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April 22, 2011

The Honorable Scott Gessler
Colorado Secretary of State
1700 Broadway, Suite 270
Denver, Colorado 80290

Re: Comment on Proposed Rules Concerning Campaign and Political Finance

Dear Secretary Gessler,

The undersigned respectfully submits the following comments to the revised draft of proposed Rules Concerning Campaign and Political Finance (8 CCR 1505-6) in connection with the record to the rulemaking hearing on draft Rule 15 which occurred on April 19, 2011.

Colorado's Campaign Finance Regime.

Article XXVIII of the Colorado Constitution and the Colorado Fair Campaign Practices Act require regulated political entities and committees to register with the Colorado Secretary of State and file regular campaign finance disclosure reports. Colorado's campaign finance limits and disclosure laws are intended to prevent corruption or the appearance of corruption, and are designed to allow the electorate access to certain information regarding the contributions and expenditures made by regulated political entities in an effort to help voters make more informed decisions about which candidates, political parties or issues to support.

While the strong enforcement of campaign finance filing requirements is certainly important, and the public interest may be furthered by providing for the full and timely disclosure of campaign contributions and expenditures, the policies governing the imposition of fines and penalties should also take into consideration the increasing complexity of applicable campaign finance regimes.

The Colorado Republican Committee and candidates running for statewide, congressional district, or higher office generally possess the resources and staff to comply with all aspects of the law; however, most of the officers and persons associated with county political party committees, local and legislative district candidates and campaign

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committees, and smaller political organizations are volunteers that lack advanced legal or accounting expertise. In addition, some of these county or local volunteers do not have the technical proficiency required to utilize the TRACER filing system with ease, and often do not receive adequate training to understand or possess the experience necessary to become familiar with the law's demands. The regular and sometimes unexpected changes in officers or volunteer leadership that is common among political party committees and other volunteer political organizations and associations also increases the likelihood that mistakes will be made and filings will be inadvertently missed.

A campaign finance regime that is overly complex, or which has the potential to impose fines and penalties that far exceed the actual activity or expenditures the regime is designed to regulate, creates significant disincentives to volunteer political activity, discourages the giving of political contributions, hinders civic engagement, and adds excessive compliance and administrative costs on the candidate committees and political organizations that are generally without significant campaign resources already as a result of Colorado's exceedingly low contribution limits. Complaints alleging campaign finance violations brought for overtly political purposes, particularly complaints filed on the eve of elections or seeking the imposition of fines and penalties as a tactic designed to reduce a political opponent's available campaign resources, undermine public confidence in the political process and do little to advance the public interest.

An overly complicated and punitive campaign finance regime discourages otherwise qualified candidates and individuals from pursuing opportunities for public service in elective office or leadership in political organizations, may encourage attempts to circumvent or ignore the law, and has the very real potential to create a chilling effect on the exercise of fundamental and constitutionally-protected rights of speech and association.

Specific Comments on Draft Rule 15.

The rules proposed in New Rule 15 will help remove uncertainty and provide some much-needed guidance and predictability in the granting of waiver requests. In particular, providing for reasonable penalty caps that correlate to the actual activity and committee fund balances makes a great deal of common sense, and are long overdue.

However, certain provisions of the proposed regulations are still overly burdensome and do not adequately contemplate the circumstances or scenarios where good cause may exist for the granting of a waiver or reduction in penalties—particularly as the proposed regulations may be applied to county political party committees, local candidate committees, and small political organizations with limited financial and volunteer resources. This letter will outline some of the more significant concerns associated with the proposed rules, and will suggest potential recommendations for the Secretary's consideration.

The guidelines in Scenario #2(A) provide that "Penalties imposed under this section are capped at the higher of the contributions or expenditures made during the reporting period." In the case where the filer has made significant contributions and/or expenditures

during the reporting period, this penalty may be excessive and unduly punitive in many circumstances, especially where the violation is not willful and is a result of administrative oversight, mistake, or ignorance regarding the law's requirements. The undersigned respectfully suggests that a penalty cap of up to 20% of the higher of the contributions or expenditures made during the reporting period or the beginning or ending fund balance for the period, with a minimum penalty of $100, is sufficient to discourage non-compliance, and is analogous to the penalty guidelines for the third or subsequent delinquencies described in Scenario #2(C). A penalty equal to 100% of the committee's contributions or expenditures during a particular period may frequently constitute a seizure or taking of virtually all of a committee's funds. The potential for fines and penalties should be a deterrent against non-compliance, and an excessive penalty that is calculated based upon the contributions and expenditures that a committee voluntarily discloses is likely to discourage the kind of voluntary disclosure and compliance that Colorado's campaign finance regime relies upon in order to function effectively. Significant fines or penalties should be reserved for where there is a repeated, willful or affirmative intent to disregard or circumvent the law.

The application of penalty caps applies to all penalties imposed in Scenario #2(A). However, the provision in Scenario #2(A) that states "Third (or subsequent) delinquency in 24 months: A reduction in penalty will not be granted" could be incorrectly interpreted or applied to mean that the penalty caps described later in the section in Scenario #2(A) may not apply in the case of third or subsequent delinquencies in a two-year period. Clarifying language may be helpful. The undersigned respectfully requests that the Secretary consider modifying the relevant provision in Scenario #2(A) to instead read: "Third (or subsequent) delinquency in 24 months: A reduction in penalty will not be granted, but shall be subject to the penalty cap described in this section."

Colorado law makes a candidate personally liable for the campaign finance penalties incurred by that candidate's candidate committee. Colo. Const. Art. XXVIII, Section 10(1). However, fines and penalties assessed against a committee or regulated political organization (such as a political party committee, political committee, small donor committee, or independent expenditure committee) remain the liability of the committee only, and do not become the responsibility of any individual officer or volunteer associated with that committee when the volunteer was acting in good faith and the violation was not willful or intentional. § 1-45-112.5(1), C.R.S. Recognizing that the committee or political organization itself, as an independent legal entity or separate segregated fund, is responsible for its own fines and penalties, the question of whether the committee or organization (rather than a particular officer or agent) has willfully or intentionally acted or failed to act in the case of a delinquency or violation of a given campaign finance regulation is not as straightforward as in the case of a candidate or natural person that may act in his or her individual capacity.

The proposed penalty guidelines in Scenario #2(A) and Scenario #2(C) each provide that the "penalty cap may be disregarded if a delinquency is found to be willful." However, determining whether an organization or committee has acted willfully in the context of a campaign finance violation requires more than the action or inaction of any given officer or apparent agent. It would be unjust and not in harmony with the intent of Colorado's

campaign finance regime and a significant body of law governing corporate and nonprofit corporations to impute the *ultra vires* actions, negligence, gross negligence, nonfeasance, willful disregard, or even malfeasance on the part of a particular officer of a political organization to the organization itself, particularly where that officer may be derelict in his or her duties or may be acting without the knowledge or consent of the executive committee, central committee, board of directors, or other governing body or governing authority of the committee or organization.

In addition, the maxim *ignorantia juris non excusat* notwithstanding, because so many county political party committees, political committees and political organizations rely upon part-time volunteer officers and other volunteers that often receive little training or guidance regarding their duties, ignorance of or mistake in understanding the law's demands should be considered in determining whether an organization has acted with the requisite willful intent to justify the imposition of significant fines or civil penalties.

Also, the proposed Rule 15 does not adequately address the situation where the filer or committee's executive committee, central committee, board of directors, or other governing authority or governing body does not actually receive notice of the delinquency, and significant fines and penalties are accruing against the committee without the committee's actual knowledge. The lack of notice of the delinquency may be due to the negligence of any particular officer, but is more often the result of an administrative oversight or error in the committee's registration statement that causes the notices sent by certified mail to arrive at the wrong address, or to the address of a former officer or individual that is no longer responsible for committee filings, or as a result of changes to officer or Registered Agent email addresses or difficulties in accessing email communications, or because of challenges associated with obtaining or accessing TRACER usernames and passwords from the Secretary of State's office or from a former officer or committee Registered Agent.

There are many potential scenarios or circumstances that could impact the reasons why a particular committee or filer is delinquent in its filings, and it is unlikely that any guidelines set forth in Rule 15 could adequately describe or contemplate all such potential scenarios. As a result, specific regulations such as proposed Rule 15 that are designed to provide guidance to the Secretary of State's office and Administrative Courts in granting waivers to fines and penalties assessed under Colorado's campaign finance regime should explicitly permit or allow the appropriate officer to exercise discretion to take into consideration all the facts and circumstances of each individual case. Guidelines should also recognize that good-faith efforts by filers to voluntarily come into compliance with the law and file amended reports once the errors or omissions are brought to the filer's attention are appropriate mitigating factors to justify a finding of good cause and a reduction of the penalty imposed.

Eliminating the permissive ability of the Secretary or an Administrative Law Judge to impose reduced penalties based upon a consideration of all the circumstances of a given case would do serious harm to the established legal principles of equity that courts and other governmental officers exercising a judicial or quasi-judicial function have long been empowered to consider, and would undermine the ability of these officers to set aside or

reduce the penalty "upon a showing of good cause" as provided for under Article XXVIII, Section 10(2)(b) and (c). *See, e.g. Willard v. Tayloe*, 75 U.S. 557 (1869) (recognizing common law doctrine of equity and finding that "…relief is not a matter of absolute right to either party; it is a matter resting in the discretion of the court, to be exercised upon a consideration of all the circumstances of each particular case.")

Therefore, the undersigned respectfully suggests the addition of the following additional provision immediately following the current paragraph A in draft Rule 15, or the incorporation of a similar provision or regulatory language in Rule 15 to this effect:

> "Notwithstanding the guidelines contained in this Rule 15 or any other Rule, the secretary of state and Administrative Law Judges may also consider all other relevant facts and circumstances in imposing campaign finance penalties or in granting requests for waiver or reduction of campaign finance penalties imposed under Article XXVIII, Section 10, including but not limited to whether notice of the delinquency was actually received by the filer or by the filer's governing authority, the extent to which efforts were subsequently made by the filer to comply with applicable campaign finance limits and disclosure requirements, and other facts and circumstances that provide the basis for a showing of good cause."

The Secretary of State Should Encourage Voluntary Compliance Prior to Finding of Delinquency and Imposition of Penalty.

As a matter of office policy, the Secretary of State's office should consistently apply Rule 6.1 and Rule 6.2 to situations where there is a failure to file or some other delinquency that would otherwise cause the imposition of fines or civil penalties under Article XXVIII, Section 10(1) and/or Section 10(2)(a). In accordance with Rule 6.1, the Secretary of State's office should first provide every potentially delinquent committee an opportunity to voluntarily cure the delinquency prior to imposing fines or penalties.

Current Rule 6.1 and Rule 6.2 provide, in relevant part:

Rule 6.1 If the appropriate officer…discovers in the ordinary course of his or her duties in maintaining the campaign finance filing system a possible violation of Article XXVIII or Title 1, Article 45, and no complaint alleging such violation has been filed with the secretary of state pursuant to Article XXVIII, Section 9(2), then the appropriate officer shall:

a. Provide the person believed to have committed the violation with written notice of the facts or conduct that constitute the possible violation, and

b. Allow seven business days to correct the violation or to submit written statements explaining the reasons that support a conclusion that a violation was not committed.

Rule 6.2 If, within the time allotted pursuant to Rule 6.1, the person fails to correct the violation or to offer a satisfactory explanation, then the appropriate officer may file a complaint pursuant to Article XXVIII, Section 9(2)(a).

If the Secretary of State were to more consistently implement Rule 6.1 to provide written notice to the filer or committee of the possible violation, failure to file a required report or other delinquency, and if the Secretary of State were to provide the affirmative opportunity for filers to cure, correct or respond to the possible violation rather than immediately imposing a penalty or fine, the Secretary's office is likely to have far, far fewer waiver requests it must consider. In addition, providing an opportunity for the filer to respond prior to the finding of delinquency may aid the Secretary in determining whether notices are actually being received by the filer or committee, or whether the violation or failure to file a required report by a committee or filer is willful.

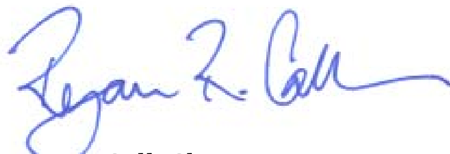
While the undersigned believes the current language in Rule 6.1 and 6.2 is sufficient for the Secretary of State to implement this policy immediately, the following proposed amendment to Rule 6.2 could clarify the Secretary of State's intent:

Proposed Rule 6.2 If, within the time allotted pursuant to Rule 6.1 and upon confirmation that the person or filer has received the written notice of the possible violation provided pursuant to Rule 6.1(a), the person or filer fails to correct the violation or to offer a satisfactory explanation, then the appropriate officer shall impose the penalty provided for in Article XXVIII, Section 10(1) or Section 10(2)(a) and shall provide written notice of the imposition of the penalty, or may file a complaint pursuant to Article XXVIII, Section 9(2)(a).

Conclusion.

The proposed regulations take important steps toward improving the enforcement of Colorado's campaign finance laws and encouraging the full and timely disclosure of campaign contributions and expenditures, while also balancing other important considerations that are in the public interest. Thank you for the opportunity to provide comments concerning the revised draft of proposed Rules Concerning Campaign and Political Finance (8 CCR 1505-6), and for your thoughtful consideration of the recommendations contained herein.

Sincerely,



Ryan R. Call, Chairman
Colorado Republican Committee