



February 27, 2023

Submitted electronically to Julie.Aube@maine.gov

Jonathan Wayne, Director
Maine Ethics Commission
135 State House Station
Augusta, ME 04333

Dear Director Wayne,

Campaign Legal Center (CLC) respectfully submits these comments to the Maine Ethics Commission (Commission) regarding the Invitation to Comment on Proposed Rule Amendments (Proposed Rule) to provide guidance for complying with Maine's ban on election spending by foreign government-influenced entities.¹

CLC is a nonpartisan, nonprofit organization that advances democracy through law at the federal, state, and local levels of government. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court, and in numerous other federal and state court cases. Our work promotes every American's right to an accountable and transparent democratic system.

By passing Question 2 and enacting 21-A M.R.S. § 1064 (the Act), Maine voters joined a growing number of states seeking to protect their elections from foreign influence.² CLC commends the Commission's rulemaking to provide guidance for complying with the Act. Adopting rules now will help prevent foreign meddling in Maine's 2024 elections and provide valuable guidance to the regulated

¹ Maine Comm'n on Governmental Ethics and Election Practices, *Invitation to Comment on Proposed Rule Amendments – Political Spending in Maine by Foreign Governments*, (Feb. 5, 2024), https://www.maine.gov/ethics/sites/maine.gov.ethics/files/inline-files/Invitation%20to%20Comment%20on%20Proposed%20Rule%20Amendments_0.pdf.

² See Alaska Stat. § 15.13.068; Cal. Gov. Code § 85320(a); Colo. Rev. Stat. § 1-45-103.7(5.3); Fla. Stat. § 106.08(12)(b); Haw. Rev. Stat. § 11-356; Idaho Code Ann. § 67-6610d; Ind. Code § 3-9-2-11; Iowa Code § 68A.404(2)(c); La. Stat. Ann. § 18:1505.2(M); Md. Code, Election Law § 13-236.1; Mo. Const. Art. XIII, § 23(3)(16); Minn. Stat. § 211B.15, subd. 4a-4b; Miss. Code Ann. § 23-15-819; Mont. Code Ann. § 13-37-502; Neb. Rev. Stat. § 49-1479.03; Nev. Rev. Stat. § 294A.325; N.H. Rev. Stat. Ann. § 664:5(VI); N.J. Stat. Ann. § 19:44A-8.1(e); N.Y. Elec. Law § 14-107(3); N.D. Cent. Code § 16.1-08.1-03.15; Ohio Rev. Code § 3517.13; S.D. Codified Laws § 12-27-21; Wash. Rev. Code § 42.17A.417; W. Va. Code § 3-8-5g.

community and the public.

CLC's comments and recommendations are intended to assist the Commission in ensuring that the Proposed Rule clearly and effectively implements the Act. Maine Citizens for Clean Elections provided assistance in the development of these comments. First, we recommend revising the Proposed Rule's "Public List" provision and safe harbor to provide more comprehensive guidance to the regulated community and the public. Second, we recommend revising the proposed "internet platform" definition to ensure it comprehensively covers platforms selling political advertising to Maine residents. Third, we recommend simplifying the Proposed Rule's disclaimer provision. Fourth, we recommend that the Proposed Rule emphasize the Act does not prohibit or otherwise restrict a media provider from reproducing prohibited campaign advertising as part of a news story. Finally, we recommend revisions to a series of the Proposed Rule's definitions.

Each part of our comments also includes proposed text for the final rule based on our recommendations. We would be happy to work with the Commission as it considers amendments for the final rule.

I. The Commission should revise its "Public List" provision to include more effective guidance for the regulated community and strengthen the Proposed Rule's safe harbor.

CLC recommends revising the Proposed Rule's "Public List" requirement to broaden the types of guidance it will provide to the public and the regulated community. CLC also recommends strengthening the safe harbor provision by prohibiting a media provider from publishing a campaign advertisement where it knows or should have known that the advertiser is a foreign government-influenced entity.

The Act requires broadcasters, television providers, print news outlets, and internet platforms (defined in the Proposed Rule as "media providers") to "establish due diligence policies, procedures, and controls" that are "reasonably designed" to prevent the media providers from publishing political advertising by foreign government-influenced entities.³ To implement this requirement, the Proposed Rule provides a safe harbor for media providers whose due diligence policies include certain features, including that a media provider decline to publish campaign advertisements by purchasers "listed by the Commission on its website as a foreign government-influenced entity" or for whom the media provider "has actual knowledge of facts indicating that" the purchaser is a foreign government-influenced entity. In turn, the Proposed Rule provides that the "Commission will maintain a list on its website" of entities determined by the Commission to be foreign government-influenced entities through its enforcement proceedings. The Proposed Rule further provides that an entity may request to be removed from the

³ 21-A M.R.S. § 1064(7).

list by providing evidence it “no longer meets the definition of a foreign government-influenced entity.”

CLC supports the Commission’s intent to provide guidance to media providers regarding entities that have been identified as foreign government-influenced entities under the Act. However, the proposed public list of foreign government-influenced entities identified in enforcement proceedings may be of limited use to the regulated community and the public. For example, particularly for publicly traded corporations, the public list could quickly become out-of-date, causing an entity to be identified as foreign government-influenced on the Commission’s website after it no longer meets the definition. Such circumstances could result in confusion for both media providers and purchasers of political advertising.

Rather than maintaining the proposed public list or requiring media providers to check the list under the safe harbor provision, CLC recommends the Commission provide broader guidance on compliance with the Act on its website. Creating an online repository—including guides, advisory opinions, final outcomes of enforcement actions, and other materials related to the Act—will provide more effective guidance and education about the Act, while avoiding potential confusion arising from the Proposed Rule’s public list.

CLC also recommends strengthening the safe harbor by requiring that a media provider’s due diligence policy specify that it will decline to publish campaign advertisements by entities for which the media provider either *knows or should have known* of an entity’s status as a foreign government-influenced entity. To ensure the safe harbor fully implements the Act’s due diligence policy requirements, a media provider should not be able to ignore circumstances indicating to a reasonable person that a potential advertiser is a foreign government-influenced entity.

Recommended text for final rule:

8. Requirements for media providers

...

B. Safe Harbor. A media provider will be deemed to satisfy the requirements of subsection 8(A) if it adopts a policy containing the following features:

...

- (4) The policy requires the media provider to decline to publish a campaign advertisement if:
 - a. the purchaser fails to provide the certification required by subsection (8)(B)(2);
 - ~~b. the purchaser is listed by the Commission on its website as a foreign government-influenced entity in accordance with subsection (8)(E) below;~~ or,

e b. the media provider ~~has actual knowledge~~ knows or should have known of facts indicating that, notwithstanding the purchaser's written confirmation to the contrary, the purchaser is a foreign government-influenced entity.

...

E. Public list guidance. The Commission will maintain ~~a list~~ on its website of all entities that it has determined in enforcement proceedings to meet the definition of a foreign government-influenced entity public resources regarding compliance with the Act, including, but not limited to, guides and manuals, advisory opinions, and the Commission's enforcement actions related to the Act. ~~An entity may request to be removed from the list by presenting satisfactory evidence to Commission staff that it no longer meets the definition of a foreign government-influenced entity. If Commission staff reject the request, the entity may request a determination by the Commission.~~

II. The Commission should revise the “internet platform” definition to comprehensively include public-facing websites and applications selling political advertisements received by Maine residents.

To ensure the Proposed Rule fully encompasses internet platforms that provide political advertisements to Maine residents, CLC recommends removing the criteria in the Proposed Rule's definition of “internet platform” that specify its application to certain media providers or to platforms that publish content “primarily intended for audiences within Maine.” Instead, CLC recommends amending the definition to include any internet platform that sells more than a minimum dollar threshold of political advertisements that are intended to influence a Maine election.

Under the Act, internet platforms, among other media providers, are required to “establish due diligence policies, procedures, and controls” that are “reasonably designed” to prevent the internet platform from publishing political advertising by foreign government-influenced entities.⁴ The Act requires an internet platform that discovers it has distributed such political advertisements to remove the advertisements “and notify the commission.”⁵ In turn, the Proposed Rule defines “internet platform” to mean “an entity that controls any public-facing website, internet application, or mobile application that sells advertising space” and either: 1) “is also” a print news outlet, broadcaster, or cable or satellite television provider; or 2) “publishes content primarily intended for audiences within Maine.” The Proposed Rule further defines “print news outlet” to include “an entity that publishes physically printed news” and, in relevant part, “distributes at least 25 percent of its copy...within the State of Maine.”

⁴ 21-A M.R.S. § 1064(7).

⁵ *Id.*

While the Proposed Rule necessarily focuses on Maine political advertising, the Proposed Rule’s approach could unintentionally exclude internet platforms providing substantial political advertising to Maine residents. For example, the public-facing website or digital application of a national or regional print news outlet with a minimal physical circulation within the state seemingly would not be covered by the Proposed Rule; despite the entity’s minimal print circulation in Maine, the entity’s online news website could still provide significant digital political advertising targeted to Maine residents.⁶ Similarly, the proposed definition would appear to exclude other internet platforms that publish a substantial amount of political advertisements received by Maine residents, such as streaming television platforms, because those platforms’ content is not “*primarily* intended for audiences within Maine.”

In the final rule, CLC recommends revising the definition of “internet platform” to include any entity that sells a certain amount of campaign advertisements, regardless of whether the entities “publish content primarily intended for Maine audiences” or meet the proposed definition of “print news outlet.” This approach would better comport with the unique nature of digital political advertising while also excluding smaller platforms that do not sell a substantial amount of Maine political advertising. The proposed revisions for the “internet platform” definition suggested below are drawn from equivalent terms used by other states and in the proposed federal Freedom to Vote Act.⁷ The proposed revisions also include a proposed threshold of \$1,000 for campaign advertising sales; we would be happy to work with the Commission and other stakeholders to identify an appropriate threshold for the final rule.

Recommended text for final rule:

I. Internet platform. “Internet platform” means an entity that controls any public-facing website, internet application, or mobile application that ~~sells advertising space and:~~

~~(1) is also a print news outlet, television or radio broadcasting station, or provider of cable or satellite television; or~~

~~(2) publishes content primarily intended for audiences within Maine displays, or causes to be displayed, campaign advertisements and receives in excess of [\$1,000]~~

⁶ See, e.g., Natasha Singer, *This Ad’s for You (Not Your Neighbor)*, N.Y. TIMES (Sept. 15, 2022) <https://www.nytimes.com/2022/09/15/business/custom-political-ads.html>. See also Brendan Fischer & Maggie Christ, CAMPAIGN LEGAL CTR., DIGITAL TRANSPARENCY LOOPHOLES IN THE 2020 ELECTIONS (Apr. 8, 2020) <https://campaignlegal.org/sites/default/files/2020-04/04-07-20%20Digital%20Loopholes%20515pm%20.pdf>.

⁷ See, e.g., Or. Admin. R. 165-012-0525(b) (defining “internet or digital platform” to mean “a public-facing website, internet-enabled application, or other digital application, including but not limited to a social network, ad network, or search engine that displays, or causes to be displayed, digital communications”); see also H.R. 11, 118th Cong. § 6108(a) (defining “online platform,” in relevant part, as “any public-facing website, web application, or digital application (including a social network, ad network, or search engine)”).

in aggregate revenue in a calendar year from displaying, or causing to be displayed, campaign advertisements.

III. The Proposed Rule should be revised to ensure that the disclaimer requirements for advertisements purchased by foreign governments to influence state or local policy are consistent.

To ensure consistency regarding the form of the disclaimer required for advertisements purchased by foreign government-influenced entities to influence state or local policy, CLC recommends specifying that the disclaimer may include specific information about state law and requiring the disclaimer be included in such advertisements that can be received directly by Maine residents.

Under the Act, if a foreign government-influenced entity purchases an advertisement to influence state or local policy, or to influence relations with a foreign country or political party, the advertisement must include a disclaimer identifying the purchaser as a “foreign government” or “foreign government-influenced entity.” The Proposed Rule provides that the disclaimer may include “additional truthful and accurate language” to describe the purchaser, including language explaining that “‘foreign government’ and ‘foreign government-influenced entity’ are defined terms under state law.” The Proposed Rule further provides that the disclaimer requirement applies “only to public communications purchased from media providers or otherwise intended to be view primarily by Maine residents.”

CLC supports the Commission’s guidance regarding optional additional language in the disclaimer permitting advertisers to explain certain terms of art in Maine law. However, the Proposed Rule is open-ended regarding other “truthful and accurate language” an ad purchaser may couch within the disclaimer. An open-ended invitation to ad purchasers to modify the disclaimer may put the Commission in the position of evaluating the truthfulness or accuracy of claims made by advertisers in their disclaimers and result in substantially varying disclaimers from advertiser to advertiser, potentially creating confusion for the public while significantly increasing the burden on Commission staff enforcing the requirement. CLC thus recommends limiting the guidance to permitting additional language in the disclaimer only to reference that “foreign government-influenced entity” and “foreign government” are terms defined in Maine law.

CLC also appreciates the Commission’s intent to provide guidance with respect to the application of the disclaimer rules. But the Proposed Rule’s application to advertisements “purchased from media providers or otherwise intended to be viewed primarily by Maine residents” may substantially and unnecessarily limit the scope of the disclaimer requirements. Instead, as with other political advertising disclaimers, CLC recommends clarifying the Proposed Rule’s application of the disclaimer requirement to include any advertisement that can be received directly by Maine residents.

Recommended text for final rule:

7. Disclaimer in paid communications

...

B. Disclaimer content. A public communication subject to the disclaimer requirement of this subsection must clearly and conspicuously contain the words “Sponsored by” immediately followed by the name of the foreign government-influenced entity that made the disbursement and a statement identifying that foreign government-influenced entity as a “foreign government” or a “foreign government-influenced entity.” The disclaimer may include ~~additional truthful and accurate language describing the entity, including~~ language to indicate that “foreign government” and “foreign government-influenced entity” are defined terms under state law, ~~for example, as follows:~~ “sponsored by [entity], a [foreign government or foreign government-influenced entity, as appropriate] as defined in Maine law.”

~~**B. C. Applicability.** This subsection applies only to public communications purchased from media providers or otherwise intended to be viewed primarily that can be received directly by Maine residents.~~

IV. The Commission should consider revising the Proposed Rule to emphasize that the Act contains no restrictions on media providers reporting on campaign advertisements.

CLC recommends revising the Proposed Rule to emphasize that the Act’s requirements impose no duties or restrictions on media providers who reproduce prohibited foreign campaign advertising in the course of reporting news stories.

Under the Proposed Rule, the safe harbor for media providers states, in relevant part, that a media provider’s “due diligence policy may allow reproduction of a campaign advertisement in a news story.” To ensure this clause in the safe harbor provision does not create confusion regarding the requirements and prohibitions of the Act or the rule, CLC also recommends revising the Proposed Rule to state that no part of the rule may be interpreted to prohibit or restrict media providers from reproducing unlawful campaign advertisements as part of a news story.

Recommended text for final rule:

8. Requirements for media providers

...

A. Policies, procedures and controls. Each media provider must establish due diligence policies, procedures and controls that are reasonably designed to ensure that it does not broadcast, distribute or otherwise make available to the public a campaign advertisement purchased by a foreign

government-influenced entity. Nothing in these rules may be interpreted to prohibit or otherwise restrict a media provider from reproducing a campaign advertisement prohibited by 21-A M.R.S. § 1064 as part of a news story, commentary, or editorial.

V. The Commission should consider revising some of the Proposed Rule’s definitions to ensure they are comprehensive and provide sufficient guidance.

CLC recommends revisions to the following definitions in the Proposed Rule:

A. Direct participation in a decision-making process.

Under the Proposed Rule, direct participation in a decision-making process means “to communicate a direction or preference” regarding a decision-making process “through a person who is an employee or official of a foreign government or an employee, director, or member of a foreign government-owned entity.”

CLC recommends revising the definition to include communications made by an owner of a foreign government-owned entity. Because foreign government-owned entities may have private owners, in addition to their foreign government owners, this definition should also encompass communications by such private owners.

Recommended text for final rule:

C. Direct participation in a decision-making process. To “directly participate in the decision-making process” means to communicate a direction or preference concerning the outcome of the decision-making process through a person who is an employee or official of a foreign government or an employee, director, ~~or~~ owner, or member of a foreign government-owned entity.

B. Indirect beneficial ownership.

The Proposed Rule provides an example of “indirect beneficial ownership” that helpfully illustrates how to determine indirect beneficial ownership in an entity by a foreign government. CLC recommends providing an additional example to demonstrate *partial* indirect beneficial ownership of an entity by a foreign government.

Recommended text for final rule:

G. Indirect beneficial ownership. “Indirect beneficial ownership” means 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:

(1) 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.

(2) if a foreign government holds a 25% ownership interest in Maine Corporation A and Maine Corporation A, in turn, holds a 40% ownership interest in Maine Corporation B, the foreign government indirectly owns 10% of Maine Corporation B.

C. Indirect participation in a decision-making process.

Under the Proposed Rule, “indirect participation in a decision-making process” means, in relevant part, to “knowingly communicate a direction or preference ... using an intermediary, whether or not the intermediary has any formal affiliation with the foreign government or foreign government-owned entity.” CLC recommends revising the definition to include communications by agents of a foreign government or foreign government-owned entity. Including agents will ensure that the definition comprehensively covers any persons who may be acting for or on behalf of a foreign government or foreign government-influenced entity, regardless of their official position.

Recommended text for final rule:

H. Indirect participation in a decision-making process. To “indirectly participate in the decision-making process” means to knowingly communicate a direction or preference concerning the outcome of the decision-making process using an intermediary or agent, whether or not the intermediary or agent has any formal affiliation with the foreign government or foreign government-owned entity.

D. Structure.

The Proposed Rule provides that “structure” includes, in relevant part, “creating a business entity whose ownership is difficult to ascertain.” While CLC supports including this example of structuring in the Proposed Rule, we recommend providing a clearer standard—“readily ascertainable”—for evaluating whether a person’s actions would constitute “structuring” under the Act.

Recommended text for final rule:

M. Structure. “Structure” means to arrange for financial activity to be made by or through a person for the purpose of evading the prohibitions and requirements of 21-A M.R.S. § 1064. Structuring includes, but is not limited to, creating a business entity whose ownership ~~is difficult to ascertain~~ cannot be readily ascertained for the purpose of concealing ownership or control by a foreign government.

Conclusion

Thank you for your consideration of CLC's comments and recommendations for this important rulemaking. We would be happy to answer questions or provide additional information to assist the Commission in promulgating the final rule to implement Maine's prohibition on foreign government spending in its elections.

Respectfully submitted,

/s/ Aaron McKean

Aaron McKean

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