To: Commission on Governmental Ethics and Election Practices
Re: Clean Election Act Rulemaking
Date: August 14, 2009

Thank you for the opportunity to comment on these proposed rules. This written testimony supplements our oral testimony delivered at the hearing on July 30th, 2009.

Our biggest concerns as we review the proposed Chapter 3 rule changes lie in the sections that deal with what happens if the Fund runs short. The statute states:

> *13. Distributions not to exceed amount in fund. The commission may not distribute revenues to certified candidates in excess of the total amount of money deposited in the fund as set forth in section 1124. Notwithstanding any other provisions of this chapter, if the commission determines that the revenues in the fund are insufficient to meet distributions under subsections 8-A [INITIAL DISTRIBUTIONS] or 9 [MATCHING FUNDS], the commission may permit certified candidates to accept and spend contributions, reduced by any seed money contributions, aggregating no more than $750 per donor per election for gubernatorial candidates and $350 per donor per election for State Senate and State House candidates, up to the applicable amounts set forth in subsections 8-A [INITIAL DISTRIBUTIONS] and 9 [MATCHING FUNDS] according to rules adopted by the commission.*

Our fervent hope is that the Legislature is willing and able to fully fund the program so that this event does not occur. That being said, we do think that the level of concern among legislators, administrators and potential candidates about the state budget does demand that the rules be fleshed out in case a shortfall does occur in 2010.

The statute, while specific as to the limits of this fundraising, leaves the logistics to the Commission to work out in rulemaking. The current rule simply says that if a shortfall occurs, the Commission would notify candidates that they could raise and spend contributions and would specify the "timeline and procedures for compliance" in that notice. Clearly, candidates can't wait until the time of an actual shortfall to know how this limited private fundraising would work, so this rulemaking is timely.

We are very concerned that the proposed rules beg more questions than they answer. We believe that much more work has to be done to come up with rules that fully flesh out how the limited private fundraising would be carried out by Clean Election candidates should that situation come about, and we suggest the Commission actively solicit input from a range of people involved with campaigns to make sure the final rules are adequate. Since there was

relatively little public testimony at the hearing on July 30th, the Commission might consider convening a stakeholder meeting to make sure all the potential issues are identified.

At the July hearing, attorney Dan Billings recommended that the Commission make some policy decisions now about how any shortfall would be handled during the election, for example, holding back initial distributions in order to preserve matching funds, cutting distributions to either legislative or gubernatorial candidates but not both rather than spreading the shortfall across all certified candidates, etc. We think it is worth considering these questions and making a deliberate decision about which are appropriately dealt with in the rule and which could be left to a later date when more is known about the size and timing of any shortfall. It is useful to consider how the proposed rules would hold up under the different scenarios that these policy decisions would create.

Another area which begs various questions is in further defining the contributions that could occur if a shortfall occurs. The statute states that the contribution limits for the contributions that could be allowed are $350 for legislative candidates and $750 for gubernatorial candidates. While those are the same as the limits for privately funded candidates, the statute does not specifically refer back to the laws that govern those candidates. The proposed rule should clarify whether the candidate and his or her spouse are subject to the limits, whether the candidate may loan the campaign money and raise money later to reimburse, and how surplus funds may be disposed.

Comments on Chapter 3 Rules

1. Chapter 3, Section 2 (3) (C) Strike the words, "during the qualifying period." Seed Money may be raised before the qualifying period starts.

2. Chapter 3, Section 2 (4) (F) (3) Insert the word "qualifying." "All qualifying contributions made over the Internet…"

3. Chapter 3, Section 3 (1) (B) What documentation is needed for in-kind contributions, should there be any from in-state voters during the Seed Money period? Is the description of the in-kind contribution on the reporting form sufficient, or should candidates produce something more concrete to ensure that the value claimed is accurate?

4. Chapter 3, Section 3 (1) (C) Clarify that this paragraph applies to people who made qualifying contributions. We suggest reordering these paragraphs so that the two that apply to qualifying contributions (A and C) are together and the two that apply to seed money (B and D) are together.

5. Chapter 3, Section 4 (4) (A) This paragraph says that Seed Money will be counted toward the contribution limits, but does not specify as to which election. We believe that Seed Money should count against the contribution limit when the private fundraising occurs in the same election. Most Seed Money contributions are made during the primary election

(exceptions are special elections and replacement candidates), and those should not count against the contribution limit if the shortfall occurs during the general election. We believe this is consistent with the statute. The phrase "during the qualifying period" should be deleted.

6. Chapter 3, Section 4 (4) (B) The concept of allowing candidates to raise private contributions but not spend them unless the Commission gives permission is not completely consistent with the statute, which states that the Commission may allow certified candidates to "accept and spend" contributions. We certainly understand the benefit to the candidate of being able to gather contributions before they are actually needed, and do not argue that the statute would not allow such a scheme. We do believe that this idea of private fundraising prior to the authorization to spend additional monies does pose a serious question about the wisdom of allowing or requiring candidates to commingle these private funds with the public dollars in the campaign account.

7. Chapter 3, Section 4 (4) (C) We agree that Clean Election expenditure guidelines should apply to all expenditures made by certified candidates. This paragraph specifies that allowable private contributions must be deposited in the campaign account, thus commingled with funds from the Maine Clean Election Fund. This makes sense for funds that the candidate is authorized to spend, but we are not sure it is wise to commingle funds that the candidate is not authorized to spend.

Comment on Chapter 1 Rules

Section 6 (8) This section addresses contributions from minor children. We found the rationale for this new rule to be unconvincing. The new mandatory Seed Money requirement should not be a factor at all, since those contributions may only come from registered Maine voters who by definition are not minors.

Maine law does not prohibit minors from making contributions or single out minors in any way. So, it would be inappropriate for the rule to impose new restrictions. The concepts in the proposed language – that contributions are made voluntarily; are not coerced or made without the person's knowledge; and are made from the contributors own funds, could apply to all contributions. The unique concern that arises with contributions from minors is preventing adults from using minors to effectively circumvent contribution limits.

We are not convinced there needs to be a rule about this, but the Commission might want to consider addressing scenarios particular to minors such as what leeway if any a fiduciary might have in making or facilitating a contribution from funds owned but not controlled by a minor, such as those in a trust.

We look forward to working with the Commission and other interested parties to improve these rules so that the Clean Election system will function well during the 2010 election and beyond.