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November 8, 2011

### MEMORANDUM

**TO:** Committee on Legal Services

**FROM:** Bob Lackner, Office of Legislative Legal Services

**RE:** Rules of the Secretary of State, Department of State, concerning campaign and political finance, 8 CCR 1505-6 (LLS Docket No. 110370; SOS Tracking No. 2011-00286).

#### STATUTORY REVIEW:

Pursuant to the provisions of section 24-4-103, C.R.S., the Office of Legislative Legal Services has examined the above-referenced rules to determine whether they are within the rule-making authority of the Secretary of State (hereinafter referred to as the "Secretary"). Under the provisions of section 24-4-103 (8) (c) (I), C.R.S., these rules are scheduled to expire on May 15, 2012, unless the General Assembly acts by bill to postpone such expiration.

#### RULES EXAMINED:

The rules examined by this office are rules of the Secretary concerning campaign and political finance.

The rules were adopted by the Secretary on a permanent basis on June 29, 2011. The Attorney General issued an opinion on the rules on July 12, 2011, and the rules were submitted to the Office of Legislative Legal Services on July 12, 2011.

#### CONCLUSIONS:

Currently, section 1-45-108 (2) (a) (I) (B), C.R.S., requires that candidate committees, political committees, issue committees, and political parties ("covered entities") report their campaign contributions and expenditures on the first Monday in July and on each Monday every 2 weeks thereafter before the primary election. Rule 5.13 effectively repeals this statutory requirement. Accordingly, Rule 5.13 conflicts with the statute.

**We therefore recommend that Rule 5.13 of the rules of the Secretary of State concerning campaign and political finance governing biweekly reporting of campaign contribution and expenditure information not be extended.**

ANALYSIS:

Rule 5.13 conflicts with section 1-45-108 (2) (a) (I) (B), C.R.S.

The text of Rule 5.13 reads as follows:

- 5.13 The requirement of section 1-45-108 (2) (a) (I) (B), C.R.S., to file reports of contributions and expenditures biweekly rather than monthly beginning in July before the primary election, was rendered infeasible by the enactment of Senate Bill 11-189, which moved the date of the primary election from August to June. Therefore, monthly filing as required by section 1-45-108 (2) (a) (I) (C), C.R.S., remains applicable through the primary election and until biweekly reporting begins in September before the November election as required by section 1-45-108 (2) (a) (I) (D), C.R.S.

Section 1-45-108 (2) (a) (I) (B), C.R.S., requires that covered entities report their campaign contributions and expenditures on the first Monday in July and on each Monday every 2 weeks thereafter before the primary election. Section 1-45-108 (2) (a) (I), C.R.S., is attached hereto as Addendum "A". Without explicitly overruling the statutory provision, Rule 5.13 states that this requirement was rendered infeasible by the provisions of Senate Bill 11-189, which moved the primary election from August to June. Section 1 of Senate Bill 11-189 amended the definition of primary election as follows:

**SECTION 1.** 1-1-104 (32), Colorado Revised Statutes, is amended to read:

**1-1-104. Definitions.** As used in this code, unless the context otherwise requires:

(32) "Primary election" means the election held on the ~~second Tuesday~~

~~of August in~~ LAST TUESDAY IN JUNE OF each even-numbered year.

Rule 5.13 replaces the statutory requirement of biweekly reporting from July through August (in accordance with section 1-45-108 (2) (a) (I) (B), C.R.S.) with a new requirement that covered entities undertake monthly reporting beginning the sixth month before the general election (in accordance with section 1-45-108 (2) (a) (I) (C), C.R.S.) to be supplemented by the biweekly reporting that commences in September before the general election (in accordance with section 1-45-108 (2) (a) (I) (D), C.R.S.). In so doing, Rule 5.13 contravenes section 1-45-108 (2) (a) (I) (B), C.R.S., by effectively repealing it and eliminating biweekly reporting of campaign finance information before the primary election. Moreover, the statute and the Rule may not be read in such a way as to eliminate this conflict. No rule may be adopted that conflicts with other provisions of law. *See* section 24-4-103 (4) (b) (IV), C.R.S.

Statutory changes are within the plenary power of the General Assembly. In this case, the determination as to when campaign finance disclosure should be made in advance of a particular election is a policy decision requiring legislative action.

The Secretary's rulemaking authority is limited to administering and enforcing rules to implement the policy choices made by other constitutionally empowered decision makers in the governmental process. Here, by promulgating Rule 5.13, the Secretary has improperly created new policy on a very controversial issue affecting the disclosure of campaign and political finance reports in the absence of any direction from the General Assembly to do so.

In connection with the enactment of Senate Bill 11-189, the General Assembly elected not to change the statutory biweekly reporting requirement at the time it moved the date of the primary election. Later in the same legislative session, the General Assembly did consider statutory changes to the reporting requirements contained in the Fair Campaign Practices Act to accommodate the change in the date of the primary election enacted in Senate Bill 11-189. On April 21, 2011, Senator Bob Bacon introduced Senate Bill 11-252, "Concerning a modification of deadlines in the 'Fair Campaign Practices Act' governing the reporting of basic campaign finance information." In general, the introduced version of the bill modified certain deadlines in subparagraph 1-45-108 (2) (a) (I), C.R.S., to accommodate the change in the date of the primary election resulting from Senate Bill 11-189. Specifically, the bill repealed sub-subparagraph 1-45-108 (2) (a) (I) (B), C.R.S., the biweekly reporting requirement at issue here, and made other changes to the deadlines

specified in subparagraph (I).

However, the sponsor, the Department of State, and other interested parties were not able to reach agreement on a modified disclosure schedule. On May 2, 2011, the bill was postponed indefinitely at the request of Senator Bacon.

The General Assembly's failure to enact legislation to address a perceived conflict among statutory provisions provides no authorization for the Secretary to unilaterally decide the issue by rule.

Without a specific delegation, the Secretary lacks the authority to assume the legislature's policymaking role and, accordingly, has exceeded his rulemaking authority. The substantive policy decision is the prerogative of the General Assembly. The introduction of, and subsequent discussions concerning, Senate Bill 11-252 make clear the strong interest of the General Assembly in the underlying policy choices governing the frequency of campaign finance disclosure in advance of various elections. By promulgating Rule 5.13 without authority from the General Assembly, the Secretary has improperly assumed the policymaking role that belongs to the legislative branch of our government under our constitutional structure. No authority exists for the Secretary to make this policy decision by rule.

In the Statement of Basis, Purpose, and Specific Statutory Authority that the Secretary provided in support of the promulgation of Rule 5.13, he argues that Rule 5.13 is necessary because the current observance of section 1-45-108 (2) (a) (I) (B), C.R.S., with its biweekly reporting requirements commencing in July and concluding in the middle of the following May resulting from the enactment of Senate Bill 11-189, makes no sense in off-year election years as a result of the change in the date of the primary election.

Nevertheless, the Secretary's rulemaking authority does not lawfully extend to promulgating rules that supersede statutory requirements in order to avoid what the Secretary perceives as a conflict among these statutory provisions. In fact, it is not at all clear that it makes no sense to require biweekly reporting for the 11-month period from July until the subsequent May even in off-year election years as would result from the continued implementation of section 1-45-108 (2) (a) (I) (B), C.R.S. In connection with the pending election cycle, many individuals who become candidates in the primary election to be held in June 2012 will not become candidates until much later than July 2011, and campaign activity is likely to be slow from July through December of the present year. As such, it is not clear that the requirement of biweekly reporting (even in an off-year) imposes any significant regulatory burden on a potential

filer, at least with respect to the period before candidates typically declare for office.<sup>1</sup>

Moreover, events change considerably the closer one gets to the primary election. By eliminating biweekly disclosure during the weeks immediately leading up to the primary election, the Rule eliminates disclosure during the period when it is most critical. In this period, biweekly disclosure is important because candidates are most likely to be raising and spending money during this period and the electorate has an increased interest in timely disclosure of these activities.

Rule 5.13 effectively repeals section 1-45-108 (2) (a) (I) (B), C.R.S. Because the Rule conflicts with the statute, we recommend that the Rule not be extended.

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<sup>1</sup> It should be noted that the existing Colorado Secretary of State Rules Concerning Campaign and Political Finance require an applicable committee to file a disclosure report for every reporting period, even if the committee has no activity (donations, expenditures, or contributions) to report during the reporting period. *See* Rule 4.18.

## ADDENDUM "A"

**1-45-108. Disclosure - definition.** (2) (a) (I) Except as provided in subsections (2.5), (2.7), and (6) of this section, such reports that are required to be filed with the secretary of state shall be filed:

(A) Quarterly in off-election years no later than the fifteenth calendar day following the end of the applicable quarter;

(B) On the first Monday in July and on each Monday every two weeks thereafter before the primary election;

(C) On the first day of each month beginning the sixth full month before the major election; except that no monthly report shall be required on the first day of the month in which the major election is held;

(D) On the first Monday in September and on each Monday every two weeks thereafter before the major election;

(E) Thirty days after the major election in election years; and

(F) Fourteen days before and thirty days after a special legislative election held in an off-election year.