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**GUIDANCE FOR COLORADO GOVERNMENTS  
IN COMPLYING WITH THE FAIR CAMPAIGN PRACTICES ACT**

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*February 2009*

In most situations, the use of government money or resources to influence an election in Colorado is against the law. The Fair Campaign Practices Act, Colorado Revised Statutes, Section 1-45-101, *et seq.* (the “FCPA”) and Article XXVIII of the Colorado Constitution govern, among other things, the use of public moneys in a campaign involving the election of any person to any public office or involving any election question. The purpose of this memorandum is to help explain the types of conduct that are allowed and not allowed under the FCPA. This memorandum does not address every situation that might occur, but it covers many of the questions that arise most frequently.

The FCPA’s restrictions apply to any agency, department, board, division, bureau, commission, or council of the State of Colorado. The same restrictions also apply to any political subdivision of the State, including counties, cities, towns, school districts and special districts. Throughout this memorandum, the term “Government” includes all the governments covered by the FCPA.

Prohibited Uses of Government Money and Resources

The FCPA prohibits a Government from (1) making any contribution in a campaign involving the nomination, retention, or election of any person to any public office; and (2) expending any public moneys from any source to urge electors to vote for or against any state-wide ballot issue, local ballot issue, referred measure, or measure for the recall of any officer. See Section 1-45-117(1)(a)(I). Therefore, in most cases, the employees and officials of a Government must not use any Government money or resources to support a candidate’s campaign or to attempt to convince voters to vote for or against an election question, including questions that have been placed on the ballot by the Government itself. For example, after calling for a bond election, a special district may not use district money to pay for fliers and visual aids that support the bond issue. *See Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4*, 107 P.3d 1140 (Colo. App. 2004). Likewise, a school district may not post information on its website advocating the passage of a bond issue that it has referred to voters. *See Wimsatt v. Jefferson County Public Schools, District R-1*, Agency Decision, Case No. OS 2004-018.

It is important to note that a Government may violate this law without specifically asking voters to “vote for” or “vote against” an election question. *See Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4*, 107 P.3d 1140 (Colo. App. 2004). Any communication

discussing an election subject to the FCPA that favors one position will violate the FCPA. *See Bruce v. School District 11*, Agency Decision, Case No. OS 2008-0030.

Also, the FCPA restrictions do not apply only to the use of Government money, but also to other Government resources such as the use of copiers, vehicles, computers, facilities, telephones or newsletters. In addition, the FCPA restrictions apply to Government employees' time during work hours. Therefore, if a city creates a flier that improperly urges voters to vote for or against an election question, it violates the FCPA not only by using city money to pay for postage for the flier, but also by using city letterhead and the staff time of city employees to prepare the flier. *Brown v. City of Littleton*, Agency Decision, Case No. OS 2006-0023. Likewise, if a Government allows outside groups to use its facilities, it must treat groups that support all candidates or both sides of an election question equally in all significant respects, including facility scheduling and fees.

### Exceptions

The FCPA's prohibition on the use of Government money and resources described above does not apply in all cases. Some exceptions to the rule are described below.

#### *1. Time Period*

The FCPA only restricts the use of Government money and resources during a certain time period leading up to an election. The restrictions do not begin with respect to a state or local ballot issue until the issue has been submitted to have a ballot title fixed or has had a ballot title fixed, and do not begin with respect to a referred measure until the measure has been referred to the voters. Thus, a school district can spend district money on a flier speaking positively about a potential bond issue before it refers the actual bond question to the voters. *See Coan v. Weld County School District Re-3J*, Agency Decision, Case No. OS 1996-006. Likewise, a special district will not violate the FCPA by distributing materials encouraging citizens to support the construction and financing of a new recreation center if the district never actually submits a bond or tax question to the voters. *See Serra v. Montrose Recreation District*, Agency Decision, Case No. OS 2006-022. However, it is important to note that once an issue has been submitted to have a ballot title fixed or has had a title fixed or a referred measure has been referred to the voters, the FCPA restrictions apply to any expenditure of public money or resources. This includes making payments for materials or services provided before the Government took official action to submit the question. For this reason, several metropolitan districts violated the FCPA by paying for materials promoting their bond issues after the district boards had passed resolutions submitting the bond questions, even though the materials themselves had been distributed before the resolutions were passed. *See Skruch v. Highlands Ranch Metropolitan Districts Nos. 1-5*, Agency Decision, Case No. OS 2002-019, which was upheld by the Colorado Court of Appeals in *Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4*, 107 P.3d 1140 (Colo. App. 2004).

#### *2. Factual Summary*

Section 1-45-117(1)(b)(I) of the FCPA permits a Government to use Government money and resources to discuss an election if the Government is providing "a factual summary, which shall include arguments both for and against the proposal." The summary may not include a conclusion or opinion in favor of or against any particular issue, and a Government may only prepare a summary regarding an issue that will appear on the ballot within its jurisdiction.

It is important to note that a communication can fail to qualify for this exception even if it is called a “factual summary” and has an “arguments for” and “arguments against” section. A permitted factual summary must not express any opinion on an issue and its description of both sides of the issue must be balanced and even-handed. However, if a summary is balanced and even-handed, it will qualify for the exception even if the arguments against the proposal are not the most persuasive arguments or do not reflect opponents’ input. *See Bruce v. City of Colorado Springs*, Agency Decision, Case No. OS 2003-005.

### 3. *Personal Opinions*

Section 1-45-117 (1)(b)(II) of the FCPA permits members of the governing body of a Government, such as a city council or board of directors, and other elected Government officials to publicly voice their personal opinion about an issue. The FCPA does not limit the right of public officials and employees to speak out on a matter before the voters. However, in expressing their personal opinions, officials and employees may not use Government money or resources. Government employees and officials may urge electors to vote in favor of or against any issue and may participate in political campaigns, however they must do so during their personal time, not during work hours. Likewise, Government employees and officials may spend money on materials that discuss elections covered by the FCPA, so long as that money is their personal money, and not Government money. For example, a city council member will not violate the FCPA by publishing a newsletter discussing a local ballot issue if she pays for the newsletter using her personal funds instead of using city funds. *See Tyler v. Boigon*, Agency Decision, Case No. OS 2007-001. Any Government employee or official who uses his or her personal time or money to participate in a campaign as described in this section should be sure to keep sufficient records to show that he or she did not use any Government time or money in the effort.

### 4. *Answering Questions*

Section 1-45-117(1)(a)(II) of the FCPA allows a Government employees and officials to respond to questions about a ballot issue or referred measure, so long as the question was not solicited by the Government.

### 5. *Fifty-Dollar Exception*

If a Government employee or official has policy-making responsibilities, then he or she may use not more than \$50 of Government money in the form of letters, telephone calls or other activities related to expressing his or her opinion on a ballot question. Section 1-45-117(1)(a)(II). It is important to note that this exception only applies to ballot issues, not to contributions made to a candidate campaign. Therefore, a city mayor will violate the FCPA by spending only \$2.35 on a letter supporting a candidate. *Muller v. Burkholder*, Agency Decision, Case No. OS 2002-012. In addition, the fifty-dollar exception is an individual exception only. So five members of a city council may not combine their \$50 exceptions to jointly spend \$250 of public moneys incidental to expressing their opinions on an issue. *See Brown v. City of Littleton*, Agency Decision, Case No. OS 2006-0023.

### 6. *Resolutions.*

Section 1-45-117(1)(b)(III) of the FCPA authorizes the governing body of a Government to formally take a position with respect to an election question by passing a resolution

urging citizens to vote for or against the question. Passage of such a resolution may be reported or distributed through the established, customary means that the Government uses to inform the public of its proceedings. For example, if a Government regularly sends out a newsletter, the passage of the resolution may be reported in the newsletter. However, extraordinary methods of distribution, such as paid advertising or a one-time newsletter for this specific purpose, may not be used.

### Enforcement

Any person who believes that a violation of the FCPA has occurred may file a written complaint with the secretary of state no later than one hundred eighty days after the date of the alleged violation. The secretary of state is required to refer the complaint to an administrative law judge within 3 days of filing. If the judge determines that a violation has occurred, the judge may issue an order or sanction as authorized by the FCPA or Article XXVII of the Colorado Constitution. The judge's decision may be reviewed by the Colorado Court of Appeals.

### Penalties

Any violation of the FCPA provisions relating to Government money or resources may be subject to the penalties set forth in Sections 9(2) and 10(1) of Article XXVIII of the Colorado Constitution or any appropriate order or relief, including an order directing the person making the prohibited contribution or expenditure to reimburse the Government fund from which the moneys were diverted, injunctive relief, or a restraining order to enjoin the continuance of the violation. Currently, there is no clear standard for determining the sanction that will be imposed. Section 10(1) of Article XXVIII authorizes a penalty anywhere between double and five times the amount of the violation. In one case, an ALJ concluded that it was appropriate to impose a penalty of double the amount spent by the Government, citing this section. *See Tippet v. Town of Snowmass Village*, Agency Decision, Case No. OS 2005-032. Another ALJ imposed a fine of \$500 for a violation involving \$157.85. The judge explained that even though the amount of Government money spent in the case was relatively insignificant, the violation of the FCPA was not. *See Brown v. City of Littleton*, Agency Decision, Case No. OS 2006-0023. However, in another case, the ALJ imposed a fine of \$1,000 for a violation involving over \$11,000 because the violation was not willful and the Government was under financial stress. *See Bruce v. City of Colorado Springs*, Agency Decision, Case No. OS 2008-030.

### Campaign Permitted Activities for Public Entities

Appended to this Memorandum is a list of permissible activities for Governments, their officials and their employees based on recent decisions of ALJs.

## CAMPAIGN PERMITTED ACTIVITIES

### A. “Can Do’s”

1. The Board may adopt a resolution taking a position of advocacy on a state-wide ballot issue that has been submitted to the secretary of state for having a title fixed, any local ballot issue that has been submitted to the legislative body of the municipality for having a title fixed, a referred measure, or a recall measure. This resolution may include a recitation of the facts and/or arguments in favor of the Board’s position. As a resolution adopted by the Board, it is available for public inspection and becomes a part of the public minutes of the meeting. Distributing the resolution or reporting on its passage may be accomplished only through established, customary means. For example, if your Government regularly sends out a newsletter, the passage of the resolution may be reported in this newsletter. However, extraordinary methods of distribution or posting, such as paid advertising or distribution of a newsletter when such was not a prior practice, may not be used.

2. The Board may authorize the expenditure of public moneys and may make contributions to disseminate a “factual summary” on such issue, which must include arguments both for and against the proposal, on any issue of “official concern” before the electorate in the jurisdiction. The summary shall not contain a conclusion or opinion in favor of or against any particular issue. An issue of official concern shall be limited to issues that appear on an election ballot in the jurisdiction.

3. A Board member or Government employee may respond to questions about election issues during working time, so long as the Government has not solicited the question. The responses should not contain partial conclusions or otherwise tend to urge a favorable or unfavorable vote on the issue. Accordingly, employees should not volunteer opinions during work time speculating about the anticipated effects of passage or defeat of the ballot question. An ALJ opinion held that a Government employee could answer questions, posed at a public meeting where he was invited to speak, about how a proposed issue would affect his department so long as that employee did not expressly urge electors to vote one way or the other.

4. A Board member or Government employee with policy-making responsibilities may spend up to \$50 of public moneys in the form of letters, telephone calls, or other activities incidental to expressing his or her opinion on the issue.

5. Elected officials may express a personal opinion on an election issue at any time and place (so long as the time and place does not indirectly constitute a contribution by the Government or a use of Government resources). This includes an elected official expressing his or her opinion at a Board meeting, even if public money is used to broadcast the meeting, so long as the meeting, and its broadcast, are regularly scheduled and are not convened primarily to express the opinion.

6. A Government employee may “endorse” an election issue on his or her personal time. A Board member or Government employee may expend personal funds, make contributions, or use personal time to urge electors to vote for or against an election issue. All employees should be asked to keep records substantiating that any time spent campaigning for the

election issue was on personal or unpaid time, time outside of working hours, compensatory time, or vacation time.

7. The Board may allow interested groups, including proponents and opponents of candidates or of issues before the electorate, to rent space in its facilities as long as the opportunity is provided on an even-handed basis. The method of communicating the invitation, the access given, and the opportunity to disseminate information must be substantially the same for all interested groups.

8. Government employees may provide information to citizens that request it, even if the employees are aware that the information may be used in a candidate or ballot issue campaign. However, this information must be given on an equal basis to all citizens who request it, regardless of which campaign they may support, and should only be provided if it is the regular practice of the Government to do so.

B. “Can’t Do’s”

1. Public funds, facilities, supplies, equipment or bulk mail permits may not be expended or used by the public entity to urge a vote in favor of or against the issue, even when the cost is reimbursed.

2. The Government may not allow others who are advocating a position on any issue before the electorate to use these resources. Nevertheless, groups that have organized to discuss or otherwise to promote or urge defeat of the election issue may be allowed to rent facilities pursuant to an adopted policy, but all such groups must be treated even-handedly and must be allowed similar access. Preferential treatment in scheduling and fees charged must not be given.

3. Employees or paid members of the Government cannot work on a campaign during working hours and may not use public facilities or equipment for a campaign. During work time, the information that members or employees dispense to the community must be limited to providing copies of the “factual summary” and to responding to unsolicited questions. Employees must restrict their “campaigning” to personal time.

4. The Government may not require employees or other staff members to work for an election issue (other than on the “factual summary”).

5. The Board may not contribute to other organizations and political committees that may be organized to raise any funds and make any expenses concerning advocacy of the election issue.

6. The Government should not accept cash or any other contributions from citizens for use by the government in connection with any election.

7. The Government must not release the addresses or telephone numbers of employees, or past or present users of public utilities, public facilities, or recreational or cultural services which are owned and operated by the state or a political subdivision thereof, regardless of whether the group seeking the information supports or opposes the election, unless the employee, user or person has given express consent to the release of such information for purposes of the election or as part of a directory that is otherwise available to the public.