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Wayne Williams
Colorado Secretary of State
1600 Broadway Suite 200
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Re: *Notice of Preliminary Draft of Proposed Rules, Written Public Comment*

To Whom it May Concern:

Please accept this public comment concerning the Preliminary Draft of Proposed Rules dated October 15, 2018 (public rulemaking hearing scheduled for 14 November 2018 beginning at 1:00 PM), regarding the Secretary's Rules Concerning Campaign and Political Finance (8 CCR 1505-6 *et seq*).

Specific comments on individual sections of the proposed rules follows. **All comment are in bold**.

Amendments to Rule 2.2.4 concerning candidate committees:

The clarification of Rule 2.2.4 (a) regarding committee reports of unexpended campaign balances appears appropriate, but raises questions of implementation. How are candidate committees to report and distinguish in TRACER between amounts retained for used in a subsequent election cycle, versus amounts retained for use as unexpended funds?

Amendments to Rule 18.2 concerning complaints:

Amendments to Rule 18.2.6(b)(1):

Campaign Integrity Watchdog maintains concerns, as stated in published comments to Secretary's Proposed Permanent Rulemaking submitted 25 September 2018, that the Secretary's usurpation of the process for adjudicating campaign finance complaints is unmoored from any constitutional or statutory authority, and is indeed directly opposed to the will of the Colorado electorate passing Amendment 27 (codified as Colo. Const. Art. XXVIII) in 2002.

Given the lack of constitutional or statutory authority, and given that the Secretary's usurpation of legislative and judicial functions in his unilaterally imposed Rule 18.2 *et seq* directly contradicts the express and unambiguous intent of the electorate, as a threshold matter, the Secretary lacks authority to promulgate rules that are contrary to clear constitutional and statutory provisions. *Gessler v. Colo. Common Cause*, 2014 CO 44, ¶9, 327 P.3d 232 (where an SOS rule "conflicts with either" the Constitution or campaign finance statute, "the rule must be set aside").

As noted supra, the Colorado Constitution reserves the enforcement of campaign finance violations to "any person" who brings a complaint pursuant to Colo. Const. Art. XXVIII §9(2)(a) and pursuant to C.R.S. 1-45-111.5 et seq (Fair Campaign Practices Act, Art. XXVIII's statutory enactment).

Not only does the Secretary lack any authority to conduct review of complaints filed, decide on which cases to forward for adjudication, and/or conduct prosecution and enforcement of violations – the citizens of the State of Colorado affirmatively removed any such authority that the Secretary had previously enjoyed (under C.R.S. 1-45-111) with passage of Amendment 27, codified as Art. XXVIII.

The most objectionable elements of the Secretary's Rule 18.2 et seq are usurpation of quasi-judicial functions – unilaterally arrogating to the Secretary's office the role of judge, jury, and (non)executioner regarding alleged violations of campaign finance law; a troubling and unconstitutional centralization of power and authority in the hands of a single (partisan) elected official.

Indeed, the record of the Secretary's actions in the past five months since implantation of Rule 18.2 and application to campaign finance complaints bears out the concerns expressed by CIW and others.

Since the Secretary unilaterally usurped the campaign finance law enforcement function with the adoption (absent prior public hearing or comment) of Rule 18.2 *et seq* in June 2018 through today's date (13 November 2018), various parties have filed a total of 25 complaints alleging violations of Colorado's campaign finance laws. Of those, one has been settled (per negotiations not transparent to the public); seven have been dismissed outright; three have been dismissed as having been "cured" (without the open hearing required by statute to determine whether the "good faith" or "substantial compliance" standards putatively established by rule were in fact met; nine have passed "initial review" but remain pending enforcement action; four remain pending review; and only one (filed on 17 September 2018) is finally going to trial on 14 November, nearly two months after filing (and long after the 15 days for referral to administrative court established under the constitution per the express will of the voters).

The pattern of delay, dismissal without due process, and lack of transparency should be deeply troubling to anyone concerned with the "full and timely disclosure" and "strong enforcement" that was unambiguously established as the purpose of Colorado's campaign finance legal enforcement regime.

Comment specific to amended rule 18.2.6(b)(1):

The amended rule 18.2.6(b)(1) at least reduces the Secretary's rule from unilateral arbiter of campaign finance complaints ("judge, jury, and (non) executioner") usurping judicial functions to a role merely unifying the functions of district attorney and public defense attorney, simultaneously.

However, the Secretary still retains too much of the status of a party to the proceedings, rather than a disinterested arbiter. Arguably, claiming the authority to "FILE A MOTION TO DISMISS" still puts the Secretary in the role of a party, arguably constitutes a reportable contribution to the Respondent[1] and may constitute criminal (C.R.S. 18-8-404, 'First Degree Official') misconduct on the part of the Secretary.

Campaign Integrity Watchdog believes legal jeopardy and potential misconduct could be reduced by restricting the Secretary's role to submitting an "amicus-style" brief, such as has already been approved by the administrative courts, setting forth the Secretary's position short of a "Motion to Dismiss" a case in which the Secretary is not, and legally cannot be, an actual party in interest.

Amendments to Rule 18.2.7(e)(1) and repeal of Rule 18.2.7(e)(3):

18.2.7 Curing violations

As a threshold issue, the constitutionality of the "notice and cure" statute is currently the subject of a constitutional challenge still pending before the Colorado Court of Appeals (case no. 2018 CA 136).

Pursuant to the express terms of the statute (C.R.S. 1-45-109(4)(c) *et seq*), determination of whether a committee asserting a claim to "notice" and "cure" of its violations of law is a matter for a hearing, not unilateral decision by the Secretary or the elections division under his authority. Specifically:

C.R.S. 1-45-109(4)(c)(II) states, as a matter of statute not subject to being ignored by the Secretary:

"(II) Upon filing an addendum to the relevant report by the committee that cures all such deficiencies in accordance with subsection (4)(c)(I) of this section, the appropriate officer shall set a hearing within thirty days of the notice to determine whether all issues raised by the complaint have been resolved.

The committee has the burden of demonstrating good faith or substantial compliance under this subsection (4)(c)(II) by a preponderance of the evidence in the hearing held by the appropriate officer under section 9 (2)(a) of article XXVIII of the state constitution. Where the committee fails to satisfy its burden of demonstrating either good faith or substantial compliance, the administrative law judge shall enter or impose a civil penalty…"

[1] See 2018 CO 7 *Campaign Integrity Watchdog v. Alliance for a Safe and Independent Woodmen Hills*, affirming that payment to a third party for legal representation "for the benefit of" a regulated committee constitutes a reportable contribution to the committee, one which is also subject to contribution limits.

Consequently, proposed amended Rule 18.2.7(e)(1) directly contradicts the express mandate of existing statute. Since the Secretary lacks authority to promulgate rules that are contrary to clear constitutional and statutory provisions, *Gessler v. Colo. Common Cause*, 2014 CO 44, ¶9, 327 P.3d 232 (where an SOS rule "conflicts with either" the Constitution or campaign finance statute, "the rule must be set aside").

Conclusion

The Secretary's new rules governing adjudication of campaign finance complaints are unmoored from (and in multiple instances as enumerated above contrary to) constitutional language and authority. Where the rules are contrary to express constitutional and/or statutory language, they are void *ab initio* and "must be set aside." *Gessler v. Colo. Common Cause*, 2014 CO 44, ¶9, 327 P.3d 232.

Additionally, the Secretary's usurpation of the constitutional enforcement process must be placed in the context of the Secretary's apparently intentional failure to defend the Colorado Constitution in order to effectively reverse the well-considered decision of Colorado voters to repeal the Secretary's role and authority in enforcement of campaign finance violations with the passage of Amendment 27 in 2002 (enactment of which as Article XXVIII repealed the previous enforcement authority in C.R.S. 1-45-111). The Secretary's role in overturning the express intent and will of the voters should not be overlooked, and must weigh in any judicial consideration of constitutional challenges to the Secretary's rules.

Regards,

_/signed/ Matt Arnold_____

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