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MEMORANDUM

TO: Gregory Brophy and Dan Gibbs

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: February 12, 2016

SUBJECT: Proposed initiative measure 2015-2016 #93, concerning the Threshold for Voter Approval of Initiated Constitutional Amendments

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 state constitution appear to be:

1. To make it more difficult to amend the state constitution by requiring an initiated constitutional amendment to be approved by at least 55% of the votes cast thereon;

2. To specify that the 55% requirement does not apply to an initiated constitutional amendment that is limited to the repeal, in whole or in part, of any provision of the state constitution;
3. To make it more difficult to amend the state constitution by requiring a constitutional amendment referred to the people by the General Assembly to be approved by at least 55% of the votes cast thereon; and
4. To specify that the 55% requirement does not apply to a referred constitutional amendment that is limited to the repeal, in whole or in part, of any provision of the state constitution.

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. Does the phrase, "In order to make it more difficult to amend this constitution . . ." in sections 1 and 2 of the proposed measure have any legal effect? Is it just a statement of intent?
 3. Section 1 of the proposed measure requires that an initiated constitutional amendment be approved by at least 55% of the votes cast thereon to become law. Does the 55% requirement in Section 1 of the proposed measure apply only to initiated measures and not to measures referred to the people by the General Assembly?
 4. Section 2 of the proposed measure requires that a constitutional amendment proposed by the General Assembly be approved by at least 55% of the votes cast thereon to become law. It seems that Section 2 of the proposed measure includes referred measures, which are excluded in Section 1. If this is correct, why does Section 1 apply only to initiated measures rather than to all measures to amend the state constitution, whether initiated by the people or referred by the General Assembly? The changes in both Section 1 and Section 2 of the proposed measure are necessary to achieve your intended result, but is there a reason why you did not make the language in both sections consistent?
1. Section 1 of the proposed measure specifies that the 55% requirement does not apply to an initiated constitutional amendment that is limited to repealing any

- provision of the state constitution. Would a constitutional amendment be considered a repeal of a provision only if existing constitutional provisions appear in strike type in the proposed initiative? Or could a constitutional amendment be repealed by implication? (For example, a new section that states: "Possessing or selling marijuana is unlawful", which would have the effect of repealing part of Amendment 64.) If so, is this also your intent for the same exception in the case of constitutional amendments referred to the people by the General Assembly in Section 2 of the proposed initiative?
2. Could a constitutional amendment that includes any new language qualify for the exception? For example, if section 20 (2) and (7) in article X of the state constitution (TABOR) are repealed in a proposed initiated or referred measure, and in the same proposed measure a definition for "inflation" is added in section 17 (2) (b) of article IX of state constitution to replace an obsolete cross-reference to TABOR, would the exception apply?
 3. As used in the measure, what is a "provision" in the constitution? Is it a section, a subdivision within a section, a sentence within a subdivision, or something else?
 4. Could a measure repeal more than one provision and qualify for the exception? Does the phrase "any provision" limit it to one provision per measure?
 5. What does it mean to repeal a provision "in part"? If a provision is less than a full subdivision in the constitution, then could a measure that repeals a single word would be subject to the exception? (For example, a change to section 21 (3) of article X of the state constitution as follows: "Such existing taxes and their distribution shall ~~not~~ be repealed or reduced by the general assembly.")
 6. Who would decide whether a proposed initiative is limited to repealing a provision of the constitution? Will the proponents know the required number prior to gathering signatures?
 7. It appears that the repeal exception applies to any part of the constitution, regardless of when it is added. So, starting in 2017, it would take 55% to add a new provision to the constitution, but a majority to remove it. Is that correct?
 8. In the case of an initiated or referred constitutional amendment that is limited to repealing, in whole or in part, any provisions of the constitution, will the constitutional amendment need to be approved by a majority of the votes cast thereon? If not, what percentage of the votes would such a measure need to receive to become law?

9. For amendments to the state constitution, it is less ambiguous and preferred drafting practice to use the phrase "; except that" rather than "; provided that".
10. The proposed initiative does not apply to initiated or referred statutory changes, correct?
11. What will be the effective date of the proposed initiative?

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. Each constitutional and statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, "In the constitution of the state of Colorado, section 1 of article V, **amend** (4) as follows:".
- 3. It is standard drafting practice to use SMALL CAPITAL LETTERS rather than ALL CAPS to show the language being added to the Colorado constitution.
- 4. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
 - a. The first letter of the first word of each sentence;
 - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
 - c. The first letter of proper names.