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May 6, 2011

The Honorable Scott Gessler
Office of the Secretary of State
1700 Broadway, Suite 200
Denver, CO 80246

RE: Comments Pursuant to May 3 Rule Making on 8 CCR 1505-6 (Rule 4.27)

Dear Mr. Secretary:

Because this rule making record has been held open through today, please consider the following comments regarding proposed rule 4.27.

First, the proposed rule raises a number of practical concerns dealing with multipurpose issue committees, as regulated under the Secretary's existing regulations.

- Is a multipurpose issue committee subject to the \$5,000 limit, regardless of the number of ballot measures it might support or oppose?
- Is the \$5,000 figure applied cumulatively to the group of ballot measures in which a committee is interested? In other words, if the committee is supporting or opposing 10 ballot issues, does it first report to your office when a total of \$50,000 in contributions or expenditures has been reached?
- Conversely, is the \$5,000 figure applied independently to each ballot measure supported or opposed by a multipurpose issue committee, meaning that reporting is required when contributions or expenditures exceed \$5,000 for a specific measure (requiring reporting on some issues supported/opposed but not others)?
- How should a general contribution to the multipurpose committee, *i.e.*, one that is not earmarked to support or oppose any of the measures in which the committee has an interest, be treated – divided pro rata, allocated to specific ballot measures at the discretion of the committee, or in some other matter?
- How should a multipurpose issue committee treat overhead costs or expenses that are not specifically associated with the support or opposition of a particular ballot measure in terms of determining whether the \$5,000 threshold has been met?

Obviously, none of these issues are concerns under the existing regulatory framework. With a \$200 trigger, multipurpose issue committees today immediately report all contributions and expenditures and treat each issue as its own reporting structure. But with the expanded contribution/expenditure threshold you propose, these questions present difficult issues for those

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using this form of committee. To address one perceived problem while creating others would be a less than productive step.

Second, if the Secretary seeks to clarify the application of these registration and reporting laws, this rule should specify which districts and local units of government are subject to its terms. Since your concern evidently is about providing a compliance roadmap, the rule should be as explicit as possible. *See Sampson v. Buescher*, 625 F.3d 1247, 1260 (10th Cir. 2010) (discussing burdens on citizens who do not comprehend the campaign finance laws).

Third, there are certain legal obstacles to enacting this rule, raised in our earlier comments, that have not yet been addressed. Would you please make clear in the rule or in the accompanying notice how the Secretary may:

- exceed the specified, quite limited authority for changing of contribution limits as set forth in Article XXVIII, sec. 3(13), 4(7) of the Colorado Constitution; and
- "leapfrog" Article XXVIII, sec. 14 of the Colorado Constitution, which expressly provides that a successful, as-applied challenge does not invalidate any other application of these provisions of the Constitution?

An agency regulation simply cannot ignore the "unambiguously expressed intent" of lawmakers, *Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005), here, the voters who adopted Amendment 27.

Finally, the \$5,000 threshold in the proposed rule is an arbitrary figure. I understand that this figure exceeds the line that the Tenth Circuit did not draw, but \$5,000 is not justified based on this rule making record. At best, there was discussion at hearing regarding the number of reporting committees with contributions or expenditures of more and less than \$5,000 in the 2010 election cycle. But this is quite beside the point; the \$5,000 figure was not specifically tied to any level of exercise of First Amendment rights. Arbitrary line-drawing in the rule making process will not withstand judicial scrutiny. *See id.* at 97 (there must be a "rational connection between the facts found and the choices made"); *Colo. State Board of Public Welfare v. Champion*, 348 P.2d 256, 258 (Colo. 1960). I urge you to withdraw proposed rule 4.27.

Very truly yours,

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