

Agenda

Item #2



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

## MEMORANDUM

To: Interested Parties

From: Jonathan Wayne, Executive Director

Date: April 6, 2011

Subject: Invitation to Comment on Proposed Rule Amendments

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The Ethics Commission is inviting comments on proposed amendments to the Commission's Rules. The proposed amendments:

- clarify that a discount provided by a vendor to a candidate for a routine business reason (*e.g.*, because defective goods were delivered) is not a contribution to the candidate;
- provide examples of paid communications and other financial activities that are considered made in cooperation or concert with a candidate;
- modify the definition of express advocacy to conform to current case law; and
- adjust the reporting schedule for independent expenditures to respond to a 2010 decision by the U.S. District Court in Maine.

In case you are interested in commenting, I have enclosed a copy of the proposed amendments and a summary of the changes. The amendments would be considered routine technical, so they would not be submitted to the Legislature for its consideration.

**The Commission will hold a public hearing on Tuesday, April 26, 2011 at 9:00 a.m. at which you are invited to comment on the proposed amendments.** The public hearing will be held at the Commission's office at 45 Memorial Circle (second floor), in Augusta. Written and e-mailed comments are also welcome. (My e-mail address is [Jonathan.Wayne@maine.gov](mailto:Jonathan.Wayne@maine.gov).) The deadline for written and e-mailed comments is 5:00 p.m. on Friday, May 6, 2011.

If you have any questions, please telephone me at 287-4179. Thank you for your consideration of the proposed amendments.

94-270

COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES

Chapter 1: PROCEDURES

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**SUMMARY:** This Chapter describes the nature and operation of the Commission, and establishes procedures by which the Commission's actions will be governed.

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**SECTION 6. CONTRIBUTIONS AND OTHER RECEIPTS**

1. The date of a contribution is the date it is received by a candidate, an agent of the candidate, a candidate's committee, a party committee and its agents, or a political action committee and its agents.
2. A loan is a contribution at the time it is made unless the loan was made by a financial institution in the State of Maine in the ordinary course of business. Loans continue to be contributions until they are repaid. Loans are subject to the candidate contribution limitations, except for loans made by the candidate, the candidate's spouse, or a financial institution in the State of Maine in the ordinary course of business. The Commission may consider any reported loan to be a cash contribution if it remains unpaid four years after the election in which it was incurred.
3. Candidates and political action committees must report the name, address, occupation and employer of each individual contributor who gives, in the aggregate, more than \$50 for the reporting period. The reporting is required for private contributions raised by privately financed candidates and for seed money contributions to candidates participating in the Maine Clean Election Act. Candidates, political action committees, and party committees must make a reasonable effort to obtain the employment information of the contributor. If a candidate or committee is unable to obtain the information from the contributor in response to a request, the candidate or committee shall indicate "information requested" in the occupation and employer sections of the campaign finance report.
4. Unless specifically exempted under Title 21-A M.R.S.A. §§ 1012 and 1052 or this section, the provision of any goods or services without charge or at a charge that is less than the usual and customary charge for such goods or services is an in-kind contribution. Examples of such goods and services include, but are not limited to: equipment, facilities, supplies, personnel, advertising, and campaign literature. If goods or services are provided at less than the usual and customary charge, the amount of the in-kind contribution is the difference between the usual and customary charge and the amount charged the candidate or political committee. A commercial vendor that has provided a discount to a candidate or political committee because of a defect in performance or other business reason has not made a contribution if the vendor grants substantially similar discounts to other customers in the ordinary course of the vendor's business.
5. An employer that has authorized an employee to provide services without charge to a candidate or political committee during the employee's paid work-time has made an in-kind contribution to the candidate or political committee. No contribution has been made

if the employee is providing services as a volunteer outside of the employee's paid work-time.

6. A commercial vendor that has extended credit to a candidate or political committee has not made a contribution if the credit is extended in the ordinary course of the vendor's business and the terms are substantially similar to extensions of credit made to nonpolitical customers that are of similar risk and size of obligation. The Commission shall presume any debt that remains unpaid more than six months after the election in which the debt was incurred to be a contribution to the candidate or political committee unless the candidate or committee provides clear and convincing evidence to the Commission that they intend to raise funds or take other measures to satisfy the debt. The Commission shall determine whether any debt that remains unpaid for more than four years after the election should be deemed a contribution to the candidate or committee. The Commission may take into consideration any evidence it believes is relevant, including evidence that the creditor did not intend to make a contribution to the candidate or committee or that the candidate or committee is unable to pay the debt.
7. For the purposes of the limitations imposed by 21-A M.R.S.A. §1015(1), 21-A M.R.S.A. §1015(2), 21-A M.R.S.A. §1015(3), and 21-A M.R.S.A. §1056, the following guidelines shall apply:
  - A. For all contributions received through the day of the primary election by candidates enrolled in a political party, the candidate shall designate on the applicable campaign finance report whether the candidate received the contribution for ~~purposes of influencing~~ the primary or the general election. If a candidate receives a contribution before the primary election and designates it for the general election, the candidate must deposit the contribution in an account that is separate from all funds received for the primary election and may not use the contribution in any way to promote the candidate's nomination in the primary election.
  - B. Notwithstanding division (c) below, if a candidate loses in the primary, all contributions made to that candidate for the purpose of liquidating debts and liabilities associated with the candidate's candidacy are deemed to be made in the primary election.
  - C. All contributions made to a general election candidate from the day after the primary election through the date of the general election are deemed to be made for the general election.
  - D. Notwithstanding division (e) below, all contributions made after the general election to a general election candidate for the purpose of reducing debts and liabilities associated with the candidate's candidacy are deemed to be made in the general election.
  - E. All contributions made after the day of the general election to a candidate who has liquidated all debts and liabilities associated with that election are deemed to be made in support of the candidate's candidacy for a subsequent election.

F. Subparagraphs A through E above shall apply to any write-in candidate who has qualified under 21-A M.R.S.A. §723, or who has received contributions or made expenditures with the intent of qualifying as a candidate.

8. If a political committee that is required to file reports with the Commission sells an item to raise funds, the entire amount received is a contribution to the committee. If the political committee provides meals or entertainment at a fundraising event, the entire amount paid by the donor is a contribution to the committee. [FOR EXAMPLE: IF A SUPPORTER PAYS A CANDIDATE COMMITTEE \$20 FOR A T-SHIRT THAT COST THE CAMPAIGN \$5, THE SUPPORTER HAS MADE A \$20 CONTRIBUTION. IF A SUPPORTER PAYS \$100 FOR A TICKET TO A FUNDRAISING DINNER, THE SUPPORTER HAS MADE A \$100 CONTRIBUTION EVEN IF THE COMMITTEE PROVIDES A MEAL WORTH \$30.]
9. If an expenditure is made to promote or support the nomination or election of a candidate, or to oppose or defeat the candidate's opponent(s), and the expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate, the expenditure is considered to be a contribution from the spender to the candidate. As used within this subsection, the term "candidate" includes a committee authorized by the candidate to promote or support his or her election, and all agents of the candidate or the authorized committee.
  - A. Cooperation and consultation includes, but is not limited to:
    1. Discussion between the candidate and the creator, producer or distributor of a communication, or the person paying for that communication, regarding the content, timing, location, mode, intended audience, volume of distribution or frequency of placement of that communication, and
    2. Participation by the candidate in making any decision regarding the content, timing, location, mode, intended audience, volume of distribution, or frequency of placement of the communication.
  - B. An expenditure is presumed to be made in cooperation, consultation or concert with, or at the request or suggestion of a candidate, when
    1. the expenditure is made in cooperation or consultation with any person who, during the twelve months preceding the expenditure, has been the candidate's treasurer or an officer of the candidate's authorized committee, has had a paid or unpaid position managing the candidate's campaign or advising the candidate, or has received any campaign-related compensation or reimbursement from the candidate;
    2. when the candidate has directly shared the candidate's campaign plans, activities, or needs with the spender for the purpose of facilitating a payment by the spender on a communication to voters to promote or support the candidate; or
    3. the communication replicates, reproduces, republishes or disseminates, in whole or in substantial part, a communication designed, produced, paid for or distributed by the candidate.

- C. If a candidate requests that a party committee, political action committee, or other potential spender not make an expenditure to promote or support the candidate, or oppose or defeat the candidate's opponent(s), the request does not constitute cooperation or coordination.
- D. An expenditure will not be presumed to have been made in cooperation, consultation or concert with, or at the request or suggestion of a candidate, solely because:
1. the spender has obtained a photograph, biography, position paper, press release, or similar material about the candidate from a publicly available source;
  2. the person making the expenditure has previously provided advice to the candidate on suggested communication strategies, budgets, issues of public policy, or other campaign plans or activities;
  3. the person makes an expenditure in response to a general, non-specific request for support by a candidate, provided that there is no discussion, cooperation or consultation with the candidate prior to the expenditure relating to the details of the expenditure;
  4. the spender has also made a contribution to the candidate, or has discussed with the candidate his or her campaign plans or activities as part of the candidate's solicitation for a donation;
  5. the expenditure is made by a for-profit or non-profit organization for invitations, announcements, food and beverages and similar costs associated with an event to which the candidate has been invited by the organization to make an appearance before the organization's members, employees, shareholders and the families thereof; or
  6. the expenditure is made by an individual who spends \$100 or less for costs associated with a sign that is lettered or printed individually by hand and that reproduces or replicates a candidate's campaign-related design or graphic.

## SECTION 10. REPORTS OF INDEPENDENT EXPENDITURES

1. **General.** Any person, party committee, political committee or political action committee that makes an independent expenditure aggregating in excess of \$100 per candidate in an election must file a report with the Commission according to this section.
2. **Definitions.** For purposes of this section, the following phrases are defined as follows:
  - A. "Clearly identified," with respect to a candidate, has the same meaning as in Title 21-A, chapter 13, subchapter II.
  - B. "Expressly advocate" means any communication that
    - (1) uses phrases such as "vote for the Governor," "reelect your Representative," "support the Democratic nominee," "cast your ballot for the Republican challenger for Senate District 1," "Jones for House of Representatives," "Jean Smith in 2002," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Woody," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Pick Berry," "Harris in 2000," "Murphy/Stevens" or "Canavan!"; or
    - (2) is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate.
  - C. "Independent expenditure" has the same meaning as in Title 21-A §1019-B. Any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents is considered to be a contribution to that candidate and is not an independent expenditure.
3. **Reporting Schedules.** Independent expenditures must be reported to the Commission in accordance with the following provisions:
  - A. Independent expenditures aggregating in excess of \$100 per candidate per election ~~but not in excess of \$250~~ made by any person, party committee, political committee or political action committee must be reported to the Commission in accordance with the following reporting schedule, ~~except that expenditures made after the 14th day before an election must be reported within 24 hours of the expenditure unless required to be reported according to the schedule in paragraph B.~~
    - (1) **Quarterly Reports.** Quarterly reports must be filed by 5:00 p.m. on:
      - (a) January 15th and be complete as of January 5th December 31st;

- (b) April 10th and be complete as of March 31st;
  - (c) July 15th and be complete as of July 5th June 30th; and
  - (d) October 10th 5th and be complete as of September 30th.
- (2) **Pre-Election Report.** A report must be filed by 5:00 p.m. on the 14th day before the election is held and be complete as of that day.

If the total of independent expenditures made to support or oppose a candidate exceeds \$100, each subsequent amount spent to support or oppose the candidate must be reported as an independent expenditure according to the schedule in this paragraph or paragraph B. ~~As long as the total amount spent with respect to the candidate does not exceed \$250, all reports must be filed according to the deadlines in this paragraph. If the total amount spent per candidate exceeds \$250, the reports must be filed in accordance with paragraph B.~~

~~[NOTE: FOR EXAMPLE, IF A COMMITTEE MAKES THREE \$80 EXPENDITURES IN SUPPORT OF A CANDIDATE ON SEPTEMBER 20, THE 15TH DAY BEFORE THE ELECTION AND THE 8TH DAY BEFORE THE ELECTION, THOSE THREE EXPENDITURES MUST BE REPORTED ON OCTOBER 10th, AND THE 14TH AND 7TH DAYS BEFORE THE ELECTION, RESPECTIVELY.]~~

- B. ~~Independent expenditures aggregating in excess of \$250 per candidate per election made by any person, party committee, political committee or political action committee must be reported to the Commission within 24 hours of those expenditures. If any additional expenditures, regardless of amount, increase the total spent per candidate above the threshold of \$250, each additional expenditure must be reported within 24 hours.~~

Independent expenditures aggregating in excess of \$250 per candidate made during the sixty days before an election must be reported within two calendar days of those expenditures.

[NOTE: WHEN THE CUMULATIVE AMOUNT OF EXPENDITURES TO SUPPORT OR OPPOSE A CANDIDATE EXCEEDS \$250, AN INDEPENDENT EXPENDITURE MUST BE FILED WITH THE COMMISSION WITHIN TWO DAYS OF GOING OVER THE \$250 THRESHOLD.]

FOR EXAMPLE, IF AN INDIVIDUAL, ORGANIZATION OR COMMITTEE MAKES THREE EXPENDITURES OF \$100 IN SUPPORT OF A CANDIDATE ON SEPTEMBER 10TH, SEPTEMBER 15TH, AND OCTOBER 1ST, FOR AN ELECTION ON NOVEMBER 8, 2011, AN INDEPENDENT EXPENDITURE REPORT MUST BE FILED BY OCTOBER 3RD. THE THIRD EXPENDITURE OF \$100 MADE THE CUMULATIVE TOTAL OF EXPENDITURES EXCEED \$250 AND THE TWO-DAY REPORTING REQUIREMENT WAS TRIGGERED ON OCTOBER 1ST. THE REPORT MUST INCLUDE ALL THREE EXPENDITURES.

AFTER OCTOBER 1ST, IF THAT INDIVIDUAL, ORGANIZATION OR COMMITTEE MAKES ADDITIONAL EXPENDITURES TO SUPPORT THAT CANDIDATE, THE REQUIREMENT TO FILE AN INDEPENDENT EXPENDITURE REPORT WITHIN TWO DAYS WILL APPLY ONLY IF THE CUMULATIVE TOTAL SPENT AFTER OCTOBER 1ST EXCEEDS \$250. FOR EXAMPLE, IF THE INDIVIDUAL, ORGANIZATION OR COMMITTEE MAKES TWO PAYMENTS OF \$200 TO PROMOTE THE CANDIDATE ON OCTOBER 10TH AND OCTOBER 15TH, ANOTHER INDEPENDENT EXPENDITURE REPORT MUST BE FILED BY OCTOBER 17TH DISCLOSING THOSE TWO EXPENDITURES.]

Independent expenditures aggregating in excess of \$100 per candidate made after the 14th day before an election must be reported within one calendar day of those expenditures.

For purposes of the filing deadlines in this paragraph, if the expenditure relates to a legislative or gubernatorial election and the filing deadline occurs on a weekend, holiday, or state government shutdown day, the report must be filed on the deadline. If the expenditure relates to a county or municipal election, the report may be filed on the next regular business day.

~~[NOTE: FOR EXAMPLE, IF A COMMITTEE HAS REPORTED INDEPENDENT EXPENDITURES TOTALING \$300 IN SUPPORT OF A CANDIDATE, AND THE COMMITTEE MAKES AN ADDITIONAL \$50 INDEPENDENT EXPENDITURE IN SUPPORT OF THE CANDIDATE, THE ADDITIONAL \$50 EXPENDITURE MUST BE REPORTED WITHIN 24 HOURS.]~~

- C. Reports must contain information as required by Title 21-A, chapter 13, subchapter II (§§ 1016-1017-A), and must clearly identify the candidate and indicate whether the expenditure was made in support of or in opposition to the candidate. Reports filed after the eighth day before an election must include the following information:
1. the date on which the person making the expenditure placed the order with the vendor for the goods or services;
  2. the approximate date when the vendor began providing design or any other services in connection with the expenditure;
  3. the date on which the person making the expenditure first learned of the total amount of the expenditure; and
  4. a statement why the expenditure could not be reported by the eighth day before the election.
- D. A separate 24-Hour Report is not required for expenditures reported in an independent expenditure report.



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COMMISSION ON GOVERNMENTAL ETHICS  
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135 STATE HOUSE STATION  
AUGUSTA, MAINE  
04333-0135

To: Commissioners

From: Jonathan Wayne, Executive Director

Date: April 6, 2011

Re: Summary of Proposed Amendments to Chapter 1 Rules

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*Chapter 1, Section 6(4) – Discounts from a Vendor due to Defects in Performance*

Currently, Section 6(4) states that if a candidate or political committee receives goods or services at a charge that is less than the usual and customary charge, the candidate or political committee has received an in-kind contribution. The Commission proposes that if a commercial vendor has provided a discount to a candidate or political committee because the vendor delivered defective goods or for some other routine business reason, the provision of the discounted goods is not an in-kind contribution.

*Chapter 1, Section 6(7) – Designating Contributions for the Primary or General Election*

Candidates may collect contributions for the primary and general election at the same time. This rule directs a candidate to designate whether a contribution was received for the primary or general election in his or her campaign finance reports. The staff proposes a minor textual change to remove the phrase “purposes of influencing” in this rule. The phrase is unnecessary and duplicative, as it is already contained in the definition of “contribution.”

*Chapter 1, Section 6(8) – Sale of Campaign Promotional Items or Tickets*

Candidates and political committees often sell promotional items (e.g., t-shirts, water bottles, hats) with their campaign logos on them, or provide a meal or entertainment to those who buy tickets for a fundraising event. Some candidates and committees have asked whether the contribution is the net amount received after the cost of the item or meal has been deducted. The staff proposes a rule that would clarify that the entire amount received by the candidate or committee.

*Chapter 1, Section 6(9) – Expenditures by Third-Parties that are Coordinated with a Candidate*

In 1996, Maine voters enacted low contribution limits through a direct initiative. These limits were amended for the 2010 election cycle by the Legislature (\$750 for gubernatorial candidates, and \$350 for other candidates). The purpose of contribution

limits is to prevent donors from corrupting the independence of public officials through large campaign contributions and to avoid the appearance to the public of such corruption.

Maine's Election Law contains a provision stating that if a candidate suggests that another person spend money to promote the candidate or has cooperated with such an expenditure (*e.g.*, a purchase of advertisements or other communications to voters), the candidate has received a non-monetary contribution. That is because the candidate has received something of value to promote his campaign that, otherwise, the campaign would have needed to purchase:

Any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents is considered to be a contribution to that candidate.

The financing by any person of the dissemination, distribution or republication, in whole or in part, of any broadcast or any written or other campaign materials prepared by the candidate, the candidate's political committee or committees or their authorized agents is considered to be a contribution to that candidate.

(21-A M.R.S.A. § 1015(5)) These "coordinated expenditures" are a type of in-kind contribution that is subject to the \$350 and \$750 limits. Many states have similar provisions. The courts have recognized that these coordinated expenditure statutes are constitutional, because they prevent a candidate's supporters from circumventing the contribution limits by making unlimited purchases to benefit the candidate.

The Commission proposes a rule that would provide some definition of what activities do – and do not – constitute coordination. The proposed rule does not provide an exhaustive list. It addresses a few of the situations that have arisen in past elections, and also includes some scenarios based on similar regulations in other states (Washington and California, primarily). Under the proposed rule, an expenditure would be coordinated with the candidate (or the candidate's authorized campaign committee, or the agents of the candidate or the candidate's committee) when:

- the candidate discusses a proposed communication to voters with the person financing the communication; or
- the candidate participates in a decision about the content, timing, location or other characteristics of a communication.

In paragraph 9(B), the proposed rule would also impose a presumption that an expenditure was made in cooperation or consultation with the candidate under certain circumstances. The presumption could be rebutted by a showing of contrary facts. The presumption would apply when:

- the expenditure is made in consultation with an individual who – within the last 12 months prior to the expenditure – has been an officer, manager, or advisor of the candidate’s committee, or who has received compensation or reimbursement of expenses from the campaign;
- the candidate has directly shared the candidate’s campaign plans, activities, or needs with the spender for the purpose of facilitating a payment by the spender on a communication to voters to promote or support the candidate; or
- the communication reproduces all or a substantial part of a communication designed or paid for by the candidate.

Some candidates would prefer that political action committees (PACs) and party committees not make an expenditure on their behalf. Paragraph 9(C) states that if a candidate makes such a request to a PAC or party committee, the request does not constitute coordination.

Paragraph 9(D) sets forth certain activities which, in themselves, would not result in a presumption that a third-party expenditure was made in consultation or cooperation with the candidate.

*Chapter 1, Section 10(2)(B) – Definition of Express Advocacy*

The current definition of “express advocacy” closely mirrors the language in *Buckley v. Valeo*, the U.S. Supreme Court’s decision in 1976 which established the line between express advocacy and issue advocacy. When considering this issue again in 2007 in *F.E.C. v. Wisconsin Right to Life*, the Court stated that a political communication may be express advocacy even if it does not contain the so-called “magic words” of *Buckley* (e.g., “vote for,” “elect,” “defeat”). The Court said “an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” The proposed amendment incorporates this concept and language into the Commission’s rule.

*Chapter 1, Section 10(3)(A) and (B) – Independent Expenditure Reporting Schedule*

On August 19, 2010, the U.S. District Court for the District of Maine issued a decision and order in *National Organization for Marriage v. McKee* invalidating the provision in the Chapter 1, Section 10(3)(B) of the Commission’s rules that required independent expenditures in excess of \$250 to be reported within 24 hours, regardless of when the expenditure occurred. On August 26, 2010, the Commission adopted an emergency rule to change the independent expenditure reporting requirements specifically for the 2010 general election. Because it was an emergency rule, it expired on November 28, 2010, ninety days after it became effective. As a result, the Commission’s rules presently do not give independent spenders *any* deadline by when they must file independent expenditure reports greater than \$250.

The proposed amendment makes permanent the schedule that the Commission adopted in August 2010 on an emergency basis, with a few minor changes. Under the proposed amendment,

- Independent expenditures aggregating in excess of \$250 per candidate made within the sixty days before an election must be reported within two calendar days of the expenditure.
- All independent expenditures aggregating in excess of \$100 per candidate made after the 14<sup>th</sup> day prior to the election must be reported within one calendar day of the expenditure. The amendment also moves this provision of the rule from paragraph 10(A) to paragraph 10(B), which pertains to independent expenditures not reported in quarterly reports.
- The reporting periods for quarterly reports of independent expenditures are changed to coincide with the reporting periods for PACs.
- The deadline for filing the October quarterly report is moved from October 10<sup>th</sup> to October 5<sup>th</sup> in order for the staff to use the information contained in those reports to calculate matching funds for MCEA candidates sooner in the final month prior to the general election.

The proposed rule also specifies that reports for independent expenditures in legislative or gubernatorial races made within the 60 days or 14 days before an election must be filed on the deadline even if the deadline falls on a weekend, holiday, or state government shutdown day. Weekend filing in legislative and gubernatorial races is valuable because these reports affect the payment of matching funds to Maine Clean Election Act candidates. However, independent expenditure reports in county or municipal races may be filed on the next regular business day if the deadline falls on a weekend, holiday, or state government shutdown day.

Thank you for your consideration of this summary of proposed rule amendments.