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Secretary Williams, Deputy Secretary Staiert –

Attached find comments and recommendations on proposed draft amendments to the Rules Concerning Campaign and Political Finance submitted by Campaign Integrity Watchdog.

Campaign Integrity Watchdog is the state's premier enforcer of the state's campaign finance laws, having successfully prosecuted more violators than any other organization in the state's history – including prosecutions, and successful affirmation of, the state's laws against the current Secretary's attempts to shield political allies and re-write the laws and regulations for the benefit of violators.

As such, Campaign Integrity Watchdog is uniquely situated to comment on the proposed amendments, many of which violate state law, judicial precedent, and exceed the Secretary's rulemaking authority.

Specific comments on proposed amendments:

a) **Rule 1.6**: the Secretary's proposed elimination of this rule is particularly striking since it was the current Secretary who (correctly) instituted the rule, in an attempt to clarify confusing language exploited by violators attempting to evade the transparency and accountability that is the clear, express purpose of the Article and Fair Campaign Practices Act (FCPA). The current Rule 1.6 **did** achieve more "uniform and proper administration of Colorado campaign and political finance laws" and the Secretary's about-face in proposing elimination of this rule undermines clarity of law and its consistent application. Indeed, elimination of this rule would run counter to several recent court rulings upholding the state's disclosure requirements for a range of campaign acts.

b) **Proposed Rule 1.7**: the Secretary's proposed Rule 1.7 adds an element to the statutory language defining "Independent Expenditure Committee" and the constitutional language defining the term "Political Committee" that is not only absent from both constitutional and statutory text, but runs directly counter to multiple rulings of both Colorado and Federal Courts.[1]

[1] See among others: OS 2016-0005 *Campaign Integrity Watchdog v. Colorado Citizens Protecting Our Constitution*; OS 2016-0018 *Campaign Integrity Watchdog v. Citizens for Reasonable Rational and Responsible Governance*; and OS 2016-0014/-0030 (combined) *Campaign Integrity Watchdog v. Colorado Pioneer Action & Colorado Right Now*. Federal jurisprudence, beginning with the seminal *Buckley v. Valeo*, 424 U.S. 1 (1976) holds that an organization may qualify as a "political committee" in the absence of coordination if its "major purpose" is the "nomination or election of a candidate." *Id*. at 79 More recently, *Citizens United v. FEC*, 558 U.S. 310 (2010) upheld disclosure requirements for contributions to political committees even absent "coordination" with candidates. See also *Republican Party of N.M. v. King*, 741 F.3d 1089, 1096-97 (10th Cir. 2013)

c) **Proposed Rule 1.21**: the Secretary's proposed Rule 1.21 seeks to re-write clear constitutional language defining "political committee" per Colo. Const. Art. XXVIII §2(12) by adding an element of "coordination" into the definition that not only does **not** exist in the constitution, contradicts both state and federal jurisprudence[2] and is not even logically coherent (how can "coordination" occur with a candidate that a political committee acts to **oppose**? ***It's logically impossible***). The Secretary's attempt to engraft a "coordination with candidates" requirement onto contributions accepted or made to ***oppose*** candidates indulges in a logical impossibility; how could an entity "coordinate" with a candidate that it acted to oppose? ("Excuse me, candidate X – do you mind that we accept contributions to oppose your nomination or election to office? Gee, thanks.") Also, the Secretary's proposed rule change adding the element of "coordination" contradicts federal jurisprudence[3] which has upheld disclosure requirements absent candidate coordination as well as Colorado jurisprudence addressing this specific issue.[4]
The Secretary thus not only exceeds his authority with this proposed rule, he does so in direct and unambiguous contradiction to both state and federal jurisprudence on the specific topic.

d) **Proposed Rule 2.2.4(c)(3**): **Support**. Clarifies the principle that federal campaign funds, collected under entirely different (and often contradictory) disclosure rules cannot "cross the stream" with contributions accepted for state, county, or local candidate committees.

e) **Proposed Rule 2.4.5**: **Oppose**, as the Secretary's proposed Rule 2.4.5 contradicts the Article's clear and unambiguous purpose of promoting transparency for "special interest" organizations; knowledge concerning board or committee membership with organizations that have either a fiduciary or political interest in influencing elections, legislation, or ballot initiatives is a crucial element of "full and timely disclosure" as expressly stated in the Article's Section 1 ("Purpose") and the FCPA's Section 2 ("Legislative Declaration").

f) **Proposed Rule 2.5**: No comment or position taken

g) **Proposed Rule 3.3**: **OPPOSE**. As noted *supra*, the Secretary's illicit attempt to re-write the state constitution and associated statutes not only exceeds the Secretary's authority, it directly contradicts extant federal and state case law and recent court rulings in which the Secretary's attempts to re-write the law have been explicitly and clearly rejected.

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[2] *Id*.

[3] See for example, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 170 n. 64 (2003), overruled on other grounds by *Citizens United v. Fed. Election Comm'n*, 538 U.S. 310 (2010) (rejecting a vagueness challenge to the phrase, "promotes or supports a candidate for that office, or attacks or opposes a candidate for that office"); *Nat. Org. for Marriage v. McKee*, 649 F. 3d 34, 62-64 (1st Cir. 2011) (rejecting vagueness challenge to the terms "promoting," "support," and "opposition"); and *Center for Individual Freedom v. Madi*gan, 697 F. 3d 464, 486 (7th Cir. 2012) (rejecting a vagueness challenge to "with the purpose of" and "advocating the defeat or passage"). Moreover, the fact that the drafters of Article XXVIII used the words "controlled by or coordinated with" in §§2(9) and 5(3) dealing with independent expenditures, but not in §2(12) defining political committee, suggests that the omission was intentional."

[4] See generally, *Colo. Right to Life Comm. v. Coffman*, 498 F. 3d at at 1155 (exclusion of language referencing "coordination" in the definitions of "contribution" indicates that the omission was "deliberate and consistent with the state citizenry's intent.")

Specifically, the Secretary's proposed Rule 3.3 seeks to re-write clear constitutional language defining "political committee" per Colo. Const. Art. XXVIII §2(12) by adding an element of "coordination" into the definition that not only does **not** exist in the constitution, it contradicts both state and federal jurisprudence[5] and is not even logically coherent (how can "coordination" occur with a candidate that a political committee acts to **oppose**? ***It's logically impossible***). The Secretary's attempt to engraft a "coordination with candidates" requirement onto contributions accepted or made to ***oppose*** candidates indulges in a logical impossibility; how could an entity "coordinate" with a candidate that it acted to oppose? ("Excuse me, candidate X – do you mind that we accept contributions to oppose your nomination or election to office? Gee, thanks.") Also, the Secretary's proposed rule change adding the element of "coordination" contradicts federal jurisprudence[6] which has upheld disclosure requirements absent candidate coordination as well as Colorado jurisprudence addressing this specific issue.[7]

The Secretary thus not only exceeds his authority with this proposed rule, he does so in direct and unambiguous contradiction to both state and federal jurisprudence on the specific topic.

h) **Proposed Rule 4.4.3**: No Comment.

i) **Proposed Rule 4.5**: **Support**. The new language clarifies requirements for issue committees left ambiguous by statute and provides guidance for compliance consistent with both the specific statutory provisions and the Article's overall purpose of promoting transparency in reporting.

j) **Proposed Rule 4.6**: Request for Clarification. This proposed rule seems to contradict the rule proposed immediately prior linking Issue Committee registration with title designation for the ballot; would it not make more sense to tie the election cycle for an issue committee with the election cycle for which the supported/opposed ballot measure appears on the ballot? This proposed rule, as currently written, seems to increase rather than decrease confusion.

k) **Proposed Rule 10.1.3**: **Support**. This proposed rule simply clarifies in rule what is already explicit in statute (specifically, C.R.S. 1-45-106(1)(a)(II) stating "[I]n no event shall contributions to a candidate committee be used for personal purposes not reasonably related to supporting the election of the candidate") and presumably extends the prohibition on the use of committee funds for personal purposes to other committee types. Consider adding language to make clear and explicit that the prohibition includes any/all committee types regulated under the Article.

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[5] *Id*.

[6] See for example, *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 170 n. 64 (2003), overruled on other grounds by *Citizens United v. Fed. Election Comm'n*, 538 U.S. 310 (2010) (rejecting a vagueness challenge to the phrase, "promotes or supports a candidate for that office, or attacks or opposes a candidate for that office"); *Nat. Org. for Marriage v. McKee*, 649 F. 3d 34, 62-64 (1st Cir. 2011) (rejecting vagueness challenge to the terms "promoting," "support," and "opposition"); and *Center for Individual Freedom v. Madi*gan, 697 F. 3d 464, 486 (7th Cir. 2012) (rejecting a vagueness challenge to "with the purpose of" and "advocating the defeat or passage"). Moreover, the fact that the drafters of Article XXVIII used the words "controlled by or coordinated with" in §§2(9) and 5(3) dealing with independent expenditures, but not in §2(12) defining political committee, suggests that the omission was intentional."

[7] See generally, *Colo. Right to Life Comm. v. Coffman*, 498 F. 3d at at 1155 (exclusion of language referencing "coordination" in the definitions of "contribution" indicates that the omission was "deliberate and consistent with the state citizenry's intent.")

l) **Proposed Amendment to Rule 10.2.3(b)**: **Oppose**. The Secretary again exceeds his authority in attempting to re-write the constitutional requirement to return undocumented contributions to the source within 30 days, which constitutional requirement exists independently of ***reporting*** requirements; failure to comply with the constitutional requirement to return undocumented (and thus illegal) contributions is a separate violation from the failure to file a report including the missing information as required by statute. Additionally, the Secretary's proposed rule change seeks to re-write the law in contradiction of recent court rulings affirming that failure to report and failure to return undocumented (illegal) contributions are separate violations.[8]

m) **Proposed Rule 10.4.6**: **Oppose**. The Secretary again attempts to re-write the law for the benefit of political allies and seeks to overturn recent Court rulings[9] (and contradict the long-standing, unambiguous guidance issued by the Secretary's office)[10] that a contribution cannot come from two people, and that the contributor must be presumed to be the person writing the check. Such longstanding guidance and court precedent is common sense, and should not be written out of existence nor overturned for the benefit of the current Secretary's political allies.

n) **Proposed Rule 10.11.3**: it is unclear just what is being amended; the same word is substituted.

o) **Proposed Rule 12.4**: Request for clarification. Does the proposed rule also apply to committees with outstanding obligations (particularly outstanding obligations owed the state pursuant to delinquent reporting and/or adjudication) not otherwise allowed to be terminated? **Oppose**, if that is the case; no contention otherwise.

p) **Proposed Rule 15.4**: No comment

q) **Proposed Amendments to Rule 18.2**, Written Complaints:
   i. Proposed Amendments to Rule 18.2.1: **Support** amendment to Rule 18.2.1(a) as a common-sense addition to most accessible form of communication; **Oppose** the amendment to Rule 18.2.1(b), or alternatively support with addition of "if known" (since, particularly for unregistered violators, the email address may not be known); Support the amendment to Rule 18.2.1(c) as consistent with the Colorado Rules of Civil Procedure and Office of Administrative Courts General Rules of Procedure, and generally as consistent with providing notice and due process to Respondents.

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[8] See **OS 2017-0004 Final Agency Decision**, *Campaign Integrity Watchdog v. Friends and Neighbors of Dan Pabon*, at 2 (Findings of Fact, ¶3) and at 7-8

[9] See OS 2017-0002 *Campaign Integrity Watchdog v. Colorado Republican Party Political Committee* FAD at 1, and OS 2017-0003 *Campaign Integrity Watchdog v. Colorado Republican Committee* Final Agency Decision (FAD) at 1

[10] See **Campaign Finance Manual**, rev. October 2016, p. 33 "Contributions from a Couple or Joint Account Holders: "A contribution cannot come from two people. Therefore, couples and joint account holders should each write their own separate checks, and note in the "memo" space which person the contribution is from. Absent such notation, **the recipient committee shall attribute the contribution to the person writing the check**. A couple cannot write one check for an amount in excess of the contribution limits with the intent of the check total representing **a contribution from two separate persons**."

ii. **Proposed Amendments to Rules 18.2.2 and 18.2.3**: Request for Clarification. Does the Secretary intend, with the proposed amendments to these rules, to eliminate electronic filing of campaign finance complaints in their entirety and force Complainants to travel to the Secretary's office in Denver to file hardcopy-only complaints? If so, OPPOSE, since precluding the avenue of filing complaints electronically disproportionately acts to disadvantage Complainants from outside the Denver Metro area and deprive them of due process and the exercise of a constitutionally guaranteed right (Art. XXVIII §9(2)(a))

r) **Proposed Rule 18.2.3 ("Substantial Compliance"): Oppose.** Once again, the Secretary attempts to re-write constitutional and statutory language and impose on campaign finance violations a "substantial compliance" standard that has been rejected by the Colorado Court of Appeals.[11] The Secretary cannot overturn constitutional and statutory language, and case law, by rule.

s) **Proposed Rule 18.2.4**: **Oppose**. The Secretary's attempt to impose a percentage-based test on "good faith" compliance is not only unsupported in constitutional and statutory language, it runs directly counter to express and unambiguous statements of purpose in the ***Article*** (Section 1) and statute (C.R.S. 1-45-102, Legislative Declaration) as well as extant case law and decisions.[12] The Secretary's attempt to create a percentage-based "good-faith" compliance standard thus not only contradicts constitutional and statutory language, as well as extant case law, but clearly exceeds the Secretary's authority (similar to an attempt to introduce a percentage-based legal standard for determining "major purpose" was rejected by the Colorado Court of Appeals).[13]

t) **Proposed Rule 18.4**: **Oppose**. Again, the Secretary attempts to re-write (effectively eliminate) the constitutional[14] and statutory[15] mandates imposed on his office for collection of debts owed the state, in violation of his fiduciary duties and apparently for the benefit of his political allies.[16] The Secretary's proposed rule would effectively preclude collection of debts due the state from any and all non-candidate committees by eliminating the "data and information necessary for the controller to institute collection" (i.e. committee registered agent, the legal designee for service of legal proceedings including collection of debt), eviscerating the constitutional and statutory mandate for debt collections.

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[11] See 15CA1110, *Campaign Integrity Watchdog v. Dan Thurlow/55*, *certiorari* denied 27 March 2017, at 14 ¶31: "Thus, Article 45 falls outside of the "substantial compliance" mandate based on the plain language of the statutes in Article 1."

[12] *Id*. at 18 ¶36, 37 and at 19, ¶39

[13] See *Colorado Ethics Watch, Paladino et. al. v. Gessler* 2013 COA 172 M

[14] See Colo. Const. Art. XXVIII Section 19(d): "Any unpaid debt owed the state resulting from a penalty imposed pursuant to this subsection (2) shall be collected by the state in accordance with the requirements of section 24-30-202.4, C.R.S. or any successor section."

[15] See C.R.S. 24-30-202.4 "Collection of debts due the state"), in relevant part: "all state agencies shall refer to the state controller debts due the state that the agency has been unable to collect within thirty days after such debts have become past due, together with the data and information necessary for the controller to institute collection"

[16] See cases OS 2014-0006/-0009/-0011 *Campaign Integrity Watchdog v. Alliance for a Safe and Independent Woodmen Hills* in which SOS Williams has refused to institute collection of debts due the state, as required by law; see also case OS 2016-0018, *Campaign Integrity Watchdog v. Citizens for Reasonable Rational & Responsible Governance*, in which the Secretary (under pressure) has initiated collection procedures that would be overturned by adoption of this rule.

Finally, the Secretary's 'Statement of Basis, Purpose, and Specific Statutory Authority' contains several material misrepresentations of fact and law that should not go unchallenged. Specifically:

- Repeal of Rule 1.6 would undermine and detract from uniformity in administration of current law
- Proposed Rule 1.7 would undermine and detract from uniformity in administration of current law and runs counter to both constitutional and statutory language and extant case law
- Proposed Rule 1.21 would undermine and detract from uniformity in administration of current law and runs counter to both constitutional and statutory language and extant case law
- Proposed Rule 3.3 would undermine and detract from uniformity in administration of current law and runs counter to both constitutional and statutory language and extant case law
- Proposed Rule 4.5 would undermine and detract from uniformity in administration of current law and runs counter to both constitutional and statutory language and extant case law
- Proposed amendments to Rule 10.2.3 contradict extant case law and exceed the Secretary's authority
- Proposed Rule 10.4.6 would undermine and detract from uniformity in administration of current law and runs counter to both constitutional and statutory language and extant case law
- Proposed Rule 18.4 would undermine and detract from uniformity in administration of current law and runs counter to both constitutional and statutory language and extant case law

Notably, the Secretary's Rulemaking Authority is limited to rules "as may be necessary to **administer** and **enforce** any provision of [Article XXVIII of the Colorado State Constitution]" – not to **re-write the law**.

Consequently, because several of the Secretary's proposed rules changes, amendments, additions, and/or deletions exceed the Secretary's authority and are not meant to administer and **enforce** the law, temporary adoption of the rules **does not comply with the law** nor preserve the public welfare.

Further, as several of the proposed rules changes, amendments, additions, and/or deletions appear to be promulgated specifically "with intent to obtain a benefit for the public servant or another or maliciously to cause harm to another" the changes may constitute first degree official misconduct as defined under C.R.S. 18-8-404, a class 2 misdemeanor criminal offense.

Respectfully submitted this 4th day of August 2017.

_/signed/ *Matt Arnold*_____

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