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July 24, 2012

The Honorable Scott Gessler  
Secretary of State  
1700 Broadway, Suite 250  
Denver, CO 80290

Re: Notice of Proposed Rulemaking, Election Rules, 8 CCR 1505-1, dated June 15, 2012;  
Revised Draft of Proposed Rules and Revised Statement of Basis dated July 18, 2012

Dear Secretary Gessler:

In accordance with the above-referenced proposed rules, I hereby submit the following written comments, on behalf of Debra Johnson, the Denver Clerk and Recorder, concerning proposed Rules 12.4.1(d), 12.11, and 13.19. These comments memorialize, clarify, and expand the comments provided at the rules hearing on July 23, 2012.

Proposed Rules 12.4.1(d), 12.11, and 13.19 add substantial limitations or qualifications to existing statute. As proposed, they are contrary to Colorado election statutes, are arbitrary and capricious, and they exceed the Secretary's rulemaking authority.

**1. Limits to the Secretary's rulemaking authority.** Administrative agencies are legally bound to comply strictly with their enabling statutes. *Adams v. Colo. Dep't of Social Servs.*, 824 P.2d 83, 86 (Colo.App. 1991). The authority to adopt rules does not include the authority to legislate. *Id.*; *Big Top, Inc. v. Schooley*, 149 Colo. 116, 120, 368 P.2d 201, 203 (1962). Where the rules are inconsistent with or contrary to the statute pursuant to which they were promulgated, they are void. *Colo. Consumer Health*, 240 P.3d at 528. Administrative rules that add to, modify, or conflict with existing statutes are void. *See, Sanger v. Dennis*, 148 P.3d. 404, 413 (Colo. App. 2006); C.R.S. 24-4-103(8)(a). Agencies cannot adopt rules to invent procedures that are not authorized by law. *De Koevend v. Board of Ed.*, 688 P.2d 219, 229 (Colo. 1984) (discussing 22-63-119, C.R.S.).

**2. Existing Law.** Section 1-7.5-107(3)(a)(I) establishes the following procedures to issue ballots in a mail-ballot election:

Not sooner than twenty-two days before an election, and no later than eighteen days before an election, except as provided in subparagraph (II) of this paragraph (a), the designated election official shall mail to each active registered elector, at the last mailing address appearing

in the registration records and in accordance with United States postal service regulations, a mail ballot packet, which shall be marked "DO NOT FORWARD. ADDRESS CORRECTION REQUESTED.", or any other similar statement that is in accordance with United States postal service regulations. Nothing in this subsection (3) shall affect any provision of this code governing the delivery of mail ballots to an absent uniformed services elector, nonresident overseas elector, or resident overseas elector covered by the federal "Uniformed and Overseas Citizens Absentee Voting Act," 42 U.S.C. § 1973ff et seq.

**3. Basis and Purpose for proposed Rules.** The original Statement of Basis and Purpose dated June 15, 2012 and the Revised Statement of Basis and Purpose dated July 18, 2012, state that new rules 12.4.1(d) and 13.19, and the proposed amendments to Rule 12.11 "clarify" when election officials may mail ballots to inactive and inactive failed to vote electors. (P. 2 of each Statement). Both the original and the revised Statement of Basis summarily conclude that county clerks may now send ballots only to active electors in a coordinated election. [Emphasis added]. In addition, both documents state that the changes to Rules 12.4.1(d) and Rule 12.11 address issues relevant to the Secretary's lawsuit against the City and County of Denver which is currently pending in Denver District Court.

**4. The Rules impermissibly intrude into existing statute.** By its terms, Section 1-7.5-107(3)(a)(I) simply provides for the mailing of ballots to "active" voters within the designated time frame, marked as nonforwardable mail, and in accordance with U.S. postal regulations. Yet, proposed new Rules 12.4.1(d) and 13.19 and the proposed amendments to Rule 12.11 do not clarify these procedures. Instead, they create new restrictions concerning a wholly different group of electors - inactive failed to vote electors. There is simply no prohibition in Section 1-7.5-107(3)(a)(I) or elsewhere in Colorado statutes that precludes the mailing of ballots in a coordinated mail ballot election to only active electors. There is also no support in the text of Section 1-7.5-107(3)(a)(I) (or elsewhere in statute) that the General Assembly intended to prohibit the mailing of ballots to inactive failed to vote electors. Thus, proposed rules 12.4.1(d), 13.19, Rule 12.11 do not clarify existing statutes. Instead, they add new restrictions to mail ballot procedures that do not otherwise exist in statute. The result is, therefore, an unreasonable extension of C.R.S. 1-7.5.107(3)(a)(I). These proposed rules impermissibly intrude into and usurp the power of Colorado General Assembly who has the power to make new laws concerning the issuance of mail ballots to inactive failed to vote electors. The authority to adopt rules does not include the authority to legislate. *Big Top*, 368 P.2d at 203.

**5. The Rules conflict with Section 1-7.5-107(3)(a)(I), C.R.S.** The proposed rules are in direct conflict with the express language of the last sentence of Section 1-7.5-107(3)(a)(I) which states:

Nothing in this subsection (3) shall affect any provision of this code governing the delivery of mail ballots to an absent uniformed services elector, nonresident overseas elector, or resident overseas elector covered by the federal "Uniformed and Overseas Citizens Absentee Voting Act", 42 U.S.C. sec. 1973ff et seq.

Ballots to uniformed military and overseas voters (UOCAVA) are mailed to "covered voters". A covered voter is defined at Section 1-8.3-102(2)(a)-(d) and includes both overseas

voters and uniformed service members who are absent by reason of active duty. The provision does not distinguish “covered voters” as either active or inactive electors. Under Section 1-8.3-110(1), county clerks are required to issue to UOCAVA active and inactive failed to vote voters. Under the proposed rules, inactive failed to vote UOCAVA voters will be singled out and prevented from receiving a ballot. This result contravenes the statutory scheme for UOCAVA voters.

**6. The Rules conflict with Sections 1-1-103(1) and 1-7.5-102, C.R.S.** The proposed rules directly contravene the requirement that Colorado’s election laws be given a liberal interpretation. Section 1-1-103(1), C.R.S; Section 1-7.5-102. Election laws are to be construed liberally because of the importance of the public's right to participate and vote in elections. The General Assembly has determined that elections are better accepted when voter participation increases. C.R.S; Section 1-7.5-102. Inactive Failed to Vote electors are registered voters. The proposed rules may result in decreased voter participation when eligible, registered inactive failed to vote voters are removed from the mailing list. The agency’s rule making authority should not be used to add language to statutory procedures where the additions and changes superimpose new restrictions to voter participation beyond the plain text of the statute.

**7. Unfair restrictions imposed on inactive failed to vote electors.** Proposed rule 12.11.4 unfairly limits the methods by which inactive electors may change their status to active. In contrast to proposed rule 12.11.3, which allows active voters to obtain replacement ballots by telephone, rule 12.11.4 does not allow inactive voters to update their status by telephone communication to county clerks. The result is that inactive voters must either appear in person or submit a written document by mail, fax, or email. The same methods of obtaining replacement ballots should be afforded to inactive voters seeking to change their voter registration status to active. The distinction is without merit and renders rule 12.11.4 arbitrary and capricious.

**8. The Rules should be limited to statewide mail ballot elections.** The Statement of Basis, as revised, states that in 2011, the Secretary filed a complaint in Denver district court to enjoin Denver from mailing to inactive – failed to vote electors. The Secretary’s complaint seeks relief, in part, to ensure that laws in statewide ballot issue elections are applied uniformly. Yet, the proposed rules impermissibly limit the delivery of ballots in coordinated and nonpartisan elections which generally involve local ballot races or local ballot questions and often do not have a statewide race or ballot question on the ballot. Even though the proposed rules are void for the reasons set forth above, we nonetheless propose the following modifications as shown in double underline to address the Secretary’s concerns in the complaint concerning statewide ballot issue elections:

New Rule 12.4.1(d):

(D) REQUEST FOR BALLOT BY INACTIVE – FAILED TO VOTE ELECTOR. IN A COORDINATED OR NONPARTISAN ELECTION, MAIL BALLOT ELECTION THAT HAS A STATEWIDE BALLOT QUESTION, THE DESIGNATED ELECTION OFFICIAL MAY NOT MAIL A BALLOT TO AN ELECTOR WHOSE REGISTRATION RECORD IS MARKED INACTIVE – FAILED TO VOTE UNTIL THE ELECTOR SUBMITS A

REGISTRATION UPDATE OR A REQUEST FOR A BALLOT UNDER SECTION 1-7.5-23 107(3), C.R.S., AND RULE 12.11.

Amendments to Rule 12.11.4

12.11.4 ~~REQUEST FOR A BALLOT BY AN~~ AN INACTIVE ELECTOR IN A ~~NONPARTISAN~~ MAIL BALLOT ELECTION THAT HAS A STATEWIDE BALLOT QUESTION WILL BE ISSUED A BALLOT IF THE ELECTOR SUBMITS A REGISTRATION UPDATE OR A BALLOT REQUEST.

New Rule 13.19

13.19 FOR ANY MAIL BALLOT ELECTION THAT HAS A STATEWIDE BALLOT QUESTION AND THAT IS NOT A PRIMARY MAIL BALLOT ELECTION, THE DESIGNATED ELECTION OFFICIAL MAY NOT ISSUE A MAIL-IN BALLOT TO AN ELECTOR WHOSE RECORD IS MARKED INACTIVE – FAILED TO VOTE UNTIL THE ELECTOR SUBMITS A TIMELY APPLICATION FOR A MAIL-IN BALLOT OR REGISTRATION UPDATE.

Section 13.19, if adopted, should also be modified for consistency with Rules 12.11.4 and 12.4.1(d) to allow an elector to activate his or her status by a registration update.

In conclusion, Proposed Rules 12.4.1(d), 12.11, and 13.19 should not be adopted for the reasons set forth above. As written, they are contrary to Colorado election statutes, are arbitrary and capricious, and they exceed the Secretary's rulemaking authority.

Sincerely,



Victoria Ortega  
Assistant City Attorney

cc: Debra Johnson,  
Denver Clerk and Recorder

Amber McReynolds  
Director, Elections Division  
Denver Clerk and Recorder

Douglas J. Friednash  
City Attorney