Colorado
COMMON CAUSE
Holding Power Accountable

December 15, 2011

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

Re: Revised Rules Concerning Campaign and Political Finance, 8 CCR 1505-6

Common Cause is a nonpartisan, nonprofit organization that is dedicated to restoring the core values of American democracy, reinventing an open, honest and accountable government that serves the public interest, and empowering ordinary people to make their voices heard in the political process.

In 2002, Colorado voters passed Amendment 27 (now Article 28 of the Colorado Constitution) because they wanted to reduce the influence of money in our political process by establishing meaningful contribution limits and comprehensive disclosure. Colorado Common Cause is concerned that many of the proposed rules included in this rewrite of the campaign finance rules are in conflict with the constitutional and statutory provisions intended to provide for transparency in Colorado elections.

Article XXVIII, § 9(1)(b) of the Colorado Constitution, authorizes the Secretary to promulgate rules "as may be necessary to administer and enforce any provision of this [campaign and political finance] article." The Secretary does not have the authority to enact rules that modify or conflict with the constitutional or statutory provisions he is purporting to enforce and administer. In short, many of the proposed revisions amount to a rewriting of constitutional and statutory provisions, which is well outside the Secretary's rulemaking authority. Common Cause urges the Secretary to reconsider the proposed revisions in light of the plain language of the constitution, current statutes addressing campaign finance regulation, and the clear limits on his rulemaking authority.

1.4: We support the inclusion of strong coordination language in the campaign finance rules and are generally supportive of the proposed language in rule 1.4. However, we believe that proposed rule 1.4.3 requires clarification. We recommend amending the language to read:

1.4.3 THIS RULE DOES NOT ~~APPLY TO~~ PRECLUDE AN ATTORNEY, ACCOUNTANT, BOOKKEEPER, OR REGISTERED AGENT WHO PROVIDES SERVICES WITHIN THE SCOPE OF HIS OR HER PROFESSION FROM PROVIDING SERVICES TO TWO OR MORE CANDIDATE COMMITTEES OR POLITICAL PARTIES. HOWEVER, NOTHING IN THIS SUBSECTION MAY

BE INTERPRETED AS PROVIDING AN EXCEPTION TO THE RULES AGAINST COORDINATION BETWEEN CAMPAIGNS, REGARDLESS OF WHETHER SUCH COORDINATION OCCURS WITHIN THE SCOPE OF A PROFESSION.

1.7: The revised definition of Electioneering Communication will result in less disclosure of political spending in Colorado. As the U.S. Supreme Court noted in *Citizens United v. FEC*, 130 S.Ct. 876, 916 (2010), the disclosure of political spending "enables the electorate to make informed decisions and give proper weight to different speakers and messages." Rule 1.7 will allow more political spending to remain anonymous, and allow for the potential for corruption and the appearance of corruption to proliferate in Colorado elections. We urge the Secretary to reject proposed rule 1.7.

1.6 and 1.21: We do not oppose the concept of creating a 'designated filing agent' and recognize the need to create a structure so multiple staff or volunteers are empowered to complete campaign filings and communicate with the Secretary of State's office about such filings. However, we believe that it is important that there be one person who is responsible for the timeliness and accuracy of the filings. We suggest that language be added to clarify that the registered agent is still ultimately responsible for the filings of a committee, regardless of the activities of the designated filing agent.

1.10 and 7.2: We urge the Secretary to reject proposed rules 1.10 and 7.2 in their entirety. These rules would result in an interpretation of law contrary to the legislative intent in passing HB07-1074. The General Assembly's goal in establishing disclosure reporting for political organizations was to capture political activities that were not express advocacy but were intended to influence or attempt to influence the outcome of an election.

The proposed definition of "influencing or attempting to influence" in rule 1.10 and the reporting requirements as outlined in rule 7.2 narrow the range of political activities that would be reported to only those that are express advocacy. If these proposed rules are adopted, the Secretary of State will have essentially repealed HB07-1074. This is not within the Secretary of State's rulemaking authority.

1.12.3: Colorado Common Cause opposes this rule and urges that it be rejected. Proposed rule 1.12.3 creates an arbitrary definition of 'major purpose' that will allow large entities to spend significant amounts of money on issue campaigns and not file as an issue committee. Amendment 27 is clearly intended to require comprehensive disclosure of ballot issue spending. Furthermore, in 2010, the General Assembly passed HB10-1370, which defined 'major purpose' to clarify its meaning after the ruling in *Independence Institute v Coffman*. We see no authority in 1-45-103 (12) (B) CRS nor in Article XXVIII of the Colorado Constitution to set a 30% spending threshold to determine whether a group qualifies as an "issue committee." This proposed rule does not "administer and enforce" existing campaign finance law but rather creates a new standard that directly conflicts with existing law. We urge the Secretary to reject this rule.

Should the Secretary reject the changes proposed by Rule 1.12.3, we recommend retaining the current rules around multi purpose issue committees.

1.18.2: Article XXVIII of the Colorado Constitution defines political committee to "mean[] any person, other than a natural person, or any group of two or more persons, including natural persons that have accepted or made contributions or expenditures in excess of $200 to support or oppose the nomination or election of one or more candidates." The Constitution does not impose a major purpose test on political committees.

There is no basis for a rule that creates a major purpose test to limit which entities are required to register and report as a political committee. By creating a major purpose test and defining major purpose as more than 50% of an entity's spending, the proposed rule would allow entities to spend significant amounts of money on express advocacy with no disclosure. Contrary to the wishes of the people of Colorado as set forth in the Purposes and Findings section of Amendment 27, this proposed rule will decrease the full and timely disclosure of political spending and create the potential for corruption. This proposed rule does not administer and enforce existing campaign finance law but rather creates a new standard that directly conflicts with existing law.

2.2.5 Common Cause is concerned that this rule could be interpreted to allow candidates to fundraise for debt retirement in excess of the constitutionally established contribution limits. The rule would allow a candidate who has already received the maximum contribution allowed from a person during the election cycle when the candidate was on the ballot to receive an additional contribution from that same person since the contribution would count against the current election cycle contribution limits even though the candidate is not running in the current election cycle. For a candidate planning to terminate his or her candidate committee, the impact of this rule would be a doubling of the contribution limits set by the Colorado electorate with the passage of Amendment 27. We urge the Secretary of State to reconsider and clarify the language in this proposed rule.

4.1: We disagree with the Secretary of State's decision to read the *Sampson* ruling as justification to weaken Colorado's issue committee disclosure requirements, and, unrelated to the matters in *Sampson*, create a new loophole that allows up to $5,000 to be raised without ever being reported. We believe the Denver District Court in *Common Cause v. Gessler* properly interpreted the limits of the Secretary's rulemaking authority and the meaning of the disclosure laws overwhelmingly approved by voters. We ask the Secretary of State to focus on measures to facilitate compliance with the law, rather than actively working to undermine the constitutional and statutory provisions he is obliged to administer and enforce.

Common Cause urges the Secretary's office to improve its guidance for citizens who will be required to comply with disclosure rules going forward. The court in *Sampson* noted that the rules were too difficult to comply with and that the Secretary of State's office often encouraged citizens to seek outside legal advice. We do not believe that the reporting requirements are overly burdensome, but to the extent that there is confusion, this office should focus on providing clarity about the requirements rather than eliminating the requirements for groups that seek to influence Colorado elections. In fact, the Colorado

legislature has recently passed two bills in an effort to make clearer when groups must register and comply with ballot disclosure rules (HB 09-1153 and HB 10-1370).

5.2: Colorado Common Cause opposes this proposed rule and would urge the Secretary of State to maintain the language in the current rule 14.6. We disagree with an interpretation of SB10-203 that allows currently regulated committees including political parties, small donor committees and political committees to raise and spend unlimited funds through independent expenditure committees.

Current Rule 14.6 (as amended 6/29/11) states: "The registration of a committee as an independent expenditure committee does not exempt the committee from existing statutory and constitutional provisions limited the source, amount, or use of funds, nor does such registration exempt a committee from statutory and constitutional provisions relating to coordination."

The rule should explicitly state that existing contribution limits are still in effect for existing political parties and committees and cannot be ignored by establishing a separate independent expenditure committee.

15.6: We urge the Secretary of State to reject this rule. Like proposed rule 4.1, this rule is contrary to both constitutional and statutory provisions and, therefore, in excess of the Secretary's rulemaking authority. Not only does the $200 reporting trigger for issue committees remain in effect pursuant to the court ruling in *Common Cause v. Gessler*, but the proposed rule also specifically contradicts the language of HB 2010-41, which explicitly imposed reporting requirements on recall committees, which operate as "issue committees," when the committee collects or spends $200 or more.

17.4: Colorado Common Cause continues to oppose this rule for the same reasons we stated in our comments submitted on June 14, 2011 during that rulemaking hearing. This rule eliminates disclosure during the period when timely disclosure is most critical. In the weeks leading up to an election, biweekly disclosure is important because candidates are most likely to be raising and spending money and the electorate has an interest in timely disclosure of their activities.

We disagree with the Secretary of State's rationale for adopting this rule. While it is true that changing the date of the primary election from the second Tuesday in August to the last Tuesday in June results in additional disclosure reporting, additional reporting is not an absurd result. The Secretary may believe that the additional reporting is excessive, but the decision to eliminate biweekly reporting (or revert to the same number of reports as was previously required before a primary election) is a policy decision that requires legislative action.

Statutory changes are within the legislature's authority and their decision not to act must be read as an intent to keep the law as it is, requiring existing disclosure. Indeed, the legislature had the opportunity to act during the 2011 legislative session but did not.

Senate Bill 11-252 would have, among other things, modified the reporting requirements in advance of the primary and general elections. The Legislature did not adopt SB11-252.

We believe that this rule is beyond the Secretary of State's rulemaking authority.

When the legislature reconvenes, we would urge the Secretary's support of a statutory change that would maintain the integrity of the current law while adjusting to the new primary date in June. To maintain the current level of reporting, C.R.S. 1-45-108 (2)(a)(I)(B) should read: "On the second Monday in May and on each Monday every two weeks thereafter before the primary election;".

18.1: We continue to be concerned that the waiver structure allows for waivers to be granted where there is not good cause, which would be a violation of Article XXVIII, §10(2)(c), and would be outside the Secretary's rulemaking authority. The caps on campaign finance penalties established in new Rule 18.1.2 are contrary to the current statutory scheme and appear to exceed the Secretary's rulemaking authority. We renew our recommendation that the Secretary of State's office conduct a public review after the rules have been in place for an election cycle to ensure that this waiver structure is appropriate and complies with the Constitution.

We encourage the Secretary of State to revise the language in Scenario 2 regarding penalty caps to state that "penalty caps shall not apply to any willful delinquency". For each circumstance, the rule notes that "if a delinquency is found to be willful, the penalty cap *may* be increased". An entity that willfully chooses to disregard the law should be required to pay the full fine.

As explained in these comments, the proposed revised rules in many instances appear to be gross overreaching by the Secretary in excess of his rulemaking authority. We urge the Secretary to rethink his approach to these rule revisions and to focus on rules that administer and enforce the campaign finance laws rather than attempting to rewrite them. Thank you for the opportunity to comment. Please contact us if you would like additional information.

Sincerely,

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