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Colorado General Assembly

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MEMORANDUM

TO: Dan Chapin and Sue Krummrei

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: March 30, 2015

SUBJECT: Proposed initiative measure 2015-2016 #24, concerning election requirements

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment to the Colorado constitution appear to be:

1. Establishing taxes and fees for certain issue committees, political action committees, and campaign committees that are involved in elections;

2. Specifying that certain issue committees, political action committees, and campaign committees may be exempt from the newly created taxes and fees by meeting certain criteria;
3. Establishing reporting and spending requirements and contribution limits for campaign committees, political action committees, issue committees, and transfer committees;
4. Creating a public debate requirement for candidates, election committees, and issue proponents in advance of an election;
5. Specifying voter registration procedures and methods for challenging voter registration;
6. Establishing a public fact check organization to determine the accuracy of statements and claims made by candidates and election committees;
7. Establishing penalties for violations of the proposed initiative.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. As a change to the Colorado constitution, the proposed initiative may only be amended by a subsequent amendment to the constitution. Is this your intention?
3. Standard drafting practice is to use the word "fund" to refer to an account into which "moneys" or "revenues" are placed. Therefore, the word "fund" or "funds" is not typically used to refer to the moneys or revenues themselves. Would the proponents consider changing the phrase "funds" to "moneys" or "revenues"?
4. In the definitions section (Section 2) of the proposed initiative:
 - a. The definition of "Committee or Committees" says "in this document". By "this document", do you mean the proposed new article XXX? If the proposed initiative becomes law, "this document" will have no meaning in the constitution. Would you clarify the meaning of "this document"?

- b. The definition of "Issue Committee" refers to a "ballot initiative that appears on any ballot in the State of Colorado." Later, "Issue" is defined to mean "any item placed upon any ballot within Colorado..." Is a ballot initiative the same as an issue? Would you clarify these terms?
 - c. "Secretary of State" is defined as the "Office of the Colorado Secretary of State or the Colorado Secretary of State Office." Are the two offices the same? What does this mean?
- 5. The Colorado constitution already contains an article (Article XXVIII) dealing with campaign and political finance and there is also a Fair Campaign Practices Act that addresses these matters in statute. What would become of these provisions of law if the proposed initiative is enacted into law? Have you contemplated how this process of harmonizing all of these legal provisions would take place?
- 6. What is the "prevailing minimum wage"? "Prevailing" where? What source of authority is to be consulted to determine this amount? Why do the proponents tie tax rates and contribution limits to the prevailing minimum wage?
- 7. Many Coloradoans across the political spectrum have become very concerned about the level of detail in measures and the specificity of legal requirements added to the Colorado constitution over the past few decades by means of citizen initiatives. To reference one problem with this trend, the level of detail and specificity of requirements makes it very difficult to make changes in the law to account for unintended consequences or the inevitable changes in circumstances because modification of the law requires another vote of the people at a biennial general election. For many people across the political spectrum, this problem has become a significant reason to vote against any citizen initiative that modifies the state constitution. Have the proponents considered these concerns in drafting the proposed initiative?
- 8. What elections does the proposed initiative apply to? Specifically, would it apply to municipal and special district elections?
- 9. With respect to Section 1 of the proposed initiative:
 - a. Are proponents aware of a historical example in Colorado or any other jurisdiction where taxes have been raised to "ensure that no individual, group, or organization unduly benefits or enjoys an example in elections, representation, or governance..."?
 - b. Given the tax increases that are a component of the proposed initiative, as reflected in the second paragraph of Section 1, is there any reason

why the ballot title for the proposed initiative should not use the ballot title form for proposed tax increases as specified in section 20 (3) (b) of article X of the Colorado constitution (the TABOR amendment)?

10. With respect to Section 2 of the proposed initiative:

- a. Many of these terms are already defined in law in article XXVIII of the state constitution. In the absence of a complete repeal of article XXVIII, why are you adding a whole set of potentially duplicative or parallel definitions of the same terms as are found in existing law?
- b. The definition of "Campaign committee(s)" includes in relevant part a person or entity "involved in or promoting the election of an individual or representative position which is directly answerable to the people of Colorado." It seems this definition would include candidates for federal office from Colorado. Do you intend to include candidates for federal office in the proposed initiative?
- c. What is a "representative position" as used in the definition of campaign committee?
- d. What is the basis for the threshold numerical requirements (e.g., 10% of their income and 1,000 times the prevailing minimum wage) in the definition of "Colorado Political Action Committee"?
- e. The definition of "Issues(s)" would appear to include candidates. Is this your intent?
- f. Why do you exclude "social media" from the definition of "mass market advertising"?
- g. What is an example of information being "pushed indiscriminately out to electors"? Who decides whether information has been disseminated in this manner?
- h. How does a candidate or committee demonstrate its intent "to not strive for a fair and open interaction with the electorate"? Who deems candidates or committees with the designation "In the Interest" or "Not in the Interest"? Isn't this an inherently subjective determination? Which entity can be trusted to make this determination for all candidates and committees in the entire political process? Are candidates or committees acting "In the Interest" merely groups favored by the proponents?
- i. What is a transfer committee? What exactly are they transferring?

11. With respect to Section 3 of the proposed initiative:

- a. Have the proponents researched whether it is constitutional (as an infringement of freedom of speech) to levy taxes based upon the political activity of the party against whom a tax is being assessed, and specifically based upon the volume of political contributions received or expended?
- b. What income does a presumably nonprofit committee generate?
- c. What is being calculated to compute the applicable tax under this section? Please explain how the taxes would work in the case of a committee that received \$100,000 in contributions during the applicable election cycle.
- d. Why is the minimum wage the prevailing standard of measurement for assessing the amount of taxes?
- e. What is the justification for not imposing a tax on groups deemed "In the Interest"? Have you researched whether discriminating in the application of a tax on this basis would pass constitutional muster?
- f. What is an "oversight fee"? What is the basis for its imposition?
- g. With respect to Section 3 (4), how are funds being transferred "to the candidate themselves"?
- h. Under the proposed initiative, are committees being taxed on both the money received and expended? Does this constitute double taxation?

12. With respect to Section 4 of the proposed initiative:

- a. Have the proponents researched whether it is legal to restrict campaign contributions to those made by an individual who is an elector of the state of Colorado? What is meant by "legally recognized elector"?
- b. What does it mean to be "highly compensated or monetarily enriched simply for forming a committee?" Who makes that determination? Based upon what standards?
- c. What is a "reliable source"? Who makes the determination of whether a source is "reliable"? Who makes the determination whether something is sufficiently accurate as to be considered "substantially true"? Stated differently, how does one know if a particular statement is 80% accurate? Which group of experts form the "recognized experts"? Who decides who the "recognized experts" are?

- d. How do the requirements of Section 4 (f) apply to statements of opinion?
- e. Who makes the determination whether a committee is deemed "In the Interest"? Is this determination for all time? Is this a perpetual determination to the end of time? Is there a way for a committee to get the determination changed?
- f. Have the proponents researched whether the provisions of Section 4, especially those in Section (4) (f), would pose a chilling effect on free expression under current legal standards?
- g. What does a committee do to remain tax exempt under the proposed initiative?

13. With respect to Section 5 of the proposed initiative:

- a. Why would a committee intend to be classified as "Not in the Interest"?
- b. What does it mean for committees to be "similar" [last line of Section 5 (1)]?
- c. With respect to Section 5 (2), how much margin is there for a committee to operate "such that their efforts substantially and primarily operate within [the relevant definition]"? How does this kind of provision accord with other provisions suggesting the determination of the type of committee at issue is rather "black and white"?
- d. Please explain what the second sentence of Section 5 (3) means.
- e. Are the proponents aware that there are existing legal requirements pertaining to reporting and disclosure of campaign contributions, some of which are duplicative of the requirements in the proposed initiative? The proponents may not be aware, for example, that electronic filing is already the preferred form of filing with the Secretary of State's office.
- f. What does Section 5 (9) mean?

14. With respect to Section 6 of the proposed initiative:

- a. What is a "qualified Colorado elector"?
- b. How do you ensure that someone is contributing "only in a manner which makes a best attempt to ensure all qualified electors are treated as equally as possible"? What kind of contribution demonstrates the satisfaction of this requirement? Who administers this requirement?

- c. Please explain the first sentence of Section 6 (3).
- d. Please explain what Section 6 (7) means.
- e. With respect to Section 6 (9), what is "reasonable curable error"? Who makes that determination?
- f. Under the proposed initiative, it appears that an individual is limited to approximately \$246 in contributions to any single category of committees (except for transfer committees). Similarly, an individual is limited to approximately \$576 in contributions to all committees combined. Is this correct? Have the proponents researched the question of whether these contribution limits specified in Section 6 (2) would pass constitutional muster on the grounds they are so low as to stifle political expression?
- g. The contribution limits set in the proposed initiative would be diluted over time through the effects of inflation. Is there any mechanism in the proposed initiative for adjusting the contribution limits over time to account for inflation?

15. With respect to Section 7:

- a. With respect to Section 7 (2), how do you require candidate or issue committees to "make themselves available for open public debates"?
- b. How would Section 7 (3) and 7 (4) pass muster against a legal challenge (certain to be brought) under the First Amendment of the United States Constitution? Specifically, what is the legal authority in, among other things, forbidding the use of mass media advertising for a certain number of days prior to an election? Where is the legal authority in requiring candidates or committees to rely on public debates in lieu of mass media advertising?
- c. How would Section 7 (4) work in practice? Who provides this "fair opportunity"? How long is this "grace period"? What happens during the grace period?
- d. Who makes the determinations required by this section? By what deadline? How will a specific person or entity be able to make these kinds of determinations within a very short period of time affecting hundreds of advertisements in multiple election contests across the state?

16. With respect to Section 8 of the proposed initiative:

- a. What is the legal authority for requiring debates, candidates, or committees to comply with the detailed and very specific requirements specified in this section?
- b. Among other things, this section regulates the position in a debate, the manner of determining a position (referencing a coin flip), the scheduling of debates, the timing of debates, the length of debates, the number of debates, the format of the debate, the content of the debates, and the source of questions at the debate. The detail extends to the number of observers participating at the location of video casting. Why is this level of specific detail necessary for inclusion in the state constitution? What happens, if for example, it turns out 5 years from now that, contrary to Section 7 (9) (d), the public wants debates that only last 45 minutes or that extend to 4 hours?
- c. What is the meaning of the term "position" for purposes of this section? What is the "Control Candidate"? What does it mean for a candidate to have "lost control"?
- d. Does Section 8 (7) (a) mean that all candidates on the ballot must be included in all debates?
- e. Section 8 (7) (j) states that "candidates must not work to intentionally place another candidate at a disadvantage". How can this requirement be satisfied given that an inherent purpose and component of an election is for one candidate to put another candidate at the ultimate disadvantage by prevailing in the election?
- f. How can it be consistent with any notion of free expression for a state constitution to severely restrict the questions asked at a debate among candidates [Section 8 (9) (g) through (i)]?
- g. If a video of a debate shows one candidate making an embarrassing verbal gaffe, would it violate Section 8 (9) (e) for the video to be broadcast?
- h. It appears that questions of a biographical experience or questions that go to the nature or extent of a candidate's experience or fitness for office would be prohibited from being asked? Is this your intent? What is the basis for prohibiting questions of such nature? If, for illustrative purposes, a candidate was best friends with known criminals or was seeking public office even though he or she had a criminal past, why should questions going to those details not be permitted to be asked of a candidate in a debate?

- i. Why are bloggers or individuals prohibited from being considered a VRA source? What if a particular individual in the debate audience was the world's preeminent authority in a particular field and could comfortably check the facts on a factual statement?
- j. How does the fact check process work for questions of opinion?
- k. Is the debate to be delayed while facts are checked? What happens if there is a difference of opinion among the sources consulted?
- l. Is it an accurate reading of Section 8 (10) (b) that a promoting committee deemed "Not in the Interest" will have its right to participate in the election revoked by the Secretary of State? If so, what is the legal authority for revoking the right of a committee to participate in the political process?
- m. Is it a correct reading of the proposed initiative that any committee desirous of opposing an initiative needs to register and conform to certain conditions (even in the absence of spending any money or accepting any contributions)? If so, have the proponents researched whether this requirement would pass legal muster?

17. With respect to Section 9 of the proposed initiative:

- a. Are there any specified grounds by which one elector may challenge the voter registration of another?
- b. What do you mean by "onerous burden on that party" in Section 9 (1) (b)?
- c. What is "reasonable knowledge" for purposes of Section 9 (2)?
- d. What would be an example of a law that would cause an election to be "less intuitive for the electorate" [Section 9 (4)]? Does Section 9 (4) mean that all election laws would be referred to the electorate of the particular jurisdiction for their ultimate approval? Who decides whether an election law fails to satisfy the requirements of Section 9 (4)?
- e. With respect to Section 9 (5), what do you mean by "other proven processes"? Who decides if the "process" is "proven"? What are the standards used to gauge whether these other "proven processes" "improve the process for the electorate"? Does this requirement mean that a group representing 1% of the pertinent electorate may force the governing body of the jurisdiction to place consideration of the "process" on the ballot for the electorate's consideration?

- f. Does this requirement in Section 9 (5) apply to home rule cities? If so, does this provision trump their powers with respect to local election procedures?

18. With respect to Section 10 of the proposed initiative:

- a. What does it mean for political parties or political party committees to have "special considerations"?
- b. Is it an accurate reading of Section 10 (2) that contributions made to political parties for the purposes of facilitating their operational expenses are not subject to contribution limits? What are other types of contributions made to political parties and how are they treated under the proposed initiative? How are these different types of expenses kept distinct?

19. With respect to Section 11 of the proposed initiative:

- a. What is the authority under the state constitution for stripping a candidate or committee of its tax exempt status under specified circumstances? With respect to the tax-exempt classification of nonprofit organizations (unless one is referring to the property tax), isn't that classification primarily a matter of federal law?
- b. With respect to the tax discussed in Section 11 (2) (c), what is the tax assessed against?
- c. With respect to Section 11 (2) (d), are the proponents aware that so-called "scarlet letter" provisions that attempt to use ballots to brand candidates in unfavorable terms have been struck down as unconstitutional?
- d. (d) Similarly, with respect to Section 11 (2) (e), have the proponents researched whether it is constitutional to compel media advertising to contain certain messages other than the source of the person or entity responsible for the message?
- e. What does Section 11 (4) (b) mean?
- f. Please explain Section 11 (4) (c).
- g. With respect to Section 11 (4) (d) and 11 (5), ordinarily, a feature of the corporate form is that individual officers or shareholders are not responsible for the liabilities of the corporation (whether taxes or debts). Does this provision change these legal requirements? If so, why would people volunteer to become involved in political committee and campaign work

if they knew they would become liable for insufficiencies (whether taxes or debts) on the part of the relevant candidate or committee?

- h. With respect to Section 11 (6), what does it mean to "deceive the electorate in regards to any other candidate or committee"? Ordinarily, someone may be sentenced to prison after being convicted of committing an offense that constitutes a felony under Colorado law. Does this section create a new felony offense under Colorado law? Is it your intent that someone violating this section may be sentenced to prison in the absence of being convicted of a felony offense?
- i. With respect to Section 11 (7), would an attorney assisting a client candidate or committee in structuring its activities so as to minimize its legal exposure under the proposed initiative, especially if the candidate or committee faces the imposition of a tax on its activity or civil or criminal liability for making the wrong decision, be engaged in "defeating or avoiding the requirements of this Article"?

20. With respect to Section 12:

- a. What does the clause in Section 12 (1) (e) referring to the "estimation of the percent of Colorado electors effected" mean? How will we know if this requirement is met?
- b. With respect to Section 12 (1) (g), what does it mean for voting to be "as intuitive" as possible?

21. With respect to Section 14:

- a. Does the Colorado Public Fact Check organization (CPFC) function as the equivalent of a state board or commission? Are there any limits on the number of members of the CPFC?
- b. What is the rationale for requiring each query put before the CPFC to be reviewed by a minimum of 9 members? Do the members take a vote on whether the statement reviewed is "misleading, deceptive, substantially true or untrue, or true or untrue"?
- c. What are the consequences of a determination by the CPFC that a statement is misleading, deceptive, substantially untrue, or untrue?

22. Under Section 16 of the proposed initiative, its provisions will take effect on January 1, 2016. Are the proponents aware that the measure will not be voted on until the November 2016 general election? Is it the proponents' intent that the proposed initiative be applied retroactively?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. Before the amending clause, number each section, part, etc. that is being amended or added with a section number (e.g., SECTION 1., SECTION 2.). For example:

SECTION 1. In the constitution of the state of Colorado, **add** article XXX as follows:

2. The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs, all in parentheses, as follows:

X-X-XXXX. Headnote. (1) Subsection.

(a) Paragraph

(I) Subparagraph

(A) Sub-subparagraph

(B) Sub-subparagraph

(II) Subparagraph

(b) Paragraph

(2) Subsection

(3) Subsection

3. It is standard drafting practice to use SMALL CAPITAL LETTERS to show the language being added to the Colorado constitution or the Colorado Revised Statutes.
4. It is standard drafting practice to only capitalize proper nouns, such as "Colorado" or "South Platte river". It is not necessary to capitalize the terms "Article," "Campaign Committee," "Current Election Cycle," "Internet," "Secretary of State," etc., in the proposed initiative.

5. The following is the standard drafting language used for creating a definition:
"As used in this article, unless the context otherwise requires: ". For purposes of the proposed initiative, it would look like this:

Section 2. Definitions. As used in this article, unless the context otherwise requires:

(1) "Campaign committee" means any individual ...
6. Use the singular form of a noun whenever possible. Do not add "(s)" to the end of a word.
7. In Section 4 of the proposed initiative, end the introductory portion of subsection (1) with a colon rather than a period as follows: "... comply with the following conditions and requirements:"
8. Since "Secretary of State" is defined to mean the "Colorado Secretary of State," it is not necessary to use the word "Colorado" in front of "Secretary of State" throughout the proposed initiative. Similarly, there is no need to add "office" after "Secretary of State" as this is included in the definition.
9. Generally, standard drafting practice in Colorado is to refer to human beings as "natural persons" to distinguish them from "artificial" persons created by law, such as corporations. The term "human individuals" is disfavored.
10. In the second paragraph of Section 1, "encouraged or discouraged" should be spelled as "encourage and discourage". In the definition of "Campaign committees(s)", "determine" should be spelled as "determined". In Section 4 (1) (f) (i), "operating" should be spelled as "operate".
11. The following words should be shown in the possessive format: "electors" before "contribution" in Section 6 (5); "challengers" before "name and address" in Section 9 (1) (b) and Section 9 (3) (a); "electors" before "name, address, party affiliation," etc., in Section 9 (2) (a); and "representatives" before "position" in Section 12 (1) (e).