



March 11, 2024

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 this letter to the Maine Ethics Commission (Commission) to supplement our previous comments in support of the Commission's rulemaking.¹ These supplemental comments address questions that were recently raised in litigation about the operation of particular provisions of 21-A M.R.S. § 1064 (the Act).²

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.

Our recommendations are intended to make certain implications of the Act explicit. First, we recommend further specifying the circumstances under which a foreign government or foreign government-owned entity actually participates in an entity's decision-making process. Second, we recommend revising the Proposed Rule to elaborate on the Act's application to entities that are wholly owned or majority owned by foreign governments. 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.

¹ Campaign Legal Ctr., *Comments on Maine Ethics Commission's Rulemaking on Foreign Influenced Election Spending* (Feb. 27, 2024), available at <https://campaignlegal.org/document/clc-comments-maine-ethics-commissions-rulemaking-foreign-influenced-election-spending>.

² See *Central Maine Power v. Maine Comm'n on Governmental Ethics and Elections Practices*, No. 1:23CV00450, 2024 WL 866367 (D. Me. Feb. 29, 2024).

I. The Commission should revise the Proposed Rule to further elucidate when a foreign government or foreign government-owned entity participates in electoral spending decisions by another entity.

The Proposed Rule defines “direct participation in a decision-making process” and “indirect participation in a decision-making process,” for which we suggested revisions in our previous comments.³ In addition to those recommendations, CLC recommends the Commission provide additional guidance regarding participation in a decision-making process by incorporating the Act’s requirements into the rule and providing examples illustrating the Act’s application.

First, the Commission should consider explicitly incorporating the Act’s requirement that a foreign government or foreign government-owned entity actually participate in the decision-making process regarding another entity’s election-related spending for that entity to be considered a foreign government-influenced entity, itself. The Proposed Rule currently provides guidance as to the actions a person must take to directly or indirectly participate in a decision-making process—generally, communicate a direction or preference regarding that decision—and our proposed language would reiterate that the expression of such a communication or preference must occur as part of the other entity’s decision-making process. In other words, a person expressing a direction or preference for the outcome of another entity’s decision-making process *outside of* that entity’s actual decision-making process will not cause the entity to become a foreign government-influenced entity.

Second, the Commission should consider providing examples that illustrate the circumstances under which the Commission may—or may not—find that a foreign government or foreign government-owned entity actually participates in another entity’s electoral spending decisions. The Federal Election Commission (FEC), for example, has long enforced its own rule regarding foreign national participation in electoral decision-making—mirroring the Act’s restriction on foreign participation in decisions involving election-related activities⁴—in a variety of different contexts, demonstrating the fact-specific nature of the determination.⁵ As such, the Commission could provide fuller guidance to the regulated community and the public by providing examples to illustrate that not every communication by or involvement of a foreign government or foreign government-owned entity with

³ Campaign Legal Ctr., *supra* note 1, at 8-9.

⁴ See 11 C.F.R. § 110.20(i).

⁵ See, e.g., FEC Adv. Op. 2004-26 (Aug. 20, 2004) (concluding federal law permits the foreign national spouse of a candidate to participate as a volunteer in certain campaign-related activities but prohibits the candidate’s foreign national spouse from participating in the candidate’s “decisions regarding his campaign activities” and “managing or participating in the decisions” of the candidate’s political committees) <https://www.fec.gov/files/legal/aos/2004-26/2004-26.pdf>; see also, Conciliation Agreement, MUR 7122 (Dec. 19, 2018) (finding that foreign national owners of a U.S. corporation participated in the electoral spending decision-making process of the corporation by directing the corporation’s U.S. citizen executive director to make contributions to a federal super PAC from the corporation) <https://www.fec.gov/files/legal/murs/7122/19044461675.pdf>.

another entity would be considered participating in that entity's electoral decision-making process.

Recommended text for final rule:

9. Direct or indirect participation in a decision-making process.

- A. **Actual participation required.** For the purposes of 21-A M.R.S. § 1064(1)(E)(2)(b), an entity is a foreign government-influenced entity only if a foreign government or foreign government-owned entity actually participates directly or indirectly in the decision-making process, as defined by this rule, with regard to the activities of the entity to influence the nomination or election of a candidate or the initiation or approval of a referendum.
- B. **Acts not constituting actual participation.** Unless shown to actually influence an entity's decision-making process with regard to the activities of the entity to influence the nomination or election of a candidate or the initiation or approval of a referendum, the following actions do not constitute direct or indirect participation by a foreign government or foreign government-owned entity in the decision-making process of another entity:
- (1) The receipt of an unsolicited communication regarding the decision-making process from an employee, official, owner, or agent of a foreign government or foreign government-owned entity.
 - (2) Participation in the entity's decision-making process for the entity's general budget, without participating in the decision-making process with respect to either total spending on activities of the entity to influence the nomination or election of a candidate or the initiation or approval of a referendum or specific contributions, expenditures, or other donations or disbursements of funds to influence the nomination or election of a candidate or the initiation or approval of a referendum.

II. The Commission should revise the Proposed Rule to delineate different entities covered by the Act's restrictions on foreign government-influenced entities.

The Act establishes restrictions on electoral spending by foreign government-influenced entities.⁶ In turn, the Act defines a foreign government-influenced entity to include, in relevant part, "a foreign government" and a "firm, partnership, corporation, association, organization or other entity with respect to which a foreign government or foreign government-owned entity...has direct or indirect beneficial

⁶ 21-A M.R.S. § 1064(2).

ownership of 5% or more of the...applicable ownership interests.”⁷ The Act defines a foreign government-owned entity to be majority owned by a foreign government: “an entity in which a foreign government owns or controls more than 50% of its equity or voting shares.”⁸ Plainly, all foreign government-owned entities are entirely included within the definition of foreign government-influenced entity, because any entity that is more than 50% owned by a foreign government is necessarily 5% or more owned by a foreign government. Additionally, although not separately defined by the Act, any entity entirely owned by a foreign government would also necessarily qualify as a foreign government-influenced entity.

Because the Act applies to all foreign government-influenced entities, there was no need for the Act to separately note that its restrictions apply to all wholly foreign government-owned entities and foreign government-owned entities. However, to ensure the Act is given its fullest application, the Commission should consider revising the Proposed Rule to specify that the Act’s requirements applicable to foreign government-influenced entities apply equally to foreign government-owned entities and entities that are wholly owned by foreign governments. Although “foreign government-influenced entity” under the Act necessarily includes entities majority or wholly owned by foreign governments, explicitly incorporating these entities into the final rule will ensure the rule comprehensively addresses the full scope of the Act, providing fuller guidance to the regulated community and the public.

Recommended text for final rule:

2. Ownership or control by a foreign government.

A. An entity qualifies as a foreign government-influenced entity subject to the requirements of 21-A M.R.S. § 1064 if it is any of the following:

- (1) A foreign government under 21-A M.R.S. § 1064(1)(D).
- (2) An entity that is wholly owned by a foreign government.
- (3) A foreign government-owned entity under 21-A M.R.S. § 1064(1)(F).
- (4) A foreign government-influenced entity under 21-A M.R.S. § 1064(1)(E)(2).

B. An entity does not qualify as a foreign government-influenced entity pursuant to 21-A M.R.S. § 1064(1)(E)(2)(a) solely because multiple foreign governments or foreign government-owned entities have ownership interests in the entity that, if combined, would exceed 5% of the entity’s total equity or other ownership interests.

⁷ 21-A M.R.S. § 1064(1)(E)(1) and (2)(a).

⁸ 21-A M.R.S. § 1064(1)(F).

Conclusion

Thank you for your consideration of our supplemental 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

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