May 21, 2015

The Honorable Wayne W. Williams
Secretary, Colorado Department of State
1700 Broadway, Suite 200
Denver, Colorado 80290

**RE: Notice of Proposed Rulemaking, Rules Concerning Campaign and Political Finance 8 CCR 1505-6**

Dear Secretary Williams:

On behalf of the Center for Competitive Politics, I write to offer comments on the Notice of Proposed Rulemaking, Rules Concerning Campaign and Political Finance ("NPRM"). Founded in 2005 by former Federal Election Commission chairman Bradley A. Smith, the Center is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, association, assembly, and petition.

The NPRM is, generally, a welcome effort to make Colorado's obscure and complex campaign finance rules comprehensible to ordinary Coloradoans. Given existing vagueness, and the extraordinarily low levels of political involvement Colorado has chosen to regulate, any such attempt should be congratulated. However, in seeking to eliminate jargon, the NPRM sometimes leaves existing ambiguity intact, and in some cases makes the situation worse.

Additionally, the NPRM removes some rules as redundant to other provisions of law. But Colorado campaign finance law is governed by constitutional provisions, statutes, federal law, court decisions, and interpretations by administrative agencies. Rather than remove rules as redundant of other law, the Rules Concerning Campaign and Political Finance should strive to serve as single source for understanding when and how activity is regulated under Colorado's campaign finance framework.

These comments are intended to provide a roadmap allowing your office to improve upon the NPRM's good work in attempting to clarify areas of the law left ambiguous by Colorado's constitution and statutes.

## I. Major Purpose

Proposed Rule 1.9 simplifies the definition of "Issue Committee":

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> "Issue committee" MEANS A PERSON OR A GROUP OF PEOPLE THAT MEETS BOTH OF THE CONDITIONS IN COLO. CONST. ARTICLE XXVIII, SECTION 2(10)(A)(1) AND 2 (10)(A)(II). AN "ISSUE COMMITTEE" DOES NOT INCLUDE A MARRIED COUPLE.[1]

But this definition tries to do too much with too little text. If adopted, the Proposed Rule incorporates the regulatory change, approved in *Independence Institute v. Coffman,* that links these two subsections of Section 2(10)(A). 209 P.3d 1130, 1135 (Colo. App. 2008). It also notes that a married couple cannot accidentally become an issue committee. These are helpful clarifications

What the definition loses is any discussion of "major purpose." The term "major purpose" helps define "issue committee" and is found in both the constitutional provision and statutes. COLO. CONST. art. XXVIII 2(10)(a)(I) (defining Issue Committee as any group "[t]hat has a major purpose of supporting or opposing any ballot issue or ballot question") and C.R.S. § 1-45-103(12). The Secretary's predecessor attempted to clarify what activity constitutes the "major purpose" of supporting or opposing a ballot measure. Secretary's Gessler's rule was struck down, however, in *Colorado Ethics Watch v. Gessler*, 2013 COA 172M (Colo. Ct. App. 2013). Present law on this topic is technical, confusing, and scattered. Any changes to the definition of "issue committee" should include a definition of "major purpose" that provides clear and unambiguous guidance to would-be speakers.

### a. "Pattern of Conduct"

To take a concrete example, Colorado law defines "major purpose," in part, as a "demonstrated pattern of conduct":

> "[M]ajor purpose" means support of or opposition to a ballot issue or ballot question that is reflected by:
>
> (I) An organization's specifically identified objectives in its organizational documents at the time it is established or as such documents are later amended; or
>
> (II) An organization's demonstrated *pattern of conduct* based upon its:
>
> (A) Annual expenditures in support of or opposition to a ballot issue or ballot question; or
>
> (B) Production or funding, or both, of written or broadcast communications, or both, in support of or opposition to a ballot issue or ballot question.

C.R.S. § 1-45-103(12)(b) (emphasis added). "Pattern of conduct" is not defined.

At one time, the Campaign Finance Rules defined "pattern of conduct" as a function of an organization's spending—either "written or broadcast communications" or annual

[1] All quotations of the Proposed Rules follow the standard statutory markup indicators used in the NPRM. SMALL CAPS indicates new text. ~~Strikethrough~~ indicates text deletions. Regular font is unchanged text.

expenditures representing more than 30% of total spending. 8 C.C.R. 1505-6 Rule 1.12.3 The Colorado courts declared this rule "arbitrary and capricious." *Colorado Ethics Watch*, 2013 COA 172M ¶ 32 ("We conclude that Rule 1.12 is arbitrary and capricious because the thirty percent threshold is unsupported by competent evidence in the record").[2]

Because there are no thresholds in the statutory term "pattern of conduct," and no definition of that concept, organizations are left wondering concerning their "major purpose" under the law. How many times may an organization expend money on issue speech before it has a "pattern of conduct" of ballot measure advocacy? How much money may be spent on expenditures before triggering Article XXVIII's "major purpose" requirement? The regulated community—which, in practice, includes anyone speaking on issues that may be placed before the electorate—deserves clarity on these points. The question is especially grave because failing to register as a committee can lead to significant fines and the initiation of litigation by ideological opponents. *See* COLO. CONST. art. XXVIII § 9(2)(a).

The *Colorado Ethics Watch* court declined to define "pattern of conduct," leaving the proverbial ball in your office's court. Any rulemaking concerning issue committee status must address this key gap in the State's definition of "major purpose."

**b. "Written or Broadcast Communication"**

The proposed rules also lack a definition of "written or broadcast communication." That vague term, which is used to define a group's "major purpose" by means of the "pattern of conduct" portion of the statute, is nowhere else defined in Colorado's campaign finance law. The Secretary should therefore define the term to protect discussions of public policy from the burdensome requirements placed upon Colorado issue committees.

Without a definition, a "written or broadcast communication" could be almost anything. Does an email count? Handmade flyers? Facebook status updates? Colorado has an obligation to make its definition of issue committee as straightforward and mathematical as possible, so that speakers may be certain whether their conduct will or will not be regulated, and to insulate them politically-motivated complaints and enforcement actions. A complete failure to define a central term is inconsistent with that duty and should be remedied as part of this rulemaking.

## II. Unclear registration triggers undermine the State's approach to regulating political associations.

**a. Issue Committees**

The line between an "issue committee" and an organization that merely discusses public policy is unclear. Issue committee status burdensome, as groups must register with the state and report their donor list to the Secretary. Unfortunately, the proposed rules do nothing to clarify this constitutionally sensitive section of the law. New Rule 8.1.3 provides:

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[2] In *dicta*, the Colorado Court of Appeals further rejected the rule because its percentage-based approach was inadequate to determine an organization's "pattern of conduct." *See id*. ¶¶ 33-34.

> An issue committee must identify the ballot ~~measures to be supported or opposed~~ MEASURE IT WILL SUPPORT OR OPPOSE, if known. If the particular ballot measures are not known, ~~an~~ THE issue committee must identify THE policy ~~positions to be supported or opposed~~ POSITION IT WILL SUPPORT OR OPPOSE.

Thus, under the rule (however formulated), the citizens of Colorado must police their own discussion of public policy and register even if one does not know that the topic will be the subject of a ballot measure. The First Amendment does not permit the state to regulate so broadly.

In fact, the proposed rule change contravenes the statute. The state legislature, recognizing that when a topic is "on the ballot" may be ambiguous, narrowly defined the speech triggering issue committee status:

> Notwithstanding any other provision of law, and subject to the provisions of paragraph (b) of this subsection (7), a matter shall be considered to be a ballot issue or ballot question for the purpose of determining whether an issue committee has been formally established, thereby necessitating compliance with any disclosure and reporting requirements of this article and article XXVIII of the state constitution, at the earliest of the following:
>
> > (I) A title for the matter has been designated and fixed in accordance with law;
> > (II) The matter has been referred to the voters by the general assembly or the governing body of any political subdivision of the state with authorization to refer matters to the voters;
> > (III) In the case of a citizen referendum petition, the matter has been submitted for format approval in accordance with law;
> > (IV) A petition concerning the matter has been circulated and signed by at least one person; except that, where a matter becomes a ballot issue or ballot question upon such signing, any person opposing the matter shall not be considered to be an issue committee for purposes of this article and article XXVIII of the state constitution until one such person knows or has reason to know of the circulation; or
> > (V) A signed petition has been submitted to the appropriate officer in accordance with law.

C.R.S. § 1-45-108(7)(a). This language does not permit your office to require all groups to declare their policy preferences, divorced from an actual ballot measure. Simply incorporating the statutory definition would be a wiser course, as it provides vital clarity the proposed rule lacks.

### b. Candidate Committees

The NPRM broadens the legal triggers for becoming a candidate for office. Proposed Rules 1.18.3 and 1.18.4. (a person "[p]ublicly announced an intention to seek election to public office or retention of a judicial office" when he or she "has made a statement signifying an interest in, OR EXPLORING THE POSSIBILITY OF SEEKING office"). The announcement may be "made by means of a speech, advertisement, or other communication reported or appearing in public or in any place accessible to the public." Proposed Rule 1.18.3. The Proposed Rules also require that "a reasonable person would expect the [candidacy] statement to become public." Proposed Rule 1.18.4.

Thus, any speech may trigger the legal consequences of an announced candidacy. This is a problem for speech *supporting* a candidacy, but committee status can, troublingly, also be triggered by speech *opposing* a candidate. This is an untenable position, as candidates are often public figures (and often officeholders) whom many organizations discuss in the context of general public policy and current events. As a result of this definition, organizations may, entirely inadvertently, become committees opposed to a "candidate" merely because a public figure has expressed potential interest in seeking office.

Moreover, the NPRM imposes no concrete line on when a candidacy is announced. This is extraordinarily dangerous, as one's political rivals are likely to read an "announcement" of "interest" into a vast array of tentative and off-the-cuff remarks. A "reasonableness" standard is insufficient to guard against the very real danger that politically-involved individuals and groups will hear what they wish to. And because Colorado permits such groups to file and prosecute complaints based upon the failure to register as a committee based upon such announcements, the costs imposed by this rule could be both real and grave.

Finally, there is no time limitation on these rules. Therefore, if one gave a speech saying she would consider running for governor in 2018, theoretically the rule is triggered *now*, with enormous ramifications for any speech concerning that newly-declared "candidate."

## III. Independent expenditure committee (Old Rule 5.2)

The NPRM would delete Old Rule 5.2, defining "independent expenditure committee." The Secretary justifies "[r]epeal of Rule 5.2 because it is addressed by section 1-45-103.7(2.5) C.R.S." NPRM at 2. Indeed, the old rule simply restated the statute. But by deleting the provision, the NPRM forces Coloradoans to search multiple places to understand the campaign finance rules—a needless burden.

In addition, the old rule noted that independent expenditure committees are *not* subject to Article XXVIII § 3(5)'s contribution limits. This, of course, is stated in the statute, but the Secretary's rules should provide additional, if redundant, clarity by specifically noting that important legal point. The Center can see little downside to doing so.

## IV. Miscellaneous issues

### a. Rules regarding transfers between levels of a political party

Rule 6.2.1, as amended reads, "A party may transfer money ~~from one level of the organization to another~~ WITHIN THE PARTY without limit." The old formulation is superior, as it emphasizes that the county and state parties may move funds specifically between one another. "Within the party" is overly colloquial and less clear, because a political party's various levels are distinct entities. "Within the party" may be inappropriately read to limit transfers only within *a particular level* of the party—for example, among accounts for the state party. CCP consequently recommends maintaining the existing language.

### b. Failure to define terms

#### i. Definition of "appropriate officer"

Proposed Rule 18.1 does not specify the "appropriate officer" who will be reviewing campaign finance penalties. A later rule, Proposed Rule 18.2, defines "appropriate officer" in terms of the constitutional definition, but this is not helpful. Article XXVIII declares that "'[a]ppropriate officer' means the individual with whom a candidate, candidate committee, political committee, small donor committee, or issue committee must file pursuant to section 1-45-109 (1), C.R.S., or any successor section." COLO. CONST. art. XXVIII § 2(1). The cited statute states that "[t]he following shall file with the secretary of state…" or with the county clerk (county races) or with the municipal clerk (city races). C.R.S. § 1-45-109 (1). Consequently, the present law does not specify the official within each office who will handle the penalty process, or how the waiver process will proceed.

Consequently, the present definition suggests that the Secretary imposes penalties personally, but this does not reflect current practice. As can only be known by those who have gone through the penalty and penalty appeals process, a member of the Secretary's staff conducts an initial review, and then refers the matter to a committee of Department of State officials that includes the Deputy Secretary. The rules should adequately and accurately reflect the actual process the Secretary intends to follow.

#### ii. Definition of "TRACER"

Throughout the rules, the NPRM refers to TRACER, but never defines the term. The old rules referred to "online campaign finance system," doubtless reflecting a time before TRACER came into common use and its acronym became known. This is a simple fix and a helpful one; the average person does not know what TRACER is or how it operates.

### c. Call for greater clarity in penalty waiver process

The NPRM leaves the process for seeking a penalty waiver largely unchanged. But the "good cause" standard for penalty waiver or reduction remains in place. That term is not defined,

but should be. Such a definition would compliment and strengthen the various scenarios describing circumstances where a penalty waiver would be appropriate.

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The Center appreciates the opportunity to highlight key areas where your office should further clarify Colorado campaign finance law. Should you have any further questions regarding these issues or any other campaign finance proposals, please do not hesitate to contact me at (703) 894-6800 or by e-mail at adickerson@campaignfreedom.org.

Thank you for your time and consideration, and for turning your attention to this important area.

Respectfully Submitted,

/s/ Allen Dickerson
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