

Agenda

Item #3



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: December 13, 2010

Re: Summary of Proposed Changes to Chapter 1 Rules

Chapter 1, Section 6(4) – Discounts from a Vendor due to Defects in Performance

The Commission staff proposes a change to its rule defining what is an “in-kind” contribution: the provision of goods or services without charge or at a charge that is less than the usual and customary charge for such goods or services. In 2008 and 2010, the Commission staff has been occasionally contacted by a candidate or a party committee who ordered printing or design services and received a defective product. In these circumstances, the vendor offered to discount the original purchase price. The Commission staff proposes an amendment to the rule to clarify that such discounts are not in-kind contributions to the candidate or other purchaser (party committee, political action committee). If the discount is part of the vendor’s ordinary business practice and is due to defective product – rather than an effort to influence an election – the staff proposes the discount should not be viewed as a contribution.

Chapter 1, Section 6(7) – Timing of Receipt of Contributions

The Commission staff proposes deleting an instance of the term “influencing” which the U.S. District Court has found to be unconstitutionally vague.

Chapter 1, Section 6(8) – Sale of Campaign Promotional Items or Tickets

Candidates and political committees often sell promotional items (e.g., t-shirts, water bottles, hats, etc.) with their campaign logos on them, or provide a meal or entertainment to those who buy tickets to a fundraising event. Some candidates and committees have asked whether the contribution is the net amount realized after the cost of the item or meal has been deducted. The staff proposes a rule that would clarify that the entire amount received by the candidate or committee for the item or for admission to the event is a contribution.

Chapter 1, Section 6(9) – Coordinated Expenditures

In 1996, the people of Maine enacted low contribution limits through a direct initiative. These limits were amended for the 2010 election cycle by the Legislature (\$750 for gubernatorial candidates, and \$350 for other candidates). The purpose of contribution limits is to prevent donors from corrupting the independence of public officials through large campaign contributions and to avoid the appearance to the public of such corruption.

Maine's Election Law contains a provision stating that if a candidate suggests that another person spend money to promote the candidate or has cooperated with such an expenditure (*e.g.*, a purchase of advertisements or other communications to voters), the candidate has received a non-monetary contribution. That is because the candidate has received something of value to promote his campaign that, otherwise, the campaign would have needed to purchase:

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.

(21-A M.R.S.A. § 1015(5)) These “coordinated expenditures” are a type of in-kind contribution that is subject to the \$350 and \$750 limits. Many states have similar provisions. The courts have recognized that these coordinated expenditure statutes are constitutional, because they prevent a candidate's supporters from circumventing the contribution limits by making unlimited purchases to benefit the candidate.

The staff proposes a rule that would provide some definition of what activities constitute coordination. The proposed rule does not provide an exhaustive list. The proposed rule addresses a few of the situations that have arisen in past elections, and also includes some scenarios based on similar regulations in other states (Washington and California, primarily). Under the proposed rule, an expenditure would be coordinated with the candidate (or the candidate's authorized campaign committee, or the agents of the candidate or the candidate's committee) when:

- the candidate discusses with the spender a proposed communication; or
- the candidate participates in a decision about the content, timing, location or other characteristics of a communication.

In paragraph 9(A), the proposed rule would also impose a presumption that an expenditure was made in cooperation or consultation with the candidate under certain circumstances. The presumption of cooperation or consultation could be rebutted by a showing of contrary facts. The presumption would apply when:

- the expenditure is made in consultation with an individual who – within the last 12 months prior to the expenditure – has been an officer, manager, or advisor of the candidate’s committee, or who has received compensation or reimbursement of expenses from the campaign;
- the candidate has provided information to the person making the expenditure concerning the candidate’s plans, projects, activities or needs, and the expenditures is based on that information; or
- the communication reproduces all or a substantial part of a communication designed or paid for by the candidate.

Some candidates would prefer that PACs and party committees not make an expenditure on their behalf. Paragraph 9(C) states that if a candidate makes such a request to a PAC or party committee, the request does not constitute coordination.

Paragraph 9(D) sets forth some scenarios in which the Commission would not presume that an expenditure was made in consultation or cooperation with the candidate:

- when the person making the expenditure has obtained a photograph, biography, position paper, or press release concerning the candidate from a publicly available source;
- when the person makes an expenditure in response to a general request for support by a candidate, provided that there is no discussion, cooperation or consultation with the candidate prior to the expenditure relating to the details of the expenditure (*e.g.*, a plea by a candidate for supporters to purchase ads in community newspapers or to post signs on their property supporting a candidate);
- when the person making the expenditure previously has made a contribution to the candidate;
- when a for-profit or non-profit organization spends money on an event at which the candidate is invited to speak to an organization’s members, employees, shareholders, or the families thereof (this scenario is not intended to cover an event open to the general public); or
- when an individual spends \$100 or less for a hand-painted sign that reproduces a candidate’s campaign logo or graphic.

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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 6. CONTRIBUTIONS AND OTHER RECEIPTS

1. The date of a contribution is the date it is received by a candidate, an agent of the candidate, a candidate's committee, a party committee and its agents, or a political action committee and its agents.
2. A loan is a contribution at the time it is made unless the loan was made by a financial institution in the State of Maine in the ordinary course of business. Loans continue to be contributions until they are repaid. Loans are subject to the candidate contribution limitations, except for loans made by the candidate, the candidate's spouse, or a financial institution in the State of Maine in the ordinary course of business. The Commission may consider any reported loan to be a cash contribution if it remains unpaid four years after the election in which it was incurred.
3. Candidates and political action committees must report the name, address, occupation and employer of each individual contributor who gives, in the aggregate, more than \$50 for the reporting period. The reporting is required for private contributions raised by privately financed candidates and for seed money contributions to candidates participating in the Maine Clean Election Act. Candidates, political action committees, and party committees must make a reasonable effort to obtain the employment information of the contributor. If a candidate or committee is unable to obtain the information from the contributor in response to a request, the candidate or committee shall indicate "information requested" in the occupation and employer sections of the campaign finance report.
4. Unless specifically exempted under Title 21-A M.R.S.A. §§ 1012 and 1052 or this section, the provision of any goods or services without charge or at a charge that is less than the usual and customary charge for such goods or services is an in-kind contribution. Examples of such goods and services include, but are not limited to: equipment, facilities, supplies, personnel, advertising, and campaign literature. If goods or services are provided at less than the usual and customary charge, the amount of the in-kind contribution is the difference between the usual and customary charge and the amount charged the candidate or political committee. A commercial vendor that has provided a discount to a candidate or political committee because of a defect in performance or other legitimate business reason has not made a contribution if the vendor grants substantially similar discounts to nonpolitical customers in the ordinary course of the vendor's business.
5. An employer that has authorized an employee to provide services without charge to a candidate or political committee during the employee's paid work-time has made an in-kind contribution to the candidate or political committee. No contribution has been made

if the employee is providing services as a volunteer outside of the employee's paid work-time.

6. A commercial vendor that has extended credit to a candidate or political committee has not made a contribution if the credit is extended in the ordinary course of the vendor's business and the terms are substantially similar to extensions of credit made to nonpolitical customers that are of similar risk and size of obligation. The Commission shall presume any debt that remains unpaid more than six months after the election in which the debt was incurred to be a contribution to the candidate or political committee unless the candidate or committee provides clear and convincing evidence to the Commission that they intend to raise funds or take other measures to satisfy the debt. The Commission shall determine whether any debt that remains unpaid for more than four years after the election should be deemed a contribution to the candidate or committee. The Commission may take into consideration any evidence it believes is relevant, including evidence that the creditor did not intend to make a contribution to the candidate or committee or that the candidate or committee is unable to pay the debt.
7. For the purposes of the limitations imposed by 21-A M.R.S.A. §1015(1), 21-A M.R.S.A. §1015(2), 21-A M.R.S.A. §1015(3), and 21-A M.R.S.A. §1056, the following guidelines shall apply:
 - A. For all contributions received through the day of the primary election by candidates enrolled in a political party, the candidate shall designate on the applicable campaign finance report whether the candidate received the contribution for purposes of influencing the primary or the general election. If a candidate receives a contribution before the primary election and designates it for the general election, the candidate must deposit the contribution in an account that is separate from all funds received for the primary election and may not use the contribution in any way to promote the candidate's nomination in the primary election.
 - B. Notwithstanding division (c) below, if a candidate loses in the primary, all contributions made to that candidate for the purpose of liquidating debts and liabilities associated with the candidate's candidacy are deemed to be made in the primary election.
 - C. All contributions made to a general election candidate from the day after the primary election through the date of the general election are deemed to be made for the general election.
 - D. Notwithstanding division (e) below, all contributions made after the general election to a general election candidate for the purpose of reducing debts and liabilities associated with the candidate's candidacy are deemed to be made in the general election.
 - E. All contributions made after the day of the general election to a candidate who has liquidated all debts and liabilities associated with that election are deemed to be made in support of the candidate's candidacy for a subsequent election.
 - F. Subparagraphs A through E above shall apply to any write-in candidate who has qualified under 21-A M.R.S.A. §723, or who has received contributions or made expenditures with the intent of qualifying as a candidate.

8. If a political committee that is required to file reports with the Commission sells an item to raise funds, the entire amount received is a contribution to the committee. If the political committee provides meals or entertainment at a fundraising event, the entire amount paid by the donor is a contribution to the committee. [FOR EXAMPLE: IF A SUPPORTER PAYS A CANDIDATE COMMITTEE \$20 FOR A T-SHIRT THAT COST THE CAMPAIGN \$5, THE SUPPORTER HAS MADE A \$20 CONTRIBUTION. IF A SUPPORTER PAYS \$100 FOR A TICKET TO A FUNDRAISING DINNER, THE SUPPORTER HAS MADE A \$100 CONTRIBUTION EVEN IF COMMITTEE PROVIDES A MEAL WORTH \$30]

9. If an expenditure is made to promote or support the nomination or election of a candidate, or to oppose or defeat the candidate's opponent(s), and the expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate, the expenditure is considered to be a contribution from the expending person to the candidate. As used within this subsection, the term "candidate" includes a committee authorized by the candidate to promote his or her election, and all agents of the candidate or the authorized committee.

A. Cooperation and consultation includes, but is not limited to:

1. Discussion between the candidate and the creator, producer or distributor of a communication, or the person paying for that communication, regarding the content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication, and
2. Participation by the candidate in making any decision regarding the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of the communication.

B. An expenditure is presumed to be made in cooperation, consultation or concert with, or at the request or suggestion of a candidate, when

1. the expenditure is made in cooperation or consultation with any person who, during the twelve months preceding the expenditure, has been the candidate's treasurer or an officer of the candidate's authorized committee, has had a paid or unpaid position managing the candidate's campaign or advising the candidate, or has received any campaign-related compensation or reimbursement from the candidate;
2. the expenditure is made based on information about the candidate's plans, projects, activities or needs obtained by the expending person from the candidate;
3. the communication replicates, reproduces, republishes or disseminates, in whole or in substantial part, a communication designed, produced, paid for or distributed by the candidate.

C. If a candidate requests that a party committee, political action committee, or other potential spender does not make an expenditure to promote or support the

candidate, or oppose or defeat the candidate's opponent(s), the request does not constitute cooperation or coordination.

D. Notwithstanding the foregoing, an expenditure is not presumed to be a contribution to a candidate because:

1. the expending person has obtained a photograph, biography, position paper, press release, or similar material about the candidate from a publicly available source;

2. the person makes an expenditure in response to a general, non-specific request for support by a candidate, provided that there is no discussion, cooperation or consultation with the candidate prior to the expenditure relating to the details of the expenditure;

3. the expending person has made a contribution to the candidate;

4. the expenditure is made by a for-profit or non-profit organization for invitations, announcements, food and beverages and similar costs associated with an event to which the candidate has been invited by the organization to make an appearance before the organization's members, employees, shareholders, and the families thereof; or

5. the expenditure is made by an individual who spends \$100 or less for costs associated with a sign that is lettered or printed individually by hand and that reproduces or replicates a candidate's campaign-related design or graphic.