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August 14, 2014

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

Re: Election Rules –8 CCR 1505-1 - Rulemaking Hearing August 14, 2014

Dear Secretary Gessler:

I am writing on behalf of the Colorado Democratic Party to comment on your proposed rules concerning Elections noticed on July 15, 2014 and revised on August 7, 2014. The Colorado Democratic Party believes that several of the newly proposed rules conflict with existing Colorado Statutes. As a result, the Colorado Democratic Party believes that you will exceed your authority if you promulgate these rules. Additionally, some of the rules would benefit from revisions to make them clearer and less open to differing interpretations.

Proposed Rule 2.2.2

Proposed Rule 2.2.2 eliminates language that protected the right to vote if a voter who submitted a voter registration form during the 22 days before an election failed to provide the date that a voter moved on the voter registration form. The previous rule protected the right to vote by allowing the affirmation to control, whereby the voter affirmed that he/she had been a resident of the state of Colorado for more than 22 days. The new rule will disenfranchise voters who fail to insert a move date, because it ignores the affirmation and defaults the move date to the date the application is received or postmarked, whichever is earlier. Colorado is an affirmation state and as long as the voter has affirmed his/her eligibility by signing the statement that the voter has been a resident of the state of Colorado for more than 22 days, the voter is entitled to vote. Proposed Rule 2.2.2 exceeds the rulemaking authority of the Secretary because it denies the fundamental right to vote to persons who have affirmed that they meet the 22 day state residency requirement of CRS §1-2-101(1)(b), and because it directly conflicts with CRS §1-2-101(1)(b).

Proposed Rule 2.13.2(a)(2)

Proposed Rule 2.13.2(a)(2) impermissibly conflicts with CRS §1-2-302.5 as it was amended during the last legislative session by SB 14-161. CRS §1-2-302.5 now requires the Secretary to conduct a monthly national change of address search using the NCOA database, and if the search indicates an elector has permanently moved, the county clerk must update the elector's record so long as the elector only moved within the county. CRS §1-2-302.5(5) also allows a county clerk to conduct a national change of address search using the NCOA database as frequently as he or she sees fit. Proposed rule 2.13.2(a)(2) exceeds the rulemaking authority of the Secretary because it directly conflicts with CRS §1-2-302.5.

Proposed Rule 2.13.3

Proposed Rule 2.13.3 should be modified to insert an "and" at the end of Rule 2.13.3(a) to make it clear that in order to cancel the registration of an elector; all three of the criteria in 2.13.3(a), 2.13.3(b) and 2.13.3(c) must be met. Without the word "and" at the end of subsection (a), the rule may be interpreted to allow cancellation of a voter's registration if the voter's record has been marked "Inactive-returned mail," "Inactive – undeliverable ballot," or "Inactive – NCOA." Instead, the law requires all three conditions to have been met – (1) the voter's records have been marked inactive, and (2) the voter has been mailed a confirmation card, and (3) the voter has since failed to vote in two consecutive general elections. If the rule is not modified to insert an "and" at the end of subsection (a), then it will conflict with existing statute.

Proposed Rule 7.2.5

Proposed Rule 7.2.5 conflicts with existing statute, and encourages voter confusion by advising voters that it is a violation of law to drop off more than ten ballots in any election. The statement is misleading because the statute, at CRS §1-7.5-107(4)(b)(I)(B), states that the eligible elector may: "deliver the ballot to any person of the elector's own choice or to any duly authorized agent of the county clerk and recorder or designated election official for mailing or personal delivery; except that no person other than a duly authorized agent of the county clerk and recorder or designated election official may receive more than ten mail ballots in any election for mailing or delivery." Any rule that seeks to inform voters about delivering ballots should include all of this language so that voters understand that they may give their ballot to any person of their own choice, and that duly authorized agent of the county clerk and recorder or designated election official may receive more than ten mail ballots. As written, the proposed rule misleads voters and conflicts with the plain language and purpose of the CRS §1-7.5-107(4)(b)(I)(B).

Proposed Rule 7.2.6

Proposed Rule 7.2.6 creates a new affirmation that conflicts with CRS §1-7.5-107((3)(b). In addition, this secondary affidavit will cause voter confusion for several reasons. First, the law does not require voters to vote their ballot in private, but rather, the law prohibits a voter from showing his/her ballot after it is prepared for voting or reveal its contents. *See* CRS §1-13-712.

Including this "private" requirement on the ballot may mislead voters into believing that they cannot vote their ballot in their home or in the presence of others, even if they are not showing the ballot or revealing its contents.

Additionally, requiring a voter to put the name of a person to whom they give their ballot for delivery is not required by law and is likely to cause confusion for voters. The law limits the number of ballots to ten that any one person may **receive** for mailing or delivery in any election. CRS §1-7.5-107(4)(b)(I)(B). The law does not place any burden to enforce the ten ballot limit on a voter who gives her ballot to another person for delivery. Mandating voters to include the name of a person the voter has chosen to deliver her ballot on the outside of the ballot is contrary to law and is likely to chill participation for those who would choose to give their ballot to another person for mailing or delivery.

Proposed Rule 7.2.6 will also lead to voter confusion, election administration uncertainty, and implementation chaos. What is the intended result if the line is left blank? Neither the Secretary nor the county clerks have any authority to reject a ballot that does not contain the name of the person who delivered it on the outside. Furthermore, how will the county clerks determine if the person whose name is written on the envelope is the person delivering the ballot? Does the Secretary envision that county clerks will staff all drop off locations and request identification from each person who delivers more than one ballot? Some County Clerks may interpret the rule to require such actions which creates the prospect of disparate treatment and violations of equal protection.

Proposed Rule 7.2.6 exceeds the rulemaking authority of the Secretary because it threatens to chill the fundamental right to vote of persons who have chosen to give their ballot to another person for mailing or delivery to the county clerk, and because it conflicts with CRS §1-7.5-107(3).

Proposed Rule 9.2

Proposed Rule 9.2 conflicts with CRS §1-9-207 and §1-9-210, and threatens the fundamental right to vote. Proposed Rule 9.2 creates a new challenge procedure for mail ballots that is not supported by law and instead directly conflicts with the procedure outlined in the existing "Challenges of ballots cast by mail" statute at CRS §1-9-207. In that statute, the law provides that if a mail ballot is challenged it must set forth a basis for the challenge in writing, and be signed by the challenger under penalty of perjury. Once a challenge is lodged, "challenged ballots, except those rejected for an incomplete or incorrect affidavit by an elector on the returned mail ballot envelope, forgery of a deceased person's signature on a mail ballot affidavit, or submission of multiple ballots, **shall be counted**." (Emphasis supplied).

Additionally, CRS §1-9-207 contemplates that a person challenged will be given an opportunity to sign an affidavit responding to the basis for the challenge. Pursuant to CRS §1-9-210, the County Clerk must notify any voter and mail a copy of the challenge to any voter who cast a mail ballot was present at the time of the challenge. Under Proposed Rule 9.2, none of these

protections are afforded the voter. Instead, Proposed Rule 9.2 creates a new process whereby it appears that two election judges may determine, potentially without any written basis or sworn affirmation, and clearly without notifying the voter of the challenge or allowing the voter to respond to the allegations made by the challenger, that a voter is not eligible and reject some or all votes contained within the voter's ballot.

Finally, the Colorado Legislature declined to approve SB 14-79, which contained almost identical language to Proposed Rule 9.2. Proposed Rule 9.2 appears to be an attempt to rewrite the existing CRS §1-9-207 and §1-9-210, which the Legislature declined to do.

Proposed Rule 9.2 exceeds the rulemaking authority of the Secretary because it threatens to disenfranchise persons who have voted by mail without any notice and an opportunity to be heard, and because it directly conflicts with CRS §1-9-207 and §1-9-210.

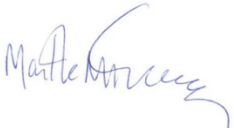
Proposed Rule 14.4.6

Proposed Rule 14.4.6 should be modified to allow for highlighting or marking so long as it does not obscure the VRD form in any way for processing by the County Clerk. Currently, some VRDs highlight VRD forms to facilitate completeness and accuracy by the voter registration applicants when filling out the forms. Eliminating this tool is likely to result in less complete and less accurate VRD forms which will result in more work for County Clerks and fewer registered voters. If the purpose behind Proposed Rule 14.4.6 is to avoid markings or highlighting which obscure the text or make it difficult to scan the data, then a rule that makes this clear would be preferable to Proposed Rule 4.4.6. Also please note that the Secretary's own VRD training advises VRDs to mark the forms under certain circumstances, which training directly conflicts with this proposed rule.

Thank you for considering these comments.

Sincerely,

HEIZER PAUL LLP



By: Martha M. Tierney

cc: Rick Palacio, Chair, Colorado Democratic Party