

**John Brautigam  
for Maine Citizens for Clean Elections**

**Rulemaking Public Hearing  
Maine Commission on Governmental Ethics and Election Practices  
December 16, 2015**

I am pleased to present these brief comments on behalf of Maine Citizens for Clean Elections.

Maine Citizens for Clean Elections is a 501(c)3 nonprofit organization dedicated to educating and engaging the public on matters of money in politics and campaign finance law, and to encouraging citizens to participate in our electoral system and in government to make ours a more politically responsive democracy.

As you probably know, MCCE wrote and sponsored the legislation enacted by voter initiative last month. In fact, the organization and many of its members, including myself, were deeply involved in the original rulemaking by the Commission following the 1996 enactment of the Maine Clean Election Act.

\* \* \*

With the enactment of this second citizen initiative, a new chapter in the history of the Maine Clean Election Act is now beginning. Although Clean Elections enjoyed an historic and highly successful start, the program was diminished by an unfortunate court decision, as well as policy-makers' decisions to re-purpose some of the funds intended for the program. MCCE undertook a two-year process to review the law and develop options to address these concerns, and then drafted the initiative that appeared as Question 1 on the ballot last month.

We were very gratified that voters adopted the measure by a double-digit margin – approximately the same approval level achieved in 1996 when the original bill was passed by the voters. There is now a strong public mandate for a robust but accountable public funding system for Maine legislative and gubernatorial candidates.

The new bill also strengthens disclosure, gives the Commission greater latitude in imposing fines and penalties, and brings transparency to the fundraising activities conducted by newly elected gubernatorial administrations.

All of these changes will add to the legacy of Maine as a laboratory of democracy, and give continued hope to those who want to ensure that government of, by and for the people is still possible.

\* \* \*

Our general view on Commission rulemaking is that the rules should give full effect to the voters' intention in enacting this measure without departing from the statutory language.

The rules should also be clear and accessible so that no confusion arises among the public, candidates, and other stakeholders who will be referring to the rules in the coming years. Clear rules mean high compliance and reduced burden on Commission staff, as well as campaign staff who are often volunteers.

The rules should also anticipate, to the greatest extent possible, that political actors may seek to exploit any crack or crevice in order to obtain an electoral advantage. We hope the rules will be clear and comprehensive, and not easily be thwarted by such tactics.

We believe the proposed rules meet most of these goals. And we commend Jonathan Wayne and Paul Lavin, along with other Commission staff, for their work on this in a relatively short time frame.

\* \* \*

Now I'd like to comment on a couple of specific portions of the proposed rules.

#### **I. Chapter 1, Section 7(12) - Disclosure of top funders in paid communications**

This proposed rule will govern the disclosure of top three funders of independent expenditures. This is probably the most crucial provision in the proposed rules. We expect that the great majority of the entities that will need to understand this rule will be PACs and the political party committees.

As applied to a political party committee, this top funder requirement seems quite clear. There are no limits on the size of contributions to the parties, and they typically receive large contributions each election cycle. If the party makes an independent expenditure that triggers the top three funders provision, it is not difficult to identify those funders simply using the information already routinely disclosed and reported.

A political action committee making independent expenditures, however, requires a somewhat different analysis. There are a variety of different situations that trigger the PAC requirement in Maine law. For at least some of these situations, it is best to think of the PAC as a reporting requirement for an existing entity, and *not* only or always a requirement to form a separate entity.

There are at least three situations that illustrate the ambiguity in existing law about what exactly is the “entity” that is making the independent expenditure. The Commission should consider these examples when deciding how to craft a strong final rule – one that can withstand any possible attempt to minimize or nullify the effect of the law:

- First, the rules should encompass the situation where a bogus entity is created exclusively for the purpose of concealing the true funder from the disclosure requirement. We would like to see the rules disregard the artificial entity – or any chain of them – for purposes of

identifying and disclosing the actual funder behind an independent expenditure communication.

- Second, where a PAC is a separate *fund* within an entity, and otherwise has *no separate formal legal existence*, the PAC should not be allowed to claim that the *entity* is its funder, and especially not its sole or dominant funder. Instead, the disclosure requirement should be satisfied only by listing contributors to the entity itself.
- Third, where one entity is a legal subsidiary of another or is wholly controlled by another entity, and receives all or the great majority of its funding from the other entity, it should not be treated as a separate entity for purposes of determining the top three funders.

There may be other circumstances which could be exploited by someone determined to evade disclosure, but these three examples illustrate why this rule needs to be as strong as possible so that the voters' intention in enacting this disclosure regime is not thwarted or circumvented.

We are more than happy to work with the Commission and staff to address these examples with regulatory language.

## **II. Chapter 3, Section 2(4)(I), (J) and (K) - Non-Compliant or Fraudulent Qualifying Contributions; Additional Compliance Procedures for Gubernatorial Candidates**

This portion of the rule will enhance stakeholder understanding and compliance. It provides appropriate guidance for instances where a candidate claims to receive a qualifying contribution in cash, but the Commission has reason to suspect that the contributor did not in fact provide the cash. It holds campaigns to a high standard, yet allows the flexibility to ensure that a candidate who exercises due diligence is not unfairly penalized for the behavior of staff or volunteers. Finally, gubernatorial candidates are required to appoint a compliance officer and submit a staff training and compliance plan addressing topics set out by the Commission.

These measures deter fraud and abuse while strengthening the Commission's ability to investigate and remedy misconduct. We support them as an appropriate means of protecting the public trust that is placed in the Clean Election system.

## **III. Chapter 3, Sections 2(4)(L) & (M) - Paid Staff Time and Other Assistance Provided to Candidates**

Under current law, a paid employee of a political party may work for a candidate for up to 40 hours in an election without the work being considered a contribution to that candidate. Employees of PACs or other entities are not given this exemption.

In the rules proposed by the Commission, paid staff time (or other expenses) for collecting qualifying contributions is considered an in-kind contribution to the candidate unless it is paid for by directly by the candidate committee. Since an in-kind contribution from a PAC is prohibited for Clean Elections candidates, and a contribution of staff time from a party is addressed elsewhere, there may be some confusion here, and an opportunity for clarification.

In providing that clarification, this rule should be guided by the following principles:

- Volunteer political activity is very important in a democracy and in the Clean Election system. Bona fide unpaid efforts should not be restricted in any way, but should be encouraged.
- Paid employees generally cannot assist a candidate in collecting qualifying contributions, or in overseeing others who collect qualifying contributions, except for the 40-hour political party exception described above.
- A candidate should not be able to pledge unearned future MCEA payments to pay for his/her own employees (or those of another entity) to collect qualifying contributions. Paying a person to collect qualifying contributions is within the letter of the law, but only if the money is already in hand.

### **Conclusion**

Thank you for undertaking this rulemaking and for listening to our comments. We will share additional thoughts shortly, and MCCE will submit written comments by the deadline of January 4, 2016, including a few suggestions for revising the language circulated by Commission staff.