



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

Note: these materials will be supplemented because the Commission received notice from the Poliquin Committee that it is requesting an IE determination for another tv advertisement.

To: Commission
From: Jonathan Wayne, Executive Director
Date: September 20, 2022
Re: Request for Independent Expenditure Determination by Bruce Poliquin for Congress Committee

The Bruce Poliquin for Congress committee (“the Poliquin Committee”) has requested a determination by the Commission that the costs of a television and radio advertisement are not independent expenditures for a Maine state candidate. Both ads contain references to Paul LePage who is running for a third term as Governor, but do not refer to him as a candidate or expressly advocate for his election. The Poliquin Committee explains that “that the intention of the Poliquin campaign was not to promote the candidacy of any other candidate. Our sole intention is to promote the candidacy of Bruce Poliquin for Congress.” The radio ad refers to both Mr. LePage and New England Patriots head coach Bill Belichick in support of a theme that Mr. Poliquin is a fighter for Maine who is scrappy and doesn’t get pushed around. Because these ads are being broadcast after Labor Day and refer to Mr. LePage, the Poliquin Committee is seeking a determination from the Commission that the advertising costs were not independent expenditures under Maine Election Law.

Relevant Law

Independent expenditure reports. Independent expenditures (IEs) are payments for communications to voters (e.g., mailings, advertisements, and digital or telephone messages) advocating for or against candidates made by political committees, other organizations, or individuals. 21-A M.R.S. § 1019-B. Any person making a single IE over \$250 per candidate must file an IE report disclosing the amounts spent on the communications, which specific candidate(s) were supported or opposed, and an affidavit confirming the expenditure was made independently of any candidate. § 1019-B(4)

During most parts of an election year, an ad is an IE if it explicitly advocates for the election or defeat of a candidate. After Labor Day, however, a communication that merely names or depicts a clearly identified candidate requires an IE report unless the spender demonstrates to the Commission that the communication was not intended to influence the nomination, election, or defeat of the candidate. 21-A M.R.S. § 1019-B(1)(B).¹

In the last 60 days before an election, IE reports must be filed within one or two calendar days of making the expenditure, according to Chapter 1, § 10 of the Commission Rules. 94-270 CMR Ch. 1, § 10(3).

Requesting a Commission determination. A person disseminating a communication naming or depicting a candidate after Labor Day may request a determination by the Commission that the payment for the communication is not an IE by submitting a signed statement that the cost was not incurred with the intent to influence the nomination, election or defeat of a candidate, supported by any additional evidence the person chooses to submit. 21-A M.R.S. § 1019-B(2). The statement must be submitted within seven days of disseminating the communication. The Commission may gather any additional evidence it determines relevant and “shall determine by a preponderance of the evidence whether the cost was incurred with intent to influence the nomination, election or defeat of a candidate.” 21-A M.R.S. § 1019-B(2).

Definition of clearly identified. “Clearly Identified” means the candidate’s name, or a photograph or drawing of the candidate, appears in a communication or the identity of the candidate is apparent by unambiguous reference. 21-A M.R.S. § 1012(1).

Allocating costs when an IE report is required for multiple candidates. Although it may not be applicable in this case, the Commission has adopted a rule stating “[w]hen a person or organization is required to report an independent expenditure for a communication that supports multiple candidates, the cost should be allocated among the candidates in rough proportion to the benefit received by each candidate.” As an

¹From 2003-2021, paragraph 1(B) imposed a presumption of an IE, but the presumption terminology was removed from the paragraph in a rewrite of the IE statute in P.L. 2021, ch. 132. The procedure is essentially the same, but there is no longer a presumption in the law. To reflect the 2021 law change, the Commission staff has updated its forms and intends to propose rule amendments later this year.

illustration, the rule provides advice on how to allocate the total cost of a mailing that supports three candidates in different legislative districts. 94-270 CMR Ch. 1, § 10(4).

Request by the Poliquin Committee

Bruce Poliquin represented Maine's second congressional district in the U.S. House of Representatives during 2015-2019. He is the Republican nominee for that office in this year's general election. The Poliquin Committee is registered as a political committee with the Federal Election Commission (FEC).

Requests for an independent expenditure determination. On September 10, 2022, the campaign manager for the Poliquin campaign, Ben Trundy, submitted a statement to rebut the presumption of an independent expenditure.² I requested a video and script for the ad, and confirmation whether the ad had been paid for independently of Paul LePage's campaign committee. On September 14, 2022, I received this information in an email statement by Mr. Trundy that the committee's counsel, Joshua A. Tardy, forwarded to me. The statement, which contains a link to the video and the script, is attached. Mr. Trundy stated:

This is to recertify in writing that the intention of the Poliquin campaign was not to promote the candidacy of any other candidate. Our sole intention is to promote the candidacy of Bruce Poliquin for Congress. With respect to this expenditure, the Poliquin campaign acted independently and did not consult with either Paul LePage or his campaign committee.

On September 15, 2022, Mr. Trundy submitted a request for an IE determination with respect to a radio ad. Mr. Tardy forwarded an email statement containing the script and an audio file, which the Commission staff will forward to the Commission.

² The Commission staff had updated this form to eliminate the presumption language, but the previous version of the form accidentally was available on the Commission's website. It has since been replaced with the updated form.

Advertising scripts

The television ad is narrated by Bruce Poliquin in which he discusses issues facing the people of Maine and his ability to fix them. The script provided by Mr. Trundy is:

My heart is breaking for our seniors in Maine. Joe Biden and the Democrats have made everything that we need to live more expensive. They are driving up inflation, driving up the cost of heating oil and gasoline and keeping our border open with Mexico. We know how to fix these problems but we need to make a change. Governor LePage needs a partner in Washington with common sense. I want to bring common sense, Maine common sense, back to Congress. I love the people of Maine, I love our state, and I want to help. I'm Bruce Poliquin and I approve this message.

The script for the radio ad is:

Born and raised in Central Maine, Bruce Poliquin's been a fighter his whole life. A Championship hockey goalie at Waterville high school, Bruce Poliquin earned a scholarship and played football alongside Bill Belichick. And just like Belichick, Bruce Poliquin doesn't just fight – he WINS. Backed by Governor LePage as Maine's State Treasurer – Bruce Poliquin helped eliminate debt and CUT taxes. Because Poliquin knows the struggle Mainers face paying for gas, groceries, and heating oil. That's why after Congressman Jared Golden caved to the extreme Pelosi-Biden agenda that's crushing Maine... Bruce Poliquin is standing up to fight for us again - to bring Maine common sense back to Congress. Because just like Belichick and LePage – Bruce Poliquin is a scrappy Mainer who will NEVER get pushed around. Tested and Tough: Bruce Poliquin fights and wins for Maine. I'm Bruce Poliquin, candidate for Congress, and I approve this message.

Analysis

The campaign manager for the Poliquin Committee has represented that it did not consult with Paul LePage and his campaign committee concerning the advertisements. If these statements of independence are accurate, the compliance issue before the Commission is how to apply Maine's independent expenditure reporting statute, 21-A M.R.S. § 1019-B. The compliance issue would *not* be whether Mr. LePage's campaign received a contribution from the Poliquin Committee.³

With regard to paid communications that refer to two or more people who are running for office, the Commission staff recommends examining each communication on a case-by-case basis to judge whether the financing of the communication complies with Maine Election Law. The communication's language, visual elements, and other objective factors such as its timing and audience will usually be relevant to the question of what was the intention of the communication.

Often, a campaign ad mentions a candidate because the communication is intended to promote that candidate. That may not always be the case, however. In May 2010, the Commission was asked whether a Maine Clean Election Act candidate for State Representative could use their public campaign funds to pay for a mailing citing an endorsement by another official who was running for State Senate. The Commission adopted the following policy:

Campaign materials paid for one candidate which contain an endorsement by another candidate generally are not contributions to the endorsing candidate, provided that the communication:

- does not mention the candidacy of the endorsing candidate, and
- contains no promotional or supportive statements concerning the endorsing candidate.

The endorsed candidate generally may use Maine Clean Election Act funds for such campaign materials.

³As it relates to candidates, the term "contribution" is defined in 21-A M.R.S. § 1012(2)(A) to mean a gift of money or anything of value made to a candidate for the purpose of influencing their nomination or election. In addition, under 21-A M.R.S. § 1015(5), a contribution results when a person makes an expenditure for the purpose of promoting a candidate and consults with the candidate, his/her political committee, or their agents.

If the Commission is asked to consider whether an endorsed candidate has provided an in-kind contribution to the endorsing candidate or inappropriately used MCEA funds to promote the endorsing candidate, the Commission will look at each communication on a case-by-case basis.

Poliquin television ad. Examining the Poliquin Committee's television ad, the content is overwhelmingly about Bruce Poliquin. Mr. Poliquin's voice and viewpoints are heard throughout the entire ad. He discusses problems facing Maine people and his ability to fix them by bringing common sense back to Congress. He is portrayed as someone who cares and wants to help, and is a problem-solver. All of the moving images in the ad are of Mr. Poliquin talking to everyday Mainers or border officials, or expressing his own views.

Paul LePage is mentioned by name once in the 30-second ad ("Governor LePage needs a partner in Washington with common sense"). The ad contains two still photographs of Bruce Poliquin standing next to Mr. LePage. These references to Paul LePage are brief and are made *only* in connection with Bruce Poliquin. The script contains 104 words, two of which are Governor LePage.

As it relates to Mr. LePage, the television message does not contain many of usual elements of a campaign ad. There is no suggestion to vote for Mr. LePage. The ad does not discuss his experience or qualifications, or contain any promotional language about him. Reactions will vary, but some people viewing the ad may feel that there is some promotional benefit to Paul LePage by virtue of the reference to "Governor LePage" (the office he is running for) and the campaign-style picture of Mr. Poliquin and Mr. LePage talking to shoppers in a grocery store. My own reaction is that if there is any benefit to Paul LePage's candidacy, it is minimal and collateral to the ad's purpose which is to promote Bruce Poliquin.

Poliquin radio ad. The radio ad is almost entirely about Bruce Poliquin. Gov. LePage is mentioned twice in the ad: first, to note his support for Mr. Poliquin when he became State Treasurer in 2010. Second, both Paul LePage and Bill Belichick are invoked to support the characterization of Bruce Poliquin as a scrappy Mainer who will not get pushed around. The ad does not mention Paul LePage as a candidate and does not encourage a vote for him. The ad implies that Mr. LePage is also a scrappy Mainer who

will not get pushed around, which some listeners may understand as a positive characterization.

Comments by executive director. My personal view is that it seems plausible that Paul LePage was included by the ads' designers in the service of promoting Bruce Poliquin. With regard to the television ad, it is a common communication technique in political advertising for a candidate to pictorially link themselves with a well-known official or to describe themselves as a potential ally or partner of an official. The candidate's alignment with the official can implicitly send a message about the candidate's political views or elevate the candidate if the official is better known. Sometimes, the current or former official is not even running for office, which underscores that the only election intended to be influenced is the candidate's.⁴

The independent expenditure statute directs Commission: "The commission may gather any additional evidence it determines relevant and material and shall determine by a preponderance of the evidence whether the cost was incurred with intent to influence the nomination, election or defeat of a candidate." 21-A M.R.S. § 1019-B(2). This is the first time that I can recall the Commission applying this provision to an advertisement by one candidate that mentions another candidate.

Some consumers of Mr. Poliquin's ads may view them as promoting Paul LePage because (1) the ads may reinforce his name in connection with the office he is seeking, (2) the radio ad implies Mr. LePage is a scrappy Mainer who sticks to his positions, and (3) the tv ad contains a campaign-style photo in a grocery store that includes Mr. LePage. My own reaction is that if there is a benefit to Paul LePage, it is minimal. The references seem instrumental toward defining Bruce Poliquin. In order to find that the costs were

⁴ For example, in her campaign website seeking the 2022 Republican nomination for Florida's 13th congressional district, candidate Amanda Makki prominently featured a photograph of Florida Governor Ron DeSantis and describes herself as "Pro-DeSantis." In a campaign video featured on the home page, a local mayor narrates "Amanda will be the partner we need to help Governor DeSantis" as the video shows Makki and DeSantis lawn signs adjacent to each other. <https://www.amandamakki.com/> Earlier this year in Wisconsin's Democratic primary election for U.S. Senate, candidate Alex Lasry ran ads describing him as "exactly the kind of ally Tammy Baldwin needs in the Senate." (<https://www.youtube.com/watch?v=TvV5Wp29AAw>). A study by a Washington D.C. research/policy organization found that 30% of 2022 candidates seeking the Republican nomination for U.S. Congress included photos or favorable mentions of former President Donald J. Trump on their campaign websites. <https://www.brookings.edu/blog/fixgov/2022/09/08/lessons-from-the-2022-primaries-what-do-they-tell-us-about-americas-political-parties-and-the-midterm-elections/>

“incurred with intent to influence” the gubernatorial election, it would be preferable if there were more substantial evidence of an objective nature that suggests the ads had a purpose of promoting Paul LePage. I recommend the view that there is insufficient evidence to conclude the costs were incurred “with intent to influence” Mr. LePage’s election.

In case this is a factor in your decision, the Poliquin Committee will presumably be publicly disclosing some information about its TV and radio advertising in its next quarterly FEC report due in October.⁵ Federal candidates report the date, amount, payee, and purpose for their expenditures. The FEC report is not required to include any information about influence on state elections, but one would expect the transactional details of the costs to be disclosed in October. One other consideration is that requiring the Poliquin Committee to file an independent expenditure report would raise enforcement issues, such as whether the Poliquin Committee was late in filing the report or should have registered as a political action committee with the Commission.

Thank you for your consideration of this memo.

⁵ Current congressional candidate spending data on the FEC’s public disclosure website includes payments made through June 30, 2022. The next quarterly report for congressional candidates is due on October 15, 2022 and will cover the period of July 1 - September 30, 2022.



Statement to Rebut Presumption of Independent Expenditure

Instructions: Under 21-A M.R.S.A. §1019-B, an expenditure to design, produce, or disseminate a communication that names or depicts a clearly identified candidate and that is disseminated during the 28 days, including election day, before a primary election; during the 35 days, including election day, before a special election; or from Labor Day to a general election day is presumed to be an independent expenditure. The individual or organization making the expenditure may attempt to rebut the presumption by filing this form with the Ethics Commission. Any documents, statements, or other evidence (e.g., a copy of a printed communication or a script of a recorded communication) supporting the rebuttal may be attached to this form. The form is required to be filed with the Ethics Commission within 48 hours of disseminating the communication, including weekends and holidays. The form may be filed by faxing it to (207) 287-6775 or by sending a scanned copy to ethics@maine.gov, provided that the Commission receives the original within 5 days.

Individual/Organization making the expenditure:

Poliquin for Congress

Contact person:

Benjamin Trundy

Contact's mailing address:

P.O. Box 524

Bangor, ME 04402

Contact's telephone number(s):

207-607-9981

Candidate(s) named or depicted:
(use additional pages if necessary)

Paul LePage

Type of communication:
(e.g., mailer, television or radio ad, online ad)

Television

Date(s) of dissemination:

Ads running post-Labor Day

Payee or creditor (including address):

Poliquin for Congress

P.O. Box 524 Bangor, ME 04402

The costs for the communication referred to above were not incurred with the intent to influence the nomination, election, or defeat of a candidate.

Signature of authorized individual

9/10/22

Date

Benjamin Trundy

Printed name of authorized individual

From: Ben Trundy <ben@poliquinforcongress.com>
Date: September 14, 2022 at 8:27:50 AM EDT
To: "josh@mitchelltardyjackson.com" <josh@mitchelltardyjackson.com>

Dear Mr. Wayne,

We have filed the Statement to Rebut Presumption of Independent Expenditure. This is to recertify in writing that the intention of the Poliquin campaign was not to promote the candidacy of any other candidate. Our sole intention is to promote the candidacy of Bruce Poliquin for Congress. With respect to this expenditure, the Poliquin campaign acted independently and did not consult with either Paul LePage or his campaign committee.

Link to video: <https://vimeo.com/741929554/436f2fdd73>

Script: "My heart is breaking for our seniors in Maine. Joe Biden and the Democrats have made everything that we need to live more expensive. They are driving up inflation, driving up the cost of heating oil and gasoline and keeping our border open with Mexico. We know how to fix these problems but we need to make a change. Governor LePage needs a partner in Washington with common sense. I want to bring common sense, Maine common sense, back to Congress. I love the people of Maine, I love our state, and I want to help. I'm Bruce Poliquin and I approve this message."

Thank you,
Ben Trundy
Campaign Manager
Poliquin for Congress



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Individual/Organization making the expenditure:

Poliquin For Congress

Contact person:

Ben Trundy

Contact's mailing address:

P.O. Box 524
Bangor, ME 04402

Contact's telephone number(s):

207-607-9981

Candidate(s) named or depicted:
(use additional pages if necessary)

Paul LePage

Type of communication:
(e.g., mailer, television or radio ad, online ad)

Radio

Date(s) of dissemination:

~~9/13/22~~ 9/13/22 - 11/8/22

Payee or creditor (including address):

Poliquin For Congress
P.O. Box 524 Bangor, ME 04402

The costs for the communication referred to above were not incurred with the intent to influence the nomination, election, or defeat of a candidate.

Benjamin Trundy
Signature of authorized individual

9/14/22
Date

Benjamin Trundy
Printed name of authorized individual

From: Ben Trundy <ben@poliquinforcongress.com>
Date: September 14, 2022 at 4:50:16 PM EDT
To: "josh@mitchelltardyjackson.com" <josh@mitchelltardyjackson.com>
Subject: Radio Ad Rebut IE Statement

For Radio Spot:

Dear Mr. Wayne,

We have filed the Statement to Rebut Presumption of Independent Expenditure. This is to recertify in writing that the intention of the Poliquin campaign was not to promote the candidacy of any other candidate. Our sole intention is to promote the candidacy of Bruce Poliquin for Congress. With respect to this expenditure, the Poliquin campaign acted independently and did not consult with either Paul LePage or his campaign committee.

SCRIPT:

Born and raised in Central Maine, Bruce Poliquin's been a fighter his whole life.

A Championship hockey goalie at Waterville high school,

Bruce Poliquin earned a scholarship and played football alongside Bill Belichick.

And just like Belichick, Bruce Poliquin doesn't just fight – he WINS.

Backed by Governor LePage as Maine's State Treasurer – Bruce Poliquin helped eliminate debt and CUT taxes.

Because Poliquin knows the struggle Mainers face paying for gas, groceries, and heating oil.

That's why after Congressman Jared Golden caved to the extreme Pelosi - Biden agenda that's crushing Maine...

Bruce Poliquin is standing up to fight for us again - to bring Maine common sense back to Congress.

Because just like Belichick and LePage – Bruce Poliquin is a scrappy Mainer who will NEVER get pushed around.

Tested and Tough: Bruce Poliquin fights and wins for Maine.

I'm Bruce Poliquin, candidate for Congress, and I approve this message.

Paid for by Bruce Poliquin for Congress.

Thank you,
Ben Trundy
Campaign Manager
Poliquin for Congress

§1019-B. Reports of independent expenditures

1. Independent expenditures; definition. For the purposes of this section, an "independent expenditure" means any expenditure made by a person, party committee or political action committee that is not made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized political committee or an agent of either and that:

A. Is made to design, produce or disseminate any communication that expressly advocates the election or defeat of a clearly identified candidate; or [PL 2021, c. 132, §7 (AMD).]

B. Unless the person, party committee or political action committee making the expenditure demonstrates under subsection 2 that the expenditure was not intended to influence the nomination, election or defeat of the candidate, is made to design, produce or disseminate a communication that names or depicts a clearly identified candidate and is disseminated during the 28 days, including election day, before a primary election; during the 35 days, including election day, before a special election; or from Labor Day to a general election day. [PL 2021, c. 132, §7 (AMD).]

[PL 2021, c. 132, §7 (AMD).]

2. Commission determination. A person, party committee or political action committee may request a determination that an expenditure that otherwise meets the definition of an independent expenditure under subsection 1, paragraph B is not an independent expenditure by filing a signed written statement with the commission within 7 days of disseminating the communication stating that the cost was not incurred with the intent to influence the nomination, election or defeat of a candidate, supported by any additional evidence the person, party committee or political action committee chooses to submit. The commission may gather any additional evidence it determines relevant and material and shall determine by a preponderance of the evidence whether the cost was incurred with intent to influence the nomination, election or defeat of a candidate.

[PL 2021, c. 132, §8 (AMD).]

3. Report required; content; rules.

[PL 2009, c. 524, §6 (RPR); MRSA T. 21-A §1019-B, sub-§3 (RP).]

4. Report required; content; rules. A person, party committee or political action committee that makes any independent expenditure in excess of \$250 during any one candidate's election shall file a report with the commission. In the case of a municipal election, the report must be filed with the municipal clerk.

A. A report required by this subsection must be filed with the commission according to a reporting schedule that the commission shall establish by rule that takes into consideration existing campaign finance reporting requirements. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A. [PL 2011, c. 558, §2 (AMD).]

B. A report required by this subsection must contain an itemized account of each expenditure in excess of \$250 in any one candidate's election, the date and purpose of each expenditure and the name of each payee or creditor. The report must state whether the expenditure is in support of or in opposition to the candidate and must include, under penalty of perjury, as provided in Title 17-A, section 451, a statement under oath or affirmation whether the expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate or an authorized committee or agent of the candidate. [PL 2015, c. 350, §6 (AMD).]

C. A report required by this subsection must be on a form prescribed and prepared by the commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form. The commission may adopt procedures requiring the electronic filing of an independent expenditure report, as long as the commission receives the statement made under oath or affirmation set out in paragraph B by the filing deadline and the commission adopts an exception for persons who lack access to the required technology or the

technological ability to file reports electronically. The commission may adopt procedures allowing for the signed statement to be provisionally filed by facsimile or electronic mail, as long as the report is not considered complete without the filing of the original signed statement. [PL 2013, c. 334, §16 (AMD).]

[PL 2019, c. 323, §17 (AMD).]

5. Exclusions. An independent expenditure does not include:

A. [PL 2021, c. 132, §9 (RP).]

B. A telephone survey that meets generally accepted standards for polling research and that is not conducted for the purpose of changing the voting position of the call recipients or discouraging them from voting; [PL 2011, c. 389, §21 (NEW).]

C. A telephone call naming a clearly identified candidate that identifies an individual's position on a candidate, ballot question or political party for the purpose of encouraging the individual to vote, as long as the call contains no advocacy for or against any candidate; and [PL 2011, c. 389, §21 (NEW).]

D. A voter guide that consists primarily of candidates' responses to surveys and questionnaires and that contains no advocacy for or against any candidate. [PL 2011, c. 389, §21 (NEW).]

[PL 2021, c. 132, §9 (AMD).]

SECTION HISTORY

PL 2003, c. 448, §3 (NEW). PL 2007, c. 443, Pt. A, §20 (AMD). PL 2009, c. 366, §5 (AMD). PL 2009, c. 366, §12 (AFF). PL 2009, c. 524, §§6, 7 (AMD). PL 2011, c. 389, §§20, 21 (AMD). PL 2011, c. 389, §62 (AFF). PL 2011, c. 558, §2 (AMD). PL 2013, c. 334, §§15, 16 (AMD). IB 2015, c. 1, §§5, 6 (AMD). PL 2015, c. 350, §6 (AMD). PL 2019, c. 323, §§15-17 (AMD). PL 2021, c. 132, §§7-9 (AMD).