STATE OF COLORADO
Department of State
1700 Broadway
Suite 250
Denver, CO 80290

Mike Coffman
Secretary of State

William A. Hobbs
Deputy Secretary of State

NOTICE OF PUBLIC HEARING
PETITION SEEKING AMENDMENT TO 8 CCR 1505-6
Campaign Finance Rule 4.20: Political Organizations
June 20, 2008

The Colorado Secretary of State has received the attached petition request for rulemaking. The petition seeks amendments to Campaign and Political Finance Rules concerning disclosure of contributions and expenditures. Specifically, the petition proposes amendments to Rule 4.20 relating to political organizations.

Pursuant to section 24-4-103 (7), C.R.S, "[a]ny interested person shall have the right to petition for the issuance, amendment, or repeal of a rule." In accordance with the Colorado Administrative Procedures Act, such petition shall be open to public inspection and any action on such petition shall be within the discretion of the Secretary of State.

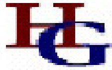
On May 29, 2008, the Secretary of State gave Notice of Proposed Rulemaking concerning Campaign and Political Finance Rules. The subject of the proposed rulemaking includes consideration of rule amendments as may be necessary to answer questions arising under Article XXVIII of the Colorado Constitution and Article 45 of Title 1 of the Colorado Revised Statutes. Because the subject of the petition is within the scope of the May 29th Notice of Proposed Rulemaking, the **Secretary of State hereby gives notice that the petition request will be considered during the rulemaking hearing to be held on July 1, 2008**.

Written and oral data, comments, and arguments relating to the petition will be received from all interested parties. Please submit any written comments relating to the petition prior to the hearing. In view of this limited public notice, the Secretary of State reserves the right to continue this matter at a future hearing date and time.

Please take notice that a public hearing on the attached petition for rulemaking will take place during the rulemaking hearing at the time and location as follows:

TUESDAY JULY 1, 2008
2:00 P.M. TO 5:00 P.M.
SECRETARY OF STATE'S OFFICE
1700 BROADWAY, SUITE 270
BLUE SPRUCE CONFERENCE ROOM
DENVER, CO 80290

For addition information, please contact Andrea Gyger, Elections Division at andrea.gyger@sos.state.co.us or at (303) 894-220, extension 6329.



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June 17, 2008

Via Electronic Mail and U.S. Mail

Mr. Bill Hobbs
Deputy Secretary of State
Colorado Secretary of State
1700 Broadway
Suite 270
Denver, CO 80290

Re: Request for rule making and advisory opinion

Dear Mr. Hobbs,

I represent the Colorado Federation of Republican Women and am requesting that your office (1) seek an advisory opinion from the Attorney General, and (2) issue a new rule defining what "contributions" or "spending" must be reported by political organizations that have a purpose of "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to state or local public office."[1] In addition, we anticipate withdrawing our request for an advisory opinion, dated October 23, 2007, upon adoption of a rule. This letter follows our meeting on June 9, 2008, between your office and my client.

Request for Formal Advisory Opinion

As a preface to this request, we understand that you are not obligated to request a formal advisory opinion from the Attorney General, nor is the Attorney General obligated to issue an advisory opinion, even if you do request one. Nonetheless, we ask that you seek an advisory opinion from the Attorney General because we believe that the current reporting requirements for political organizations are unconstitutional, absent a limiting construction.

[1] C.R.S. § 1-45-103(14.5).

By way of background, C.R.S. § 1-45-103(14.5) defines a "political organization" as an organization "that is engaged in influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any state or local public office in the state and that is exempt, or intends to seek any exemption, from taxation pursuant to section 527 of the internal revenue code." Colorado law further requires these political organizations to report any contributions, the name and address of any person contributing $20 or more in a reporting period,[2] and any spending greater than $20 in a reporting period.[3]

In an effort to provide guidance, your office has promulgated Rule 4.20.1, which states "political organizations shall only report contributions and expenditures for the purpose of "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any state or local public office."[4]

Despite the narrowing construction in Rule 4.20, both the statute and rule are unconstitutional. As I referenced in my earlier request for an advisory opinion, in *Buckley v. Valeo*[5] the U.S. Supreme Court found the term "influence" as used in the definition of "political committee" to be unconstitutionally vague. Accordingly, the Court stated that the term "influence" must be limited to encompass only words that expressly advocate the election or defeat of a candidate.[6] In 2003, the Court expanded the permissible scope of regulation by allowing Congress to regulate electioneering communications "to the extent" that such communications were the "functional equivalent" of express advocacy.[7] More recently, in *Federal Election Com'n v. Wisconsin Right To Life, Inc.* the Court held that the state could regulate a political communication only if the communication were "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[8]

Based on this line of cases, two conclusions seem clear: (1) the term "influence" must be limited, or else the term is unconstitutionally vague; and (2) the state may only regulate communications that are express advocacy or the functional equivalent of express advocacy. Accordingly, the restrictions that Colorado imposes on "political organizations" are unconstitutional, absent a limiting construction.

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[2] C.R.S. § 1-45-109(1)(a).

[3] C.R.S. § 1-45-109(1)(b).

[4] 8 C.C.R. § 1505-6, Rule 4.20.1.

[5] *Buckley v. Valeo*, 424 U.S. 1 (1976).

[6] *Id.* at 79-80.

[7] *McConnell v. Federal Election Commission*, 540 U.S. 93, 204 (2003).

[8] *Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 127 S.Ct. 2652, 2667 (2007).

Nonetheless, it seems that Colorado has patterned its law after disclosure regulations found in the federal tax code. This does not solve the constitutional problems. The internal revenue service exempts political organizations from paying income taxes for expenditures on "exempt functions" which it defines to include "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office."[9] And political organizations operated primarily for exempt function activities must disclose contributions, contributors, and expenditures.[10]

Only once has this particular provision has been attacked on constitutional grounds. At the trial court level, the federal district court held that Section 527 could not be constitutionally applied to state and local elections, and could only apply to federal elections to the extent it regulated "federal electoral advocacy."[11] On appeal, the circuit court dismissed the complaint, finding that the disclosure requirements under Section 527 constituted conditions attached to the receipt of a tax subsidy, and therefore the federal Anti-Injunction Act barred the complaint.[12] Accordingly, no court decision has ruled upon Section 527's constitutional merits.

Even assuming, however, that a court could find that Section 527's disclosure requirements are constitutional due to a "tax subsidy," one cannot sincerely argue that Colorado's imposition of disclosure requirements under C.R.S. § 1-45-109 are in exchange for a "tax subsidy." Colorado's restrictions and penalty provisions sit squarely within the election code, as the language, penalties, and legislative history of the measure make abundantly clear.

Finally, I note that the political organization disclosure requirements are not narrowly tailored to any state interest. As the Supreme Court has made clear, the state may only regulate political expression to combat corruption or the appearance of corruption.[13] It is difficult to see how reporting requirements for contributions and expenditures as low as $20 are necessary to combat corruption or the appearance of corruption. Indeed, in *Randall v. Sorrell* the Court struck down restrictions on larger contributions and expenditures, because the restrictions were not

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[9] 26 U.S.C. § 527(e)(2).

[10] 26 U.S.C. § 527(j).

[11] *National Federation of Republican Assemblies v. U.S.*, 218 F.Supp.2d 1300, 1354-1355 (S.D.Ala. 2002); *vacated by Mobile Republican Assembly v. U.S.*, 353 F.3d 1357 (11th Cir. 2003).

[12] *Mobile Republican Assembly v. U.S.*, 353 F.3d 1357, 1352 (11th Cir. 2003).

[13] *Randall v. Sorrell*, 548 U.S. 230, 245-246 (2006).

narrowly tailored to the state's interest.[14] And by comparison, Section 527 exempts from reporting requirements all political organizations with annual expenditures of less than $25,000.[15]

Request for Rule

Based upon the above considerations, we believe that the disclosure requirements for "political organizations" may survive constitutional scrutiny only by limiting the term "influence." Accordingly, we propose that Rule 4.20 be changed. Currently, Rule 4.20.1 reads in part:

> . . . political organizations shall only report contributions and expenditures for the purpose of "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any state or local public office."[16]

We propose that the following language either be added to Rule 4.20.1 or included in a new Rule 4.20.2 (with the current rule 4.20.2 appropriately renumbered):

> THE TERM "INFLUENCING OR ATTEMPTING TO INFLUENCE" SHALL MEAN EXPRESSLY ADVOCATING THE ELECTION OR DEFEAT OF A CANDIDATE OR MAKING AN ELECTIONEERING COMMUNICATION."

This rule appropriately limits the term "influence." First, it limits the term to express advocacy, as required by *Buckley*. Second, it limits it to electioneering communications that are the functional equivalent of express advocacy, as required by *Wisconsin Right to Life*. I note that the rule does not, on its face, limit the term "influence" only to those electioneering communications that serve as the "functional equivalent" of express advocacy. Nonetheless, your office has correctly limited Colorado's definition of "electioneering communications" to communications that are "susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate."[17] By using the term "electioneering communications" our proposed rule incorporates Rule 9.4's requirement that "electioneering communications" are only those communications that serve as the functional equivalent of express advocacy.

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[14] *Id*. at 248-262.

[15] 26 U.S.C. § 527(j)(5)(D).

[16] 8 C.C.R. § 1505-6, Rule 4.20.1.

[17] 8 C.C.R. § 1505-6, Rule 9.4.

Thank you for your attention, and I am always available to answer questions or further discuss these matters at your convenience.

Sincerely,

HACKSTAFF GESSLER LLC

Scott E. Gessler

c. Kelly Weist