment.

What's even more problematic is that these expenditures could be deemed a contribution to a candidate under the provisions of 21-A M.R.S.A. § 1015(5):

Any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents is considered to be a contribution to that candidate.

The financing by any person of the dissemination, distribution or republication, in whole or in part, of any broadcast or any written or other campaign materials prepared by the candidate, the candidate's political committee or committees or their authorized agents is considered to be a contribution to that candidate.

Id. The statute does not define the terms “in cooperation, consultation or concert with, or at the request or suggestion of.” Arguably, if the candidate calls a press conference or issues a press release (even if it is a candidate other than the family-member candidate), that action could be considered a “request or suggestion” that the newspaper publish a news story, editorial or commentary related to the press release, which could then be treated as a contribution.

Furthermore, if the newspaper quotes a candidate’s press release “in whole or in part” then the dissemination of the news story apparently automatically becomes a contribution. *Id.*

Contributions are limited to \$750 for most candidates under 21-A M.R.S.A. § 1015(1)-(2).

Depending on whether the amount of the “expenditure” would include the salary of the reporter, and depending on what the cost and circulation numbers of the newspaper are, this news story could theoretically exceed the contribution limit with the circulation of a single day’s newspaper.

After the threshold was reached, the newspaper would thereafter be censored from publishing any more articles related to the candidate. This is clearly constitutionally impermissible and is unrelated to any important governmental interest. Sections 1015(1)-(2) are clear that the limitation “does not apply to contributions in support of a candidate by that candidate or that candidate's spouse or domestic partner.” *See also Buckley*, 424 U.S. 1.

In order for Maine’s press exemption and the contribution limits to be read together in a constitutionally permissible way, then either contribution limits must be interpreted not to apply to a candidate’s immediate family, or the press exemption must be interpreted as limited to a press entity owned by a “candidate or that candidate's spouse or domestic partner,” not the broad definition that includes stepgrandchildren and inlaws. For this reason, we would suggest that the Commission adopt an interpretive rule that reads the phrase “immediate family” used in the press exemption to be limited to a “candidate's spouse or domestic partner,” as that phrase is used in

21-A M.R.S.A. § 1015(1)-(2). That would also bring Maine’s regulatory framework in line with the FEC and federal campaign finance law, which applies the exception to the press exemption only to press entities “owned or controlled by any political party, political committee, or candidate” and does not include the far too broad “immediate family” provision. 2 U.S.C. § 431(9)(B)(i); 11 CFR §100.132.

SPECIFIC RESPONSES TO THE COMMISSION’S PROPOSED RULE

The Commission staff’s proposed rule attempts to address some, but not all of the issues raised in our general comments. Here, we will attempt to respond to specific portions of the proposed rule. We have placed the language of the Commission’s proposed rule in a box, and then provided our specific comments immediately following that box.

Press exemption. In order for the costs of preparing and disseminating a news story, commentary, or editorial to be exempt from the definitions of expenditure under the press exemption [§§ 1012(3)(B)(1) & 1052(4)(B)(1)], the following criteria must be met:

See Comment #2 above regarding the difficulty in determining “the costs of preparing and disseminating a news story, commentary, or editorial.”

a. the names of the persons or entities who own, control and operate the broadcasting station or publication are identified within the publication or otherwise made known to the public;

We completely support this provision becoming part of the Commission’s interpretive rule. Such a provision ensures that the government’s informational interest “in identifying the speakers behind politically oriented messages ... enable[ing] the electorate to make informed decisions and give proper weight to different speakers and messages” is furthered. The existence of this provision, in conjunction with the provision immediately below, fully satisfies the

government's informational interest and its anti-circumvention interest. As such, these two provisions weigh in favor of providing the protections of the press exemption to broadcast facilities and publications that are owned or controlled by a candidate or the candidate's family.

b. the broadcasting station or publication and the individuals or entities described in paragraph a of this subsection are not compensated for or reimbursed for expenditures by a candidate, candidate's authorized campaign committee, political party, political action committee, or ballot question committee, or their agents, except in exchange for providing advertising time or space to the candidates or committees; and

We completely support this provision becoming part of the Commission's interpretive rule. Because this proposed language is part of an exception to an exemption to the definition of the term "expenditure," the use of the term "expenditure" may lead to some confusion and the staff may want to consider replacing that word with the "costs incurred in covering or carrying a news story, commentary or editorial."

c. the broadcasting station or publication is not owned or controlled by any political party, political action committee or ballot question committee and is not owned or controlled by any candidate or authorized campaign committee of the candidate, who is a subject of the news story, commentary, or editorial, or by a member of the immediate family of such a candidate; except that

*See Comments #1 and #3*above. For the reasons set out in those comments, and for reasons of clarity, we would suggest making the following changes to the Commission's proposed rule:

c. the broadcasting station or publication is not owned or controlled by any political party, political action committee or ballot question committee ~~and is not owned or controlled~~ or by any candidate for state, county or municipal office who is a subject of the news story, commentary, or editorial, or by the authorized campaign committee of ~~the such a candidate, who is a subject of the news story, commentary, or editorial~~; or by a member of the immediate family of such a candidate; except that

Also, for the reasons articulated in Comment #4 above, we would also propose replacing the term “immediate family” with the “spouse or domestic partner.”

i. the cost of a bona fide news story appearing in a publication of general circulation or on a broadcasting station that is part of a pattern of campaign-related news coverage that provides reasonably equal coverage to all opposing candidates, is not an expenditure; and

See Comment #1 above. The separation of the terms “bona fide news story” in subparagraph (i) from “commentary and editorials” in subparagraph (ii) appears to imply a content-based distinction other than the *WRTL* standard of “no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” Such a content-based standard is neither desirable nor constitutionally permissible. We propose that this problem be addressed in our proposed modified rule below by adding a simple disclosure requirement.

Furthermore, the phrase “reasonably equal coverage to all opposing candidates” should not be used. Such a standard impermissibly intrudes on the editorial judgment of the publication, which necessarily makes judgments every day about content and newsworthiness. See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down a “right of access” statute that interfered with the editorial judgment of news editors). For example, in a twelve candidate primary election, all twelve opposing candidates may not merit “reasonably equal coverage to all opposing candidates.” For these reasons we would propose the following changes to the Commission’s proposed rule

i. the cost of a bona fide news story or commentary appearing in a publication of general circulation or on a broadcasting station that is part of a pattern of campaign-related news coverage that provides ~~reasonably equal~~ reasonable coverage to all opposing candidates, is not an expenditure; and

ii. the cost of commentary and editorials about other candidates who are not in the same race as the candidate is not an expenditure.

See Comments #1 and #4 above. We support what the Commission is trying to achieve by this provision, but we suggest that it be worded instead as follows:

ii. when the broadcasting facility or publication is owned or controlled by any candidate for state, county or municipal office, or by the authorized campaign committee of such a candidate, or by a spouse or domestic partner of such a candidate, the cost of a news story, commentary and or editorial editorials about other candidates who are not in the same race as the candidate is not an expenditure.

Furthermore, for the reasons articulated in Comment #2 above, we would suggest adding the additional clarification of what costs must be tracked and reported:

iii. when a broadcasting facility or publication is owned or controlled by any candidate for state, county or municipal office, or by the campaign committee of such a candidate, or by the spouse or domestic partner of such a candidate, the cost of any editorial or other endorsement subject to no reasonable interpretation other than an appeal to vote for or a against a specific candidate in the same race as such candidate is not an expenditure as long as (i) disclosure of the ownership or control of the broadcast facility or publication is made in the endorsement and (ii) no costs are

incurred in the making of such endorsement above the normal operating costs of the broadcast facility or publication.

In addition to the above criteria, to qualify as a periodical publication, including one in electronic form on the Internet, or a newspaper or magazine, a publication (i) must have been disseminating news stories, commentaries or editorials on a variety of topics to the general public on a periodic basis for at least the previous twelve months, or (ii) must have a record of disseminating news stories, commentaries or editorials on a variety of topics to the general public that objectively indicates that the publication will continue to be published on a periodic basis beyond the election cycle during which the press exemption is claimed.

We support this provision as a mechanism to further the informational and anti-circumvention governmental interests.

PROPOSED MODIFIED RULE

For all of the above reasons, we recommend that the Commission adopt the following interpretive rule:

Press exemption. In order for the costs of preparing and disseminating a news story, commentary, or editorial to be exempt from the definitions of expenditure under the press exemption [§§ 1012(3)(B)(1) & 1052(4)(B)(1)], the following criteria must be met:

- a. the names of the persons or entities who own, control and operate the broadcasting station or publication are identified within the publication or otherwise made known to the public;
- b. the broadcasting station or publication and the individuals or entities described in paragraph a of this subsection are not compensated for or reimbursed for costs incurred in covering or carrying a news story, commentary or editorial by a candidate, candidate's authorized campaign committee, political party, political action committee, or ballot question committee, or their agents, except in exchange for providing advertising time or space to the candidates or committees; and
- c. the broadcasting station or publication is not owned or controlled by any political party, political action committee or ballot question committee or by any candidate for state, county or municipal office who is a subject of the news story, commentary, or editorial, or by the authorized campaign committee of such a candidate, or by the spouse or domestic partner of such a candidate; except that
 - i. the cost of a bona fide news story or commentary appearing in a publication of general circulation or on a broadcasting station that is part of a pattern of campaign-related news coverage that provides reasonable coverage to all

opposing candidates is not an expenditure; and

ii. when the broadcasting facility or publication is owned or controlled by any candidate for state, county or municipal office, or by the authorized campaign committee of such a candidate, or by a spouse or domestic partner of such a candidate, then:

- a. the cost of a news story, commentary or editorial about a candidate not in the same race as such a candidate is not an expenditure; and
- b. the cost of any editorial or other endorsement of a candidate subject to no reasonable interpretation other than an appeal to vote for or against a specific candidate in the same race as such candidate is not an expenditure as long as (i) disclosure of the ownership of the broadcast facility or publication is made in the endorsement and (ii) no costs are incurred in the making of such endorsement above the normal operating costs of the broadcast facility or publication.

In addition to the above criteria, to qualify as a periodical publication, including one in electronic form on the Internet, or a newspaper or magazine, a publication (i) must have been disseminating news stories, commentaries or editorials on a variety of topics to the general public on a periodic basis for at least the previous twelve months, or (ii) must have a record of disseminating news stories, commentaries or editorials on a variety of topics to the general public that objectively indicates that the publication will continue to be published on a periodic basis beyond the election cycle during which the press exemption is claimed.

95 Md. Op. Atty. Gen. 110 (Md.A.G.), 2010 WL 3547900 (Md.A.G.)

Office of the Attorney General

State of Maryland
May 24, 2010

ELECTION LAW

***1 CAMPAIGN FINANCE - IN-KIND CONTRIBUTION - CONSTITUTIONAL LAW - FREEDOM OF SPEECH**

Ms. Linda H. Lamone
Administrator
Maryland State Board of Elections

You have requested legal advice regarding a letter submitted to the State Board of Elections ("SBE") by the Maryland Democratic Party alleging that former Governor Robert Ehrlich and WBAL Radio have violated Maryland's campaign finance law. In essence, the letter asserts that, because the former Governor acts as host or co-host of a show on WBAL Radio, the station has made an illegal in-kind contribution to his gubernatorial campaign. The legal issue concerns the circumstances under which the broadcast of political discussion or commentary by a candidate or prospective candidate would amount to an in-kind contribution by the broadcaster.

In general, state efforts to regulate media appearances by a candidate, potential candidate, or others through a state's campaign finance laws raise significant First Amendment concerns. This is true even where the person appearing has some practical control over the content of the broadcast, including as host. Significantly, research by our Office has revealed no recent instances, under either federal law or the laws of other states, where in-kind contribution limits have been successfully applied in the way urged by the complaint. To the contrary, courts have routinely disapproved efforts to closely regulate the content of print or broadcast media featuring political discussion. The role of the candidate or potential candidate in that discussion does not fundamentally change that analysis. Our Office therefore advises that, consistent with its past practice with respect to media coverage of a candidate or potential candidate, SBE should decline to treat the radio broadcasts complained of as an illegal contribution to the Ehrlich campaign.

Several objective, content-neutral factors may be of special relevance. First, if the radio show at issue significantly pre-dates the current campaign season, it is unlikely that a court would find the station created the program as a vehicle to promote an actual or prospective candidacy. Second, a live call-in show featuring political discussion that is similar in format to other broadcasts regularly aired by the station would tend to negate an inference that the show was created especially for a campaign purpose. Third, if the program appears to be part of the station's ordinary broadcasting business, sponsored by paid commercial advertisements, that, too, makes it unlikely the program would be deemed a contribution to a particular campaign. In such circumstances, it would not appear that a station has donated to a campaign free air-time for which it would ordinarily charge a fee. *Cf.* Letter from Assistant Attorney General Kathryn M. Rowe to Delegate George W. Owings, III (August 25, 1994) (concluding that political use of a public access channel is not an in-kind contribution, in part because the cable franchisee does not charge for time). Therefore, regardless of any reason a candidate or potential candidate might have for hosting this type of show, from the station's perspective, the show would not amount to an unpaid "infomercial."

*2 Unquestionably, Maryland has a strong interest in preventing the evasion of its campaign finance limits through indirect means. This includes, of course, misconduct by media companies. But the First Amendment demands a lighter touch in this area, due to the media's role in providing a forum for public debate. This calls for a regulatory approach narrowly tailored to prevent the threatened harm, while avoiding unnecessary burdens on political speech. In our view, applying in-kind contribution limits to the type of activity at issue here would not be sufficiently tailored to the problem to justify its likely impact on political speech. Accordingly, SBE should treat a broadcast hosted by a candidate or potential candidate no differently than it does other appearances or commentary by political figures in the print or broadcast media. Greater scrutiny may be appropriate during the period immediately preceding the election, when both the temptation to abuse and the potential for harm are at their greatest. *See e.g., Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 895 (2010) ("It is well known that the public begins to concentrate on elections only in the weeks immediately before they are held."). Other regulations, such as the Federal Communication Commission's ("FCC") "equal time" rule, are specifically

targeted at such pre-election campaign activity. In any event, because we understand that this latter issue is not immediately of concern, it is not addressed in this advice letter.¹

I

Background

A. First Amendment Standards

A major purpose of the First Amendment is “to protect the free discussion of governmental affairs ... includ[ing] discussions of candidates.” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). The First Amendment guarantee “‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). More recently, the Supreme Court has warned against laws that, either through imprecision or complexity, impose impermissible burdens or uncertainties on speakers “discussing the most salient political issues of our day.” *Citizens United*, 130 S.Ct. at 888. “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *NAACP v. Button*, 371 U.S. 415, 433 (1963).

This need for specificity means that not all campaign-related speech may be regulated. Only campaign speech that can be identified as “express advocacy or its functional equivalent” meets a sufficiently definite standard that it may be subject to some government imposed limits. *Federal Election Comm’n v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) (“*WRTL*”).² Therefore, in the case of a radio broadcast involving a candidate or potential candidate, the question whether the appearance is subject to regulation, including as an in-kind contribution, arises *only* to the extent the broadcast involves express advocacy or its equivalent. If it does not, no further analysis is needed; the First Amendment precludes regulation of the appearance through campaign finance laws. If the broadcast *does* involve express advocacy or its equivalent, the issue becomes whether the purported restriction may be constitutionally applied. *See, e.g., Citizens United*, 130 S. Ct. at 898 (“Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”)(citation and internal quotations omitted).

^{*3} States have a strong interest in enacting laws to preserve the integrity and fairness of the electoral process. *Federal Election Comm’n v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982). This includes measures relating to campaign finance. *Buckley*, 424 U.S. at 26-29; *see also Nixon v. Shrink Missouri PAC*, 528 U.S. 377, 389 (2000). Limits on campaign contributions - which generally have their most direct impact on the First Amendment right of free association, *see Buckley*, 415 U.S. at 25 - are subject to a somewhat less rigorous standard of review than are more direct restrictions on speech. In analyzing laws that limit campaign contributions, courts will uphold the restriction if it promotes a “sufficiently important” government interest and is “closely drawn” to avoid unnecessary abridgment of the right to free association. *Id.* Under either standard, however, the test to be applied is a demanding one.

With regard to dollar limits on the value of contributions, the Supreme Court has recognized two “sufficiently important” state interests: an “anti-corruption” interest and an “anti-circumvention interest.” The first embraces not only express or implied *quid pro quo* arrangements, but also the threat of undue influence by large donors over elected officials, or the appearance of it, which undermines public confidence in the integrity and fairness of the electoral system. *Buckley*, 424 U.S. at 26-29; *see also Shrink Missouri PAC*, 528 U.S. at 389 (“In speaking of improper influence and opportunities for abuse ... we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”). The second interest is furthered by measures designed to prevent evasion or circumvention of legitimate campaign finance restrictions, so that individuals or organizations may not undermine valid contribution limits indirectly. *See Buckley*, 414 U.S. at 46-47. In-kind contribution limits promote both of these interests.

B. Federal Media Exception

Federal law provides a useful example of how First Amendment values may be accommodated in campaign finance regulation. The Federal Election Campaign Act (“FECA”), 2 U.S.C. § 431, *et seq.*, was amended shortly after its enactment to provide a specific statutory exception for most media appearances by a candidate. *See* 2 U.S.C. § 431(9)(B)(i). When it added the media exception in 1974, Congress indicated that it was intended to make clear that campaign finance regulation would not “limit or burden in any way the First Amendment freedoms of the press and of association. Thus the exclusion assures the unfettered right of the ... media to cover and comment on political campaigns.” H. Rep. No. 93-943, 93d Congs., 2d Sess. at 4 (1974); *see also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (discussing rationale for

media exception). This special protection of press freedoms is justified not because of any special privilege the press enjoys, but because press entities serve a critical role in our society as a forum for public debate.³

*4 Under regulations adopted pursuant to FECA, contributions and expenditures are defined so as to exclude “any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station ..., Web site, newspaper, magazine, or other periodical publication ...” except when the facility is “owned or controlled by any political party, political committee, or candidate ...” See 11 CFR § 100.73 (contributions), 100.132 (expenditures). For media facilities owned by a party, candidate, or political committee, federal law exempts only news stories that meet other criteria to ensure fairness.⁴ However, fairness, balance, or lack of bias are not requirements for media outlets not owned or controlled by a party, candidate, or political committee. *Id.*

Courts interpreting this provision have set forth a two-part analysis. *Federal Election Comm’n v. Phillips Publishing, Inc.*, 517 F.Supp. 1308, 1312-13 (D.D.C. 1981) (citing *Reader’s Digest Ass’n v. Federal Election Comm’n*, 509 F.Supp. 1210 (S.D.N.Y. 1981)).

Under the *Reader’s Digest* procedure, the initial inquiry is limited to whether the press entity is owned or controlled by any political party or candidate and whether the press entity was acting as a press entity with respect to the conduct in question. ... If the press entity is not owned or controlled by a political party or candidate and it is acting as a press entity, the FEC lacks subject matter jurisdiction and is barred from investigating the subject matter of the complaint.

Phillips Publishing, 517 F.Supp. at 1313 (citations omitted). In other words, provided an independent press entity acts “as a press entity,” the content of any political message it disseminates is largely irrelevant for federal campaign finance purposes. A number of states have adopted similar explicit media exceptions as part of their campaign finance laws to accommodate First Amendment values.

C. Maryland Campaign Finance Law

Regulation of Contributions and Expenditures

The Maryland Campaign Finance Law regulates contributions and expenditures in connection with State elections. See Annotated Code of Maryland, Election Law Article, § 13-101 *et seq.* Under that law, all campaign finance activity must be conducted through a “campaign finance entity.” EL § 13-202(a). In addition, the establishment of a campaign finance entity is made an express prerequisite to the filing of a certificate of candidacy for State office. EL § 13-202(b).

Once established, the campaign finance entity is to file regular reports with SBE of all contributions received and expenditures made. See EL § 13-304. SBE publishes a Summary Guide to assist candidates, contributors, officers of campaign finance entities, and others in complying with these requirements. EL § 13-103. Campaign finance obligations are continuing in nature. So long as an individual maintains a campaign finance entity registered with SBE, the campaign remains subject to the Title 13’s bookkeeping requirements, periodic reporting duties, and contribution limits. See, e.g., EL § 13-312; see also EL § 13-305 (treasurer may file affidavit in lieu of report in certain circumstances). Winding down or terminating a campaign finance entity requires compliance with several provisions of the Election Law Article, including those relating to disposition of remaining campaign funds and the filing of a final report. EL § § 13-247, 13-310, 13-311.

Contribution Limits and In-kind Contributions

*5 The Campaign Finance Law generally imposes limits on a donor’s political contributions based on a four-year election cycle. See EL § 1-101(w) (defining “election cycle”). In general, during any election cycle, the statute caps a donor’s contributions to any one candidate at \$4,000, and at \$10,000 to all campaign finance entities in the aggregate. EL § 13-226. The State election law defines a “contribution” as “the gift or transfer, or promise of gift or transfer, of money or other thing of value to a campaign finance entity to promote or assist in the promotion of the success or defeat of a candidate, political party, or question.” EL § 1-101(o)(1) (emphasis added). When a contribution is made in a form other than a direct gift of money to the campaign treasurer, it is considered an in-kind contribution.

The Summary Guide provides, in relevant part, the following explanation of an in-kind contribution:

An in-kind contribution includes any thing of value (except money). For example: a person can contribute bumper stickers to a candidate’s committee. The amount of the contribution equals the fair market value of the bumper stickers. An in-kind contribution counts towards the donor’s contribution limits.

Summary Guide - Maryland Candidacy & Campaign Finance Laws (revised July, 2006) at 27. In addition to giving a thing of value directly to a campaign, there are two other generic situations in which an in-kind contribution occurs: if a payment is made to a third party to defray a charge incurred by the campaign (see, e.g., EL § 13-602(a)(4)(i)), or if spending in support of a candidate is done in "coordination" with the campaign. Compare EL § 1-101(bb) (defining an "independent expenditure," which is *not* treated as an in-kind contribution). The complaint letter appears to suggest that the broadcast of a talk show hosted by a candidate might be viewed as either a donation of free air-time or as an expenditure by the station made in coordination with the campaign.

II

Analysis

In contrast to federal law and the campaign finance laws of some other states, Maryland statutes do not expressly except from the definition of a "contribution" the imputed cost or fair market value of media coverage of a campaign. See EL § 13-101(l) (defining "contribution"). Even so, it has been SBE's longstanding administrative practice not to regard traditional media coverage of candidates as in-kind contributions. This policy has been followed without regard to the political content, if any, of the candidate's message. SBE's past practice is thus entirely appropriate in light of the First Amendment concerns outlined above. Intrusive inquiry into the content of a candidate's speech inevitably has a chilling effect on free expression. Faced with a possible campaign violation, some candidates would doubtless censor their remarks, inhibiting the quantity and quality of public discourse.

*6 On the other hand, the First Amendment does not exempt media outlets from all campaign finance regulation. Unrestricted campaign finance activity could result in the exact type of harm that contribution limits were intended to prevent.⁵ Certainly, the possibility exists that elected officials could become too reliant upon or indebted to a media company in the same way this could occur with other private interests. See, e.g., *Citizens United*, 130 S.Ct. at 905 (expressing concerns about unequal treatment of corporations under federal media exception). This concern is legitimate.⁶ However, it seems plain that mechanical application of the in-kind rule to prevent possible misconduct by broadcasters would not be sufficiently "tailored" to the problem to meet the First Amendment standard.

As an example, because campaign finance obligations exist so long as a "candidate" maintains a campaign finance entity to support any current or future campaign - regardless of current activity or an intention to run - the in-kind rule could in theory be applied to any past media appearance by the candidate, at any time, throughout the entire course of the candidate's State political career. In addition, the in-kind requirements could be triggered by others as well, including a spokesperson, strategist, consultant, or any other person, acting in coordination with the campaign. Thus, a significant amount of core political speech might be suppressed solely to guard against a mostly theoretical, or at least rare, threat of abuse. This is regulation the First Amendment does not allow. See, e.g., *Citizens United*, 130 S. Ct. at 891 (First Amendment requires giving "benefit of any doubt to protecting rather than stifling speech.") (quoting *WRTL*, 551 U.S. at 469 (2007)). Our Office is not aware of any similar cases in which a federal or state agency has successfully upheld a finding that media commentary by a candidate (or those coordinating with the candidate's campaign) amounted to an impermissible in-kind contribution. See, e.g., *San Juan County v. No New Gas Tax*, 157 P.3d 831 (Wash. S. Ct. 2007) (criticism of gas tax by radio talk show hosts during regularly scheduled program for which the broadcaster did not normally require payment was not an in-kind contribution to political committee seeking to overturn tax by ballot initiative); 2003 Ariz. Op. Atty. Gen. 12, 2003 WL 23966055 (Ariz. A.G.) (candidate's media appearance not a contribution under statutory exception); *In re Dorman*, MUR 4689, Statement of Reasons ("SOR") of Chm'n Wold and Commr's Elliott, Mason, and Sandstrom (FEC "Matters Under Review," Feb. 14, 2000) (concluding media exception applies to guest host of radio show, whether before or after becoming a candidate for federal office).⁷

Nor does the absence of a statutory media exception require a different outcome. For example, the Arizona Attorney General noted that that Office had reached the same conclusion before the exception was added to the Arizona Code. "In 1988, even though there was not yet a news media exemption in Arizona's campaign finance laws, the Arizona Attorney General opined that 'regulation of newspaper editorials would clearly run afoul of constitutional guarantees of freedom of the press ...' 2003 Ariz. Op. Atty. Gen. No. 103-003 at 2 (quoting Arizona Attorney General Opinion No. 188-020 (1988)).

*7 Thus, even if a state lacks an explicit media exception in its campaign finance law, one may be implied in construing the law consistent with constitutional limitations. For example, in *Laffey v. Begin*, 137 Fed. Appx. 362 (1st Cir. 2005), the Rhode Island board of elections brought an enforcement action against an incumbent mayor, alleging that he had received an in-kind

contribution when a local radio station allowed him to host a weekly radio show. The mayor sued, claiming that the board action abridged his First Amendment rights. Eventually, the board agreed to suspend its enforcement action and the First Circuit remanded the case for an assessment of how the state election law accommodated the First Amendment.

The clear teaching of these authorities is that any enforcement policy that involves close regulation of the content of political speech can impermissibly threaten the values protected by the First Amendment. The Constitution is better served by a content-neutral analysis specifically targeting efforts to evade applicable campaign finance limits. *See, e.g., San Juan County*, 157 P.3d at 841 (observing that Washington Code “limits judicial inquiry into the content of the speech, focusing instead on the content-neutral question of whether the radio station ordinarily would collect a fee for the broadcast”); *compare* EL § 13-602(a)(4)(i) (prohibiting persons from defraying costs of campaign finance entity directly or indirectly); *see also Federal Election Comm’n v. Massachusetts Citizens for Life*, 479 U.S. 238, 250-51 & n.5 (1986) (holding, in part, that a “Special Edition” newsletter expressly advocating election of pro-life candidates was not covered by FECA’s media exception and was not akin to the normal business activity of a press entity, relying on content-neutral factors).

It is true that in some earlier cases, the FEC sought to put content restrictions on the on-air statements of candidates. *See, e.g., FEC Advisory Op. 1977-42* (limiting candidate’s permissible speech as host of public affairs radio program). But that is clearly no longer the case, provided the candidate appears on an “independent” media outlet that is performing its normal press function. *See In re Dorman*, MUR 4689, SOR of Com’r Wold *et al.*; *see also* FEC Advisory Op. 2005-19, at 5 (regarding press exemption for non-candidate despite “lack of objectivity” in coverage). Nor does the identity of the host change the analysis. Whatever control over program content a host might exercise, the relevant consideration under FECA is ownership or control of the station itself. *Id.* Nor is there a constitutionally relevant distinction between programs where a candidate acts as “host,” as compared to those where a candidate responds to questions from a friendly interviewer or audience of supporters. For First Amendment purposes, the identity of the speaker should be irrelevant. *Citizens United*, 130 S. Ct. at 898 (“Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some, but not by others.”).

*8 To avoid a potential chilling effect on free expression, courts are likely to give considerable leeway to the editorial or programming decisions of media companies, including a company’s choice of host. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244 (1974) (holding ‘right of reply’ statute to be an unconstitutional intrusion into the function of editors).⁸ Therefore, generally speaking, the use of objective, content-neutral criteria is an approach better suited to the First Amendment. In this regard, some factors to consider might include whether the program at issue is consistent with the station’s usual format, whether it was created well in advance of the campaign season or to provide a campaign vehicle for the candidate, and whether the station would ordinarily have collected a fee for the broadcast. The purpose of these questions would be to help SBE assess whether otherwise protected media activity is in reality an effort to promote a particular candidacy.

III

Conclusion

In light of the more than 35 years’ experience of courts and the FEC in interpreting a media exception consistent with the First Amendment, federal law probably offers the most useful guidance on the issue you have asked about. In line with that guidance, we would advise that, in considering possible misconduct relating to the coverage of political discussion by a candidate or potential candidate, the focus should remain on activity by the media outlet that appears to be inconsistent with its ordinary press or broadcast function.

Ordinarily, SBE would not analyze the broadcast of a candidate’s political remarks as a possible in-kind contribution. The reason advanced for doing so here appears mainly to derive from the participation of former Governor Ehrlich as a host or co-host of the broadcast, and the control over the show’s content that circumstance implies. But as is explained above, this consideration does not appear to be decisive, or even greatly relevant, for First Amendment purposes. Similarly, charges of media bias or a lack of balanced coverage do not provide grounds for subjecting a particular media outlet to campaign finance regulation where it would not be otherwise. Consequently, we see no reason in this situation for SBE to depart from its usual practice.

Douglas F. Gansler
Attorney General

Jeffrey L. Darsic
Assistant Attorney General
Robert N. McDonald
Chief Counsel Opinions and Advice

Editor's Note:

*9 This opinion was originally issued as a letter of advice.

Footnotes

- 1 According to public statements by the Ehrlich campaign and WBAL station management, the program will not be aired after the former Governor files a certificate of candidacy on or before the July 6, 2010 deadline. From that date, the FCC's "equal time" rule would apply to any "use" of the station by a filed candidate. *See* 47 U.S.C. § 315(a); 47 CFR § 73.1940 *et seq.*
- 2 The "functional equivalent" of express advocacy is a political message that is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *WRTL*, 551 U.S. at 469-70.
- 3 The Supreme Court has explained:
The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate. *Mills v. Alabama*, 384 U.S., at 219, 86 S.Ct., at 1437; *see Saxbe v. Washington Post Co.*, 417 U.S. 843, 863-864, 94 S.Ct. 2811, 2821-2822, 41 L.Ed.2d 514 (1974) (Powell, J., dissenting). But the press does not have a monopoly on either the First Amendment or the ability to enlighten. *Cf. Buckley v. Valeo*, 424 U.S., at 51 n. 56, 96 S.Ct., at 650; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-390, 89 S.Ct. 1794, 1806-1807, 23 L.Ed.2d 371 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964); *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945). *Bellotti*, 435 U.S. at 781-82 (footnotes omitted).
- 4 For a candidate-owned facility, only a news story:
(a) That represents a *bona fide* news account communicated in a publication of general circulation or on a licensed broadcasting facility; and
(b) That is part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not a contribution.
11 CFR § 100.73(a)(b).
- 5 Candidates often promote their candidacies through paid radio advertisements. If a radio station were to permit a candidate to air a campaign ad for free when it charged other advertisers, including other candidates, the free air time would be an in-kind contribution to the candidate by the radio station. Similarly, if a third party paid for the candidate's ad on behalf of the campaign, that, too, would be an in-kind contribution.
- 6 Although we recognize the potential for abuse, in the "free media" context this risk is arguably less as compared to other forms of in-kind contribution. In the case of a public broadcast, there can be no question as to the relationship between the candidate and the broadcaster. This may, in itself, encourage candidates and broadcasters to remain at arms-length with respect to policy issues affecting the company.
- 7 FEC Advisory Opinions and enforcement actions ("Matters Under Review") are available on-line at the FEC's website: www.fec.gov (last visited May 20, 2010).
- 8 As the Supreme Court observed in *Miami Herald*:
"The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time."
418 U.S. at 258 (citations omitted).

Wayne, Jonathan

From: James Parker [jparker339@roadrunner.com]
Sent: Wednesday, June 06, 2012 4:58 PM
To: Wayne, Jonathan
Subject: News papers

Jonathan:

As you know we have to account very closely for every penny used in our elections. If my wife could buy a local paper her editorial staff could selectively control my opponents input and greatly enhance my positive exposure.

In the case of Sussman buying papers in Pingrees district I see it as a blatant attempt to prompt her candidacy to the demise of other candidates. It may be a Federal office but it is an in state election. Just talking about it gives her more exposure than her opponents get.

This should not be allowed without full disclosure.

Rep Jim Parker
District 18
Bangor, Veazie, Orono

Sent from my iPad



July 6, 2012

Jonathan Wayne
Executive Director
Commission on Governmental Ethics and Election Practices
135 State House Station
Augusta, ME 04333-0135

Re: Proposed Rule 2012-P10 and 2012-P11

Dear Director Wayne:

I am pleased to submit some additional comments on behalf of Maine Citizens for Clean Elections ("MCCE") regarding the "press exemption" draft approved at the May 30, 2012 meeting of the Commission.

MCCE is a nonpartisan organization that has been advocating for the full and effective implementation of the Maine Clean Election Act since it was passed in 1996. MCCE also supports effective disclosure and transparency in campaign funding as vital to our democratic process.

We continue to support the Commission's effort to codify the press exemption in its regulations. Without repeating our previous comments, we offer only a few suggestions where we have questions or concerns.

1. We do not understand the necessity of 10(b) of the draft, and we find it potentially confusing. This subparagraph relates to circumstances in which a media entity has published an item in exchange for compensation or reimbursement. Under such circumstances, there can be no doubt that an expenditure has occurred under current rules as widely understood. The expenditure consists of the money paid to reimburse the media entity. The person making the reimbursement is the person who should be expected to report the expenditure under Maine law.

We are concerned that bringing this type of transaction under the "press exemption" provision is potentially confusing and unnecessary. For a hypothetical comparison, a printing company that prints up lawn signs for a candidate does not need an exemption from the definition of "expenditure." We doubt anyone would suggest that the printing company has made an "expenditure" when the printing was merely the fulfillment of a contract for a customer. The expenditure consists of the candidate's payment for the lawn signs, and it is the candidate who must report the expenditure. The same transaction

Partner Organizations

AARP Maine, Common Cause Maine, EqualityMaine, League of Women Voters of Maine, League of Young Voters, Maine AFL-CIO, Maine Council of Churches, Maine People's Alliance/Maine People's Resource Center, Maine State Employees Association/SEIU Local 1989, Maine Women's Lobby, NAACP-Portland, Sierra Club Maine Chapter

should be reported only once. Much the same analysis should apply to a media entity that publishes an item in exchange for compensation or reimbursement. The media entity has not made an expenditure, although it is possible that the entity that provides the reimbursement has made one, depending on other factors.

We believe this interpretation should be applied regardless of whether the media entity is paid to publish a specific item, or is more generally the recipient of financial support such as a general purpose grant. Either way, the expenditure is properly attributed to the candidate rather than the media entity.

2. We also believe that subparagraph 10(c)(ii) may be unnecessary and potentially confusing. The initial paragraph – 10(c) – already limits the criterion to cases where the candidate is the “subject of the news story, commentary, or editorial.” Thus, it seems redundant to add 10(c)(ii) to carve out the situation where the commentary or editorial is “about other candidates”

If additional clarification is needed, we would recommend amending the phrase in 10(c) to read “. . . owned or controlled by any candidate, or authorized campaign committee of the candidate, ~~who~~ whose election campaign or opponent is a subject of the news story, commentary, or editorial” This would make it quite clear that news stories, commentaries or editorials about subjects other than the race involving the owner-candidate are entitled to the press exemption. If this clarification is included in 10(c) subparagraph 10(c)(ii) should be deleted.

3. We support the interpretation of the statutory phrase “broadcast station” to apply equally to cable television operators, programmers and producers consistent with the FEC’s regulations (although it was not immediately clear how this is actually accomplished in the Draft Rule language dated May 30, 2012).

In all other respect we support the draft.

Thank you very much, and we look forward to continuing to work with you and the Commission.

Sincerely yours,



John Brautigam



July 6, 2012

By Email and First Class Mail

Walter F. McKee, Chair
Maine Commission on Governmental
Ethics and Election Practices
135 State House Station
Augusta, Maine 04333-0135

RE: June 1, 2012 Commission Invitation to Comment on Revised Rule
Interpreting Press Exception.

Dear Mr. McKee:

Introduction and Summary

The New England Cable and Telecommunications Association, Inc. (“NECTA”) represents most New England cable television operators in legislative and regulatory matters. NECTA respectfully offers this letter in lieu of written comments in response to the June 1, 2012 Memorandum Invitation to Comment on Revised Rule Interpreting Press Exception (“June 1 Memorandum”) issued by the Maine Commission on Governmental Ethics and Election Practices (“Commission”). NECTA strongly supports the recommendation that the “press exception” of 21 A.M.R.S.A. §§ 1012(3)(B)(1) and 1052(4)(B)(1) (“Maine Exception Statutes”) be interpreted in a manner identical to longstanding counterpart federal law provisions.¹ Accordingly, the Commission should construe the campaign finance press exception to apply to all televised news, commentary and editorials, provided that such outlet is not owned or controlled by a party, political committee or candidate as precluded in applicable state and federal campaign laws.² NECTA commends the Commission for its careful consideration of this important First Amendment issue.

Background and Prior Proceedings

The Commission has been considering changes to the press exception since at least January 2012, and has solicited and received several rounds of comments from interested persons and groups. See June 1 Memorandum; see also May 22, 2012

¹ Section 1012(3)(B)(1) establishes the press exception for political campaigns and Section 1052(4)(B)(1) does the same for political action committees.

² NECTA is amenable to a legislative change to clarify the statutory text but does not see such change as required to interpret the Maine Exception Statutes to include cable.

Murtha Cullina LLP | Attorneys at Law

BOSTON

HARTFORD

MADISON

NEW HAVEN

STAMFORD

WOBURN

Memorandum from Executive Director to Commissioners (attaching prior draft Rules and attaching comments filed). Section 7(10) of Proposed Commission Rule 94-270 (circulated with the June 1 Memorandum) interprets the “press exception” set forth in the Maine Exception Statutes which provides that televised news, commentary and editorial stories shall not be considered reportable “expenditures” under campaign finance laws. E.g., 21 A.M.R.S.A. § 1012(3)(B)(1) (“expenditure” excludes “[a]ny news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication...” unless owned or controlled by a party, political committee or candidate). The press exception text in the Exception Statutes is materially identical to the counterpart federal “press exception.” Compare 2 U.S.C. § 431(9)(B)(i). In addition to requesting comments on “any aspect” of the Proposed Rule, the Memorandum specifically solicits comment on specific press exception issues including the following:

“3) Can the Commission’s rule interpret the statutory phrase “broadcast station” to exempt cable television operators, programmers and producers (as the FEC has)?”

June 1 Memorandum, p. 1; compare 11 C.F.R. § 100.132 (excluding costs associated with news, commentary and editorials by “any broadcasting station (including a cable television operator, programmer or producer))....” (emphasis added).

NECTA Comments

1. The Commission Should Interpret the Maine Exception Statutes to Include Cable Operators and Programming.

The Commission lawfully may, and should as a policy matter, construe the Maine Exemption Statutes to encompass cable television providers and programming, for multiple reasons. First, the Maine legislature adopted virtually the same text as the longstanding counterpart federal press exception, which has maintained rules expressly covering cable broadcasters since 1996, long before enactment of the Maine statute. Accordingly, absent contrary indications in the legislative history (which do not, to NECTA’s knowledge, in fact exist), the Maine legislature should be assumed to intend a similar scope that includes cable operators. At minimum, Maine law authorizes the Commission to adopt the Federal Election Commission interpretation as persuasive guidance in interpreting the counterpart Maine statutes. See Neal Prescott v. State Tax Assessor, 721 A. 2d 169, 172-73 (ME 1998) (determining that interpretation of a Maine state statute may be guided by federal court decisions involving a similar federal tax code provision); Maine Human Rights Commission et al., v. City of Auburn et al., 425 A. 2d. 990, 996 (ME 1981) (affirming lower court’s application of a federal rule where the Maine statute was modeled after federal statutes). Additionally, the plain meaning of “broadcasting” and “broadcasting stations” easily encompass cable television companies

that distribute the same or highly similar content to most Maine consumers over the same cable television platform.³

2. The Commission Should Construe the Maine Exemption Statutes to Avoid Manifest Potential Constitutional Problems.

The Executive Director's May 22, 2012 Memorandum to the Commission properly highlighted the importance of the press exception "because it allows publishers of news and commentary to present to the public news reports and viewpoints concerning candidates, without the fear that they will be entangled in campaign finance regulations." *Id.*, p. 2. NECTA concurs, and to the extent the Commission does not rest on legislative intent and plain meaning, NECTA requests that the Board avoid evident First Amendment difficulties by construing the press exception to apply to cable television operators and outlets, as is done under longstanding federal law.

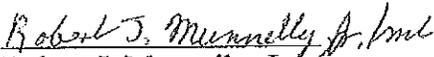
The strong First Amendment policies recognized in the legislative history of the federal press exception apply equally to broadcast and cable-generated news, commentary and editorials. *See* H.R. Rep. No. 93-1239, at 4 (1974) (stating that Congress did not intend to "limit or burden in any way the First Amendment freedoms of the press and of association. [The exception] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns"). Understandably, a 2010 legal opinion from the Maryland Attorney General to the Maryland State Board of Elections identified no cases nationally "in which a federal or state agency has successfully upheld a finding that media commentary by a candidate (or those coordinating with the candidate's campaign) amounted to an impermissible in-kind contribution...." *See* Maryland Attorney General's Office May 24, 2010 letter to Administrator, Maryland State Board of Elections, p. 8 (copy attached as Exhibit A.) The Maryland Attorney General also concluded that media statements received First Amendment protections even in the absence of a statutory media exception. *Id.*, p. 9 (discussing Arizona and Rhode Island laws).

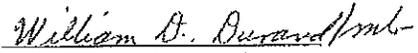
³ *E.g.*, Merriam-Webster Dictionary Online (m-w.com): "cast or scattered in all directions...made public by means of radio or television...of or relating to radio or television broadcasting"). Once again, no legislative history suggests that "broadcast station" was intended to be used in a narrow, hypertechnical sense, to limit the press exemption to the handful of broadcast television stations and to exclude hundreds of channels of cable-delivered programming.

Conclusion

For the foregoing reasons, the Commission may lawfully, and should as a matter of policy, apply the press exception to cable operators and programming in Maine without the necessity of amendments to the Maine Exception Statutes.

Very truly yours,


Robert J. Munnely, Jr.
Murtha Cullina LLP


William D. Durand
New England Cable and
Telecommunications Association, Inc.

cc: Jonathan Wayne, Executive Director

Exhibit A

DOUGLAS F. GANSLER
Attorney General

)
jdarsie@oag.state.md.us

E-Mail

(410) 576-7036
FACSIMILE NO.



KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL

(410) 576-6356
WRITER'S DIRECT DIAL NO.

May 24, 2010

Ms. Linda H. Lamone
Administrator
Maryland State Board of Elections
151 West Street – Suite 200
Annapolis, Maryland 21401

Dear Ms. Lamone:

You have requested legal advice regarding a letter submitted to the State Board of Elections (“SBE”) by the Maryland Democratic Party alleging that former Governor Robert Ehrlich and WBAL Radio have violated Maryland’s campaign finance law. In essence, the letter asserts that, because the former Governor acts as host or co-host of a show on WBAL Radio, the station has made an illegal in-kind contribution to his gubernatorial campaign. The legal issue concerns the circumstances under which the broadcast of political discussion or commentary by a candidate or prospective candidate would amount to an in-kind contribution by the broadcaster.

In general, state efforts to regulate media appearances by a candidate, potential candidate, or others through a state’s campaign finance laws raise significant First Amendment concerns. This is true even where the person appearing has some practical control over the content of the broadcast, including as host. Significantly, research by our Office has revealed no recent instances, under either federal law or the laws of other states, where in-kind contribution limits have been successfully applied in the way urged by the complaint. To the contrary, courts have routinely disapproved efforts to closely regulate the content of print or broadcast media featuring political discussion. The role of the candidate or potential candidate in that discussion does not fundamentally change that analysis. Our Office therefore advises that, consistent with its past practice with respect to media coverage of a candidate or potential candidate, SBE should decline to treat the radio broadcasts complained of as an illegal contribution to the Ehrlich campaign.

Several objective, content-neutral factors favor this conclusion. First, if the radio show at issue significantly pre-dates the current campaign season, it is unlikely that a court would find the station created the program as a vehicle to promote an actual or prospective candidacy. Second, a live call-in show featuring political discussion that is similar in format

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to other broadcasts regularly aired by the station would tend to negate an inference that the show was created especially for a campaign purpose. Third, if the program appears to be part of the station's ordinary broadcasting business, sponsored by paid commercial advertisements, that, too, makes it unlikely the program would be deemed a contribution to a particular campaign. In such circumstances, it would not appear that a station has donated to a campaign free air-time for which it would ordinarily charge a fee. *Cf.* Letter from Assistant Attorney General Kathryn M. Rowe to Delegate George W. Owings, III (August 25, 1994) (concluding that political use of a public access channel is not an in-kind contribution, in part because the cable franchisee does not charge for time). Therefore, regardless of any reason a candidate or potential candidate might have for hosting this type of show, from the station's perspective, the show would not amount to an unpaid "infomercial."

Unquestionably, Maryland has a strong interest in preventing the evasion of its campaign finance limits through indirect means. This includes, of course, misconduct by media companies. But the First Amendment demands a lighter touch in this area, due to the media's role in providing a forum for public debate. This calls for a regulatory approach narrowly tailored to prevent the threatened harm, while avoiding unnecessary burdens on political speech. In our view, applying in-kind contribution limits to the type of activity at issue here would not be sufficiently tailored to the problem to justify its likely impact on political speech. Accordingly, SBE should treat a broadcast hosted by a candidate or potential candidate no differently than it does other appearances or commentary by political figures in the print or broadcast media.

Greater scrutiny may be appropriate during the period immediately preceding the election, when both the temptation to abuse and the potential for harm are at their greatest. *See e.g., Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 895 (2010) ("it is well known that the public begins to concentrate on elections only in the weeks immediately before they are held."). Other regulations, such as the Federal Communication Commission's ("FCC") "equal time" rule, are specifically targeted at such pre-election campaign activity. In any event, because we understand that this latter issue is not immediately of concern, it is not addressed in this advice letter.¹

¹ According to public statements by the Ehrlich campaign and WBAL station management, the program will not be aired after the former Governor files a certificate of candidacy on or before the July 6, 2010 deadline. From that date, the FCC's "equal time" rule would apply to any "use" of the station by a filed candidate. *See* 47 U.S.C. §315(a); 47 CFR §73.1940 *et seq.*

Background

First Amendment Standards

A major purpose of the First Amendment is “to protect the free discussion of governmental affairs . . . includ[ing] discussions of candidates.” *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). The First Amendment guarantee “has its fullest and most urgent application” to speech uttered during a campaign for political office.” *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)). More recently, the Supreme Court has warned against laws that, either through imprecision or complexity, impose impermissible burdens or uncertainties on speakers “discussing the most salient political issues of our day.” *Citizens United*, 130 S.Ct. at 888. “Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *NAACP v. Button*, 371 U.S. 415, 433 (1963).

This need for specificity means that not all campaign-related speech may be regulated. Only campaign speech that can be identified as “express advocacy or its functional equivalent” meets a sufficiently definite standard that it may be subject to some government imposed limits. *Federal Election Comm’n v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) (“*WRTL*”).² Therefore, in the case of a radio broadcast involving a candidate or potential candidate, the question whether the appearance is subject to regulation, including as an in-kind contribution, arises *only* to the extent the broadcast involves express advocacy or its equivalent. If it does not, no further analysis is needed; the First Amendment precludes regulation of the appearance through campaign finance laws. If the broadcast *does* involve express advocacy or its equivalent, the issue becomes whether the purported restriction may be constitutionally applied. *See, e.g., Citizens United*, 130 S. Ct. at 898 (“Laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.”)(citation and internal quotations omitted).

States have a strong interest in enacting laws to preserve the integrity and fairness of the electoral process. *Federal Election Comm’n v. National Right to Work Comm.*, 459 U.S. 197, 208 (1982). This includes measures relating to campaign finance. *Buckley*, 424 U.S. at 26-29; *see also Nixon v. Shrink Missouri PAC*, 528 U.S. 377, 389 (2000). Limits on campaign contributions—which generally have their most direct impact on the First Amendment right of free association, *see Buckley*, 415 U.S. at 25—are subject to a somewhat

² The “functional equivalent” of express advocacy is a political message that is “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *WRTL*, 551 U.S. at 469-70.

less rigorous standard of review than are more direct restrictions on speech. In analyzing laws that limit campaign contributions, courts will uphold the restriction if it promotes a “sufficiently important” government interest and is “closely drawn” to avoid unnecessary abridgment of the right to free association. *Id.* Under either standard, however, the test to be applied is a demanding one.

With regard to dollar limits on the value of contributions, the Supreme Court has recognized two “sufficiently important” state interests: an “anti-corruption” interest and an “anti-circumvention interest.” The first embraces not only express or implied *quid pro quo* arrangements, but also the threat of undue influence by large donors over elected officials, or the appearance of it, which undermines public confidence in the integrity and fairness of the electoral system. *Buckley*, 424 U.S. at 26-29; *see also Shrink Missouri PAC*, 528 U.S. at 389 (“In speaking of improper influence and opportunities for abuse . . . we recognized a concern not confined to bribery of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors.”). The second interest is furthered by measures designed to prevent evasion or circumvention of legitimate campaign finance restrictions, so that individuals or organizations may not undermine valid contribution limits indirectly. *See Buckley*; 414 U.S. at 46-47. In-kind contribution limits promote both of these interests.

Federal Media Exception

Federal law provides a useful example of how First Amendment values may be accommodated in campaign finance regulation. The Federal Election Campaign Act (“FECA”), 2 U.S.C. §431, *et seq.*, was amended shortly after its enactment to provide a specific statutory exception for most media appearances by a candidate. *See* 2 U.S.C. §431(9)(B)(i). When it added the media exception in 1974, Congress indicated that it was intended to make clear that campaign finance regulation would not “limit or burden in any way the First Amendment freedoms of the press and of association. Thus the exclusion assures the unfettered right of the . . . media to cover and comment on political campaigns.” H. Rep. No. 93-943, 93d Congs., 2d Sess. at 4 (1974); *see also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (discussing rationale for media exception). This special protection of press freedoms is justified not because of any special privilege the press enjoys, but because press entities serve a critical role in our society as a forum for public debate.³

³ The Supreme Court has explained:

The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate. *Mills v.*

(continued...)

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Under regulations adopted pursuant to FECA, contributions and expenditures are defined so as to exclude "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station . . . , Web site, newspaper, magazine, or other periodical publication . . ." except when the facility is "owned or controlled by any political party, political committee, or candidate . . ." See 11 CFR §§100.73 (contributions), 100.132 (expenditures). For media facilities owned by a party, candidate, or political committee, federal law exempts only news stories that meet other criteria to ensure fairness.⁴ However, fairness, balance, or lack of bias are not requirements for media outlets not owned or controlled by a party, candidate, or political committee. *Id.*

Courts interpreting this provision have set forth a two-part analysis. *Federal Election Comm'n v. Phillips Publishing, Inc.*, 517 F.Supp. 1308, 1312-13 (D.D.C. 1981) (citing *Reader's Digest Ass'n v. Federal Election Comm'n*, 509 F.Supp. 1210 (S.D.N.Y. 1981)).

Under the *Reader's Digest* procedure, the initial inquiry is limited to whether the press entity is owned or controlled by any political party or candidate and whether the press entity was acting as a press entity with respect to the conduct in question.

³ (...continued)

Alabama, 384 U.S., at 219, 86 S.Ct., at 1437; see *Saxbe v. Washington Post Co.*, 417 U.S. 843, 863-864, 94 S.Ct. 2811, 2821-2822, 41 L.Ed.2d 514 (1974) (Powell, J., dissenting). But the press does not have a monopoly on either the First Amendment or the ability to enlighten. Cf. *Buckley v. Valeo*, 424 U.S., at 51 n. 56, 96 S.Ct., at 650; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 389-390, 89 S.Ct. 1794, 1806-1807, 23 L.Ed.2d 371 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964); *Associated Press v. United States*, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013 (1945).

Bellotti, 435 U.S. at 781-82 (footnotes omitted).

⁴ For a candidate-owned facility, only a news story:

(a) That represents a *bona fide* news account communicated in a publication of general circulation or on a licensed broadcasting facility; and

(b) That is part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not a contribution.

11 CFR §100.73(a)(b).

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... If the press entity is not owned or controlled by a political party or candidate and it is acting as a press entity, the FEC lacks subject matter jurisdiction and is barred from investigating the subject matter of the complaint.

Phillips Publishing, 517 F.Supp. at 1313 (citations omitted). In other words, provided an independent press entity acts "as a press entity," the content of any political message it disseminates is largely irrelevant for federal campaign finance purposes. A number of states have adopted similar explicit media exceptions as part of their campaign finance laws to accommodate First Amendment values.

Maryland Campaign Finance Law

Regulation of contributions and expenditures

The Maryland Campaign Finance Law regulates contributions and expenditures in connection with State elections. See Annotated Code of Maryland, Election Law Article, §13-101 *et seq.* Under that law, all campaign finance activity must be conducted through a "campaign finance entity." EL §13-202(a). In addition, the establishment of a campaign finance entity is made an express prerequisite to the filing of a certificate of candidacy for State office. EL §13-202(b).

Once established, the campaign finance entity is to file regular reports with SBE of all contributions received and expenditures made. See EL §13-304. SBE publishes a Summary Guide to assist candidates, contributors, officers of campaign finance entities, and others in complying with these requirements. EL §13-103. Campaign finance obligations are continuing in nature. So long as an individual maintains a campaign finance entity registered with SBE, the campaign remains subject to the Title 13's bookkeeping requirements, periodic reporting duties, and contribution limits. See, e.g., EL §13-312; see also EL §13-305 (treasurer may file affidavit in lieu of report in certain circumstances). Winding down or terminating a campaign finance entity requires compliance with several provisions of the Election Law Article, including those relating to disposition of remaining campaign funds and the filing of a final report. EL §§13-247, 13-310, 13-311.

Contribution limits and In-kind Contributions

The Campaign Finance Law generally imposes limits on a donor's political contributions based on a four-year election cycle. See EL §1-101(w) (defining "election cycle"). In general, during any election cycle, the statute caps a donor's contributions to any one candidate at \$4,000, and at \$10,000 to all campaign finance entities in the aggregate. EL §13-226. The State election law defines a "contribution" as "the gift or transfer, or promise

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of gift or transfer, of money *or other thing of value* to a campaign finance entity to promote or assist in the promotion of the success or defeat of a candidate, political party, or question.” EL §1-101(o)(1) (emphasis added). When a contribution is made in a form other than a direct gift of money to the campaign treasurer, it is considered an in-kind contribution.

The Summary Guide provides, in relevant part, the following explanation of an in-kind contribution:

An in-kind contribution includes any thing of value (except money). For example: a person can contribute bumper stickers to a candidate’s committee. The amount of the contribution equals the fair market value of the bumper stickers. An in-kind contribution counts towards the donor’s contribution limits.

Summary Guide – Maryland Candidacy & Campaign Finance Laws (revised July, 2006) at 27. In addition to giving a thing of value directly to a campaign, there are two other generic situations in which an in-kind contribution occurs: if a payment is made to a third party to defray a charge incurred by the campaign (*see, e.g.*, EL §13-602(a)(4)(i)), or if spending in support of a candidate is done in “coordination” with the campaign. *Compare* EL §1-101(bb) (defining an “independent expenditure,” which is *not* treated as an in-kind contribution). The complaint letter appears to suggest that the broadcast of a talk show hosted by a candidate might be viewed as either a donation of free air-time or as an expenditure by the station made in coordination with the campaign.

Analysis

In contrast to federal law and the campaign finance laws of some other states, Maryland statutes do not expressly except from the definition of a “contribution” the imputed cost or fair market value of media coverage of a campaign. *See* EL §13-101(l) (defining “contribution”). Even so, it has been SBE’s longstanding administrative practice not to regard traditional media coverage of candidates as in-kind contributions. This policy has been followed without regard to the political content, if any, of the candidate’s message. SBE’s past practice is thus entirely appropriate in light of the First Amendment concerns outlined above. Intrusive inquiry into the content of a candidate’s speech inevitably has a chilling effect on free expression. Faced with a possible campaign violation, some candidates would doubtless censor their remarks, inhibiting the quantity and quality of public discourse.

On the other hand, the First Amendment does not exempt media outlets from all campaign finance regulation. Unrestricted campaign finance activity could result in the exact

Linda H. Lamone
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type of harm that contribution limits were intended to prevent.⁵ Certainly, the possibility exists that elected officials could become too reliant upon or indebted to a media company in the same way this could occur with other private interests. *See, e.g., Citizens United*, 130 S.Ct. at 905 (expressing concerns about unequal treatment of corporations under federal media exception). This concern is legitimate.⁶ However, it seems plain that mechanical application of the in-kind rule to prevent possible misconduct by broadcasters would not be sufficiently “tailored” to the problem to meet the First Amendment standard.

As an example, because campaign finance obligations exist so long as a “candidate” maintains a campaign finance entity to support any current or future campaign—regardless of current activity or an intention to run – the in-kind rule could in theory be applied to any past media appearance by the candidate, at any time, throughout the entire course of the candidate’s State political career. In addition, the in-kind requirements could be triggered by others as well, including a spokesperson, strategist, consultant, or any other person, acting in coordination with the campaign. Thus, a significant amount of core political speech might be suppressed solely to guard against a mostly theoretical, or at least rare, threat of abuse. This is regulation the First Amendment does not allow. *See, e.g., Citizens United*, 130 S. Ct. at 891 (First Amendment requires giving “benefit of any doubt to protecting rather than stifling speech.”) (quoting *WRTL*, 551 U.S. at 469 (2007)).

Our Office is not aware of any similar cases in which a federal or state agency has successfully upheld a finding that media commentary by a candidate (or those coordinating with the candidate’s campaign) amounted to an impermissible in-kind contribution. *See, e.g., San Juan County v. No New Gas Tax*, 157 P.3d 831 (Wash. S. Ct. 2007) (criticism of gas tax by radio talk show hosts during regularly scheduled program for which the broadcaster did not normally require payment was not an in-kind contribution to political committee seeking to overturn tax by ballot initiative); 2003 Ariz. Op. Atty. Gen. 12, 2003 WL 23966055 (Ariz. A.G.) (candidate’s media appearance not a contribution under statutory exception); *In re Dornan*, MUR 4689, Statement of Reasons (“SOR”) of Chm’n Wold and Commr’s Elliott, Mason, and Sandstrom (FEC “Matters Under Review,” Feb. 14, 2000) (concluding media

⁵ Candidates often promote their candidacies through paid radio advertisements. If a radio station were to permit a candidate to air a campaign ad for free when it charged other advertisers, including other candidates, the free air time would be an in-kind contribution to the candidate by the radio station. Similarly, if a third party paid for the candidate’s ad on behalf of the campaign, that, too, would be an in-kind contribution.

⁶ Although we recognize the potential for abuse, in the “free media” context arguably this risk will often be less as compared to other forms of in-kind contribution. In the case of a public broadcast, there can be no question as to the relationship between the candidate and the broadcaster. This may, in itself, encourage candidates and broadcasters to remain at arms-length with respect to policy issues affecting the company.

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exception applies to guest host of radio show, whether before or after becoming a candidate for federal office).⁷

Nor does the absence of a statutory media exception require a different outcome. For example, the Arizona Attorney General noted that Office had reached the same conclusion before the exception was added to the Arizona Code. "In 1988, even though there was not yet a news media exemption in Arizona's campaign finance laws, the Arizona Attorney General opined that 'regulation of newspaper editorials would clearly run afoul of constitutional guarantees of freedom of the press...' 2003 Ariz. Op. Atty. Gen. No. I03-003 at 2 (quoting Arizona Attorney General Opinion No. 188-020 (1988)).

Thus, even if a state lacks an explicit media exception in its campaign finance law, one may be implied in construing the law consistent with constitutional limitations. For example, in *Laffey v. Begin*, 137 Fed. Appx. 362 (1st Cir. 2005), the Rhode Island board of elections brought an enforcement action against an incumbent mayor, alleging that he had received an in-kind contribution when a local radio station allowed him to host a weekly radio show. The mayor sued, claiming that the board action abridged his First Amendment rights. Eventually, the board agreed to suspend its enforcement action and the First Circuit remanded the case for an assessment of how the state election law accommodated the First Amendment.

The clear teaching of these authorities is that any enforcement policy that involves close regulation of the content of political speech can impermissibly threaten the values protected by the First Amendment. The Constitution is better served by a content-neutral analysis specifically targeting efforts to evade applicable campaign finance limits. *See, e.g., San Juan County*, 157 P.3d at 841 (observing that Washington Code "limits judicial inquiry into the content of the speech, focusing instead on the content-neutral question of whether the radio station ordinarily would collect a fee for the broadcast"); *compare* EL §13-602(a)(4)(i) (prohibiting persons from defraying costs of campaign finance entity directly or indirectly); *see also Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 250-51 & n.5 (1986) (holding, in part, that a "Special Edition" newsletter expressly advocating election of pro-life candidates was not covered by FECA's media exception and was not akin to the normal business activity of a press entity, relying on content-neutral factors).

It is true that in some earlier cases, the FEC sought to put content restrictions on the on-air statements of candidates. *See, e.g.,* FEC Advisory Op. 1977-42 (limiting candidate's permissible speech as host of public affairs radio program). But that is clearly no longer the

⁷ FEC Advisory Opinions and enforcement actions ("Matters Under Review") are available on-line at the FEC's website: www.fec.gov (last visited May 20, 2010).

case, provided the candidate appears on an “independent” media outlet that is performing its normal press function. See *In re Dornan*, MUR 4689, SOR of Com’r Wold *et al.*; see also FEC Advisory Op. 2005-19, at 5 (regarding press exemption for non-candidate despite “lack of objectivity” in coverage). Nor does the identity of the host change the analysis. Whatever control over program content a host might exercise, the relevant consideration under FECA is ownership or control of the station itself. *Id.* Nor is there a constitutionally relevant distinction between programs where a candidate acts as “host,” as compared to those where a candidate responds to questions from a friendly interviewer or audience of supporters. For First Amendment purposes, the identity of the speaker should be irrelevant. *Citizens United*, 130 S. Ct. at 898 (“Prohibited, too, are restrictions distinguishing among different speakers, allowing speech by some, but not by others.”).

To avoid a potential chilling effect on free expression, courts are likely to give considerable leeway to the editorial or programming decisions of media companies, including a company’s choice of host. See, e.g., *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 244 (1974) (holding ‘right of reply’ statute to be an unconstitutional intrusion into the function of editors).⁸ Therefore, generally speaking, the use of objective, content-neutral criteria is an approach better suited to the First Amendment. In this regard, some factors to consider might include whether the program at issue is consistent with the station’s usual format, whether it was created well in advance of the campaign season or to provide a campaign vehicle for the candidate, and whether the station would ordinarily have collected a fee for the broadcast. The purpose of these questions would be to help SBE assess whether otherwise protected media activity is in reality an effort to promote a particular candidacy.

Conclusion

In light of the more than 35 years’ experience of courts and the FEC in interpreting a media exception consistent with the First Amendment, federal law probably offers the most useful guidance on the issue you have asked about. In line with that guidance, our Office would advise that, in considering possible misconduct relating to the coverage of political

⁸ As the Supreme Court observed in *Miami Herald*:

“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”

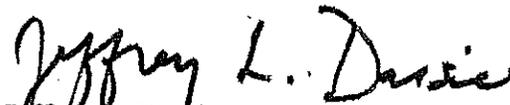
418 U.S. at 258 (citations omitted).

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discussion by a candidate or potential candidate, the focus should remain on activity by the media outlet that appears to be inconsistent with its ordinary press or broadcast function.

Ordinarily, SBE would not analyze the broadcast of a candidate's political remarks as a possible in-kind contribution. The reason advanced for doing so here appears mainly to derive from the participation of former Governor Ehrlich as a host or co-host of the broadcast, and the control over the show's content that circumstance implies. But as is explained above, this consideration does not appear to be decisive, or even greatly relevant, for First Amendment purposes. Similarly, charges of media bias or a lack of balanced coverage do not provide grounds for subjecting a particular media outlet to campaign finance regulation where it would not be otherwise. Consequently, our Office sees no reason in this situation for SBE to depart from its usual practice.

Sincerely,



Jeffrey L. Darsie
Assistant Attorney General