

The Law Office of Alexander Hornaday, LLC

1624 Market Street, Suite 202  
Denver, CO 80202  
Office: (303) 625-4088  
Fax: (303) 625-4081  
ahornaday@hornadaylaw.com

October 23, 2012

Douglas H. Shulman  
Commissioner  
Internal Revenue Service  
1111 Constitution Ave. NW  
Washington, DC 20224

*VIA EMAIL AND US POSTAL SERVICE*

**Re: Tax-exempt status under 501(c)(3) for New Era Colorado Foundation, Tax ID # 26-1389272**

Dear Commissioner Shulman:

I respectfully submit this referral and request that the Internal Revenue Service (“IRS”) consider the enclosed information regarding political activities potentially undertaken and funded by New Era Colorado Foundation (“NECF”), Tax ID # 26-1389272, and that the IRS take whatever steps are necessary to ensure compliance with the Internal Revenue Code by NECF up to and including revocation of tax exempt status and imposition of an excise tax on funds expended on or earned from political activity. As set forth more fully below, it appears that in violation of the Internal Revenue Code and regulations adopted in connection thereto, that NECF may have impermissibly engaged in political activity. At the very least it has blurred the lines between NECF a tax-exempt organization organized pursuant to I.R.C. 501(c)(3) and New Era Colorado (“NEC”), a social welfare organization organized pursuant to I.R.C. 501(c)(4) in such a way that merits investigation.

## **I. Background**

NECF is a Colorado Domestic Nonprofit Corporation incorporated on November 9, 2007 and that operates as a 501(c)(3) charitable organization. *See Exhibit A, NECF Articles of Incorporation.* The Articles of Incorporation for NECF state that “The primary purpose of [NECF] is to carry on one or more exempt functions under section 501 (C)3 of the Internal revenue Code of 1986, as amended, or the corresponding section of any future federal tax code.” *See Exhibit A.* NEC is a Colorado Domestic Nonprofit Corporation incorporated on August 17, 2006 that operates as a 501(c)(4). *See Exhibit B, NEC Articles of Incorporation.*

NECF’s website is [www.neweracolorado.org](http://www.neweracolorado.org), which indicates clearly that it is the website for NECF, and not NEC. *See Exhibit C, Screenshot of NECF Homepage.*<sup>1</sup> On its website NECF indicates that it’s purpose as:

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<sup>1</sup> Available online at <http://www.neweracolorado.org/>. Last viewed Oct. 17, 2012.

New Era Colorado is a multi-issue organization committed to engaging, educating, and training a new generation of active citizens and young leaders in Colorado. We are a full-spectrum civic engagement organization; we provide the resources and tools for young people to gain collective power in all levels of the democratic process, including issue organizing, electoral mobilization, and the legislative process. *See Exhibit D, Screenshots of NECF About Us Website.*<sup>2</sup>

Notably in the mission statement on NECF's website, the organizations refers to itself by the name "New Era Colorado" instead of "New Era Colorado Foundation." Moreover, two paragraphs later NECF refers to NEC with the language "We also are affiliated with New Era Colorado, a 501(c)4 nonprofit organization. They're good people too." *See Exhibit D.* This adds to confusion by suggesting that NEC is separate, despite the fact that NEC was the name used in the mission statement.

NEC does not appear to have its own website. The donation page on the website indicates clearly that donations are made to a 501(c)(3) charitable organizations, and such donations are tax deductible. *See Exhibit E, Screenshot of NECF Donation Page.*<sup>3</sup> There does not appear to be an avenue to contribute to NEC on the website.

NECF also operates a website called New Era News, the homepage of which clearly indicates that it is a project of New Era Colorado Foundation. *See Exhibit F, Screenshot of New Era News Homepage.*<sup>4</sup> The Editor of New Era News is Aurora Randolph, who also serves as the Boulder Organizing Fellow for NECF. *See Exhibit G, New Era News Bio of Aurora Randolph*<sup>5</sup>; *See also Exhibit H, NECF Staff Page.*<sup>6</sup>

In addition to websites, NECF operates a Facebook Page.<sup>7</sup> In the "About" section for the Facebook page, the websites listed are the NECF website and the New Era News Website. *See Exhibit I, Facebook About Page.*<sup>8</sup> NECF also operates a twitter account, using the handle @NewEraColorado, and the profile for the twitter account lists the NECF website. *See Exhibit J, Twitter Profile for @NewEraColorado.*<sup>9</sup> Not only do the Facebook and twitter accounts link to the NECF webpage, but also the NECF website links to the twitter and Facebook accounts. *See Exhibit F.* The link to the Facebook and twitter accounts is next to text that reads, "Stalk us," making clear that these are the accounts for NECF. The Internet relationship between the NECF website and the twitter and Facebook accounts runs both ways.

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<sup>2</sup> Available online at <http://www.neweracolorado.org/about-us/>. Last viewed Oct. 17, 2012.

<sup>3</sup> Available online at <http://www.neweracolorado.org/donate/>. Last viewed Oct. 17, 2012.

<sup>4</sup> Available online at <http://neweranews.org/>. Last viewed Oct. 17, 2012.

<sup>5</sup> Available online at <http://neweranews.org/users/aurora-randolph>. Last viewed Oct. 17, 2012.

<sup>6</sup> Available online at <http://www.neweracolorado.org/staff/>. Last viewed Oct. 17, 2012

<sup>7</sup> The Facebook page for NECF can be found at [www.facebook.com/NewEraColorado?fref=ts](http://www.facebook.com/NewEraColorado?fref=ts). Last viewed Oct. 17, 2012.

<sup>8</sup> Available online at [www.facebook.com/NewEraColorado/info](http://www.facebook.com/NewEraColorado/info). Last viewed Oct. 17, 2012.

<sup>9</sup> Available online at <https://twitter.com/NewEraColorado>. Last viewed Oct. 17, 2012.

## II. Activities That Constitute Prohibited Political Campaign Intervention:

### *A. Organization of precinct walks and canvassing activities with particular candidates for electoral office.*

Brittany Pettersen is a candidate for Colorado House District 28, running as a Democrat. *See Exhibit K, Pettersen Candidate Affidavit.* Ms. Pettersen currently or has recently worked for either NEC or NECF or both. *See Exhibit L, Meet Brittany.*<sup>10</sup> On October 13, 2012 Ms. Pettersen tweeted the following: “Wow! @NewEraColorado really brought the heat to Lakewood! Thanks to all those lovely volunteers for braving the cold to canvass with us!” *See Exhibit M, Pettersen tweets.*<sup>11</sup> On October 14, 2012, Ms. Pettersen tweeted the following “Check out all the FIRED UP @NewEraColorado volunteers who came out to canvass with us! Let’s win this!” and included a picture. *See Exhibit L.* As noted above the twitter handle @NewEraColorado is linked to the NECF website, and appears to be maintained by NECF.

Perhaps a candidate unfamiliar with NEC and NECF might mistake one for the other, but as Ms. Pettersen is or was recently employed by either NEC or NECF or both, she ought to be aware of the distinction between the 501(c)(4) and 501(c)(3) organizations and the importance of maintaining it. It should be noted that the twitter profile does indicate that the feed is maintained by campaign staff, which might not be as aware of the distinction. In any case, a mistake by a campaign staffer or even an unreasonable mistake by a candidate does not by itself indicate intervention in a political campaign.

In addition to Ms. Pettersen’s comments, NECF itself noted the event on its Facebook page. *See Exhibit N, Screenshot from NECF Facebook Page.* On the Facebook page controlled by NECF, and listing [www.neweracolorado.org](http://www.neweracolorado.org) and [www.neweranews.org](http://www.neweranews.org) as its websites, both clearly affiliated with NECF rather than NEC, NECF stated on October 13, 2012 “Record-breaking day as bus trip season 2012 kicks off w/ 52 volunteers + 1 candidate on Tiny Dancer!!!! (shhh, don’t tell the fire marshall).” Such a statement indicates clearly that NECF was involved in activities with a candidate. Taken with Ms. Pettersen’s tweets on or about the same day, there is no doubt that the activities included canvassing with a candidate and other activities designed to help Ms. Pettersen “win this” election. Indeed a link from the NECF website takes an internet user directly to the NECF Facebook page that brags about this work with a candidate.

### *B. TheBallot.org Voter Guide.*

Either NEC or NECF participated in TheBallot.org. The About page for the TheBallot.org, lists “New Era Colorado” as among the collaborators but links to the NECF website. *See Exhibit O,*

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<sup>10</sup> Available online at <http://brittanypettersen.com/meet-brittany-pettersen-candidate-house-district-28>. Last viewed Oct 17, 2012.

<sup>11</sup> Available online at <https://twitter.com/BrittanyforHD28>. Last viewed Oct. 17, 2012.

*TheBallot.org About Page.*<sup>12</sup> On the website one can find “New Era Colorado’s Voting Guide.” See *Exhibit P, TheBallot.org New Era Colorado Voting Guide.*<sup>13</sup>

In New Era Colorado’s Voting Guide, NECF appears to endorse Diana DeGette for Colorado Congressional District 1, Jared Polis for Colorado Congressional District 2, President Obama for United States President, Stephen Ludwig for Colorado University Board of Regents, which is a partisan electoral office in the State of Colorado. See *Exhibit P; See also Exhibit Q, Ludwig Candidate Affidavit.*

The fact that website links to the NECF website in the section regarding collaboration but also contain electoral endorsements by “New Era Colorado” (due to a lack of consistency in the organizations’ usage of the name “New Era Colorado,” it is difficult to determine whether the endorsements were made by NECF or NEC), raises the question of whether a 501(c)(3) organization endorsed candidate for political office, which would be a clear violation of the prohibition against intervention in political campaigns.

*C. Piece on New Era News Contrasting President Obama and Mitt Romney on Several Issues*

On October 16, 2012, New Era News, an official publication of NECF, published a piece entitled “It’s Not Just the Economy, Stupid: What We Aren’t Hearing About This Election” [hereinafter “Not Just the Economy”], which is attached in its entirety as Exhibit R.<sup>14</sup> “Not Just the Economy” was written by Katie O’Connell, who is identified as an “Intern” on her New Era News Bio page, included as Exhibit S.<sup>15</sup>

“Not Just the Economy” is currently the leading item on the New Era News homepage. See *Exhibit F.* The format of the piece that the author gives her opinion on various issues and contrasts the candidates positions in a way that make President Obama look more favorable and Mitt Romney more unfavorable. Additionally, “Not Just the Economy” includes the following baldly partisan statement: “The issue [of reproductive rights] has been making headlines recently (mostly with regards to the GOP and their insensitive and reprehensible comments about rape).”

*D. Piece on New Era News advocating voters vote against the incumbent Secretary of State of Colorado*

On September 3, 2012 New Era News, an official publication of NECF, published a piece written by editor Aurora Rudolph entitled “Dear Suspected Noncitizen.” A complete copy of the

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<sup>12</sup> Available online at <http://theballot.org/about>. Last viewed Oct. 17, 2012.

<sup>13</sup> Available online at <http://theballot.org/neweracolorado>. Last viewed Oct. 17, 2012.

<sup>14</sup> Available online at <http://neweranews.org/blog/its-not-just-the-economy-stupid-what-we-arent-hearing-this-election>. Last viewed Oct. 17, 2012.

<sup>15</sup> Available online at <http://neweranews.org/users/katie-oconnell>. Last viewed Oct. 17, 2012.

piece is included as Exhibit T.<sup>16</sup> In “Dear Suspected Noncitizen” Ms. Rudolph criticized Colorado Secretary of State Scott Gessler’s program to ensure that only eligible voters are registered to vote in Colorado. The piece identifies Secretary Gessler by name, includes a picture, and labels him as a “conservative” who seeks to disenfranchise voters who are “democrat[s] [sic]” and “independent[s].” Normally the criticism of a policy would not constitute political activity, but after several paragraphs of criticizing Secretary Gessler and his policy, including speculation of sinister motives, the piece ends with the following four lines:

Moral of the story:

- 1) Who you vote for in every office matters (i.e. Secretary of State)
- 2) You should be pissed
- 3) Get good to vote and DO IT

Item one clearly indicates that Secretary of State is office for which Colorado electors vote; item two indicates that the incumbent’s action should upset the reader; and item three is an exhortation to vote. Taken together the three items cannot be taken in any way except for the reader to vote against Secretary Gessler at the next opportunity. Secretary Gessler is currently a candidate for office, although not for election in 2012, but for 2014. *See Exhibit U, Gessler Candidate Affidavit.*

### **III. Prohibition on Political Campaign Intervention By 501(c)(3) Organizations**

According to 26 U.S.C. 501(c)(3), in order to be classified as a charitable organization eligible to received tax-deductible donations, such organization may not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.” “The term ‘candidate for public office’ is defined as an individual who offers himself, or is proposed by others, as a contested for an elective public office, whether such office be national, State, or local.” Rev. Rul. 2007-41, 2007-25 I.R.B. 1421 (June 18, 2008). Intervention or participation in a political campaign on behalf of or in opposition to a candidate might include, *inter alia*, the publication or distribution of written statements or making verbal statements that either support or oppose a candidate for public office. *See id.*

It should be noted that there is no acceptable level of participation or intervention in political campaigns by a 501(c)(3). *See U.S. v. Dykema*, 666 F.2d 1096, 1101 (7<sup>th</sup> Cir. 1981)(“Exemption is lost [] by participation in any political campaign on behalf of a candidate for public office. It need not form a substantial part of an organization’s activities.”). Therefore if after investigation the IRS determines that any of NECF’s activities are participation or intervention in a political campaign, it must revoke tax-exempt status.

Several of the situations described in Rev. Rul. 2007-41 are instructive in this case. Situation 21 concerns a church website that includes unambiguous endorsement of a candidate, which is

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<sup>16</sup> Available online at <http://neweranews.org/blog/dear-suspected-noncitizen>. Last viewed Oct. 17, 2012.

analogous to the TheBallot.org endorsements described above in Section II.B. Situation 4 determines that intervention has occurred when a university president who in an official university publication endorses a candidate, such as the pieces that appeared on New Era News' website described above in Sections II.C and II.D.

Additionally Rev. Rul. 2007-41 and Rev. Rul. 2004-06 both identify that key factors in distinguishing permissible issue advocacy from impermissible political campaign intervention include the following:

- Whether the statement identifies one or more candidates for a given public office;
- Whether the statement expresses approval or disapproval for one or more candidates' positions and/or actions;
- Whether the statement is delivered close in time to the election;
- Whether the statement makes reference to voting or an election;
- Whether the issue addressed in the communication has been raised as an issue distinguishing candidates for a given office;
- Whether the communication is part of an ongoing series of communications by the organization on the same issue that are made independent of the timing of any election; and
- Whether the timing of the communication and identification of the candidate are related to a non-electoral event such as a scheduled vote on specific legislation by an office holder who also happens to be a candidate for public office.

The "Not Just the Economy" piece described above in Section II.C specifically identifies both candidates for United State President, generally expresses approval of President Obama's position and disapproval of Mitt Romney's positions, was delivered less than 30 days before the general election, specifically mentioned the 2012 general election, raised the issues in an attempt to distinguish the candidates, does not appear to part of an ongoing series or related to non-electoral events. The Supreme Court has noted that express advocacy is the distinguishing characteristic between mere discussion of issues and exhortations to vote. *See Massachusetts Citizens for Life v. FEC*, 479 U.S. 238, 249 (1986) [Hereinafter "MCFL"]. By indicating a preferred position and contrasting the candidates positions, this situation is directly analogous to that determined to be express advocacy in MCFL. *See id.*

The "Dear Suspected Noncitizen" piece described above in Section II.D. was the statement of the editor of the website, specifically referenced a candidate for public office, expressed disapproval of the candidates actions and positions, made specific reference to voting, included language could only be reasonably interpreted as an exhortation to vote against a candidate, and because a search of the relevant keywords yielded no other pieces about the candidate, does not appear to be part of an going series about the issue raised. On the other hand the piece was not delivered close in time before the candidate's next election, and it did not address an issue that has already been raised as a distinguishing issue in the campaign because the candidate does not yet have an opponent. Because the piece does make allegations of voter suppression and is identified by the keyword "election 2012" but is also related to activities other than the candidate's own election it is not clear how the final criterion might apply. Moreover, Dear

Suspected Noncitizen does include language that cannot be interpreted in any way other than an exhortation to vote against an identified candidate and as such constitutes express advocacy under MCFL. *See MCFL*, 479 U.S. at 249.

The activities described in Section II.A., however, are not analogous to any of the situation in Rev. Rul. 2007-41, because if undertaken by a 501(c)(3) organization are so obviously intervention in a campaign, recognition of such would not require IRS guidance.

#### **IV. Conclusion**

Based on the activities described above and the relevant standards and requirements that apply to 501(c)(3) organizations, it appears that NECF may have violated the statutes and rules governing political activities of a 501(c)(3) organization. I respectfully request that the IRS commence an investigation into NECF's activities as well as the tangled relationship between NECF and NEC.

If the IRS should find that NECF did participate or intervene in a political campaign at all, it should revoke NECF's tax-exempt status as well as impose an excise tax on funds spent on or earned by such participation or intervention, or any other sanction that the IRS deems appropriate.

Most sincerely,



Alexander W.C. Hornaday

Encl.

cc: IRS EO Classification Office