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

Minutes of the November 19, 2009, Meeting of the
Commission on Governmental Ethics and Election Practices
Held in the Burton M. Cross Office Building, Room 208,
111 Sewall Street, Augusta, Maine

Present: Walter F. McKee, Esq., Chair; André Duchette, Esq.; Hon. Francis C. Marsano (by phone); Hon. Edward M. Youngblood. Staff: Executive Director Jonathan Wayne; Phyllis Gardiner, Counsel.

At 10:00 a.m., Chair Walter McKee convened the meeting.

The Commission considered the following items:

Agenda Item #1. Ratification of Minutes of the October 1, 2009 Meeting

Mr. Youngblood moved to accept the minutes of the October 1 meeting as drafted. Mr. Duchette seconded. Motion passed unanimously (4-0).

Agenda Item #2. Draft Report on Maine Clean Election Fund

Mr. Wayne explained the requirement, pursuant to section 1124(3) of the Maine Clean Election Act, for the Commission to report to the Governor and the Legislature regarding the sufficiency of the Maine Clean Election Fund. He presented a draft version of a report regarding the Fund balance which is due by January 1, 2010, to the Governor and the Legislature. He explained that the staff has been reviewing the costs for the 2010 elections and under certain scenarios, the Fund will not be sufficient to pay to candidates the full amount of public funds for their campaigns. He said this report states that there may be a shortfall for the 2010 election cycle. He said the gubernatorial race is the variable that will determine the adequacy of the Fund and the draft report includes four different scenarios regarding payments to gubernatorial candidates. He said with the Commission's acceptance of this draft, it will be forwarded to the Governor and Legislature.

Mr. Youngblood stated that he had no concerns with forwarding the report and believed there was no other choice but to submit it. He also said notice should be given to the Governor and the Legislature that if this Fund had not been tapped into for other purposes, this report would not be necessary.

Agenda Item #3. Public Hearing on Rulemaking/Shortfall in Maine Clean Election Fund

Mr. McKee explained that at the September 8, 2009 meeting, the Commission agreed to accept comments on proposed amendments to the Commission's rule regarding the procedures for authorizing Maine Clean Election Act candidates to accept contributions if there is insufficient funding. The Commission expects to adopt a rule at its January meeting. He opened the public hearing to receive comment on these proposed amendments.

Jim Mitchell, speaking on behalf of the Libby Mitchell for Governor campaign, raised his concerns regarding the proposed report to the Legislature on the status of the Maine Clean Election Fund for the 2010 election cycle. Mr. Mitchell questioned the staff's assumptions regarding the worst-case scenario. For the report, the staff estimated five primary candidates and three general election candidates, which resulted in a significant shortfall. However, he said currently there are six primary candidates and potentially five general election candidates. He expressed concern that the draft report underestimates the potential shortfall. He said that while it is possible that not every gubernatorial candidate seeking MCEA certification will qualify, the Commission should base its report on the possibility that all will qualify, in which case there may be no funds available for the general election.

Mr. Mitchell said that the amount of money ($1,200,000) provided to MCEA gubernatorial candidates is not realistic given the cost of recent large campaigns in Maine, *e.g.*, former Representative Tom Allen's 2008 Senate campaign ($5,700,000), Gov. Baldacci's 2006 re-election campaign ($1,500,000), and Representative Chellie Pingree's 2008 campaign ($2,000,000 in the general election and $1,000,000 in the primary). He was concerned by the prospect that the MCEA funds available to gubernatorial candidates, which is not sufficient in the first place, may be reduced even more.

Mr. Mitchell said the Mills and Mitchell campaigns proposed that in addition to raising private funds up to the amount of any funding reduction, the campaigns should also be allowed to raise an additional $50,000 above the statutory distribution amount to cover the cost of the private fundraising effort. He said that it is

clear that the gubernatorial campaigns are under-funded; however, that is part of the fundamental agreement to become a clean election candidate. Candidates have less money to run their campaigns but in exchange, they have more time for campaigning instead of fundraising. Mr. Mitchell said that when the State reneges on its part of the agreement, candidates must then spend much more time fundraising instead of campaigning. He said that is not equitable or fair, because the purpose of the MCEA is to level the playing field and allow candidates to spend more time campaigning. He said fundraising requires candidates to spend substantial amounts of time calling contributors instead of talking to people and campaigning for votes. He said in order to truly level the playing field, candidates should be able to raise twice the amount of the reduction, plus an additional one-third of that amount to cover the costs of fundraising.

He said he agreed with the suggestion that in order for candidates to spend more than $1,200,000, the statute must be changed. He recommended that if the Commission proposes any statutory changes to the amount that a MCEA candidate can raise or spend, it do so as soon as possible in order to avoid the potential of a legal challenge later on in the election cycle.

Alison Smith, co-chair of Maine Citizens for Clean Elections (MCCE), said the MCCE agreed with the staff's recommendation to remove the sentence regarding the avoidance of fundraising in the last six weeks of the election. Ms. Smith said that the MCCE also believed that there was a sound rationale for the policy of treating legislative and gubernatorial candidates differently by making small across the board cuts in the initial distributions to legislative candidates and reducing the amount of matching funds that would be available to gubernatorial candidates.

Ms. Smith said that while the law does not clearly state that candidates may raise funds they are not authorized to spend, the MCCE supports this policy so that candidates are not forced to fundraise at the end of their campaign. She also said the privately raised matching funds should be used after public funds have been exhausted. Ms. Smith questioned whether it was necessary for the rule to require that all privately raised funds be deposited into a separate account. She said that it seemed that only the <u>unauthorized</u> funds needed to be deposited into a separate account. The amounts that a candidate raised <u>after</u> receiving authorization could be deposited directly into the primary campaign account.

Ms. Smith said the MCCE does not agree with the draft rule regarding how candidates should dispose of surplus privately raised funds. She said once the authorized private funds are commingled with public funds, they should be treated in every way as public funds and should be returned to the Maine Clean Election Fund (MCEF). In a previous hearing on proposed rules, the Commission decided that the expenditures guidelines would apply to all purchases made with commingled funds. She said the same logic should apply to surplus campaign funds once authorized private and public funds have been commingled. Any surplus in the campaign account should be returned to the MCEF. However, the unauthorized funds in the segregated accounts should be returned to the donors, the MCEF, or the State treasury. She said the other options under the statute available to traditionally funded candidates, *e.g.*, to make gifts to their party, another candidate or a charity, to carry surplus funds over to future campaigns, or to pay for legislative expenses, are inconsistent with the intent of the Maine Clean Election Act. Ms. Smith urged the Commission to limit the options for disposing of unauthorized, privately raised matching funds.

Ms. Smith said MCCE agrees with the policy, suggested by the Democratic legislative caucuses in their written comments to the Commission, to prohibit contributions from PACs, lobbyists or corporations and to allow only contributions from individuals. However, the MCCE questions whether these restrictions could be implemented through rulemaking or whether it would require a statutory change. She said the MCCE also questioned whether banning a lobbyist from making a contribution as an individual might be subject to a constitutional challenge and encouraged the Commission to get a legal opinion before implementing a rule or proposing a statutory change.

Ms. Smith said that it would require a statutory change to allow a candidate to raise and spend more that the amounts established in the Maine Clean Election Act in order to pay for the additional fundraising expenses.

Ms. Smith said that one of the advantages of being a MCEA candidate is that the candidate can focus on campaigning rather than fundraising. She said that while it would be unfortunate if MCEA candidates had to raise private contributions due to a shortfall, it would not really put them at a disadvantage relative to privately financed candidates. In order to maintain parity with a MCEA candidate who receives $1,200,000, it is necessary for a privately financed gubernatorial candidate to raise $1,500,000 because they

have to spend money to raise money. She said that the MCCE shares the concern expressed by others about under-funding these campaigns.

David Bright, campaign manager for the Lynne Williams for Governor campaign, said he agreed with the comments made by Mr. Mitchell that MCEA candidates will have to spend money to raise the additional private funds to cover any shortfall. He also said that he believed it was inconsistent with the purpose and spirit of the Maine Clean Election Act to require gubernatorial candidates to raise $40,000 and for the Legislature to transfer money out of the Maine Clean Election Funds. He said the Commission should be aggressive in trying to get the Legislature to return those funds. Mr. Bright said that the Maine Clean Election Act was intended, in part, to foster better government. He said the integrity of the electoral process is fundamental to everything the Legislature does and if the people cannot trust the integrity of the electoral process, then everything the Legislature does is suspect. Mr. Bright expressed doubt that the anticipated funds transfers for the 2010 election cycle will actually occur given the size of the existing state budget gap. In light of that, the Commission should authorized campaign to start raising funds now.

Mr. Bright said that he agreed with the proposed rule that candidates maintain a separate account for privately raised funds. He said that maintaining separate accounts and transferring funds between accounts is easily done and that campaigns will be able to keep accurate and transparent records of the private funds raised.

Anya Trundy, House Democratic Caucus Director, said that she was speaking on behalf of both the House and Senate Democratic caucuses and their respective leaders. She said that their initial reaction was that the reduction should be taken from the matching funds but after seeing the staff's calculations, they determined that it would be better to reduce the initial distribution instead (Option 1A). This option is preferable because candidates will know at the outset how much they have to raise and the amounts to be raised are reasonably achievable. Ms. Trundy said that the option to reduce the initial distribution by an equal percentage across all candidates (Option 1B) would impose a greater hardship on Senate candidates who would have to raise $1,000 more than under Option 1A. She said that many candidates have run as MCEA candidates in the past and do not have the kind of fundraising network this effort would require.

Ms. Trundy made the following suggestions for the Commission's consideration:

- Candidates should be allowed to accept contributions from individuals only, including individual lobbyists, but not from corporations, PACs and lobbying firms.
- The private contribution limits ($350 for legislative candidates and $750 for gubernatorial candidates) should apply instead of the $100 seed money contribution limit.

Mr. Youngblood asked Ms. Trundy for her perspective on the ability of legislative candidates to keeps accurate records. He said the gubernatorial candidates have more expertise regarding keeping records; whereas, the legislative candidates have had difficulty in the past. He expressed concern over the legislative candidates' ability to keep track of the requirement to separate funds.

Ms. Trundy responded that gubernatorial candidates would have a somewhat more complicated task since they would have to raise funds to cover a reduction in matching funds, which would have to be kept in a separate account until they were authorized to use those matching funds. Legislative candidates' initial distribution would be reduced. Any private funds raised would not have to be segregated from public funds and could be deposited directly into the campaign account. She said the recordkeeping process would be the same as that for seed money contributions.

Daniel I. Billings, Esq., said that he was not speaking on behalf of a client, though he has had discussions with several potential legislative candidates regarding these issues being addressed by the proposed rules. He said he believed that if any reductions are to be made, the initial distributions should be reduced. He said one of the strengths of the MCEA program is how the matching funds process works and changing that process would make the program much less attractive to potential candidates. He said spreading the shortfall across all the candidates would lessen the overall impact of the reduction per candidate. Because there are far fewer candidates that receive matching funds, if matching funds were reduced, the impact could be very substantial on individual candidates. Mr. Billings said he had initially thought that the initial distribution to gubernatorial candidates should be reduced but after giving it more consideration, he agrees with the policy reasons for reducing the matching funds for gubernatorial candidates. It is likely that all MCEA gubernatorial candidates in the general election will receive the maximum matching funds, so the impact would be the same for each candidate. He said the staff's projections for the number of

gubernatorial candidates in the general election are sound and realistic. He said that it was very unlikely that more than three MCEA gubernatorial candidates would be in the general election.

Mr. McKee closed the Public hearing and said the issue will be addressed further at the January meeting.

Agenda Item #4. Request by TABOR NOW to Investigate the City of South Portland

Mr. Wayne explained that David Crocker of the TABOR NOW campaign requested a Commission investigation into whether the City of South Portland was required to register and file reports as a ballot question committee. He said the City included, in a mailing of property tax bills, a flier which stated that the South Portland City Council had voted to oppose the two initiatives. Mr. Crocker believes that the purpose of the flier was to influence the election and that the cost of the flier may have exceeded the $5,000 expenditure threshold for qualifying as a ballot question committee. Mr. Wayne also said that there was a threshold question regarding whether the ballot question statute (21-A M.R.S.A. § 1056-B) applied to the City of South Portland.

Mr. David Crocker, Esq., formerly the Chair of the TABOR campaign, said he believes there is no threshold question. He said the City of South Portland falls within the purview of § 1056-B. He referred to Article IV, Section 14 of the Maine Constitution, which deals with the formation of corporations and the applicability of the general laws of the State of Maine to corporations, and which includes municipal corporations and puts them on a par with all other corporations. He said that the definition of "person" applicable to § 1056-B includes the term "corporation" and it is clear that the City of South Portland is a municipal corporation. He said, also, that § 1056-B states very clearly that a person must register with the Commission if it spends more than $5000 to influence, in any way, a ballot question. He said that he did not understand the Commission staff's caution in interpreting § 1056-B in this case. He said that mailing this flier in a tax bill was not an act of neutral education. It was sent to taxpayers along with the tax bill and stated that the City was in opposition to both referenda. He said taking a broad view, according to § 1056-B and the Maine Constitution, the City of South Portland is a corporation and subject to § 1056-B. He said the only investigation necessary would be the costs associated with the flier.

Daniel I. Billings, Esq., said he has spent a great deal of time contemplating § 1056-B and the staff's interpretation due to his involvement with the 2006 complaint against the Maine Heritage Policy Center.

He said the Commission staff's approach to this request has not been consistent with past procedure. He said although he does not agree with this law, the Commission staff's past practice has been to promote the goal of the law which is to have transparency and public disclosure in campaign expenditures. He said the South Portland expenditures for this flier should be put in context of the statewide campaign. He said many municipalities spent a considerable amount of money to influence the vote on Questions 2 and 4; however, most municipalities did not exceed the $5000 threshold. He said South Portland pushed the envelope, in his opinion, and mailed campaign fliers out to all tax paying property owners. He said if one were to account for all the expenditures for this flier, a question would be raised as to whether the $5,000 threshold has been met. He said even if they did meet the threshold, they would only need to file the report. There has been no suggestion of limiting what the City can spend. Mr. Billings said he agreed with Mr. Crocker that there is no threshold question with regard to whether the City of South Portland is a corporation.

Mr. McKee, addressing the threshold question, noted that the definition of "person" is quite specific and that the Legislature did not include the term "municipal corporation" even though it could have. He referred to the definition of "person" in the Lobbyist Disclosure Law which includes "municipality and quasi-municipality" as an example of how the Legislature specifically includes "municipality" when it means to. He said that it appeared to him that the § 1056-B definition would not apply to municipalities.

Mr. Billings said that he did not believe that the definition of a term in one title should be used to interpret a statute in an entirely different title. He said that the best way to interpret the term "corporation" is to use the plain language of the definition of the word. The term "corporation" is not limited in any way in the definition of "person." It includes for-profit corporations, non-profit corporations and municipal corporations. He also said that if the City of South Portland would not be considered a corporation for the purposes of § 1056-B, it would certainly qualify as an organization which is a broader term. Mr. Billings also said that the staff time used for the research and analysis that ultimately went into the campaign flier should count when figuring the expenditure amounts for this flier. He said that under the Commission's guidelines for ballot question committees that staff time should count towards the threshold. In addition, under the same guidelines, it is clear that the communication was made to influence the election because it clearly and unambiguously refers to the ballot questions and is not susceptible of any other reasonable interpretation other than to influence the election.

Mr. Duchette asked Mr. Billings whether it was the fact that South Portland mailed the flier along with the tax bills that distinguished this case from the activities regarding these ballot questions engaged in by other municipalities.

Mr. Billings said the issue comes down to money: how much did South Portland actually spend on this communication? In this case, the cost should include the staff time that went into the communication and the staff time for the work that eventually led the Council to come to its decision to oppose the ballot questions, as well as the nuts and bolts costs of printing, stuffing and mailing the flier. Looking at these factors raises the question of whether the threshold was met.

Finally, Mr. Billings expressed his concern about the staff's suggestion regarding how the Commission should approach the issue of time spent by municipal employees on research and analysis regarding ballot questions. He said that the Commission already deals with this same type of review of staff time in the context of the Lobbyist Disclosure Law (Title 3, Chapter 15). If a municipality hires a lobbyist to communicate with Legislators, the cost of the staff time spent to analyze legislation and to prepare documents and testimony to be used in lobbying must be reported in the lobbyist's monthly report. He said his major concern is that the staff's memo seems to suggest that there is one set of rules for governmental entities and another set for everyone else. He said that the Maine Heritage Policy Center is in the business of analyzing and publishing its analysis on various public policy issues. It routinely reviews its activity to determine whether § 1056-B would be applicable. Mr. Billings said that he did not see any reason why governmental entities should be treated any differently in this regard.

Mr. Joseph Greenier, from Stockton Springs, said his town sent information to influence a referendum as well. He expressed concern over any town spending tax money to influence a ballot question and then not having to report it.

Sally Daggett, Esq., City Attorney for the City of South Portland, said that the City does think that there is a threshold question regarding the applicability of § 1056-B to municipalities. She said the Legislature knows how to include municipalities in the campaign finance law when it wants to and has chosen not to include governmental agencies in the campaign finance reporting requirements. She said this is a policy issue left to the Legislature to change if deemed necessary. She said that municipalities are aware of the

case law regarding the appropriate use of public funds to comment on issues that affect municipalities and recognize that there is a line between fair comment on public issues and electioneering. Ms. Daggett also cited the Attorney General opinion from 2004 regarding the use of public funds in commenting on a citizen's initiative. In that opinion the Attorney General recognized that it is not only appropriate for a municipality to comment on and disseminate informational materials about an issue affecting the municipality, the municipal officers may have a duty to inform their constituents about the impact of a referendum. She said there is a provision in Title 30-A that requires municipal officers to comment on their position on appropriations that are sent out to the voters and inform constituents of the impact of referenda on municipal budgets. She also said that the general rule among municipal practitioners is that it is very appropriate for municipalities to spend money on issues in order to inform constituents in a neutral educational manner as long as there is no partisan advocacy.

Mr. McKee asked Ms. Daggett whether someone who took a common sense approach to interpreting this particular flier could be led to believe it was intended to send a negative message about the initiatives.

Ms. Daggett said their position is that this flier is a neutral, educational piece. It provides facts and directs the reader to the City's website where there are links to both sides of the issue.

Mr. McKee asked Ms. Daggett whether there was anything in the flier that could be seen as a positive statement about the initiatives or that would balance out the other negative comments.

Ms. Daggett said the City did not believe there were any positive comments to be made regarding the initiatives. The flier informs constituents about the impacts of the initiatives which is appropriate under the Attorney General's opinion and the Superior Court opinion because it is a neutral, educational flier.

In response to a question from Mr. McKee, Mr. Jim Gailey, City Manager for South Portland, stated that the tax bill mailings are done by a private company who receives a bulk rate (33 ½ cents) for the mailings. He also said that when compared to the July tax bill mailing cost, the October mailing which included the flier was the same dollar amount, indicating that there was no incremental increase due to the inclusion of the flier.

Ms. Daggett said the total cost of the October tax bill mailing was $3,233.34. She said even if one were to take the position that half of that amount should be attributed to the cost of the flier, it would only amount to approximately $1,600. She stated, finally, that this is a policy issue that affects not only municipalities but school administrative units, counties and other subdivisions of the State and questioned whether campaign finance reporting requirements apply to all these various subdivisions. She said that policy issues should be left to the Legislature to decide.

Mr. Youngblood stated that looking at the issue as a regular man on the street, the definition of a person includes a corporation. In his opinion, municipalities are corporations and would be required to report under § 1056-B. He said municipalities should not be allowed to spend what they wish on advocating for or against a referendum question without disclosing those expenditures to the public in campaign finance reports. He said in this case, the cost of the flier does not come close to the limit.

Mr. Youngblood moved that the Commission accept the staff recommendation to do no investigation due to the fact that the cost of the flier does not go over the threshold amount. Mr. Duchette seconded.

Mr. Duchette said that he agreed with Mr. Youngblood regarding municipalities being corporations. He said that there could be an argument made that § 1056-B does not apply to municipalities but that it would be a difficult argument to win. However, he said that there seems to be an agreement that this policy issue is best left to the Legislature. Even taking a liberal approach to calculating the cost of the flier, it did not exceed the threshold amount.

Mr. Marsano said the threshold question is important and the Commission should address it in deciding this matter in order to allow the Legislature or the courts to ultimately determine this issue. He said the motion should be that a municipality is not a person for the purpose of § 1056-B. Though he would vote in favor of the current motion, he would do so reluctantly because he believes the motion does not address the important question as to whether municipalities are persons for § 1056-B purposes. He suggested amending the motion.

Mr. Marsano reiterated that the legal issue presented by the threshold question is an important one and should be addressed by the Legislature or by the courts so that municipalities will know where they stand. If this motion passes, the question will remain unresolved.

Mr. McKee restated the motion as he understood it: that the Commission find that a municipality was included in the definition of person; that the Commission find that the purpose of the mailing was to advocate a position in opposition to the ballot questions; and that the Commission find that there was not enough money spent to reach the $5,000 threshold and no further investigation was necessary. He explained that this motion would provide clarity to the public as to how the Commission viewed the issue.

Mr. Youngblood said he agreed with the clarification. Mr. Duchette said that he would still second the motion as clarified by Mr. McKee.

Mr. Marsano said he would support dividing the motion into three separate motions.

Mr. Youngblood agreed to have his motion amended by having it divided into three parts. Mr. Duchette seconded the amendment.

Mr. McKee stated the first motion that the Commission find that a municipality is a person under 21-A M.R.S.A. § 1001(3). The motion passed (3-1) with Mr. Marsano opposed.

Mr. McKee stated the second motion that the Commission find that the purpose of the mailing was to advocate opposition to the ballot questions. The motion passed (3-1) with Mr. Marsano opposed.

Mr. McKee stated the third motion that the Commission find that the $5,000 threshold was not met and that no further investigation is necessary. The motion passed unanimously (4-0).

Mr. Wayne stated that as a result of the Commission's vote, many municipalities may be surprised to learn that they might be subject to the campaign finance reporting requirements. Mr. Wayne asked for clarity regarding the basis for including municipalities under the definition of "person" and asked whether it was

because they were corporations or organizations. He said this information would be useful in order for the staff to address questions from municipalities and others about reporting requirements.

Mr. McKee said in his opinion the term "organization" in statute is sufficiently broad enough to cover municipalities and other subdivisions of the state and other types of entities.

Agenda Item #5. Request by Maine Leads for Waiver of Late-Filing Penalties

Mr. Wayne explained that at the October 1, 2009 meeting, the Commission directed Maine Leads to file campaign finance reports as a ballot question committee to disclose its financial activities in 2007 and 2008 in support of three citizen initiatives. Mr. Wayne explained that applying the routine penalty formula in this case would result in very large penalties for four late reports. Mr. Wayne explained that during some reporting periods Maine Leads did not have any financial activity and the maximum monetary penalty that could be imposed for those reports is $100. Maine Leads requests a waiver of the late-filing penalties.

Daniel I. Billings, Esq., on behalf of Maine Leads, said that he agreed with the staff's interpretation of the statute in effect prior to September 12, 2009, which did not set a maximum penalty for late filed reports by ballot question committees. However, he does not think that it reflects a policy decision by the Legislature that ballot question committees should be more heavily penalized than PACs, but that it is a drafting oversight. He also said the harm to the public due to lack of filing is insubstantial in this case. He said Maine Leads did not intend to hide any activity and their involvement in these citizen initiatives was well known. He said it was more a case of misunderstanding or disagreement about the reporting requirements during that time period. He said the financial reports were made available quickly after the Commission determined that Maine Leads should be filing as a BQC and were available to the public before the election on the ballot questions. Mr. Billings also pointed out that in the cases regarding ballot question committees that have come before the Commission in the past, none has involved a situation in which expenditures were made during the signature gathering phase of the initiative process. Those cases involved expenditures made after the initiative was certified for the ballot. Thus, it was not clear how expenditures made during the signature gathering phase should be reported. He said since this is the first case of imposing penalties on a BQC, the penalty amount should not be the maximum. Mr. Billings reviewed past cases in which significant penalties were imposed on PACs and how those cases were distinguishable from this case. He said that some of the penalty amounts recommended by the staff are disproportionate to the

amount of financial activity in the report. Though the Commission did not accept his argument that the statute is unconstitutionally vague with respect to the meaning of ballot question, Mr. Billings said that the Commission could consider the confusion or disagreement as whether certain expenditures counted towards the threshold and had to be reported as a mitigating circumstance in determining a penalty amount. Mr. Billings said that he and his client believed that a more appropriate penalty would be 25% of the staff's recommended penalty.

Mr. McKee moved that the Commission accept the staff recommendation to access a penalty of $4,500 for each report. Mr. Youngblood seconded the motion.

Mr. Duchette said he was troubled by this being the largest penalty the Commission has assessed and believed that this amount is too high. He had difficulty determining what a fair amount would be in this case but the recommended penalty did not seem appropriate.

Mr. Youngblood agreed with Mr. Duchette that the staff recommendation was too high. He took into consideration the degree of severity of the late-filing and the willingness of Maine Leads to provide information during the investigation and does not believe that a large penalty is warranted. He stated that he, too, was uncertain of what the penalty amount should be.

Mr. Marsano said the staff's reasoning was logical given the parameters of the statute but felt ambivalent to the amount of the penalty.

Mr. McKee said it was reasonable to establish the maximum possible penalty at $5,000 per report in this case. He said a penalty determination should be based on the egregiousness of the failure to report. He said a decision on the appropriate penalty amount will be reached more by a subjective analysis rather than scientific or objective factors. He withdrew his previous motion. Mr. McKee said $2,500 for each report for a total of $10,000 takes into account the egregiousness of the conduct and recognizes the mitigating circumstances.

Mr. McKee moved that the Commission assess a penalty of $2,500 for each report, for a total of $10,000, and waive the $100 penalty for the fifth report. Mr. Duchette seconded.

Motion passed unanimously (4-0).

Agenda Item #6. Update on Investigation of National Organization for Marriage

Mr. Wayne explained that at the October 1, 2009 meeting, the Commission authorized the staff to investigate whether the National Organization for Marriage was required to register and file campaign finance reports as a ballot question committee. He said the investigation will include examining what fundraising methods were used by NOM to solicit money that was eventually contributed to Stand for Marriage Maine. Preliminary examination shows that NOM has contributed at least $1.6 million to Stand for Marriage. He said the staff will look into the techniques NOM used to raise these funds, NOM's purpose in soliciting the donors for these funds, and NOM's communications to the donors regarding the use of these funds. He also said there are different contributions that are deemed reportable under § 1056-B and NOM will be asked specifically what types of contributions were received.

Mr. Wayne said a request for documents and information will be sent to NOM and the staff may seek to depose certain individuals, if necessary. He said the investigation will be a similar to the procedure followed in the Maine Leads investigation. He said the investigation will be more extensive and provide more detail than what was submitted to the Commission at the October meeting.

Mr. McKee said that the Commission will rely on the staff to proceed with the investigation and that the staff will seek guidance and feedback from the Commission as needed

Mr. Marsano asked whether any Commission action was required with respect to the confidentiality of some of the information obtained during the investigation.

Mr. Wayne said the staff will rely upon the confidentiality provisions established in the statute and that there was no Commission action required.

Agenda Item #7. Developing Ethical Standards for the Executive Branch

Mr. Wayne explained that this was the second draft of a report to the Legislature, which is due December 3. He said the Maine Legislature adopted Resolve 2009, Chapter 88, which requires the Commission to

examine existing ethics standards for executive branch employees and to develop advisory recommendations regarding statutory ethical standards for the executive branch of Maine state government, including proposed legislation. Mr. Wayne said this draft responded to comments from Commissioners Marsano and McKee. He said one issue brought up in the report was that existing ethics laws are currently scattered in several different statutes and difficult to find. Mr. Marsano suggested in his e-mail comments to the report that the Commission recommend that the ethics laws be centralized in one location in the statutes (Option A in the report).

Mr. Marsano said the report looks very good and would support using Option A in Mr. Wayne's draft.

Mr. McKee agreed with Mr. Marsano that Option A should be adopted.

Other Business

Agenda Item #3. Rulemaking/Shortfall in Maine Clean Election Fund (Further Discussion)
Mr. Marsano expressed concern that more discussion on this issue did not take place earlier. He said Mr. Mitchell's comments were very significant and he would like to see his suggestions regarding the statutory changes incorporated into legislation. Mr. Marsano noted that waiting until the January meeting for further discussion will be too late to make these changes. However, he also questioned whether the Commission had statutory authority to make some of the changes suggested.

Mr. Wayne said that after reviewing the statute with regard to the Commission's authorization to allow MCEA candidates to raise campaign contributions, counsel and staff felt the Commission did not have the authority to allow candidates to spend more than $1.2 million for the general election. He said the proposal submitted by Senators Mitchell and Mills which suggested they be allowed to raise an additional amount to cover fundraising costs would not be allowed by statute. He said what Mr. Mitchell was suggesting is that the Commission submit an after-deadline bill that would make the statutory change. Mr. Wayne stated that a bill could be put in sooner, if the Commission wanted to do so.

Mr. Marsano suggested that the report present this statutory change as a possible course of action for the Legislature to take, instead of submitting a bill. He said once the Legislature receives the report and is

aware of the problem with the funding, they may want to take action and most likely will. He said including this recommendation in the report will motivate the Legislature to do something on their own since many will have a vested interest in the program. He would not recommend the Commission submit an emergency bill before the report is submitted.

Mr. Wayne said the report discussed under Agenda Item #2, regarding the status of the Maine Clean Election Fund, could contain Mr. Mitchell's suggestions as recommendations to the Legislature.

Mr. Duchette questioned the timeline of making these changes in time for the January 1 due date and said he would need time to review all the comments made today before making any decisions.

Mr. McKee said everyone should have an opportunity to think these suggestions through and the Commission should keep all options open; however, the report needs to be filed on time.

Mr. McKee questioned whether the report could indicate that some candidates have suggested that they be allowed to raise more than the $1.2 million but the Commission is not taking a position on it. He said at least it would be included in the report as information.

Mr. Wayne said that he would include that information in the report.

Lynne Williams Campaign Request for Advice

Mr. McKee indicated that due to the last minute nature of this item, he had not been able to review the materials and thought the Commission staff would be better suited to give advice. He recommended placing this item on the agenda for the next meeting.

Mr. Marsano said the issue was important and should be more fully discussed by the Commission in the future.

Mr. Wayne said waiting for the January meeting may be too late because the Williams campaign needs to move forward on this issue.

Mr. McKee said the staff should do their best to give guidance on the issues and the campaign can move forward on that staff advice, provided that the campaign understands that the Commission's guidance may be different once it has had an opportunity to discuss these questions and decide on a policy.

It was agreed to have the Commission members determine the date for the January meeting by e-mailing their choices to Mr. Wayne.

Mr. Youngblood moved to adjourn. Mr. Duchette seconded. The meeting adjourned at 12:55 p.m.

Respectfully submitted,

Jonathan Wayne, Executive Director