



April 8, 2015

Honorable Wayne Williams
Secretary of State of Colorado
1700 Broadway, Suite 250
Denver, CO 80290

Re: Working Draft of Proposed Rules Regarding Campaign and Political Finance, 8 C.C.R. 1505-6.

Dear Secretary Williams:

Colorado Ethics Watch (“Ethics Watch”) is a nonpartisan, nonprofit watchdog group dedicated to ethics, transparency, and clean elections at the state and local level in Colorado. Ethics Watch respectfully submits these comments on the March 25, 2015 Working Draft of Proposed Rules for Campaign and Political Finance Rules.

Overall, Ethics Watch supports the working draft and the Secretary’s efforts to update and streamline the state campaign finance regulations. Specific comments with regard to certain provisions of the working draft are as follows:

Former Rule 1.7 definition of “electioneering communications” [2:34-37 & 3:1-14]¹ – Ethics Watch supports the complete deletion of this rule pursuant to the Colorado Court of Appeals decision in *Colorado Ethics Watch, et al. v. Gessler*, 2013 COA 172M.

Former Rule 1.10 definition of “influencing or attempting to influence” [4:4-7] – Ethics Watch supports the complete deletion of this rule pursuant to the Colorado Court of Appeals decision in *Colorado Ethics Watch, et al. v. Gessler*, 2013 COA 172M.

New Rule 1.9 definition of “issue committee” [4:9-24] – Ethics Watch supports the revisions to this rule (former Rule 1.12) pursuant to the Colorado Court of Appeals decision in *Colorado Ethics Watch, et al. v. Gessler*, 2013 COA 172M.

New Rule 1.10 definition of “limited liability company” [4:25-29] – Ethics Watch recommends amendment to this proposed new definition. C.R.S. § 1-45-103.7(8) provides a unique definition of “limited liability company” as used in that section which is broader than other uses of the term in corporate law. This regulatory definition appears to incorporate the types of entities within the scope of that statutory section, which itself refers to domestic and foreign entities as defined in C.R.S. §7-90-102(13) and (23), respectively. However, the listed entities in the rule do not appear to encompass all

¹ Page and line number references to the Working Draft are listed as [page:lines].

entities listed in the governing statutory sections. For example, C.R.S. §7-90-102(13) also includes “domestic cooperative” which is not in the proposed rule. More importantly, C.R.S. §7-90-102(13) includes a general catch-all phrase for “any other organization” recognized under the state law as a separate legal entity, which should be interpreted to include limited liability partnerships. Neither the catch-all provision or these other types of organizations are included in the proposed rule.

We recommend you include the statutory cites here in the regulation to clarify that it refers to those terms as defined in that section and to the full extent of C.R.S. §1-45-103.7(8) and the incorporated sections from title 7.

New Rule 1.16 definition of “political committee” [5:8-21] - Ethics Watch supports the revisions to this rule (former Rule 1.18) pursuant to the Colorado Court of Appeals decision in *Colorado Ethics Watch, et al. v. Gessler*, 2013 COA 172M.

Former Rule 4.1 issue committees [10:15-24] - Ethics Watch supports the revisions to Rule 4, including removal of former Rule 4.1 pursuant to the Colorado Supreme Court decision in *Gessler v. Colorado Common Cause et al.*, 2014 CO 44.

New Rule 7.2 political organizations [14:17-25] - Ethics Watch supports the revisions to this rule, including removal of former Rule 7.2.1 pursuant to the Colorado Court of Appeals decision in *Colorado Ethics Watch, et al. v. Gessler*, 2013 COA 172M.

New Rule 10.6 excessive contributions [18:20-26] – Ethics Watch suggests revising new Rule 10.6 regarding the return of excessive contributions. The amendments to the rule appear to remove the immunity from liability if a candidate makes timely refund of excessive contributions. Thus, under the proposed wording a candidate could return an excessive contribution within 10 days of receipt but still be subject to a campaign finance complaint and administrative proceeding for receipt of that excessive contribution. The safe harbor provision of the first sentence should be restored to avoid these types of “gotcha” complaints which do not serve to improve compliance with the constitutional and statutory requirements.

Former Rule 10.10.1 reporting of loans [20:18-19] – Ethics Watch recommends clarifying in New Rule 10.12 that loans to candidate committees must be reported. Although loans are included in the Colo. Const. art. XXVIII, § 2(5)(a) definition of “contribution”, the constitution excepts loans from the contribution limits of art. XXVIII § 3. The working draft deletion of former Rule 10.10.1 could cause confusion as to how and whether or not to report loans on candidate committee reports.

New Rule 10.17 major contribution reports [27:15-27] – Ethics Watch supports the deletion of subsections (a)-(c) to this rule (former Rule 18.1.8) pursuant to the Colorado Court of Appeals decision in *Colorado Ethics Watch, et al. v. Gessler*, 2013 COA 172M.

New Rules 10.17.1 and 10.17.2 exemptions to major contribution reports [27:28-33] – Ethics Watch opposes the new Rules 10.17.1 and 10.17.2 because both provisions exceed the authority of the Secretary and contradict the statute. C.R.S. § 1-45-108(2.5) specifically requires “all candidate committees, political committees, issue committees, and political parties” to file additional reports when any contribution of \$1,000 or more is received within the last 30 days before the primary or general election. New Rule 10.17.1 purports to exempt all political committees and small donor committees (a type of political committee) from this statutory requirement. The fact that any such \$1,000 contribution received would exceed the contribution limits makes it more imperative that such improper contribution (and its timely refund) be disclosed to voters. The General Assembly has decided that political committees must file major contributions reports should such a contribution occur. Similarly, the statute explicitly includes issue committees in the list of groups that must file major contribution reports in the 30 days prior to a primary election. Proposed Rule 10.17.2 attempts to grant a blanket exemption to all issue committees from this statutory requirement, perhaps because ballot measures are not included on a primary ballot. However, the General Assembly chose to require separate reporting of contributions at \$1,000 or more during this time for issue committees. The legislation is clear as to both of these provisions.

Regardless of policy arguments supporting these proposed rules, the Secretary does not have the authority to issue a rule directly contradicting the statute. If the Secretary believes these proposed changes would be preferable policy, he should ask the legislature to amend C.R.S. § 1-45-108(2.5). Ethics Watch would not oppose legislation relieving issue committees from filing major contribution reports during the thirty days before a primary. Proposed Rules 10.17.1 and 10.17.2 should not be adopted in the rulemaking.

Former Rule 11.1 electioneering communications disclosure [28:2-6] – Ethics Watch recommends against deleting the former Rule 11.1 in its entirety because it would mean a lack of guidance as to electioneering communication disclosure. Both the constitutional provision for electioneering communication disclosure at Colo. Const. art. XXVII, § 6 and the statutory requirement for disclosure at C.R.S. 1-45-108(1)(a)(III) were enacted prior to the U.S. Supreme Court decision in *Citizens United v. FEC*, 558 U.S. 310 (2010). Therefore, disclosure of electioneering communications by corporations and labor organizations was not contemplated in these provisions because such spending was banned. In the post-*Citizens United* world, former Rule 11.1 is the only guidance to corporations and labor organizations as to which funds must be reported. While the Secretary may want to take public comment on revising the formulation of this earmarking provision, it would be detrimental to corporations and labor organizations who make electioneering communications – and the public which relies upon accurate reporting – to simply remove former Rule 11.1 without further guidance in the regulations.

New Rule 14.3 political parties and local elections [31:11-20] – Ethics Watch recommends amendments to the revised language in New Rule 14.3. As proposed, this rule would allow a political party to establish a separate account for each and every

county and municipality without contributions to that account being subject to the state contribution limits in Colo. Const. art. XXVIII, § 3. However, this type of separate account is only permissible for home rule counties and municipality elections. We believe this is the intent of the draft rule, however, the language should be clarified to make it clear that the rule applies only to home rule jurisdictions with their own campaign finance systems.

We appreciate this opportunity to comment and look forward to the rulemaking proceedings.

Sincerely,

A handwritten signature in blue ink that reads "Peg Perl". The signature is written in a cursive, flowing style.

Peg Perl
Senior Counsel