94-270 Commission on Governmental Ethics and Election Practices

94-270 Commission on Governmental Ethics and Election Practices	
2024-073: Chapter 1, Procedures	
Statutory Authority:	1 M.R.S. § 1003(1); 21-A M.R.S. § 1126
Type:	Routine Technical
Emergency?:	No
Fiscal impact:	*The Commission anticipates that the rule amendments will not have a fiscal impact on the State, the municipalities and counties of Maine, and will not impose an economic burden on small businesses.*
Principal purpose:	*The Commission wishes to conform its rules to statute.*
Basis Statement:	***Chapter 1, § 3(1)&(6) – Selection of Meeting Dates and Quorum Requirements*** *Factual and policy basis for amendment: Under the proposed amendment, the Commission's executive director would circulate proposed meeting dates for approval by the members of the Commission, which is the Commission's current practice for setting its meeting schedule. The proposed amendments also modify the quorum rule to reflect that Commission members may participate in meetings remotely consistent with the Commission's written policy on remote participation. The amendment removes a paragraph concerning the number of members that must be present in person to hold a formal hearing. In the future, this issue could be addressed on a case-by-case basis, or (if the Commission prefers) in the Commission's policy on remote participation.* *Comments received: No comments were received concerning this amendment.* *Commission's response to comments: The Commission adopted the amendment as proposed.* ***Chapter 1, § 6(12) – Revenue to a Political Committee from a Game Night*** *Factual and policy basis for amendment: The Legislature enacted P.L. 2023, Ch. 391 (attached) which authorizes political action committees, party committees, and ballot question committees to hold a once annual "game night" to raise revenue. The proposed amendments require the committee sponsoring the event to keep records of all participants that pay more than $50 at the event as an entry fee or to purchase chips, food, etc. The committee is required to disclose these amounts as contributions in its next campaign finance report. For purposes of keeping records and reporting contributions, the committee may deduct from each payment the value of food or goods purchased by the participant.* *Comments received: No comments were received concerning this amendment.* *Commission's response to comments: The Commission adopted the amendment as proposed.* ***Chapter 1, § 10(3)(E) – Receiving Independent Expenditure Reports by Fax*** *Factual and policy basis for amendment: In P.L. 2023, Chapter 324, § 14 (attached), the Legislature removed statutory provisions allowing campaign finance reports to be filed provisionally by fax. The proposed rule amendment reflects this change in statute.* *Comments received: No comments were received concerning this amendment.* *Commission's response to comments: The Commission adopted the amendment as proposed.*

Chapter 1, § 10(5) – Independent Expenditure Determinations by the Commission

Factual and policy basis for amendment: Under 21-A M.R.S. § 1019-B, if an individual or organization spends money on a communication that names or depicts a clearly identified candidate and is disseminated to the public in the 28 days before a primary election or after Labor Day, the spender is required to file an independent expenditure (IE) report unless the Commission determines that the communication was not intended to influence an election.

The proposed rule amendments to Chapter 1, § 10(5) reflect 2023 statutory changes to the procedures used by the Commission to make this determination. P.L. 2023, Chapter 324, §§ 10-13 (attached). The amendments incorporate a new "purpose or effect of" standard in Chapter 324. The Commission's executive director would make the initial determination, which could be appealed to the Commission within two days. If the Commission or its executive director determined that an IE report was required and the report was filed late, the Commission's standard late-filing penalty procedures would apply. The Commission or its executive director would have the discretion to extend the deadline for a short period for good cause. If the report was filed within this extension period, the report would be considered filed on time.

Comments received: At the November 29, 2023 public hearing, Mr. William Hayward, on behalf of Maine Citizens for Clean Elections, expressed support for this amendment. He said that shifting the language of the rule to focus on the effect of a communication, rather than trying to determine the spender's subjective intent, made the law more effective and reflects how money influences elections. Mr. Hayward did not submit written comments.

Commission's response to comments: Because the Commission received only positive comments on the proposed amendment, the Commission adopted the amendment as proposed.

Chapter 1, § 15 – Simplified Procedures for Certain Political Action Committees and Ballot Question Committees

Factual and policy basis for amendment: In 2021, the Legislature enacted a bill intended to equalize the requirements for political action committees and ballot question committees (registration, bank account, record-keeping, and financial reporting). P.L. 2021, Chapter 217, attached. The legislation included a requirement that all election-influencing contributions and expenditures flow through a separate "campaign bank account," rather than a bank account containing the general funds of the persons or organization that established the committee.

Chapter 217 contained three provisions that would allow the Commission to adopt simplified procedures, particularly in the case where an individual qualifies as a ballot question committee because they have spent more than $5,000 to support or oppose a ballot question:

21-A M.R.S. § 1052-A(6): the Commission is authorized to adopt simplified registration procedures for an individual registering as a ballot question committee,

21-A M.R.S. § 1054(3): the Commission may adopt procedures by rule for waiving the requirement to maintain a separate campaign account upon a showing by a committee that a separate account would be administratively burdensome,

including but not limited to committees organized outside Maine or an individual who registers as a ballot question committee, and
21-A M.R.S. § 1057(5): the Commission may adopt by rule simplified record-keeping requirements for an individual registering as a ballot question committee.
The proposed amendment sets out these simplified procedures.

Comments received: No comments were received concerning this amendment.
Commission's response to comments: The Commission adopted the amendment as proposed.

Chapter 3, § 9(2) – Qualifying Period for Replacement Candidates
Factual and policy basis for amendment: In 2023, the Legislature enacted a bill that addressed the qualifying period for Maine Clean Election Act candidates who are seeking to replace a candidate who has withdrawn, died, or has become ineligible. P.L. 2023, Chapter 211, attached. The new law stated that the qualifying period begins when the Secretary of State receives a notice of withdrawal or declares a vacancy. Chapter 211 also specified that if a person seeking to replace a party nominee has collected qualifying contributions and then fails to win their party's nomination at a nominating caucus, the Commission must return the qualifying contributions to the contributors unless the contributors authorize the deposit of the qualifying contributions into the Maine Clean Election Fund. The proposed amendment incorporates these requirements into the Commission's rules.
Comments received: No comments were received concerning this amendment.
Commission's response to comments: The Commission adopted the amendment as proposed.

94-270 Commission on Governmental Ethics and Election Practices	
2024-074: Chapter 3, Maine Clean Election Act and Related Provisions	
Statutory Authority:	1 M.R.S. § 1003(1); 21-A M.R.S. § 1126
Type:	Routine Technical
Emergency?:	No
Fiscal impact:	*The Commission anticipates that the rule amendments will not have a fiscal impact on the State, the municipalities and counties of Maine, and will not impose an economic burden on small businesses.*
Principal purpose:	*The Commission wishes to conform its rules to statute.*
Basis Statement:	*See* Basis Statement at 2024-073, *supra*.

94-270 Commission on Governmental Ethics and Election Practices	
2024-160: Chapter 1, Procedures	
Statutory Authority:	21-A M.R.S. § 1064
Type:	Routine Technical
Emergency?:	No
Fiscal Impact:	*The Commission anticipates that the rule amendments will not have a fiscal impact on the State, the municipalities and counties of Maine, and will not impose an economic burden on small businesses.*
Principal purpose:	*On November 7, 2023, Maine voters approved a new law, 21-A M.R.S. § 1064, which forbids foreign governments and businesses or associations they own or control from making expenditures to influence candidate and ballot question elections in Maine. On January 31, 2024, the Commission proposed amendments to its rules to implement the new law. In response to comments received, the Commission invited a second round of comments on changes to the amendments proposed in January.*
Basis Statement:	***SUMMARY:*** *On January 31, 2024, the Commission decided to invite comments on a new § 15 of Chapter 1 of the Commission's rules. The new section will implement 21-A M.R.S. § 1064, which prohibits foreign governments and entities controlled or influenced by foreign governments from making contributions or expenditures to influence elections in Maine. Comments were accepted through March 11, 2024. At a meeting on March 27, 2024, the Commission invited a second round of comments on revised amendments that were proposed by Commission staff.* *The Commission carefully considered comments submitted by eight organizations during the two rounds of comment and accepted some changes suggested by one commenter, the Campaign Legal Center. In addition, the Commission made changes to the amendments responsive to constitutional concerns raised by an order by the U.S. District Court for the District of Maine granting a preliminary injunction to plaintiffs in Central Maine Power Co., et al. v. Maine Comm'n on Governmental Ethics and Election Practices, et al., No. 1:23-cv-00450-NT, 2024 U.S. Dist. LEXIS 34853 (D. Me. Feb. 29, 2024).* *This statement contains two parts. Part 1 describes the factual and policy basis for each subsection of the amendments. If the Commission received a comment relative to that subsection, the comment is summarized, along with the Commission's response to the comment. Part 2 summarizes more general comments received in the first round that did not suggest changes to the amendments.* ***Part 1 – Factual and Policy Basis for Each Subsection of Amendments*** ***Chapter 1, § 15(1) – Definitions*** *Factual and policy basis for amendment: In § 15(1), the Commission has adopted definitions for terms used but not defined in § 1064. The definitions provide guidance on which entities are considered foreign government-influenced entities ("FGIEs") that are forbidden from spending money to influence Maine elections. The definitions also address which media companies must establish policies to avoid publishing campaign advertisements by FGIEs. The definitions describe certain campaign finance activities that are prohibited under § 1064.*

Comments received: The Commission did not receive comments concerning most of the 14 definitions proposed on January 31, 2024. The comments received concerning proposed
§ 15(1)(C), (G), (H), (I) & (M) are summarized in the following sections.

Chapter 1, § 15(1)(C)&(H) – Definitions of Direct and Indirect Participation in a Decision-Making Process
Factual and policy basis for amendment: The definition of FGIE in § 1064(1)(E) contains three subparts. Under § 1064(1)(E)(2)(b), an entity qualifies as a FGIE if a foreign government directs, controls, or "directly or indirectly participates" in the entity's decisions regarding electoral activities.

In the amendments proposed on January 31, 2024, § 15(1)(C) & (H) defined "direct participation" and "indirect participation" as communicating a direction or preference concerning the outcome of a decision-making process. Participation would be indirect if made through an intermediary.

Comments received: In its March 11, 2024 comments, the Campaign Legal Center suggested that a foreign government's communication of a direction or preference should qualify as participation only if the foreign government is actually involved in the entity's decision-making process. Drawing on concerns expressed by the U.S. District Court in the preliminary injunction order, the Campaign Legal Center commented that if a foreign government sends an unsolicited communication to an entity making a decision on election spending, that unsolicited communication should not count as participation. The Campaign Legal Center suggested providing examples that illustrate when expressing a direction or preference would or would not constitute participation.

Commission's response to comments: The Commission agrees generally with the concerns raised by the Campaign Legal Center. To address them, in § 15(1)(L) the Commission adopted a definition for a new term, "participate," that is narrower than the definitions proposed on January 31, 2024. In § 15(1)(L), "participate" is defined to mean "to deliberate or vote on a decision" "with the invitation, consent, or acquiescence of" the entity making the decision. As part of the definition, the Commission has provided three examples of situations that do not constitute participation, including two that are variations of examples suggested by the Campaign Legal Center. The Commission has changed the definitions of "direct participation" and "indirect participation" in § 15(1)(C) & (H) to incorporate the new definition of participate in § 15(1)(L).

Chapter 1, § 15(1)(G) – Definition of Indirect Beneficial Ownership
Factual and policy basis for the amendment: Under § 1064(1)(E)(2)(a), a firm, association, or other entity qualifies as a FGIE if a foreign government indirectly owns 5% or more of the total equity of the firm, association, or other entity. In January, the Commission proposed defining "indirect beneficial ownership" to mean "having an ownership interest in an entity as a result of owning an interest in an intermediate entity that either directly owns part or all of the entity or indirectly

owns part or all of the entity through other intermediate entities. For example, if a foreign government wholly owns a firm that has a 10% interest in a Maine corporation, the foreign government indirectly owns 10% of that corporation."

Comments received: In its February 27, 2024 comments, the Campaign Legal Center suggests including a second example to illustrate how a foreign government's partial ownership of an intermediate entity can result in indirect ownership of a firm, association, or entity.

Commission's response to comments: The Commission has included the example in the adopted amendments.

Chapter 1, § 15(1)(I) – Definition of Internet Platform

Factual and policy basis for amendment: Under § 1064(7), internet platforms are among the media providers that must establish a policy and advertising procedures designed to avoid publishing election messages funded by FGIEs. The definition of internet platform proposed on January 31, 2024 was intended to focus on publishers of internet content primarily intended for audiences within Maine.

Comments received: In its February 27, 2024 comments, the Campaign Legal Center suggested alternative language to cover a wider scope of internet platforms (e.g., national streaming platforms such as Netflix).

Commission's response to comments: Requiring national internet platforms to change their advertising procedures to avoid foreign government influence would be difficult for the Commission to implement. It would result in a large number of unintentional legal violations by national companies that are unaware of Maine's requirement. It would be challenging to effectively educate internet platforms nationally. The Commission would have no way of detecting violations nationwide by companies that failed to adopt the policies and procedures. Also, the Commission has doubts whether requiring national internet platforms to change their advertising procedures will have a significant marginal impact on Maine elections. For these reasons, the Commission has adopted the definition of "internet platform" as originally proposed in January.

Chapter 1, § 15(1)(M) – Structuring a Transaction

Factual and policy basis for amendment: Under § 1064(5), a person may not structure a contribution, expenditure, or other campaign transaction to evade the prohibitions in § 1064. The Commission proposed a definition for the term "structure" that included the example of: "creating a business entity whose ownership is difficult to ascertain for the purpose of concealing ownership or control by a foreign government."

Comments received: With regard to the example, the Campaign Legal Center suggested in its February 27, 2024 comments changing the standard from "difficult to ascertain" to "cannot be readily ascertained," which would be more clear.

Commission's response to comments: The Commission made the language change suggested by the Campaign Legal Center.

Chapter 1, § 15(2) – Ownership or Control by a Foreign Government
Factual and policy basis for amendment: The language of § 1064(1)(E) defines the term "foreign government-influenced entity." Under § 1064(1)(E)(2)(a), a business entity qualifies as an FGIE if a foreign government owns 5% or more of the business entity. Section 15(2) was proposed to reflect this requirement and to clarify that an entity does not qualify as a FGIE merely because multiple governments, combined, own 5% or more of the entity.

Comments received: American Promise commented favorably on this section as proposed. In its March 11, 2024 comments, the Campaign Legal Center proposed that § 15(2) be modified to be even more explicit that an entity qualifies as a FGIE if it is majority- or wholly owned by a foreign government.

Commission's response to comments: The Commission declines to make the changes proposed by the Campaign Legal Center in the interest of simplicity and because § 1064(1)(E)(2)(a) and
§ 15(2) are already clear. An entity is a FGIE if a foreign government owns or controls more than 5% of the equity of the entity. By implication, if an entity is majority- or wholly owned by a foreign government, it is a FGIE.

Chapter 1, § 15(3) – Campaign Spending by Foreign Governments Prohibited
Factual and policy basis for amendment: The amendment reflects the language in 21-A M.R.S.
§ 1064(2) that prohibits spending of any kind by foreign governments in any Maine election.

Comments received: The Commission received no comments concerning this subsection.

Chapter 1, § 15(4) – Solicitation or Acceptance of Contributions from Foreign Governments Prohibited
Factual and policy basis for amendment: The amendment reflects the language in 21-A M.R.S.
§ 1064(3) stating that a person cannot knowingly solicit, accept, or receive a contribution from a foreign government for any Maine election.

Comments received: The Commission received no comments concerning this subsection.

Chapter 1, § 15(5) – Substantial Assistance Prohibited
Factual and policy basis for amendment: The amendment reflects the language in 21-A M.R.S.
§ 1064(4) that prohibits persons from knowingly or recklessly providing substantial assistance in a contribution or expenditure that violates § 1064(2) or (3).

Comments received: The Commission received no comments concerning this subsection.

Chapter 1, § 15(6) – Circumvention through Structuring Financial Activity

Factual and policy basis for amendment: The amendment reflects the language in § 1064(5) that prohibits persons from attempting to structure a campaign finance transaction to evade the prohibitions in § 1064.

Comments received: The Commission received no comments concerning this subsection.

Chapter 1, § 15(7)(B) – Disclaimers in Paid Communications to Influence Policy

Factual and policy basis for amendment: Section 15(7) reflects the requirement in § 1064(6) that public communications paid for by a FGIE must include a disclaimer if they influence the public, or a state, county or local official/agency, regarding:
any state or local government policy, or
the political or public interest of a foreign country/political party, or government relations with a foreign country/political party.
Under § 1064(6), the disclaimer must include "sponsored by [name of FGIE]," and a statement that the FGIE is a "foreign government" or a "foreign government-influenced entity."
The § 15(7)(B) proposed on January 31, 2024 was drafted to allow a FGIE to add "truthful and accurate information" to the disclaimer, such as a statement that foreign government and foreign government-influenced entity are defined terms under state law.

Comments received: In its February 27, 2024 comments, the Campaign Legal Center expressed concern that generally allowing the insertion of "truthful and accurate information" could result in inconsistent disclaimers that would confuse the public and increase the burden on Commission staff in determining whether the additional language was accurate. It suggested limiting the additional language to a statement that "foreign government" or "foreign government-influenced entity" are defined terms under state law.

Commission response to comments: The Commission agrees that it should not be engaged in making determinations about the truthfulness of information in disclaimers and has adopted the language suggested by the Campaign Legal Center.

Chapter 1, § 15(7)(C) – Applicability of Disclaimer Requirement (proposed as § 15(7)(B))

Factual and policy basis for amendment: In January, the Commission proposed that the disclaimer requirement would apply "only to public communications purchased from media providers or otherwise intended to be viewed primarily by Maine residents."

Comments received: In its February 27, 2024 comments, the Campaign Legal Center suggests broadening the disclaimer requirements to cover public communications "that can be received directly by" residents of Maine.

Commission's response to comments: The Commission is concerned that the language suggested by the Campaign Legal Center would require an advertisement received by a national audience to include the sponsorship disclaimer merely because some residents in Maine received the ad. For example, under the Campaign Legal Center proposal, an advertisement by a FGIE to influence national foreign policy directed at the entire U.S. population during a major sporting event could be required to include the "sponsored by" disclaimer. The Commission questions whether a subsection of Maine campaign finance law should have this nationwide effect on advertising. As another example, a FGIE that purchased a digital ad from the Washington Post to influence Virginia residents regarding legislation in that state would need to include the disclaimer in the ad merely because some Maine residents consume the Washington Post online.

In addition to the issue of overreach, Commission has concerns that the Campaign Legal Center proposal would result in many unintentional legal violations by FGIEs nationwide that have no awareness of the "sponsored by" disclaimer requirement in § 1064. For the above reasons, the Commission declines to make the change proposed by the Campaign Legal Center.

Chapter 1, § 15(8)(A) – Requirements for Media Providers – Policies, Procedures, Controls

Factual and policy basis for amendment: The Commission has adopted § 15(8) to implement the requirement in § 1064(7) that media companies must establish due diligence policies, procedures and controls that are reasonably designed to ensure they do not publish campaign advertising by FGIEs. Subsection 15(8)(A) restates this requirement using terms defined in the adopted rule.

Comments received: American Promise commented that the safe harbor provision is a reasonable set of compliance procedures for media providers. The Campaign Legal Center suggested inserting language in § 15(8)(A) confirming that the Commission's rules do not prohibit a media provider from reproducing a campaign advertisement prohibited by § 1064 as part of a news story, commentary or editorial.

Commission's response to comments: The Commission has adopted the change suggested by the Campaign Legal Center.

Chapter 1, § 15(8)(B) – Optional Safe Harbor Policy

Factual and policy basis for amendment: This amendment sets out an optional set of procedures that a media provider may adopt to avoid broadcasting or distributing a campaign advertisement by a FGIE. This "safe harbor" policy includes features numbered § 15(B)(1) - (5). If a media provider adopts a policy containing these five features, the Commission will view their policy as compliant (i.e., reasonably designed to avoid broadcasting or publishing campaign ads by FGIEs). The safe harbor policy is intended to provide media companies with a practical set of inexpensive procedures they can use to comply with § 1064(7). The two key elements of the policy are:

when a media provider or their agent sells a campaign ad, they need to provide the

purchaser an opportunity to certify through checkbox or similar means that the purchaser is not an FGIE, and
the media provider will decline to publish a campaign ad if the purchaser fails to certify that it is not a FGIE or if the media provider has actual knowledge of facts indicating that the purchaser is a FGIE.
The media provider would need to keep the purchasers' certifications for at least two years. The policy must expressly allow the media provider to publish a campaign advertisement by a FGIE in a news story to which the advertisement is relevant. Further, if the media provider is an internet platform, the policy must require the platform to remove any communications that it discovers were funded by a FGIE.

Comments received: In its February 27, 2024 comments, the Campaign Legal Center suggests that the safe harbor policy (§ 15(8)(B)(4)(c)) should contain a provision stating that a media provider will decline to publish a campaign advertisement if the media provider should have known of facts indicating that the purchaser is a FGIE.

Commission's response to comments received: The Commission views the primary purpose of the statutory requirements in § 1064(7) as serving as an enforcement backstop against FGIE election spending and not as an independent regulation on Maine media. As described below, some media providers in Maine have expressed concern that they may be found "liable" by the State of Maine for unintentionally violating § 1064. In turn, the purpose of § 15(8)(B) is to implement the statute's aims while also supplying media providers a level of certainty that they can adopt minimally burdensome policies and procedures that satisfy the legal requirement in § 1064(7). Section 15(8)(B) accomplishes these goals by establishing a safe harbor regime that would remove nearly all due diligence burdens from media providers and place them on ad-purchasers by requiring entities to self-certify that they are not FGIEs at the time of purchase. The only minimal burden remaining on media providers in such a safe harbor regime would be adopting a policy of not publishing FGIE advertisements in circumstances where the media provider has actual knowledge that such an ad would violate the statute's ban on FGIE political spending. The change suggested by the Campaign Legal Center could erode a potential media provider's certainty that it has complied with the safe harbor provision by introducing a less objective "should have known" standard. Similarly, the Commission should not be engaged in making determinations about whether a media entity "should have known" that any specific advertisement violates the statute. For these reasons, the Commission has not adopted the language suggested by the Campaign Legal Center.

Chapter 1, § 15(8)(C) – Other Policies, Procedures and Controls are Permitted
Factual and policy basis for amendment: The amendment confirms that media companies are not required to adopt the safe harbor provision set out in § 15(8)(B). They may adopt other policies, procedures and controls that are reasonably designed to avoid publishing a campaign advertisement by a FGIE.

Comments received: The Commission received no comments concerning this subsection.

Chapter 1, § 15(8)(D) – Investigations not Required

Factual and policy basis for amendment: The amendment confirms that a media provider is not required to conduct an investigation of their advertisers and is not required to monitor any comments section or similar forum that the media provider makes available to its users.

Comments received: The Commission received no comments concerning this subsection.

Chapter 1, § 15(8)(E) – Requirements for Media Providers – Public List

Factual and policy basis for amendment: The proposed § 15(8)(E) required the Commission to maintain a list on its website of all entities the Commission has determined to be FGIEs in enforcement actions. The list was intended as a reference tool to assist media providers in not publishing campaign ads by FGIEs. The optional safe harbor policy set out in proposed
§ 15(8)(B)(4)(b) contained a provision that media providers must decline to publish a campaign advertisement if the purchaser is on the Commission's list of FGIEs.

Comments received: In its February 27, 2024 submission, the Campaign Legal Center commented that a public list of entities determined by the Commission in enforcement proceedings to be FGIEs could quickly become out of date, causing an entity to be listed as a FGIE when it no longer meets the definition. Rather than posting this type of list, the Campaign Legal Center recommended that the Commission post a repository of materials related to § 1064, such as guides, advisory opinions, and final outcomes of enforcement actions.

Commission response to comments: After considering the comments of the Campaign Legal Center, the Commission has decided to withdraw the public list provision. If the federal courts find that § 1064 is valid and enforceable, the Commission expects that most foreign government-influenced entities will refrain from spending money to influence Maine elections. Consequently, the Commission expects to make relatively few determinations that a FGIE violated § 1064 by spending money to influence a Maine election. Therefore, the Commission has decided to withdraw the public list provision in § 15(8)(E) and the related safe harbor provision in 15(8)(B)(4)(b).
The Commission declines to adopt the suggested provision requiring the Commission to post written guidance concerning § 1064. If the statute is found to be valid by the courts, the Commission intends to issue guidance and publish it on the agency's website, as it regularly does on a variety of campaign finance topics. A legal requirement in the Commission's rules is unnecessary.

Chapter 1, § 15(8)(F) – Requirements for Media Providers – Takedown Requirement

Factual and policy basis for amendment: This subsection reflects the requirement in § 1064(7) that an internet platform must take down any campaign advertisement that it discovers was purchased by a FGIE.

Comments received: The Commission received no comments concerning this

subsection.

Chapter 1, § 15(9) & 10 – Effective Date and Severability

Factual and policy basis for amendment: Subsection 15(9) states that § 15 will take effect on the date, if any, that the U.S. District Court for Maine removes the injunction against enforcement of § 1064. The Commission finds that § 15(9) is advisable due to the February 29, 2024 order granting plaintiffs' motion for a preliminary injunction in Central Maine Power Company, et al. v. Maine Comm'n on Governmental Ethics and Election Practices, et al., Docket No. 1:23-cv-00450-NT, 2024 U.S. Dist. LEXIS 34853 (D. Me. Feb. 29, 2024). The added language makes clear to the public and the regulated community that no enforcement of § 1064 will occur except to the extent the federal courts later permit such enforcement. If the federal courts permit the Commission to enforce § 1064, the § 15 amendments would take effect automatically.

Similarly, in § 15(10) the Commission is adopting a policy that if any portion of § 1064 is finally determined to be invalid or unenforceable, § 15 is enforceable only to the extent that the corresponding provisions of § 1064 are valid and enforceable. The Commission finds that clarification of how the rule would be implemented if only parts of § 1064 are ultimately permitted to go into effect would benefit the public and the regulated community.

Comments received: During the first round of comments, the Commission received no comments concerning § 15(9) & (10) because these subsections were not part of the amendments proposed for public comment. The general topic, however, was addressed in rulemaking comments submitted by Versant Power and other plaintiffs. In summary, the plaintiffs urge the Commission to suspend the rulemaking, characterizing it as imprudent and a waste of agency resources. Versant Power suggests that completing the rulemaking may be illegal because § 1064 is currently unenforceable.

In its second set of comments dated May 1, 2024, Versant Power asserts that § 15(9) & (10) will create uncertainty regarding which provisions of § 15 are enforceable. It argues that "[p]ersons and entities potentially subject to the Act and Proposed Rule will be forced to predict how a judgment in [the constitutional challenge] affects the different provisions of the Proposed Rule and how to adjust their actions as necessary—without any guidance from the Commission." Versant Power asks the Commission to suspend the rulemaking.

Commission's response to comments: The Commission has considered the plaintiffs' arguments, including Versant Power's second set of comments, but finds them unpersuasive. By the terms of § 15(9), section 15 would take effect only if the U.S. District Court removes the injunction against the enforcement of § 1064. If the federal courts determine that portions of § 1064 are invalid, the corresponding parts of § 15 would be unenforceable under § 15(10). Because the effectiveness of the proposed rule would, by the rule's own terms, be entirely contingent upon a lifting or modification of the injunction currently in effect, the Commission is in no sense "enforcing" § 1064 by proceeding with the mandated rulemaking process. The values

of efficiency, agency resources, and providing guidance to regulated constituencies all point to proceeding with the rulemaking but conditioning the effectiveness of § 15 on the outcome of the litigation. If § 1064 is determined by the courts to be valid and enforceable, it would benefit the regulated community to have implementing rules that reasonably interpret § 1064 take effect automatically, rather than wait for the Commission to conduct a second rulemaking.

In response to Versant Power's second submission, the Commission disagrees that § 15(9) & (10) will result in uncertainty. Each rule provision clearly corresponds with a specific statutory provision in § 1064, which should make it straightforward to determine which parts of the rule are effective in the event of a less-than-total injunction on enforcement of § 1064. In the event of any change in the status quo, the Commission can and would provide public guidance to the regulated community as to which portions of the rule it might regard as having taken effect under the severability provision. Any benefits to suspending the rulemaking process are outweighed by the prospect of having the injunction lifted and having § 1064 go into effect with no implementing rules to guide enforcement.

Part 2 – General Comments Received During First Round

During the first round of comments, the Commission received comments from seven organizations which are summarized in this section. These comments were more general and did not suggest any changes to specific amendments. The Commission considered the comments and determined they do not require any revisions to the original amendments proposed in January.

Maine Citizens for Clean Elections

Anna Kellar, the Executive Director of the Maine Citizens for Clean Elections provided written comments dated February 28, 2024. The organization expresses its appreciation to the Commission for developing the rules and endorses the comments of the Campaign Legal Center.

Protect Maine Elections

Kaitlin LaCasse is the campaign manager for Protect Maine Elections, the ballot question committee that promoted Question 2 on the November 2023 ballot. Ms. LaCasse testified at the February 28, 2024 public hearing and submitted written comments.

Protect Maine Elections states that § 1064 closes a dangerous loophole created by a ruling of the Federal Elections Commission. It argues that § 1064 is necessary because of the volume of recent spending by FGIEs to influence Maine elections. Protect Maine Elections supports the amendments that were proposed on January 31, 2024.

American Promise

The Commission received written comments from Brian Boyle, Chief Program Officer and General Counsel of American Promise, a nonprofit advocacy organization which promotes an amendment to the U.S. Constitution allowing for

greater regulation of money in U.S. politics. American Promise supports the proposed amendments. In particular, it views the proposed "safe harbor" policy for media providers as reasonable and it agrees that an entity should not qualify as a FGIE solely because the combined ownership of an entity by two or more foreign governments exceeds 5%.

American Promise also commented on a topic other than the rulemaking. In addition to § 1064, Question 2 required the Commission to receive public comment and issue an annual report on congressional proposals to amend the U.S. Constitution to allow for greater campaign finance regulation. American Promise encourages the Commission to hold public hearings before issuing the report so that the people of Maine can voice their support for this type of amendment. The Commission will address these issues in public meetings during 2024.

Versant Power

Arielle Silver Karsh, the Vice President for Legal and Regulatory Affairs for Versant Power, submitted written comments dated March 11, 2024. Versant Power initiated one of the four constitutional challenges of § 1064. The utility does not comment on any specific provision of the amendments. It believes the proposed amendments share and exacerbate the constitutional flaws in § 1064. In light of the District Court's order enjoining the enforcement of § 1064, Versant Power suggests it would be a waste of administrative resources for the Commission to adopt the proposed rule. It suggests suspending the rulemaking. For the reasons expressed above in the section concerning § 15(9) & (10), the Commission completed the rulemaking notwithstanding the objections by Versant Power and the other plaintiffs.

Central Maine Power Company

Carlisle Tuggey, General Counsel for Central Maine Power Company ("CMP"), submitted written comments dated March 11, 2024. CMP does not comment on any specific provision of the proposed amendments. The utility summarizes the order enjoining enforcement of § 1064. It argues that it is generally unwise to engage in rulemaking while litigation is ongoing and it is indefensible to adopt rules meant to enforce a law that a federal court has found to be facially unconstitutional. If § 1064 is struck down, CMP submits that the Commission's rules would be meaningless. It suggests not adopting any rules until the litigation concludes. For the reasons expressed above in the section concerning § 15(9) & (10), the Commission completed the rulemaking notwithstanding the objections by CMP and the other plaintiffs.

Jane Pringle, Kenneth Fletcher, Bonnie Gould, Brenda Garrand and Lawrence Wold

A group of Maine voters who filed a constitutional challenge to § 1060 also submitted comments on the rulemaking. Similar to Versant Power and CMP, they do not refer to any specific section of the amendments and they urge the Commission not to proceed with the rulemaking. For the reasons expressed above in the section concerning § 15(9) & (10), the Commission completed the rulemaking notwithstanding the objections by the individual and business/association plaintiffs.

Comments by Maine Association of Broadcasters

Mr. Timothy Moore, the Executive Director of the Maine Association of Broadcasters, testified at the Commission's February 28, 2024 public hearing and provided written testimony. The association believes § 1064 is vague, burdensome on media outlets, and unconstitutional because it would silence legitimate political voices. The association encourages the Commission to refrain from taking any action on the rulemaking until the U.S. District Court decides on the association's petition for a permanent injunction. In its February 28 comments, the association did not refer to any specific part of the amendments. For the reasons expressed above in the section concerning § 15(9) & (10), the Commission completed the rulemaking notwithstanding the objections by Maine Association of Broadcasters and the other plaintiffs.

In supplemental written comments submitted February 29, 2024, Mr. Moore posed nine questions "regarding a station's liability in some real-world situations." The Commission has considered the questions and determined they do not need to be addressed in the Commission's rulemaking. Two of the practical questions will be resolved if the Commission agrees with the staff's recommendation to eliminate the public list requirement, discussed above. Some of the questions are apparently based on a misconception that the Commission will punish broadcasters for publishing campaign advertisements that are funded by FGIEs. The text of § 1064 makes this unlikely. Mr. Moore's questions may be more appropriately handled in an advice session if the due diligence provisions in § 1064(7) are found to be valid and enforceable by the courts.