



## Notice of Temporary & Permanent Adoption

### Office of the Secretary of State Rules Concerning Campaign and Political Finance 8 CCR 1505-6

October 11, 2018

#### I. Adopted Rule Amendments

As authorized by the Colorado Constitution<sup>1</sup>, Colorado campaign finance law<sup>2</sup>, and the State Administrative Procedure Act<sup>3</sup>, the Colorado Secretary of State gives notice that the following amendments to rules concerning campaign and political finance<sup>4</sup> are adopted on a temporary and permanent basis.

The rules were considered at the September 19, 2018 rulemaking hearing in accordance with the State Administrative Procedure Act<sup>5</sup>.

Please note the following formatting key:

Font effect	Meaning
Sentence case	Retained/modified current rule language
SMALL CAPS	New language
Strikethrough	Deletions
<i>[Italic blue font text]</i>	Annotations and publication notes

#### *Amendments to 8 CCR 1505-6:*

*[The following proposed New Rule 18.2 will replace current Rule 18.2, temporarily adopted on June 19, 2018 under CCR# 2018-00275, in its entirety.]*

#### **Rule 18. Penalties, Violations, and Complaints**

##### **18.2 Complaints.**

**18.2.1 Any person who believes that a violation of Article XXVIII of the Colorado Constitution, the Fair Campaign Practices Act, or the Secretary of State's rules**

<sup>1</sup> Article XXVIII, Section 9(1)(b) of the Colorado Constitution.

<sup>2</sup> Article 45 of Title 1, C.R.S. (2018).

<sup>3</sup> Section 24-4-103(3)(a), C.R.S. (2018).

<sup>4</sup> 8 CCR 1505-6.

<sup>5</sup> Section 24-4-103(3)(a), C.R.S. (2018).

concerning campaign and political finance has occurred may file a complaint with the Secretary of State.

18.2.2 Complaints must be filed no later than 90 days after the complainant knew or should have known by the exercise of reasonable diligence of the alleged violation.

18.2.3 Complaints must be filed in writing and signed by the complainant on the form provided by the Secretary of State. The complaint must identify the respondent or respondents and the complainant must provide the information required on the form.

18.2.4 UPON RECEIPT OF A COMPLAINT, THE SECRETARY OF STATE'S ELECTIONS DIVISION MUST NOTIFY THE RESPONDENT OF THE COMPLAINT BY EMAIL, OR BY MAIL IF EMAIL IS UNAVAILABLE.

18.2.5 COMPLAINTS MADE AGAINST ANY CANDIDATE FOR SECRETARY OF STATE WILL BE FORWARDED TO THE ATTORNEY GENERAL'S OFFICE FOR REVIEW IN ACCORDANCE WITH THIS RULE 18.2.

~~18.2.4~~ 18.2.6 Initial review

(a) ~~Upon receipt of a complaint, the Secretary of State's elections division must notify the respondent of the complaint by email, or by mail if email is unavailable, and~~ THE ELECTIONS DIVISION will review THE COMPLAINT TO DETERMINE:

(1) WHETHER THE COMPLAINT WAS TIMELY FILED UNDER RULE 18.2.2,

(2) Whether the complainant has specifically identified one or more violations of Colorado Constitution Article XXVIII, the Fair Campaign Practices Act, or the Secretary of State's rules concerning campaign and political finance, and

~~(2)~~-(3) Whether the complainant has alleged sufficient facts to support a legal and factual basis for the complaint.

(b) Within 10 business days of receiving the complaint, the elections division must take one OR MORE of the following actions:

(1) If the elections division determines that the complaint WAS NOT TIMELY FILED, has not specifically identified one or more violations, or that the complainant did not assert facts sufficient to support the alleged violations, the elections division will dismiss the complaint and notify the complainant and respondent of the reasons for dismissal. The dismissal is a final agency action, and subject to review under section 24-4-106, C.R.S.

(2) If the elections division determines that the complaint alleges one or more curable violations as described in Rule ~~18.2.5~~ 18.2.7, the elections division will notify the respondent and provide an opportunity to cure.

- (3) If the elections division determines that the complaint alleges one or more violations that require a factual finding or legal interpretation, the elections division will conduct additional review under Rule ~~18.2.6~~-18.2.8 to determine whether to file a complaint with a hearing officer.

~~18.2.5~~-18.2.7 Curing violations

- (a) Upon the election division's determination that a complaint alleges a failure to file or otherwise disclose required information, or other curable violation, the elections division will notify the respondent by email, or by mail if email is unavailable, of the curable deficiencies alleged in the complaint.
- (b) The respondent has 10 business days from the date the notice is mailed to file an amendment to the relevant report or reports that cures any deficiencies specified in the notice.
- (c) The respondent must provide the elections division with notice of its intent to cure on the form provided by the Secretary of State and include a copy of any amendments.
- (D) THE ELECTIONS DIVISION MAY ASK THE RESPONDENT TO PROVIDE ADDITIONAL INFORMATION, AND MAY GRANT AN EXTENSION OF TIME TO FILE A NOTICE OF INTENT TO CURE IN ORDER TO RESPOND TO SUCH A REQUEST.
- (~~d~~)-(E) After the period for cure, the elections division will determine whether the respondent cured the violations, and if so, whether the respondent substantially complied or acted in good faith under Rules ~~18.2.8~~-18.2.7(F) and ~~18.2.9~~-18.2.7(G).
  - (1) IF THE ELECTIONS DIVISION DETERMINES THAT THE RESPONDENT SUBSTANTIALLY COMPLIED OR ACTED IN GOOD FAITH, THE ELECTIONS DIVISION WILL DISMISS THE COMPLAINT.
  - (2) IF THE ELECTIONS DIVISION DETERMINES THAT THE RESPONDENT NEITHER SUBSTANTIALLY COMPLIED NOR ACTED IN GOOD FAITH, THE ELECTIONS DIVISION WILL CONDUCT ADDITIONAL REVIEW UNDER RULE 18.2.6 TO DETERMINE WHETHER TO FILE THE COMPLAINT WITH A HEARING OFFICER.
  - (3) The election division's determination under this subsection is a final agency action, subject to review under section 24-4-106, C.R.S.

*[Current temporary Rule 18.2.5(e) is recodified as Rule 18.2.7(h) as shown below]*

~~18.2.8~~-(F) In determining whether an entity substantially complied as that term is used in Rule ~~18.2.5~~-18.2.7, the elections division must consider:

- (~~a~~)(1) The extent of the respondent's noncompliance;

- (b)(2) The purpose of the provision violated and whether that purpose was substantially achieved despite the noncompliance; and
- (c)(3) Whether the noncompliance can properly be viewed as an intentional attempt to mislead the electorate or election officials.

~~18.2.9~~(G) In determining whether an entity registered or disclosed in “Good faith” as that term is used in Rule ~~18.2.5~~18.2.7, the elections division may consider whether ten percent or less of either the entity’s disclosures or, alternatively, the reported dollar amounts required on the report or appearing on the filed reports at issue in the complaint are out of compliance.

~~18.2.5~~(e)(H) If the ELECTIONS DIVISION DETERMINES THAT respondent fails-FAILED to cure any alleged deficiency, the elections division will conduct additional review under Rule ~~18.2.6~~18.2.8 to determine whether to file the complaint with a hearing officer.

#### ~~18.2.6~~18.2.8 Investigation and enforcement

- (a) The elections division must investigate each unresolved or uncured complaint to determine whether to file a complaint with the hearing officer described in Rule ~~18.2.7(b)~~18.2.9(B).
  - (1) If the elections division determines that it will not file a complaint with a hearing officer because there is not sufficient information to support the allegations or for any other reason, it must dismiss the complaint within 30 days of the election division’s initial determination under Rule ~~18.2.4(b)~~18.2.6(B).
  - (2) If the elections division files a complaint with a hearing officer, it must send notice, including a copy of the filing, by certified mail, return receipt requested, to the complainant, and the respondent within one business day of referral.
- (b) If the elections division files a complaint with a hearing officer under this rule, it is responsible for conducting such discovery as may be necessary for effectively prosecuting the complaint, supplementing or amending the complaint with such additional or alternate allegations as may be justified by the evidence, amending the complaint to strike allegations that are not justified by the evidence, and in all other respects, prosecuting the complaint.
- (c) The complainant or any other non-respondent is not a party to the review, except that a complainant may seek permission from the hearing officer to file written legal arguments or factual documentation, or both, as a friend-of-the-court. A person’s status as a complainant is not sufficient to establish that he or she may be affected or aggrieved by the Secretary’s action on the complaint. A complainant may also seek review of a final agency action under Rules ~~18.2.4(b)(1)~~18.2.6(B)(1) and ~~18.2.7(d)~~18.2.9(c) under section 24-4-106, C.R.S.

- (d) If the election division fails to file a complaint with the hearing officer within 30 days as outlined in ~~18.2.6(a)(1)~~-RULE 18.2.8(A)(1), the complaint is deemed dismissed under Rule ~~18.2.4(b)(1)~~-18.2.6(B)(1).

~~18.2.7~~-18.2.9 Hearings

- (a) The hearing officer must be an individual authorized under section 24-4-105(3), C.R.S.
- (b) Hearings conducted by a hearing officer under Rule 18.2 must be in accordance with the provisions of section 24-4-105, C.R.S., except that a hearing officer must hold a hearing within 15 business days of the filing of the complaint, and must make a determination within 15 days of the hearing. The respondent must be granted an extension of up to 30 days upon respondent's motion, or longer upon a showing of good cause.
- (c) Determinations made by the hearing officer must be made under section 24-4-105, C.R.S., and are subject to review under section 24-4-106, C.R.S.

*[Content of Temporary Rule 18.2.8 is amended and relocated under Rule 18.2.7(f) as shown above]*

*[Content of Temporary Rule 18.2.9 is amended and relocated under Rule 18.2.7(g) as shown above]*

18.2.10 Any person seeking guidance on the application of Article XXVIII of the Colorado Constitution, the Fair Campaign Practices Act, or the Secretary of State's rules concerning campaign and political finance may request that the Secretary of State issue an advisory opinion regarding their specific activities.

- (A) THE SECRETARY OF STATE WILL DETERMINE, AT HIS OR HER DISCRETION, WHETHER TO ISSUE AN ADVISORY OPINION. IN MAKING THE DETERMINATION, THE SECRETARY WILL CONSIDER:
  - (1) WHETHER THE ADVISORY OPINION WILL TERMINATE A CONTROVERSY OR REMOVE UNCERTAINTIES AS TO THE APPLICATION OF THE REQUESTOR OF ANY LAW;
  - (2) WHETHER THE REQUEST INVOLVES A SUBJECT, QUESTION, OR ISSUE THAT CONCERNS A FORMAL OR INFORMAL MATTER OR INVESTIGATION CURRENTLY PENDING BEFORE THE SECRETARY OF STATE OR A COURT; AND
  - (3) WHETHER THE REQUEST SEEKS A RULING ON A MOOT OR HYPOTHETICAL QUESTION.
- (B) A person may rely on the Secretary of State's advisory opinion as an affirmative defense to any complaint filed under this Rule.

18.2.11 THE ELECTIONS DIVISION WILL MAKE DOCUMENTS RELATED TO A COMPLAINT PUBLICLY AVAILABLE AS FOLLOWS:

- (A) THE ORIGINAL COMPLAINT, NOTICE OF INITIAL REVIEW, FINAL AGENCY DECISION, AND ANY COMPLAINT FILED BY THE ELECTIONS DIVISION WITH A HEARING OFFICER WILL BE PUBLICLY AVAILABLE AT THE TIME THE ELECTIONS DIVISION PROVIDES THE DOCUMENT TO THE RESPONDENT.
- (B) ANY ADDITIONAL DOCUMENTATION RELATED TO THE COMPLAINT, INCLUDING A NOTICE OF INTENT TO CURE AND SUPPORTING EVIDENCE, OR DOCUMENTS RELATED TO THE ELECTIONS DIVISION'S INVESTIGATION, WILL BE PUBLICLY AVAILABLE AT THE TIME THE ELECTIONS DIVISION ISSUES A FINAL AGENCY DECISION OR FILES A COMPLAINT WITH A HEARING OFFICER.
- (C) THE ELECTIONS DIVISION MAY REDACT ANY DOCUMENT RELATED TO A COMPLAINT IF IT IS NECESSARY TO PROTECT ANY PERSON'S PRIVATE OR CONFIDENTIAL INFORMATION.

~~18.2.11~~ 18.2.12 The Office of Administrative Courts must remand back to the Secretary of State all pending complaints that were filed with the Secretary of State before June 19, 2018. Those complaints may be re-filed under this Rule 18.2 WITHIN 180 DAYS OF REMAND, even if the alleged violations fall outside the period for filing set forth in Rule 18.2.2.

**II. Basis, Purpose, and Specific Statutory Authority**

A Statement of Basis, Purpose, and Specific Statutory Authority follows this notice and is incorporated by reference.

**III. Statement of Justification and Reasons for Adoption of Temporary Rules**

A statement of the Secretary of State's findings to justify the immediate adoption of these new and amended rules on a temporary basis follows this notice and is incorporated by reference.<sup>6</sup>

**IV. Effective Date of Adopted Rules**

These new and amended rules are immediately effective on a temporary basis. The rules will become permanently effective twenty days after publication in the Colorado Register.<sup>7</sup>

Dated this 11th day of October, 2018,



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Suzanne Staiert  
Deputy Secretary of State

For

Wayne W. Williams  
Colorado Secretary of State

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<sup>6</sup> Section 24-4-103(6), C.R.S. (2018).

<sup>7</sup> Section 24-4-103(5), C.R.S. (2018).



## Statement of Basis, Purpose, and Specific Statutory Authority

### Office of the Secretary of State Rules Concerning Campaign and Political Finance 8 CCR 1505-6

October 11, 2018

#### I. Basis and Purpose

This statement explains amendments to the Colorado Secretary of State rules concerning campaign and political finance.<sup>1</sup> The amendments are intended to ensure uniform and proper administration, implementation, and enforcement of Colorado campaign finance law<sup>2</sup> as follows:

- On June 19, 2018, the Secretary temporarily adopted amendments to Rule 18.2. New Rule 18.2 concerning written complaints is necessary to ensure enforcement of Colorado's campaign finance laws and uniform application of the law throughout the state.

Other changes to rules not specifically listed are non-substantive and necessary for consistency with Department rulemaking format and style. Cross-references in rules are also corrected or updated.

The comments we received for this rulemaking are available online at: [https://www.sos.state.co.us/pubs/rule\\_making/hearings/2018/CPFRulesHearing20180919.html](https://www.sos.state.co.us/pubs/rule_making/hearings/2018/CPFRulesHearing20180919.html) and are incorporated into the official rulemaking record.

#### II. Rulemaking Authority

- Article XXVIII, Section 8 of the Colorado Constitution, which requires the Secretary of State to “promulgate rules related to filing in accordance with article 4 of title 24, C.R.S.”
- Article XXVIII, Section 9(1)(b) of the Colorado Constitution, which requires the Secretary of State to “[p]romulgate such rules, in accordance with article 4 of title 24, C.R.S., or any successor section, as may be necessary to administer and enforce any provision of [Article XVIII of the Colorado State Constitution].”

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<sup>1</sup> 8 CCR 1505-CCR 6.

<sup>2</sup> Article 45 of Title 1, C.R.S. (2017).

- Section 1-1-107(2)(a), C.R.S., (2018), which authorizes the Secretary of State “[t]o promulgate, publish, and distribute...such rules as the secretary of state finds necessary for the proper administration and enforcement of the election laws.”
- Section 1-45-111.5(1), C.R.S., (2018), which requires the Secretary of State to promulgate such rules “as may be necessary to enforce and administer any provision of” article 45 of title 1, C.R.S.





## **Statement of Justification and Reasons for Adoption of Temporary Rules**

### **Office of the Secretary of State Rules Concerning Campaign and Political Finance 8 CCR 1505-6**

**October 11, 2018**

Amendments to temporary Rule 18.2 (initially adopted under CCR Tracking #2018-00275 on June 19, 2018). Includes New Rules: 18.2.4, 18.2.5, 18.2.6(a)(1), 18.2.7(d), 18.2.7(e)(1) and (2), Rule 18.2.10(a)(1)-(3), and Rule 18.2.11.

In accordance with Colorado campaign and political finance laws,<sup>1</sup> the Secretary of State finds that certain amendments to the existing campaign and political finance rules must be adopted and effective immediately to ensure the uniform and proper administration and enforcement of Colorado campaign and political finance laws during the 2018 election cycle. Temporary adoption is necessary both to comply with law and to preserve the public welfare generally. This New Rule 18.2 will replace the temporary rule adopted on June 19, 2018. The Secretary simultaneously adopts the rule on a permanent basis under CCR #2018-00402.

In *Holland v. Williams*<sup>2</sup>, a private citizen challenged the constitutionality of Colorado's campaign finance private enforcement system on First and Fourteenth Amendment grounds. On June 12, 2018, the U.S. District Court held that section 9(2)(a) of Article XXVIII of the Colorado Constitution [the private enforcement system] was facially unconstitutional.

Amendments to Rule 18.2 are consistent with the U.S. District Court's holding, and are necessary to ensure that Colorado's campaign finance laws continue to be enforced in a uniform manner.

For these reasons, and in accordance with the State Administrative Procedure Act, the Secretary of State finds that adoption and immediate effect of the amendments to existing campaign and political finance rules is imperatively necessary to comply with state and federal law and to promote public interests.<sup>3</sup>

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<sup>1</sup> Article XXVIII, Section 9(1)(b), of the Colorado Constitution and section 1-45-111.5(1), C.R.S. (2018).

<sup>2</sup> *Holland v. Williams*, 16-cv-00138 (June 12, 2018).

<sup>3</sup> Section 24-4-103(3)(6), C.R.S. (2018).