



July 27, 2012

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

**Re: Proposed Rulemaking Concerning the Uniform and Proper Administration of State and Federal Election Laws and other matters**

Dear Secretary Gessler:

Thank you for your consideration of our comments in response to the above-identified rulemaking and in connection with the hearing on these proposed rules held on July 23, 2012.

Common Cause is a nonpartisan, nonprofit organization that is dedicated to restoring the core values of American democracy, reinventing an open, honest and accountable government that serves the public interest, and empowering ordinary people to make their voices heard in the political process.

In line with our mission, we oppose the adoption of rules that make it harder for some Coloradans to vote – it is not only wrong, but at odds with our most basic national values. Every eligible citizen should be encouraged to vote. It is from this perspective that we ask you to reject some of the proposed rules included in this rulemaking.

**Rules Relating to Inactive-Failed to Vote Electors**

Common Cause urges rejection of proposed Rules 12.4.1(d) and 13.19, limiting access to voting by eligible voters who have been designated “inactive failed to vote” (“IFTV”). These proposed rules would impose unnecessary and unjustified burdens on the voting rights of Coloradans, and would thereby violate the Colorado and the U.S. Constitutions. Moreover, these proposed rules are inconsistent with Colorado statutory law.

The Legislature passed the Mail Ballot Election Act in 1990, setting forth the rules regarding the distribution of mail ballots, in order to *increase* voter participation in elections. Reflecting that legislative intent, the statutes governing mail ballots plainly state that election officials shall send, at a minimum, a ballot to “each active registered elector.” But, proposed Rule 12.4.1(d) would *prohibit* an election official from mailing a ballot in connection with an all-mail-ballot election to any eligible, properly-registered elector who is marked IFTV. This is clearly at odds with the plain language and purpose of the applicable law.

Indeed, the Secretary is attempting to change the law as it stands by introducing an exclusionary concept through this rulemaking. The proposed rules are drafted as if the underlying statute says that the county clerks may mail *only* to active registered electors, which it does not.

Enacting Proposed Rule 12.4.1(d) would not only be unlawful, it would be improper. In proposing rules relating to IFTV electors, the Secretary appears to be attempting to enact rules that support his position in *Scott Gessler v. Debra Johnson, et al.*, Case No. 11CV6588, pending litigation in which the Secretary is a party. (Common Cause has joined the lawsuit as well). The Secretary's office should not be abusing the powers of its office to conduct rulemaking to support its unlawful litigation position.

In the Revised Statement of Basis, Purpose and Specific Statutory Authority, the Secretary states that he is adopting the proposed rules relating to Inactive-Failed to Vote electors "to address Denver's concern that the Secretary failed to comply with the Administrative Procedures Act (APA)." But adopting these improper rules now will not cure the underlying issues concerning interpretation of the statute.

At the hearing, the Secretary asked several speakers about whether they knew of clerks mailing ballots to IFTV electors other than in connection with the November 2011 election (or pursuant to the mandate in Section 1-7.5-108.5(b)(I)). He claimed that the interpretation of the statute to allow mailing to IFTV electors was new and questioned why, if the clerks had always had the ability to mail to IFTVs, none of them had done so prior to the November 2011 election (except pursuant to the mandate). While Common Cause has not evaluated whether the Secretary's assumption that no clerks mailed to IFTV electors prior to November 2011 is correct, the impact of the IFTV status has clearly been exacerbated in recent years by the adoption of the permanent vote by mail ("PVBM") ballot rules and the increase in the number of elections that are conducted as all mail ballot elections. While only 29% of ballots in Colorado were cast by mail in 2004, in January 2011 69% of voters were cast by mail<sup>1</sup>. The special obstacles to IFTV electors have become much more prevalent in recent years, when voting by mail has become the primary means of voting in the state. .

Proposed Rule 13.19 would prohibit an election official from issuing a mail-in ballot in any election, other than a primary mail ballot election, to an IFTV elector until the elector submits an application for a mail-in ballot. It is unclear to us why this rule is necessary based on the current state of the law. Because there is no statutory reference noted in the rule, we ask that the Secretary provide a reference to explain the basis for this rule. Our read is that this proposed rule attempts to restate Section 1-8-108(2)(b)(III), but we would appreciate confirmation from the Secretary.

Voter confusion is one of the many problems with the IFTV status. Based on our experience hearing directly from voters and from civic engagement organizations, most voters who are registered to vote and have requested permanent mail-in ballot status do not know that they have become an IFTV elector and that, as a result, they have been removed from the permanent mail-in ballot list.

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<sup>1</sup> Peggy Cuciti and Allan Wallis, CHANGING THE WAY COLORADO VOTES: A STUDY OF SELECTED REFORMS 17 (2011), available at <http://www.sos.state.co.us/pubs/elections/BestPractices/CUDenverElectionReformStudy02012011.pdf> .

For these reasons, and more, Common Cause urges the rejection of all of these proposed rules as they relate to IFTV electors.

Concerning proposed Rule 12.11 which relates to a request for a replacement ballot by an active elector and a request for a ballot by an inactive elector, we note that the request by an active elector may be made by phone. However, the request by the inactive elector *cannot* be made by phone. Common Cause believes a phone request should be permissible for both active and inactive electors.

### **Rules Relating to Poll Watchers**

Common Cause opposes the adoption of Rules 8.6.3 and 8.6.4 and urges the Secretary of State to reject them. There is no basis in current law to support their adoption, and the rules would undermine the role of poll watchers in Colorado elections. The purpose of poll watchers is to bring transparency and integrity to the election process. As more Coloradans choose to vote by mail, and more elections are conducted exclusively by mail, the need for poll watchers to effectively observe the processing and counting of mail ballots is increasingly important. This is similarly important with respect to the processing of provisional ballots. The adoption of Rules 8.6.3 and 8.6.4 will allow counties to deny poll watchers the ability to in fact “watch” the election process, by configuring space such that the poll watchers are kept at a distance in excess of six feet. Common Cause believes these rules exceed the Secretary’s authority and will have the effect of defeating the purpose of poll watchers.

### **Rules Relating to Identification**

Common Cause believes that the proposed changes to Rule 30.1.6 are appropriate and should be adopted, to the extent that they allow the valid veteran identification card (Section 30.1.6(l)) and a valid tribal identification card (Section 30.1.6(m)) to be used as identification for voting. Similarly, the removal of the example in Section 30.1.6(g)(II) is appropriate in that the example required that documentation from a public institution of higher education in Colorado contain at least the name, date of birth and legal residence address of the student elector. The requirement of a date of birth as stated in the example was beyond the language of Section 1-1-104(19.5)(a)(VII) and was therefore in excess of the Secretary’s authority to promulgate in the first instance. Removing the example should make it clearer that a government document that shows the name and address of the elector from any source, including from a public institution of higher education in Colorado, is valid.

Common Cause would oppose any change in the present rules that would impose a match between a voter’s present residence address and the address shown on those pieces of identification that are presented at the polls. The rules currently reflect the requirements of Colorado law and should not be modified.

### **Rule 9 Regarding Assistance**

Common Cause supports proposed Rule 9.1 as it is presently drafted. By allowing assistance to voters by a person of the voter’s choosing, in addition to assistance from an Election Judge, the rules now conform to the provisions of Section 26 of House Bill 12-1292, and to the provisions of Section 208 of the Voting Rights Act. Any additional language that would make it more

difficult to receive assistance from a person of the voter's choosing would not only be contrary to law, but would improperly burden the right to assistance. The rules already clearly provide that a person providing assistance may not seek to persuade the voter or induce the voter to vote in a particular manner.

### **New Rule 10.7**

Common Cause believes that new Rule 10.7 is necessary to ensure that a voter will be able to cast his or her ballot in the appropriate political party primary. The June 2012 primary election demonstrated that there was confusion about how to process ballots when a voter changed his or her affiliation close to the affiliation deadline. The Secretary of State's proposed rules provide guidance that ensures that the voter's chosen political affiliation is the basis for the ballot being counted, and requires safeguards that will minimize the potential for multiple ballots. Common Cause supports the adoption of new Rule 10.7

### **Rules Relating to Canvass Boards**

Common Cause opposes Rules 41.3 and 41.4 and urges that the Secretary of State reject their adoption. The Colorado General Assembly has carefully considered the role of a canvass board in Colorado elections. The proposed Rules 41.3 and 41.14 are in conflict with current law and severely undercut the effectiveness and ability of the canvass board to carry out its functions.

Proposed Rule 41.3.1 directly contradicts existing law by limiting the role of the canvass board. Under Colorado Revised Statutes Sections 1-10-101-205 and Sections 1-10.5-101-110, the canvass board has a range of duties, including the duty to conduct a recount. The proposed rules attempt to change this authority and limit the canvass board to conducting the canvass. This is in direct conflict with existing statute and exceeds the Secretary's authority.

Proposed Rule 41.14 also contravenes the process for oversight established by the Colorado General Assembly in statute. By allowing the clerk and recorder, or a majority of the canvass board members, to delegate their authority to the Secretary of State, the rule essentially reallocates responsibilities contrary to the statute. The statute contemplates a clear division of responsibilities between a canvass board and the Secretary of State. This proposed rule allows a majority of the canvass board, or the clerk and recorder, to supersede the authority of the canvass board and strip it of its functions. This is significant as it brings the Secretary of State into issues, such as voter intent, voter eligibility or recount reports, that the Colorado General Assembly never intended would fall into the jurisdiction of a partisan office such as the Secretary of State.

This is of particular concern where partisanship will likely be called into question during any controversial election issue. As you are aware, our organization has called on you to adopt an oath of nonpartisanship as the chief election officer of the state. To ensure confidence in the administration of our elections, the chief election official of the state must be an impartial referee and not introduce any question as to whether election procedures have been skewed to the advantage of any particular ideology or political party. It is of the utmost importance that those responsible for the oversight and management of our elections approach this duty from an objective and unbiased view.

For all of the above reasons, the proposed rules exceed the rulemaking authority of the Secretary of State because they conflict with existing Colorado law and are not a reasonable interpretation of such law. Common Cause urges the rejection of these proposed rules.

Thank you for the opportunity to comment. Please contact us if you would like additional information.

Sincerely,

A handwritten signature in black ink, appearing to read 'E Nunez', with a long horizontal flourish extending to the right.

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