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December 23, 2011

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

RE: Proposed Campaign Finance Rules

Dear Secretary Gessler:

I am submitting these comments on behalf of our firm's client, Citizens for Integrity, and ask that they be used to supplement my oral remarks at your rule making hearing held on December 15, 2011.

As a general matter, I would note that any regulatory standard that your office cannot clearly define should not be included in the enacted rules. If the purpose of this exercise is truly to provide clarity to affected members of the public, using general phrases such as "functional equivalent of express advocacy," "subject to no other reasonable interpretation other than an appeal to vote for or against a specific candidate," "'intent and effect' test," and "demonstrated pattern of conduct" does not advance that goal. Further, the regulatory reach of all provisions should not be a disputed matter and should not depart from the provisions of Article XXVIII and implementing statutes.

Specific provisions that should be deleted from your enacted regulations or altered as indicated include the following.

A. "Member" definition (Rule 1.13)

Your reenacted rule 1.13 defines "member" as "a person who pays membership dues." This definition is overbroad, given the fact that many organizations have non-dues paying members and the provisions of Article XXVIII that do not deal with the use of membership dues for payments to certain committees are artificially constrained by the existing definition that you recodify.

The issue of who is a "member" has been thoroughly litigated. In the campaign finance context, the courts will look to the ordinary definition of "member." *Sanger v. Dennis*, 148 P.3d 404, 413 (Colo.Ct.App. 2006). That definition is not strictly a function of dues payments. *Merriam-Webster's Collegiate Dictionary* 724 (10th Ed. 1993) ("member" is "one of the

individuals comprising a group"); *Oxford American Dictionary* 414 (1980) ("member" is "a person or thing that belongs to a particular group or society").

This question is significant because of the use of the term "member" throughout Article XXVIII. That term is not simply limited to the matter of use of member dues as contributions to small donor committees, political committees, and independent expenditure committees. It also governs whether certain communications are treated as "expenditures" under Article XXVIII, which allows a membership organization to communicate candidate matters with "members and their families." Likewise, there is no "contribution" or "expenditure" where an organization solicits contributions from its members. Colo. Const., art. XXVIII, §§ 2(5)(b), (8)(b)(III), (IV). There is no logical nexus between dues payment and membership for these purposes. Organizations that do not require dues payment in order to join as a member would be put in an odd position under this rule: their communications with dues paying members would be exempt from Article XXVIII, whereas their communications with non-due paying members would be subject to such regulation. Similarly, their solicitation of contributions from dues-payers would not be an expenditure, whereas their solicitation of non-dues paying members would be an expenditure. The issue of dues payment cannot possibly justify this divergent treatment.

B. "Electioneering communications" and "express advocacy" (Rules 1.10, 7.2)

Several of your rules operate such that public reporting is conditioned on the use of "express advocacy" in "electioneering communications." That simply is not the status of the law in Colorado.

> [Amendment 27] provided for the regulation of electioneering communications separate from the regulation of independent expenditures…. Under the applicable definitions, however, an advertisement that expressly advocated the election of a candidate would also qualify as an electioneering communication, if it were aired, printed, mailed, delivered, or distributed during the electioneering window…. Conversely, **an electioneering communication would not necessarily constitute express advocacy**…. [We agree] that article XXVIII was intended to constitutionalize the prevailing definition of express advocacy at the time of article XXVIII's passage (the *Buckley* "magic words" and other substantially similar or synonymous words).

Colo. Ethics Watch v. Senate Majority Fund, LLC, 2010 Colo. App. LEXIS 368, 20-21 (Colo. Ct. App. Mar. 18, 2010) (citations omitted), *cert. granted*.

Your rules would take significant communications that are distributed by 527 political organizations out of any reporting requirement under state law. Political organizations seek to influence an election by paying for electioneering communications. C.R.S. § 1-45-103(14.5). Political organizations, under your proposed rules 1.10 and 7.2.1, seek to influence an election only by engaging in express advocacy. Your proposed definition cannot so severely limit the reporting and registration responsibilities of political organizations by conditioning all political organization reporting on the use of *Buckley*'s magic words or words that are substantially similar. *Colo. Ethics Watch, supra.*

That this result would be counter to the plain meaning of "electioneering communication" and the intent of the voters has been thoroughly addressed by the Colorado courts. *Harwood v. Senate Majority Fund, LLC*, 141 P.3d 962, 964 (Colo.Ct.App.2006). The 2002 Blue Book discussed at length the intent of voters in employing this term and the associated reporting requirements. *Id.* None of this authority is undermined in any way by the *Wisconsin Right to Life* decision, cited during your rule making hearing.

Finally, if express advocacy is the test for an electioneering communication, how is an entity to know if it is to register as a political committee or a political organization? Unless the answer to this question is clear (and it certainly does not appear to be so from the current definitions of those terms), these regulations undermine the clarity of existing registration and reporting requirements.

C. "Major purpose" tests (Rules 1.12.3, 1.18.2, 7.2.1)

Your rules propose specific percentages to determine "major purpose" for political committees (50% of total spending) and issue committees (30% of total spending). Obviously, neither of these percentage tests is set forth in any legal authority, constitutional or statutory. Perhaps the General Assembly could legislate on such questions, but your ability to enforce and administer the laws does not extend to creating new legal standards or modifying existing ones. *See Sanger, supra.*

It should be noted that the Colorado Constitution does not provide a "major purpose" test for the political committee definition. That should be the proverbial red flag in terms of your authority to impute one.

In a similar vein, the creation of a "major purpose" test for "political organizations" – even without a percentage test – is entirely without textual support. It also runs counter to practical experience, as entities or groups can send messages that qualify as electioneering communications that are intended to influence elections without having to primarily pursuing the objective of influencing elections. The purpose of the reporting requirement is to ensure that these messages are still fully disclosed. Colo. Const., art. XXVIII, §§ 2(7), 6. Additionally, as there is no requirement that organizations actually raise or spend $25,000 in order to qualify as a political organization (Rule 7.2.1.B), no such requirement should be imputed here.

The addition of the issue committee test that an organization must have "a demonstrated pattern of conduct" in the ballot issue arena is unclear and therefore counterproductive. Colorado has a very clear test, developed by the appellate courts and reflected now in C.R.S. § 1-45-103(12)(b), that has emerged from two litigated vagueness challenges. *Cerbo v. Protect Colo. Jobs, Inc.*, 240 P.3d 495, 504 (Colo.Ct.App. 2010); *Independence Inst. v. Coffman*, 209 P.3d 1130, 1136 (Colo.Ct.App. 2008). These additional factors, including the 30% minimum on spending, simply are not required.

Finally, the major purpose tests that revolve around a percentage of spending are plainly unworkable. If that percentage is a function of annual spending (both rules refer to "annual expenditures" and "during that same period"), the determination of whether that test was met would only be clear at year's end – after the election was over. If it is a function of the reporting period in which it occurred (an alternative interpretation of "period"), groups might pass into and out of the status of reporting committees as a function of what they spent during any particularly two-week, month-long, or quarterly reporting period, a development that does not actually reflect any entity's "major purpose." This construct would also prevent anyone, including the public and the staff in your office, from knowing whether groups involved in issue or candidate speech should be reporting since none of these groups' other expenditure activity or information would be in the public domain during the election cycle. As a result, there could be no enforcement which is a result that clearly contravenes Art. XXVIII, § 1 ("interests of the public are best served by… providing for full and timely disclosure… and strong enforcement of campaign finance requirements").

D. Multipurpose issue committee reporting (Rule 4.4)

Your revision of these rules is problematic, in part, because it does not require separate accounts for each measure supported or opposed. (Rule 4.4.1(b)). In essence, a committee that seeks to hide the amount to be spent on a particular issue and the sources that are interested in that ballot measure may do so by placing funds with a multipurpose issue committee. No one in the public would ever have the ability to know who it is that is funding that particular effort or how the funds spent out of that account are to be attributed among the various ballot measures that the committee declares it is supporting or opposing.

It is also not clear what constitutes an "earmark" for purposes of donor reporting. (Rule 4.4.1(a)). Any direct or indirect, written or verbal communication that imparts the desire of the donor to have his funds used on a particular ballot measure should be sufficient for this purpose.

E. Political party transfers (Rule 6.2)

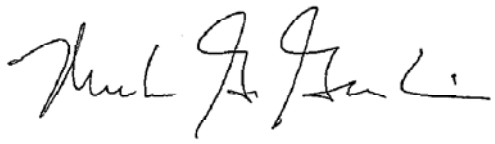
Rule 6.2.1. appears to be incomplete. Where it states that money can be transferred from one level of an organization to another "without limit," I assume that you meant to add the phrase, "subject to the contribution limits provided in Article XXVIII." Otherwise, given your rules that exempt party organizations in home rule jurisdictions from contribution limits, those entities will become funnels for money to the state parties.

F. Employer disclosure (Rule 10.1.4)

Your proposed rules in terms of occupation and employer disclosure relate only to donations of $100 or more, rather than aggregate donations. This reading is inconsistent with C.R.S. 1-45-108(1)(a)(II) and would allow multiple donations of $99.99 for which this information would never be provided.

Thank you for considering these comments.

Very truly yours,



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