



**Martha M. Tierney**  
Direct Dial: 303 ■ 376 ■ 3711  
mtierney@hpgfirm.com

July 27, 2012

**VIA EMAIL**

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

Re: Election Rules – 8 CCR 1505-1

Dear Secretary Gessler:

I am writing on behalf of the Colorado Democratic Party to comment on your proposed rules concerning Elections noticed on July 18, 2012 and June 15, 2012. The Colorado Democratic Party believes that several of the newly proposed rules conflict with existing Colorado Statutes. As a result, the Colorado Democratic Party believes that you will exceed your authority if you promulgate these rules. Additionally, some of the rules would benefit from revisions to make them clearer and less open to differing interpretations.

**Proposed Rules 8.6.3 and 8.6.4 – Watchers**

Watchers play a critical role in the conduct of elections. Historically, watchers have received disparate treatment amongst Colorado's 64 counties, rendering them hugely effective in one county, while lacking any meaningful opportunity to observe in another. The proposed new watcher rules do not cure the wide disparities historically experienced by watchers across the State and may result in further restrictions that are not permitted under the law. Section 1-7-108(3), C.R.S. provides that

Each watcher shall have the right to maintain a list of eligible electors who have voted, to witness and verify each step in the conduct of the election from prior to the opening of the polls through the completion of the count and announcement of the results, to challenge ineligible electors, and to assist in the correction of discrepancies.”

The six foot limitation contained in Section 1-5-503, C.R.S., applies only to the voting equipment or voting booths, and the ballot box. The proposed Rule 8.6.3 creates a new six foot baseline for watchers observing all other activities outside the immediate voting area. This rule has no basis in law, directly conflicts with the statutory rights of watchers delineated in Section 1-7-108(3), and when combined with the discretion granted in proposed Rule 8.6.4, will result in the perpetuation of widely differing treatment for watchers amongst Colorado's 64 counties. Moreover, proposed Rule 8.3.6 may invite the use by election officials of rooms sized or configured in a way that does not permit Watchers to meaningfully observe. Proposed Rules 8.6.3 and 8.6.4 will result in less uniformity in elections, not more.

Contrary to the proposed rules, Rule 8.6 should make it clear that Watchers are permitted to witness and verify each step in the conduct of the election, that no six foot barrier exists outside the voting equipment/voting booths and ballot box, and that so long as the Watcher is not improperly interfering with the conduct of the election, the Watcher may observe from any distance that allows for meaningful witness and verification.

#### **Proposed Rule 12.4.1(d) – Inactive Failed to Vote**

The Colorado Democratic Party urges the Secretary to reject Proposed Rule 12.4.1(d), which limits access to the ballot by eligible voters who have been designated "inactive failed to vote." These proposed rules exceed the agency's rulemaking authority because they are inconsistent with Colorado statutes.

In 1992, the General Assembly adopted the Mail Ballot Election Act, establishing laws for conducting elections whereby eligible electors may cast ballots by mail. §1-7.5-101, C.R.S., *et seq.* In so doing, the Colorado Legislature declared its desire to increase voter participation via mail ballot elections. §1-7.5-102, C.R.S. Reflecting that legislative intent, the statute plainly states that election officials shall send a ballot to "each active registered elector." §1-7.5-107(3)(a)(1), C.R.S. Proposed Rule 12.4.1(d), however, prohibits an election official from mailing a ballot in connection with an all-mail-ballot election to any eligible, properly-registered elector who is marked inactive failed-to-vote. As a result, Proposed Rule 12.4.1(d) conflicts with the plain language and purpose of the Mail Ballot Election Act.

Until the advent of the permanent mail-in voter status in 2007, §1-8-104.5, C.R.S., and the growing preference by many counties to opt to conduct mail ballot elections pursuant to §1-7.5-104, C.R.S., the IFTV status was not as great a barrier because voters showed up to the polls to vote and they were reactivated at that time. There is a clear growing preference by counties for all mail ballot elections (49 counties conducted mail ballot primary elections in 2012, up from 45 in 2010, the first year primary elections by mail ballot alone were permitted). In light of these changes, including the growing number of registered electors who opt to be placed on the permanent mail-in voter list, Proposed Rule 12.4.1(d) will result in registered eligible electors

being denied their fundamental right to vote based on the sole reason that the voter opted not to vote in one general election.

Additionally, in the Revised Statement of Basis, Purpose and Specific Statutory Authority, dated June 15, 2012, the Secretary states that he is adopting the proposed rules relating to Inactive-Failed to Vote electors “to address Denver’s concern that the Secretary failed to comply with the Administrative Procedures Act (APA).” The Secretary appears to be attempting to enact rules that support his position in *Scott Gessler v. Debra Johnson, et al.*, Case No. 11CV6588, pending litigation in which the Secretary is a party. This attempt to gain an advantage in pending litigation is an improper use of the agency’s rulemaking authority.

### **Proposed Rule 41.3.1 – Duties of the Canvass Board**

The Colorado Democratic Party urges the Secretary of State to reject Proposed Rule 41.3.1 because it directly conflicts with existing law and impermissibly strips duties allocated to the canvass board under existing statutes. The canvass board does not have a sole duty under Colorado law, but rather has several duties as set forth in Sections 1-10-101-205, and Sections 1-10.5-101-110. Proposed Rule 41.3.1 purports to strip away many of the duties that the Colorado General Assembly has carefully delegated to the politically balanced canvass board, not least of which is the conduct of a recount pursuant to Article 10.5. Proposed Rule 41.3.1 exceeds the rulemaking authority of the Secretary because it directly conflicts with existing statutes.

### **Proposed Rule 41.14 – Role of the Secretary of State (Canvass Board)**

Proposed Rule 41.14 impermissibly strips authority from the canvass board by allowing a clerk and recorder or a majority vote of the canvass board to essentially delegate the canvass board’s authority to the Secretary of State upon request. Again, as pointed out above, the Colorado General Assembly gave certain duties and authority to the canvass board, to ensure that those functions are carried out by an independent and politically balanced group of individuals. Proposed Rule 41.14 would eliminate the General Assembly’s careful attention to keeping the functions of the canvass board separate from those of the Secretary of State.

For example, it is the canvass board’s duty to conduct a recount pursuant to Section 1-10.5-107, C.R.S. Under Proposed Rule 41.14.1, a majority of the canvass board could cede its authority or a county clerk and recorder could strip a canvass board of its authority and delegate the role of conducting a recount to the Secretary of State, an admittedly partisan office in the state of Colorado. Presently, a Secretary of State cannot weigh in with county clerks or canvass boards as to matters of voter intent, voter eligibility, or reports/logs generated after Election Day in the course of the conduct of a recount unless the recount has been challenged under §1-10.5-109. In the absence of such a challenge, the General Assembly intended those functions to stay with the County under the authority of the independent canvass board. §1-10.5-107(2), C.R.S.

Secretary of State Scott Gessler  
July 23, 2012  
Page 4 of 4

Similarly, the Secretary of State should reject Proposed Rule 41.14.3(B) because it directly conflicts with existing statutes and exceeds the agency's rulemaking authority. Under Proposed Rule 41.14.3(B), the Secretary of State usurps the authority of the canvass board and the county clerk, upon the finding of a clerical error or omission in the returns, to consult with the election judges and obtain any explanation or verification of needed additions or corrections resulting from imperfect returns. *See* § 1-10-104, C.R.S.

Proposed rule 41.14 and all of its subparts exceed the rulemaking authority of the Secretary because they conflict with existing statute and are not a permissible and reasonable reading of Colorado statutes. Rather than strip the authority from the canvass board upon a majority vote or at the whim of the County Clerk, the Secretary of State has reasonable alternatives available to it, such as seeking emergency relief in Court or asking the legislature to amend the law.

The above-described rules appear to exceed the rulemaking authority of the Secretary because they directly conflict with existing statutory provisions and are not based on a reasonable interpretation of Colorado law.

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 that reads "Martha Tierney". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Martha Tierney  
[mtierney@hpgfirm.com](mailto:mtierney@hpgfirm.com)

cc: Rick Palacio, Chair, Colorado Democratic Party