

December 15, 2011

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

Re: Rules Concerning Campaign and Political Finance § CCR 1505-6

Dear Secretary Gessler:

I am writing on behalf of the Colorado Democratic Party to comment on your proposed rules concerning Campaign and Political Finance. The Colorado Democratic Party believes that several of the newly proposed rules directly conflict with the Colorado Constitution and existing Colorado Statutes, and such conflict is not cured by the cited case law authority in most cases. As a result, the Colorado Democratic Party believes that you will exceed your authority if you promulgate these rules.

Colorado voters passed Amendment 27 in 2002 with 66% of voters expressing the need for full and timely disclosure of campaign spending. See Colo. Const. art. XXVIII. The Colorado Democratic Party seeks to ensure compliance with this clear directive from Colorado voters. The purpose of Amendment 27 is set forth in Section 1 and declares, in relevant part, that:

The people of the state of Colorado hereby find and declare... that the interests of the public are best served by . . . providing full and timely disclosure of campaign contributions, independent expenditures, and funding electioneering communications and strong enforcement of campaign finance requirements.

Colo. Const. art. XXVIII, §1. The proposed rules appear to ignore this clear mandate provided in the Colorado Constitution and reiterated by the United States Supreme Court in its recent decision, *Citizens United v. FEC*, 130 S.Ct. 876 (2010), wherein the Court overwhelmingly upheld the need for full and timely disclosure of campaign spending.

Proposed Rule 1.7 – Electioneering Communications

Proposed 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. The revised definition of Electioneering Communication will result in less disclosure of political spending in Colorado, in direct contravention of the U.S. Supreme Court’s finding in *Citizens United v. FEC*, 130 S.Ct. at 916, that the disclosure of political spending “enables the electorate to make informed decisions and give proper weight to different speakers and messages.” We urge the Secretary to reject Proposed Rule 1.7.

Proposed Rule 1.12 and 4.1 – Issue Committee

We also urge the Secretary to reject Proposed Rules 1.12 and 4.1. 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 with no disclosure. Amendment 27 creates a comprehensive disclosure scheme for ballot issue spending. Additionally, in 2010, the General Assembly passed HB10-1370, which clarified the meaning of ‘major purpose’ after the ruling in *Independence Institute v Coffman*, 209 P.3d 1130 (Colo. App. 2008). The Proposed Rule 1.12 sets an arbitrary numeric threshold such that Issue Committees will only have to register and report if they have a major purpose of influencing an issue election, as evidenced by (a) annual expenditures of 30% or more of the organization’s revenue in support or opposition to a ballot issue; or (b) spending on written or broadcast communications to support or oppose a ballot issue that exceeds 30% of the group’s annual spending total. This new arbitrary numeric threshold is substantively different than the definition codified by the legislature and the plain language of Amendment 27. Additionally, the Colorado Court of Appeals came to the same conclusion in *Independence Institute v. Coffman*. This rule appears to be an attempt to change state law.

For example, an entity that would otherwise qualify as multipurpose issue committees would be exempt from registering and reporting its activity unless it reached the 30% or more of the entity’s annual spending total. Associations and corporations would be able to spend up to 30% of their total revenue influencing an election without ever disclosing such spending to the public. This type of anonymous influence creates the potential for corruption and the appearance of corruption in our elections – something the Supreme Court has repeatedly held is a basis for full and fair disclosure of political spending.

Moreover, the Colorado Democratic Party objects to the Secretary of State’s decision to read the *Sampson v. Buescher* ruling as a justification to weaken the issue committee disclosure requirements, and create a new loophole that allows up to \$5,000 to be raised by an issue committee without any type of disclosure. The Denver District Court in *Common Cause v. Gessler* properly interpreted the limits of the Secretary’s rulemaking authority and upheld the disclosure laws overwhelmingly approved by voters in Amendment 27. The Secretary of State should refrain undermining the constitutional and statutory provisions he is obliged to administer and enforce.

Proposed Rule 1.18 – Political Committee

The Colorado Democratic Party requests that the Secretary reject proposed Rule 1.18. Article XXVIII of the Colorado Constitution defines a political committee to “means[] 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.” This Constitutional definition does not impose a major purpose test on political committees.

Nonetheless, Proposed Rule 1.18 allows a Political Committee to avoid registration and reporting unless its “major purpose” is to support or oppose candidates, as evidenced by organizing documents that establish this as “a primary objective” or if expenditures on candidates exceed 50% of total spending “during the same period.” Similar to the concerns expressed regarding Rule 1.12 above, this proposed rule would permit an entity that would otherwise qualify as a multipurpose issue committee to be exempt from registering and reporting its activity unless it reached 50% or more of the entity’s annual spending total. This rule would allow large organizations to evade any type of registration and disclosure – a clear disregard for the wishes of the voters of Colorado and the plain language of the Colorado Constitution.

Proposed Rules 1.10, 7.2 – Political Organization

We urge the Secretary to reject Proposed Rules 1.10 and 7.2. The proposed new definition of Political Organization ignores the General Assembly’s intent when it adopted HB 07-1074, and as a justification therefore, cites the 35 year old case of *Buckley v. Valeo*, 424 U.S. 1, 1976, a case the General Assembly was well aware of in 2007 and had determined did not control in this instance. The Proposed Rule adds four new conditions to the existing definition adopted by the legislature in 2010. C.R.S. § 1-45-103(14.5). In order to trigger the registration and reporting requirements, the Proposed Rule requires that the Political Organization must (1) engage in express advocacy; (b) raise or spend more than \$25,000 in a calendar year; (c) have as its major purpose influencing or attempting to influence elections; and (d) is exempt, or intends to seek exemption, from taxation by the internal revenue service. There is no basis in current law to require an express advocacy or a major purpose test for Political Organizations. There is no basis in current law to exempt those organizations that spend less than \$25,000 annually from registration and disclosure requirements. Moreover, there is no basis, absent a Court order, for the Secretary of State to unilaterally overturn the clear will of Colorado voters on matters of unchallenged campaign finance regulation.

It is the obligation of the Secretary of State to uphold the law, not devise ways to circumvent it based on a contrary political ideology. Your proposals are a major change to existing law, at odds with what the voters adopted and in excess of what would be required to comply with more recently decided cases. Moreover, these rules appear to exceed the rulemaking authority of the Secretary because they directly conflict with existing Constitutional or statutory provisions.

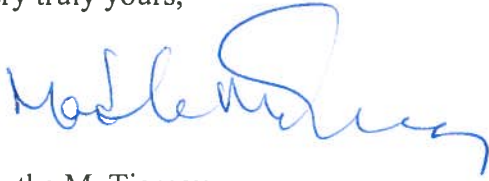
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Thank you for the opportunity to comment. Please do not hesitate to contact me should you desire additional information or wish to discuss these positions further.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Martha M. Tierney". The signature is fluid and cursive, with a large loop at the end.

Martha M. Tierney

cc: Rick Palacio, Chair, Colorado Democratic Party