

Mike Mauer, Director
Legislative Council Staff

Colorado Legislative Council
200 East Colfax Avenue Suite 029
Denver, Colorado 80203-1716
Telephone 303-866-3521
Facsimile 303-866-3855
TDD 303-866-3472



Dan L. Cartin, Director
Office of Legislative Legal Services

Office of Legislative Legal Services
200 East Colfax Avenue Suite 091
Denver, Colorado 80203-1716
Telephone 303-866-2045
Facsimile 303-866-4157
Email: olls.ga@state.co.us

MEMORANDUM

TO: Mark Waller and Polly Lawrence
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: September 28, 2015
SUBJECT: Proposed initiative measure 2015-2016 #42, concerning Iran Divestment by Public Funds

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 Revised Statutes appear to be:

1. To require the state treasurer, board of directors of the public employees' retirement association, Colorado county officials and employees retirement

association, board of directors of the fire and police pension association, and the board of directors of the regional transportation district (public fund) to identify certain Iran-restricted companies and instruct the public fund's investment advisors to sell, redeem, divest, or withdraw direct holdings from such companies;

2. To prohibit the public fund from acquiring securities of Iran-restricted companies;
3. To make conforming amendments to separate the existing provisions of article 54.8 of title 24, C.R.S., from the newly added provisions in the proposed initiative.

Substantive Comments and Questions

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

1. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, this phrase should be added to the beginning of the proposed initiative.
2. 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?
3. What will be the effective date of the proposed initiative?
4. Section 24-54.8-202 (4) (a) of the proposed initiative specifies three criteria that will determine whether a company is an Iran-restricted company. The first criteria specifies that more than 10 percent of the company's revenues come from particular sources and the second criteria specifies that less than 75% of the company's revenues come from particular sources. Regarding the 75% requirement, is it correct to say that not more than 75 percent of the company's revenues may come from such sources? If so, please consider rephrasing this requirement for clarity and consistency.
5. What is the basis for the 75% standard? Why, for example, would a company with 70% of its revenues produced by oil contracts with Iran be restricted, but a company with 80% of its revenues produced by similar contracts not be restricted?

6. The third criteria for an Iran-restricted company in section 24-54.8-202 (4) (a) of the proposed initiative states that the company "has failed to take substantial action". What does "substantial action" mean? What does the company have to fail to take substantial action to do? Please consider defining or otherwise explaining this term.
7. What is the significance of the "August 5, 1996" date in section 24-54.8-202 (4) (b) of the proposed initiative?
8. Pursuant to section 24-54.8-202 (4) (b) of the proposed initiative, one factor that dictates whether a company is an "Iran-restricted company" is that the company has made certain investments of certain amounts that directly or significantly contribute to the enhancement of Iran's ability to develop petroleum resources of Iran. Who would make this determination? How would a pension plan know that such a determination has been made?
9. The introductory portion to section 24-54.8-203 of the proposed initiative refers to "companies on the list of Iran-restricted companies." What is the list of Iran-restricted companies? Does each public fund have to create one or is it created one time by some other entity for use by all public funds? If each public fund creates its own list, is there a risk that each list will be different? What information is used to create the list? Once a company is on the list, can it ever come off? How often would the list be updated? Please consider including an explanation of these questions and any other necessary information regarding the list of Iran-restricted companies in your proposed initiative.
10. Section 24-54.8-203 (2) of the proposed initiative requires a public fund to sell, redeem, divest, or withdraw all direct holdings of Iran-restricted companies from the public fund's assets in an orderly and fiduciarily responsible manner. What qualifies as an "orderly and fiduciarily responsible manner"? If a public fund is required to divest pursuant to the proposed initiative, does it really have much choice regarding the manner in which it does so?
11. Why does the proposed initiative target only companies involved in oil-related and mineral extraction activities?
12. Is there any way to verify that a public fund has taken the actions required by the proposed initiative? Is there any particular entity that is responsible for determining whether a public fund is in compliance with the requirements of the proposed initiative?

13. Is there any risk that requiring a public fund to divest from certain companies without any financial or actuarial analysis will have a negative impact on the funded status of the public fund?
14. In section 2 of the proposed initiative, adding a new paragraph (s) to section 24-54.8-101 to clarify that paragraph (r) does not apply to part 2 to is unnecessary due to the conforming amendment in paragraph (r) that states ". . . this **part 1** should remain in effect . . .". (Emphasis added). Similarly, adding a new paragraph (d) to section 24-54.8-106 (1) in section 5 of the proposed initiative is unnecessary because of the conforming amendment to paragraph (c). Consider removing the newly added paragraphs (s) and (c). If you choose to leave these new paragraphs, change the amending clauses for each section to reflect their addition.

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. The introductory paragraph in section 24-54.8-203 in the proposed initiative should be numbered as subsection (1), and the paragraphs underneath should be lettered as (a) to (d) rather than numbered (1) to (4) to conform to standard drafting practice.
2. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty."
3. The following word is misspelled: "sub-section" should be spelled "subsection".
4. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to the Colorado Revised Statutes.
5. In section 1 of the proposed initiative, the sections should be numbered sequentially, starting with section 24-54.8-201.

6. In section 24-54.8-202 (8) of the proposed initiative, the internal reference reads "section 10 24-54.8-102 (14)". It appears that the "10" should be omitted.
7. The introductory portion to section 24-54.8-203 of the proposed initiative refers to "The public fund". Please consider changing this to "Each public fund" or "Every public fund" if your intent is that the requirements of section 24-54.8-203 apply to all entities included in the definition of "public fund".
8. In each place in sections 2 through 5 of the proposed initiative where you have inserted "PART 1", the existing statutory language refers to "this article." It is standard drafting practice to show the existing statutory language in strike type before the new language as follows: "this ~~article~~ PART 1".