CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

December 23, 2011

VIA ELECTRONIC MAIL

The Honorable Scott Gessler
Secretary of State
1700 Broadway, Suite 200
Denver, Colorado 80290

RE: Proposed Re-Codifiction of Rules Concerning Campaign and Political Finance

Dear Secretary Gessler:

The Center for Competitive Politics ("CCP") submits these comments concerning the proposed re-codification of Colorado's campaign finance regulations presently being undertaken by your office. This letter serves to restate and expand upon my oral testimony given on December 15, 2011. For the reasons stated below, CCP believes that the proposed re-codification, and certain related changes to Colorado regulations, are in the interest of broad political participation by Colorado residents, and bring Colorado into better compliance with the requirements of the First Amendment.

The Supreme Court has eloquently stated that "[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United v. FEC*, 130 S. Ct. 876, 889 (2010). Yet citizens, especially those who work for underfunded organizations or toward unpopular ends, must often seek legal advice before engaging in political activity in Colorado. The complexity of state regulations, and the fact they often do not reflect established constitutional law, makes it difficult for a layperson to obtain accurate guidance in the area of campaign finance.

The proposed re-codification goes some distance toward remedying this situation. First, it establishes bright-line rules in the place of general or intent-based guidelines. Second, it provides a one-stop location for private citizens (that is, those without representation) to learn what is required of them under Colorado law and, as importantly, what they have a constitutional right to do without the State's interference.

These comments will emphasize three elements of the proposed Rules: the definition of Electioneering Communication found in draft Rule 1.7; the status of Independent Expenditure

Committees, most notably found in draft Rule 5.2; and the major-purpose test for Political Committees found in draft Rule 1.18.2.

1. The definition of Electioneering Communication found in the draft re-codification appropriately borrows the standard enunciated in a binding U.S. Supreme Court ruling.

CCP was pleased to see that the definition of "Electioneering Communication" found in draft Rule 1.7 borrows its language directly from *Wisconsin Right to Life v. FEC,* 551 U.S. 449 (2007) (*WRTL II*), a seminal case defining precisely this term for purposes of federal elections.[1] In *WRTL,* the FEC argued that certain issue ads were "shams," in that they were intended to be calls for the election or defeat of candidates and, functionally, express advocacy that could be regulated pursuant to *Buckley v. Valeo,* 424 U.S. 1 (1976). But the Supreme Court noted that the government's interest in regulating express advocacy does not apply with the same force to the discussion of issues, and required that "electioneering communications" be understood to include only ads "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." 551 U.S. at 469-70.

Moreover, Chief Justice Roberts made clear that he favored bright lines in this area, rather than "amorphous considerations of intent and effect" or "the open-ended rough-and-tumble of factors." *Id.* This was for two reasons. First, parties who wish to engage in political discussions must be subject to objective, not subjective, standards that provide adequate notice of their rights. Second, multi-factor tests and considerations of intent involve substantial discovery, complex arguments in trial court, and "virtually inevitable appeal." *Id.* As you were consistently reminded during last week's hearing, these legal risks chill speech.

Draft Rule 1.7 includes both the "no reasonable interpretation" test found in *WRTL,* and the clear guidance that no "intent and effect" standard should be used. This is the right approach, foreclosing the threat of open-ended litigation and burdensome discovery into an organization's intentions.

Draft Rule 1.7.3 attempts to build on this clarity and success by creating an easily-understood safe harbor. Any communication that meets the three-part test included therein is not an electioneering communication. This is a helpful addition for communications that do, in fact, meet all three descriptions.

But CCP believes draft Rule 1.7.3 to be overly restrictive. Because it provides a safe harbor only for activity fully covered by a three-part test, it will likely serve as a guide for the drafting of electioneering communications. In a sense, of course, that is the role of a safe harbor.

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[1] While this language comes from a portion of the opinion joined by only one other justice, the balance of the majority would have gone further and simply overturned *McConnell v. FEC,* 540 U.S. 93 (2003). In this situation, the Chief Justice's opinion represents the narrowest grounds of decision, and should be treated as controlling. *See, e.g., Marks v. United States,* 430 U.S. 188, 193 (1977).

Yet the definition found in 1.7.1 and 1.7.2, taken together, appear to allow a broader range of communications than those covered by the safe harbor provisions of Rule 1.7.3.

Rule 1.7.3 should be re-written to more completely embrace the range of protected communications described in draft Rules 1.7.1 and 1.7.2. At a minimum, instead of serving as a single, multi-part template, draft Rule 1.7.3 should be written to provide multiple safe harbors, rather than a single, complex standard that will – in practice – supplant the broader (and constitutionally correct) definition found earlier in the draft Rule. This may be accomplished simply by substituting the word "or" for the word "and" at the end of subsection (B), or by otherwise transforming this portion of the Rule into an illustrative list.

Draft Rule 1.7.3 makes substantial progress toward informing Colorado residents of their constitutional rights, using the specific language of a leading Supreme Court case about which most political speakers would never hear, absent an expensive meeting with legal counsel. But *WRTL* protects a broad range of speech, and draft Rule 1.7.3, while laudably attempting to provide clarity, will in practice stifle creative expression of political ideas by forcing discussion of the "most salient issues of the day" to abide by a restrictive three-part test.

2. Colorado should be applauded for clearly stating that Independent Expenditure Committees are not subject to contribution limits.

Draft Rule 5.2 states that a Committee "that raises money solely for the purpose of making independent expenditures, and which does not make contributions to candidates, shall be an independent expenditure committee and shall not be considered a political committee. An independent expenditure committee is not subject to the political committee restrictions in Article XXVIII, Section 3(5) [concerning contribution limits to Political Committees]."

This Rule should be applauded. Committees that engage only in independent expenditures are not subject to contribution limits. This is settled law at the federal level, due to the decision in *SpeechNow.org v. FEC,* a ruling of the U.S. Court of Appeals for the D.C. Circuit that is binding on the Federal Election Commission. 599 F.3d 686 (2010). The federal appeals court for the Ninth Circuit has agreed. *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (2010). There is no reason to believe the Tenth Circuit, where Colorado is situated, would rule differently, and competent counsel would doubtless already inform a well-represented committee of their constitutional rights in this regard.

Failing to include this provision would only hide an established constitutional right from Colorado residents, an outcome that should be attractive to no one and which affirmatively undermines the rule of law.

3. The "major purpose" test found in draft Rule 1.18.2 furthers the aim of providing clear, bright-line guidance to grass-roots political speakers.

Draft Rule 1.18.2 specifies that a group of people qualifies as a Political Committee only if its "major purpose" is the nomination or election of candidates. It provides two methods of determining that such is a group's purpose: either the committee must say so in its organizing documents, or more than half its expenditures must be spent toward that purpose. The rule has the advantage of clarity. This is vital if unrepresented entities are to be made aware of when they must abide by the numerous reporting and contribution requirements governing Political Committees.

But it is also important because the "major purpose" test has its roots in the First Amendment. In the seminal case of *Buckley v. Valeo,* the Supreme Court noted that a vague definition of "political committee" could pose difficulties for groups engaged purely in issue discussions, who may be unaware of whether they qualify as political committees. 424 U.S. 1, 79 (1976). The "major purpose" test helps ensure that only groups who are truly formed for the purpose of political activities, and not for the discussion of issues, are burdened with the substantial requirements governing political committees.

Moreover, a Colorado court has – as your office notes in the draft regulations themselves – already ruled on this matter, and adopted *Buckley's* major purpose test as regards Colorado committees. *See Alliance for Colorado's Families v. Gilbert,* 172 P.3d 964, 970 (Colo. App. 2007). The Secretary of State can hardly ignore that precedent. Again, the major purpose test is an element of our constitutional liberties, and your office should be applauded for making its implications clear to Colorado residents.

At the hearing held December 15 in your offices, several speakers suggested that a dollar amount, rather than a percentage of expenditures, should serve as the test for a political committee's major purpose. There is merit to this suggestion, in the sense that a dollar amount provides clearer guidance – especially for organizations that do not have accountants, quarterly budgets, and compliance staff.

Yet a specific dollar amount runs the danger of being arbitrary and both under- and over-inclusive. Small organizations who are dedicated entirely to expressly advocating the election or defeat of candidates may not meet the dollar figure. But a large organization may find itself unintentionally labeled a Political Committee for funding a single advertisement using only a small portion of its budget (precisely the situation that occurred in *Alliance for Colorado's Families*).

In the final analysis, a minimum spending amount, below which an organization need not worry about registering with the State, combined with the current draft language, would be acceptable. There are administrative law concerns to such an approach, but it would best serve both clarity and the *de minimis* activity concerns enunciated in *Sampson v. Buescher,* 625 F.3d 1247 (10th Cir. 2010).

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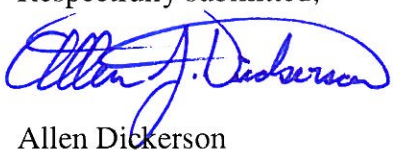
CCP appreciates the opportunity to comment on this Petition, and looks forward to participating in any future hearings and commenting on any proposed rulemaking.

Respectfully submitted,



Allen Dickerson
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