November 17, 2009

The Honorable Bernie Buescher, Secretary of State
Department of State
1700 Broadway
Denver, CO 80290

On behalf of Common Cause of Colorado, Mi Familia Vota Education Fund and the Service Employees International Union, I am pleased to comply with the Secretary's request that we submit additional comments on the proposed Rules in response to the comments submitted the ESRC.[1] As I indicated in my testimony on November 10, we believe that the Rules as drafted provide better protections to voters over the status quo and are fully supportive of progress in this direction.

By way of overview, we appreciate the thoughtfulness and thoroughness of the Clerks' comments. We share many of the concerns raised by the Clerks regarding the clarity and operation of the proposed Rules. We firmly believe that election officials must be given sufficient resources and support, including the necessary funding, to perform their very important duties. We also trust that there is no disagreement that any adopted rules must fully comport with federal law and adequately protect voters. Our comments below and our proposed revisions to the proposed Rules reflect our efforts to address the concerns raised by the Clerks while ensuring Colorado's compliance with applicable federal law and providing voters the necessary protections.

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2.18.2 The Clerks have raised a number of concerns with regard to the clarity of Rule 2.18.2 and of the notice it requires counties to send to a voter when NCOA data indicates the voter may have moved. Many of these concerns would be addressed by the adoption of the language for this rule we proposed in our November 10 Comments.

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[1] ESRC Comments re: SOS Proposed Rules, submitted 11/09/09 ("Clerks' Comments").

But before moving on to the merits of our proposal, there are sound reasons for distinguishing between voters the NCOA data indicates have moved within a county and those who move out of a county, namely that is a distinction set forth under the NVRA. Pursuant to the NVRA, election officials are permitted to use NCOA data for list maintenance, but they cannot rely solely on that data for changing a voter's status such that the voter cannot cast a regular ballot. The class of voters who move in-county have different rights and are owed different responsibilities than the class of voters who move outside the county. As specified in the proposed language for Rule 2.18.3, where NCOA data indicates a voter moved within a county, the state may not cancel the voter's registration, even where the voter fails to respond to a confirmation mailing and has not voted in two consecutive general elections. However, where NCOA data indicates that a voter has moved out of the county in which he or she was registered, and that voter fails to respond to a confirmation mailing and fails to vote in two consecutive general elections, the state is permitted to cancel the voter's registration record. These two NCOA designations in SCORE allows the county to treat these two groups of voters differently as required.

Our proposed text for Rule 2.18.2 permits the use of NCOA data to conduct list maintenance, but imposes certain protections for voters. Given the Clerks' concern about the reliability of the NCOA data, we expect that there is agreement on the need for these protections. Under our proposed language, when the NCOA data indicates that a voter may have moved, the voter will remain registered at the address of record as reflected in SCORE unless the voter confirms a move to the NCOA-indicated address or another address. A voter with a status of either Inactive-NCOA In County or Inactive-NCOA Out of County can confirm her address of record and restore her registration record to active status if she presents herself to vote at the precinct associated with her address of record. That confirmation card is sent by forwardable mail.

These changes to the rule text will help ensure that voters remain registered and able to vote regardless of the accuracy of the NCOA data. If the Secretary has received erroneous information that a voter has moved, the voter can correct the information at the polls without being required to vote a provisional ballot. Voters who have indeed moved to the NCOA-indicated address will receive notice that they need to update their record. If a voter moved to the NCOA-indicated address, but moved again and left a forwarding address, the voter will receive information that the address of record needs to be updated when the card is forwarded to the new address.

Our proposed changes provide greater opportunity to voters to provide an accurate address. Updated records help voters and election administrators alike. Informing voters that they should respond and why will promote timely updates. The confirmation card must be subjected to usability testing to avoid any potential confusion that rightfully concerns the Clerks.

We presume that implementation will be easier if the county in which the voter is currently registered remains responsible for communications with the voter, and the address confirmation card should be both sent by that county and returned to that county.

We agree with the Clerks that having the card returned to a different county from the one that sent it is likely to create confusion and problems of administration. We also believe that if the returned card confirms that the voter has moved out of the county, then at that point, the voter's record can be transferred to the new county. If however, there are implementation or other administrative reasons for why the county associated with the NCOA-address should do all these mailings before the voter has confirmed the move to that address, we would welcome such an explanation.

We are sympathetic to the Clerks' desire to receive automatic updates from the NCOA data when technologically possible. We believe in many instances that automating updates is more efficient and often more accurate than manually entering data. Because automatic updates eliminate human review, however, safeguards are necessary to ensure that any errors can be caught and corrected as early as possible. Specifically, any system of automated data entry must be accompanied by a requirement of timely notice to the voter of the changes made to his or her registration record, as well as a robust system for ensuring that any errors can be corrected on Election Day without burdening the right to vote. These requirements are reflected in the language we proposed.

Consistent with that theme, we join the Clerks in the recommendation that Colorado continue to strive to innovate and use the best of modern technology in its election administration. Use of the online registration system, when it becomes operational in April, would save postage and expense. The usability experts should assist in developing language for the confirmation cards that would promote increased use of this system.

Finally, we strongly agree that correspondence should be produced in both English and Spanish when required by law or consistent with good practice. Accordingly, we look to the Clerks and the SOS to develop rules supporting this effort.

The Clerks also raise a number of technical points that are unrelated to our comments and to which we take no position. For example, we have not fully explored the technological capacity of SCORE, the feasibility of conducting any of the list maintenance process outside of SCORE, or the legality of doing so and thus decline to comment on this issue. We also do not know whether NCOA data will suggest a person has moved to a P.O. Box instead of providing a street address. We believe, however, that these concerns are consistent with our position that there must be adequate and accurate protocols in place to make sure voters receive their mailings at the most appropriate address possible and that a voter is not disenfranchised on account of NCOA data alone. This shared belief should serve as a guiding principle when addressing any problems associated with P.O. Boxes, limitations of SCORE, or errors in the NCOA database.

Although we find much common ground with the Clerks, as evidenced by our comments to the proposed rules and those above, we do not agree that the current process is adequate. The existing process fails to provide the notice and waiting time required by the NVRA before a voter's record may be cancelled on the basis of NCOA data, and it fails to properly distinguish between voters who move within a county and those who move out of the county as the NVRA requires.

2.18.3 We agree that Colorado's practice of changing a voter's status on account of missing one election is improper, confusing, and unwieldy. Accordingly, we could support a number of proposals which would eliminate this practice. The Clerks' questions regarding "duplicates" are not appropriately addressed by this section. The list maintenance rules governing duplicate registrations and records which are not duplicates but appear to belong to the same voter are found later in the proposed rules, in sections 2.22 and 2.23.

2.19.1 We support the position that confirmation cards should encourage voters to use the online registration form when more efficient. We believe that any attempt to encourage voters in this way, however, must be done in a manner which reflects best practices and usability principles. The availability of online registration services does not and should not replace the mailing of a confirmation card at this time.

2.19.2 We fully support the Clerks' position that the confirmation cards should be designed in a manner that reflects best practices and usability principles, accordingly, we agree with the Clerks that the SOS should be required to use best practices and usability testing and design and would endorse changing the rule text from "shall consider" to "shall utilize." We reiterate that incorporating usability principles can be done in a timely fashion and should in no way justify significant delay.

2.20.1 We are supportive of transparency, uniformity, and accountability in the list maintenance process. To the extent that a diagram such as the one suggested by the Clerks would promote the goals of transparency, uniformity and accountability, directly or indirectly, we would endorse the Clerks' suggestions.

2.20.2 Inactive-NCOA Out of County voters must remain on the pollbook because they are voters who have registered and have not indicated to election officials that their residence has changed. The NVRA makes clear that election officials cannot presume voters have changed residence outside the jurisdiction unless the voters fail to respond to an address confirmation notice and also fail to vote or otherwise correct their address during the period covering the subsequent two general federal elections. The Clerks have themselves claimed that the NCOA data is not perfectly reliable. If the Clerks are correct in that assessment, using NCOA data as the sole basis for removal from the pollbooks would be harmful to voters, not to mention illegal. We take no position on the recommended technical fixes to subpoints (C); (F), and (G), except insofar as to note that (F) and (G) cover different mailings

2.21.1 While we support responsible list maintenance practices, we take no position as to whether Clerks should be required to conduct the additional list maintenance practices contemplated in their comments. We would be opposed to any revision to the Proposed Rules which permit a consolidation, cancellation, or clerk-initiated transfer unless the minimum matching criteria are met.

2.21.2 We fully support the employment of strict and stringent matching criteria before a record is updated in any manner which would preclude the voter associated with that record from casting a regular ballot. Accordingly, we endorse the Clerks' position that the absence of a suffix in one record, but the existence of a suffix in another record, is strong evidence that the two records pertain to two different people.

2.22 The prohibition of systematic cancelling or consolidating records within 90 days of an election is rooted in sound public policy and reflected in federal law. List maintenance should be done in a timely and consistent manner throughout the year. The 90 days before an election is when election officials are their busiest—processing last minute registration applications, printing needed election materials, training pollworkers, etc. The pace and the volume of work during that period, plus the use of temporary employees with less expertise, makes the commission of errors on the part of election workers during that period more likely than during other times of the year. Moreover, any error committed within the 90-day period preceding an election is too close to the election for voters to have ample knowledge of and opportunity to correct the error. Finally, many records that are deemed "duplicates" are in fact not—they are records with similar identifying information, but different addresses. Either these records pertain to two different people, or they belong to a voter who has moved but has failed to notify the clerk's office. The former cannot be properly consolidated and the latter cannot be consolidated without providing the notice and two federal election waiting period as required by federal law for movers.

The Clerks' reliance of the reinstatement procedures and use of provisional ballots are insufficient as remedies in the event of an error because the experience for the voter has been burdened, the certainty that the voter's ballot will count is in doubt, and these so-called remedies cause confusion and delay on Election Day.

When there is no election at all, a scenario raised by the Clerks, voters are not at risk of being unable to cast a regular ballot on account of an erroneous record change without sufficient time to discover and correct the error. Accordingly, such scenarios do not implicate the public policy concerns behind the 90-day ban.

2.23 The Clerks have a number of comments pertaining to this proposed rule, and in many instances, we share the Clerks' skepticism. As described above, there are very sound reasons for prohibiting the systematic cancellation or consolidation of records within 90 days of an election, apart from the requirements of federal law.

The proposed rules set forth two different periods in time—one in 2.22 in which the 90-day ban or "blackout" is absolute for records presumed to be duplicates, and one prior to 2012 in 2.23 in which consolidations are permitted with certain protections for the voters. List maintenance would be much simpler and easier if the absolute ban, which is what is required under federal law, was imposed immediately. In the absence of an immediate ban, the second-best alternative would be for the State to confer the protections that such a ban was designed to provide, namely, adequate notice and the opportunity to correct any errors before Election Day. Rule 2.23 attempts to do this by sending a letter to the

address associated with the record that did not survive as a means of guarding against erroneous consolidations, for example consolidating records that pertain to two different people. Under this circumstance, a record is in effect cancelled because only the surviving record remains on the applicable poll list and sending a notice to the address from the non-surviving record provides the voter with notice that they are no longer registered to vote at that address.

We take no position as to which county should be responsible for sending the letter to the address that did not survive, and defer to the Clerks and the Secretary's office on this logistical detail The county tasked with this responsibility, however, should send out such letters with 2-4 days of the consolidation.

With respect to what language should be used to describe the election at issue in each rule, we strongly recommend that the primary objective of any descriptive term be to clearly and accurately reflect Colorado's obligations under federal law and the principles and policies undergirding that law.

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We urge the adoption of the recommendations set forth here and in the November 10 testimony. The text of the Rules as drafted reflects much-needed progress. Thank you for this opportunity to comment further upon the proposed Rules.

Sincerely,

Jenny Flanagan
Colorado Common Cause