Andrea Gyger

From: Susan Rudy [Susan.Rudy@cha.com]
Sent: Wednesday, August 12, 2009 11:09 AM
To: Andrea Gyger
Subject: New Proposed Rule - Campaign Finance

Follow Up Flag: Follow up
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Good morning Andrea,
The Colorado Hospital Association has a registered political committee, Friends of Colorado Hospitals. I have a couple questions about the proposed rules that will be heard at the 9/1/09 meeting. I hope you can clarify for me or if not, let me know whom I should contact.

1. Registered Agent, Rule 2.3

Sometimes people can come and go quickly. If the registered agent is no longer associated with the committee (and the Association), how can the committee comply with the statute and rule in the absence of a letter of resignation from the agent?

2. Purpose of Committee, Rule 2.4

If it is not sufficient to use support of "legislative candidates" or "statewide candidates" to describe a committee's purpose, what should one list as the committee's purpose? I see little value in listing all the state legislators since the list changes at least every two years. What is the rule's intent here?

3. Unexpended Campaign Contributions, Rule 3.7

At the risk of being obtuse, what does this mean? Committees not subject to limits would be what? Issue committees, 527s? Committees subject to limits would include political committees, party committees, another candidate committee, small donor committee? Others? What is the intent here?

You expert assistance would be greatly appreciated!

Ethics Watch

September 1, 2009

Honorable Bernie Buescher
Secretary of State of Colorado
1700 Broadway, Suite 250
Denver, CO 80290

Re: Colorado Ethics Watch Comments on Proposed Revisions to the "Rules Regarding Campaign and Political Finance," 8 C.C.R. 1505-6.

Dear Secretary Buescher:

Colorado Ethics Watch ("Ethics Watch") is a nonpartisan, nonprofit watchdog group that holds public officials and organizations legally accountable for unethical activities that undermine the integrity of state and local government. Ethics Watch respectfully submits the following comments on the proposed revisions to the "Rules Regarding Campaign and Political Finance," 8 C.C.R. 1505-6 (the "Rules"). Ethics Watch submits these comments in anticipation of the rulemaking hearing to be held on September 1, 2009.

Rule 4.3. The proposed revision would require committees that receive checks at least five days before the end of a reporting period to deposit the check or return it to the contributor by the close of the reporting period.

Ethics Watch strongly supports this rule change, which would close a loophole in campaign finance law that currently permits office-seekers to solicit contributions and collect checks, yet delay registering a campaign committee and reporting contributions by simply waiting to cash the checks. Under the Colorado Constitution, a "person is a candidate for election if the person has publicly announced an intention to seek election to public office or retention of a judicial office and thereafter has received a contribution or made an expenditure in support of the candidacy." Colo. Const. art. XXVIII, § 2(2). The current version of Rule 4.3 provides that a contribution is not considered to be "received" until it is deposited in a committee's bank account. As written, the rule allows office-seekers, even ones who have publicly announced their intention to run for office, to delay compliance with registration requirements by simply holding on to collected checks until the office-seeker decides to deposit the checks and officially become a "candidate." Under the Uniform Commercial Code a check can be held as long as ninety days before it becomes stale. C.R.S. 4-3-304. An office-seeker could therefore hold checks for as long as ninety days, and only he or she would know that the funds represented by the check had been committed to his or her campaign. Closer to an election, a candidate can hide the source of a contribution for multiple reporting periods by holding on to the check, yet still be able to make expenditures knowing that the funds represented by the check would eventually become available. These results are contrary to the

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goal of "full and timely disclosure of campaign contributions" enshrined in Section 1 of Article XXVIII of the Colorado Constitution.

Ethics Watch recommends one change to the rule that would strengthen its enforcement. As proposed, office-seekers who have not yet become "candidates" because they had not deposited any checks might consider themselves not to be bound to the five-day requirement because until they deposited a check they would not need to establish a committee. Ethics Watch therefore recommends that the Secretary add the words "OR PERSON WHO HAS PUBLICLY ANNOUNCED AN INTENTION TO SEEK ELECTION TO PUBLIC OFFICE" after the words "527 POLITICAL ORGANIZATION" in the proposed new version of Rule 4.3.

Rule 6.1. The proposed revision would limit the appropriate officer's ability to enforce campaign finance laws in contradiction with Article XXVIII, § 9. Currently the rules authorize the appropriate officer to request information from possible violators of Article XXVIII or the Fair Campaign Practices Act and allow seven business days to correct the violation or explain reasons to support a conclusion that there was no violation. The proposed rule would limit this authority to only those circumstances where the violation was discovered "in the ordinary course of his or her duties in maintaining a campaign finance filing system." The purpose of the revision appears to be to prohibit the Secretary of State and other appropriate officers from following up on reports of wrongdoing provided to the office.

The proposed rule revision fails the most basic constitutional test because it is not "necessary to administer and enforce any provision of" Article XXVIII, Colorado's constitutional provision regarding campaign finance. Colo. Const. art. XXVIII, § 9(a)(2). To the contrary, the rule change will impede administration and enforcement of the law by tying the hands of appropriate officers who receive outside information regarding possible violations of campaign finance laws.

The Secretary of State has a unique role in the administration of campaign finance laws. The Secretary of State has the sole authority to make rules, not just to administer, but to **enforce** campaign finance laws. Without question, private organizations such as Ethics Watch have a critical role to play in enforcing campaign finance laws. Private parties, however, do not have authority to require filers to respond to inquiries before filing suit, and yet can be subject to sanctions under C.R.S. § 1-45-111.5, C.R.C.P. 11 and Rule 15 of the General Rules of Procedure of the Office of Administrative Courts if an administrative law judge finds that the complaining party lacked a sufficient factual basis to file a complaint. The prospect of sanctions is a significant deterrent to the filing of campaign finance complaints, particularly because there is no corresponding upside for complaining parties who prevail.

As the Colorado Court of Appeals has explained, Rules 6.1 and 6.2 fill the gap by creating a procedure for the appropriate officer to inquire into possible campaign violations and permitting (but not requiring) the filing of complaints when a responding party fails to correct the apparent violation or explain why a violation has not occurred. *Patterson Recall Committee v. Patterson*, 209 P.3d 1210, 1216 (Colo. App. 2009).

Some campaign finance laws can only be effectively enforced by the Secretary of State and violations will not necessarily or even likely be discovered in the ordinary course of maintaining a campaign finance filing system. For one example, C.R.S. § 1-45-103.7(5)(d)(1) requires committees to retain for one year written affirmations from limited liability companies (LLCs) who make contributions to the committee. For another, CPF Rule 4.1 and 4.4 provide that while committees need identify only contributions and expenditures of $20 or more in their public reports, they must keep a record of all contributions and expenditures regardless of size. The purpose of this requirement is to prevent committees from concealing contributions or expenditures by structuring them in increments of less than $20 to avoid reporting. Committees need not share LLC affirmations or records of contributions or expenditures of less than $20 with the members of the public. Only the Secretary of State, through Rule 6.1, has the authority to require committees to demonstrate compliance with requirements that committees keep records that are not required to be publicly filed. The proposed rule change would hamper effective enforcement of these requirements.

Finally, the rule change would eviscerate, not promote, its original statement of justification. When Rule 6.1 was initially adopted in 1999, its stated purpose was to prevent formal complaints and imposition of penalties against persons attempting in good faith to comply with campaign finance laws. The rule provided an alternative to the formal complaint process by allowing the Secretary of State to notify the possible violator and provide an opportunity for the violation to be cured without formal litigation. According to the statement of basis, without the rule "the Office would be forced ... to ignore the violations and allow them to continue and perhaps grow larger until some later date when a complaint might be filed..." The proposed rule change and the premise behind it would not "clarify" the rule; it would defeat the very purpose for which the original rule was adopted.

There appears to be no reason for the rule change; the rule is certainly not necessary to administer or enforce Article XXVIII. To the contrary, the rule would solidify an existing enforcement gap in which campaign finance violations thrive. For these reasons, Ethics Watch urges the Secretary of State not to adopt the proposed change to Rule 6.1.

We appreciate this opportunity to comment on the Secretary of State's proposed rule changes.

Very truly yours,

Chantell Taylor

Chantell Taylor
Director