July 25, 2016

Honorable Wayne Williams

Secretary of State of Colorado

1700 Broadway, Suite 250

Denver, CO 80290

Re: Notice of Proposed Rulemaking; Campaign and Political Finance, 8 C.C.R. 1505-6.

Dear Secretary Williams:

Colorado Ethics Watch ("Ethics Watch") is a nonpartisan, nonprofit watchdog group dedicated to ethics, transparency, and clean elections at the state and local level in Colorado. Ethics Watch respectfully submits these comments on the June 15, 2015 Notice of Proposed Rulemaking for Campaign and Political Finance Rules.

Ethics Watch was a supporter of both major pieces of campaign finance legislation enacted in the 2016 General Assembly that caused many of the proposed changes in this Rulemaking. Ethics Watch overall supports the proposed rules, however, some clarifications are suggested to properly implement these new laws. In addition, Ethics Watch believes the proposed changes to rules regarding enforcement of campaign finance laws (not required by recent legislation) raise significant concerns regarding the effectiveness of the campaign finance regulatory scheme in Colorado for this election year and in the future.

Reporting for Regular Biennial School Elections

HB 16-1282 revised disclosure requirements in C.R.S. 1-45-107.5 and 1-45-108 as they relate to activity conducted in regular biennial school elections in odd-numbered years. The intent of this legislation was to change reporting requirements in the following ways:

1. Create "regular biennial school electioneering communication" disclosures that must be filed by any person for certain advertisements in the last sixty days before a school election (C.R.S. 1-45-103(15.5) & 1-45-108(1)(a)(III));
2. Require 48-hour notices be filed by any person for independent expenditures made within thirty days of a school election (C.R.S. 1-45-107.5(4) & (6));
3. Require any political committee, small donor committee, independent expenditure committee or political organization that participates in a school election to switch to a "frequent" filing schedule once such related spending occurs (C.R.S. 1-45-108(2)(a)(V));
4. Require all school board candidates to file reports on the "frequent" filing schedule during most of the year of their school election (C.R.S. 1-45-108(2)(a)(III); and
5. Apply the required 24-hour disclosure of major contributions to all committees and candidates within thirty days of a school election (C.R.S. 1-45-108(2.5)).

While we generally support the proposed rule changes regarding HB 16-1282, the proposed rules appear to implement these new provisions somewhat incompletely in a way that may create confusion during regular biennial school election year (starting in 2017). We suggest the following revisions and clarifications to the proposed rules to avoid such confusion.

1. Regular Biennial School Electioneering Communications

The proposed rules properly amend Rule 11 to add "regular biennial school electioneering communications" to the requirements of Rule 11.2, 11.3 and 11.4. However, Rule 11.5 is not amended. Does the Secretary intend that the permission for committees to not file separate electioneering reports if the spending is disclosed on the next regular report to also apply to regular biennial school electioneering communications? Based on the new requirements in 1-45-108(2)(a)(V), any registered committee that makes a regular biennial school electioneering communication would be considered "participating" in the school election and must switch to a frequent filing schedule as of the date of such spending. Thus, regular reporting will be filed by those committees that could include this spending instead of a stand-alone report. Rule 11.5 should be amended to make clear that both the filing provision and the requirement that names of candidates be reported in the next regular report apply in the context of regular biennial school electioneering communications as well. By amending all other subsections

except Rule 11.5, it could be interpreted as the Secretary's intent to explicitly NOT apply Rule 11.5 to these new communications as compared to the application of all other provisions governing electioneering communications.

2. Frequent Filing Schedule Changes

The proposed rules amending the definition of "frequent filing schedule" do not fully incorporate the changes in HB 16-1282. First, the proposed new Rule 1.7.3 does not state that the frequent filing schedule for political committees, small donor committees, independent expenditure committees and political organizations only begins as of the date of an expenditure or spending in connection with the school election. A committee could remain on the infrequent filing schedule until two weeks before a November school election, and only then make an expenditure that requires switching to a frequent filing schedule for the rest of the calendar year. A similar change is proposed in Rule 17.2.2(a) concerning filing schedules. We suggest both proposed Rules 1.7.3 and 17.2.2 be clarified to include notice of that trigger.

More confusing is the lack of any proposed amendments to Rules 1.7.2 or 17.2.1 regarding the filing schedules for school board candidate committees. Under the Secretary's interpretation of the prior law (reflected in candidate filing calendars), school board candidates were categorized with "county, municipal and special district candidates" and instructed to file under the separate calendar in section 1-45-108(2)(a)(II) (Rule 1.7.2) in years of regular school elections. HB 16-1282 specifically changed those requirements by adding "regular biennial school election" the definitions of "election year" and "major election" in C.R.S. 1-45-108(2)(a)(III). This change was intended to move school board candidates out of the county, municipal and special district candidate election year reporting schedule (referenced in Rule 1.7.2) and instead require reporting on a frequent filing candidates for all school board candidates starting on the first day of each month beginning the sixth month before their election. Current (and proposed) Rule 1.7 does not refer to school board candidates specifically.

We suggest the Secretary add a new Rule 1.7.4 specifically for school board candidates to explain the frequent filing schedule that now applies to those candidates for the last six months before their election pursuant to C.R.S. 1-45-108(2)(a)(III), which differs from other types of candidates. Moreover, because of the prior Secretary interpretation categorizing school board candidates with county, municipal and special district candidates, we suggest the Secretary

amend Rule 17.2.1 to specifically state that school board candidates are required to file on a frequent filing schedule in the last six months of the year in which they are up for election. This is slightly different rule than other state candidates currently referred to in Rule 17.2.1, so the clarification would aid compliance with the new legislation.

Because the Rules do not address 48-hour reports for independent expenditures and 24-hour reports for major contributions, we do not believe any additional amendments are required to implement those portions of HB 16-1282.

Small-Scale Issue Committees

SB 16-186 added new provisions to the disclosure requirements of C.R.S. 1-45-108 by defining a new sub-category of committee: "small-scale issue committee" ("SSIC") as a temporary measure to comply with the Tenth Circuit ruling in *Coalition for Secular Gov't v. Williams* while awaiting disposition of a petition for *certiorari* for U.S. Supreme Court review. The goal of the legislation was to create limited registration and reporting requirements for organizations which met the definition of "issue committee" (including the $200 threshold) but have raised or spent less than $5,000. *See* C.R.S. 1-45-103(16.3. Once a SSIC reaches $5,000 in activity reporting requirements transition to those of all other "issue committees." *See* C.R.S. 1-45-108(1.5)(c).

The proposed rules appropriately amend many rules to include "small-scale issue committees" in provisions governing all types of issue committees because SSICs are a subset of the Colorado Constitution definition of issue committee and should be treated the same for all areas of the law except the registration and reporting requirements amended in SB 16-186. Therefore, we support proposed Rules 3.1 (prohibition on contributions), 8.1.3 (identification of ballot measure), and 17.6 (municipal measures).

Proposed Rule 4.4 implements SB 16-186 by enacting a new rule governing SSIC registration and reporting. A few clarifications in the language of the proposed rule would aid compliance with the new SSIC rules and the transition to full issue committee reporting. First, in proposed Rule 4.4.1 we suggest language to make clear that if a SSIC supports or opposes more than one ballot measure the $5,000 threshold for contributions or expenditures applies to aggregate activity of the SSIC for all ballot measures. Without such language, proposed Rule

4.4.1 could be read to allow an SSIC to conduct up to $5,000 per ballot measure without triggering the transition to full issue committee reporting in C.R.S. 1-45-108(1.5)(c).

Second, proposed Rules 4.4.3 and 4.4.4 should be more explicit regarding the reporting obligations at the time of transition from an SSIC to an issue committee. Pursuant to C.R.S. 1-45-108(1.5)(c), when an SSIC reaches the $5,000 threshold it must:

1. Notify the Secretary of the change in the committee's status to full issue committee (C.R.S. 1-45-108(1.5)(c)(III);
2. Report every contribution accepted or expenditure made (including names and amounts) up to the $5,000 threshold (C.R.S. 1-45-108(1.5)(c)(I); and
3. Start disclosing all contributions and expenditures after the $5,000 threshold according to the regular requirements and periodic reporting schedule for issue committees (C.R.S. 1-45-108(1.5)(c)(II)).

The notification is required to be sent to the Secretary within fifteen days of reaching the threshold, but the statute does not set any timing requirement for the report including the first $5,000 of contributions or expenditures. We support proposed Rule 4.4.3's requirement that an SSIC file the report of these early contributions and expenditures within five days of the notice sent to the Secretary. Proposed Rule 4.4.4 then requires the first issue committee report after the transition (timing will vary based on the reporting calendar at that time) to include the SSIC funds on hand as a beginning balance. A few things are unclear about the transition from these proposed rules. Is the Secretary expecting an SSIC to file a notice and then file the report of contributions and expenditures as the last filing of the SSIC before terminating the SSIC and registering a new issue committee whose first filing will include a starting balance but no information as to the contributions or expenditures before that balance? If so, does the Secretary intend that TRACER link back to the SSIC filings so voters will have that information when looking at the new issue committee reports? Or will the registered entity remain the same without any termination but just an increase in reports filed after the transition from SSIC to issue committee?

We suggest proposed Rule 4.4 set forth a clear transition timeline requiring a SSIC to (1) file a notice with the Secretary within fifteen days of reaching the threshold; (2) file the first report of contributions and expenditures within five days of that notice; and (3) continue to

report on the issue committee schedule from that point forward with TRACER automatically carrying forward cash on hand from that first report. This could be accomplished by including more specific instructions in proposed Rule 4.4.3 and eliminating the proposed Rule 4.4.4 for a "first report" (which is actually the second report) including a starting balance based on the SSIC cash on hand after the actual initial report (filed five days after threshold notice). Similarly, proposed Rules 10.2 and 10.3 should clarify that the transition report filed by a SSIC disclosing the first $5,000 in contributions or expenditures is subject to the itemization and occupation/employer requirements in those Rules in the same way as all subsequent reports filed after the transition.

Enforcement of Campaign Finance Requirements

The Secretary proposes deleting Rules 18.2 and 18.3 as "duplicative of the Colorado Constitution or statute and obsolete." However, this change would repeal a longstanding rule that limits the secretary's discretion to file a private-party campaign finance complaint under Article XXVIII, Section 9(2)(a) to situations where the Secretary discovers possible violations of reporting requirements, notifies the person who may be in violation, and if the person notified does not correct the violation within a fifteen-day cure period, the Secretary may file a complaint. These proactive enforcement measures are not detailed elsewhere in the Colorado Constitution or statute, although the authority underlying this rule generally exists in those provisions because the Secretary is a "person" who may file a private-party enforcement complaint. *See Patterson Recall Comm. v. Patterson*, 206 P.3d 1210, 1216 (Colo. App. 2009) (predecessor rules to Rules 18.2 and 18.3 grant permission to the "appropriate officer" to file private party complaints). The purpose of these rules is to give the Secretary an efficient means to promote compliance with technical filing rules.

When the predecessor to Rules 18.2 and 18.3 was initially adopted in 1999, its stated purpose was to prevent formal complaints and imposition of penalties against persons attempting in good faith to comply with campaign finance laws. The rule provided an alternative to the formal complaint process by allowing the Secretary of State to notify the possible violator and provide an opportunity for the violation to be cured without formal litigation.

By deleting Rules 18.2 and 18.3, it appears the Secretary will no longer take even this minor action to enforce campaign finance laws. Such a move will undermine enforcement of the

campaign finance reporting requirements, as the Secretary is the repository of much information and documentation from reporting entities that may indicate potential violations. The Secretary has the constitutional duty to "administer and enforce" Colorado's campaign finance laws under Article XXVIII, Section 9(b).

Instead of decreasing administrative enforcement of reporting requirements, we urge the Secretary to retain these Rules and modernize the TRACER system to provide notices of violations without requiring an increase in staff resources. Currently, the TRACER system will provide notice and start tallying fines when a required report is not filed on the due date. The same approach could be programmed into TRACER for technical reporting violations, such as reporting contribution of excessive amounts, leaving blank the candidate name and support/oppose information for an electioneering communication report, or omitting the occupation/employer information for a contribution greater than $100. We understand other campaign finance systems, such as the system used for Denver municipal elections, have such violations built into the programming so that a filer receives an "error" message if they attempt to enter an excessive contribution or similar items to flag technical reporting violations.

Using the TRACER technology to handle these technical violations would promote compliance with reporting requirements and provide a more consistently complete public record for voters. TRACER notifications would also more efficiently enforce these reporting provisions than the full administrative complaint process at government (and the parties') expense. Finally, uniform TRACER administrative enforcement would decrease the possibility of selective enforcement of technical reporting violations through litigation.

To be sure, the elimination of Rules 18.2 and 18.3 will not prevent appropriate officers from filing campaign finance complaints under the private-party system; they have the same right as any other person to file such complaints. The elimination of these two Rules will simply mean that there will be no notice or standards to govern the appropriate authority's exercise of discretion as to when a private-party enforcement complaint should be filed.

We suggest retaining Rules 18.2 and 18.3 and implementing those rules through technical upgrades in the TRACER system such as those in use elsewhere in the state and country.

We will be happy to respond to any questions regarding these comments and suggestions during the public hearing regarding this Rulemaking.

Respectfully Submitted,

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Senior Counsel