

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

**TO:** Jeff Peckman and Peggy Ritchie  
**FROM:** Legislative Council Staff and Office of Legislative Legal Services  
**DATE:** December 19, 2017  
**SUBJECT:** Proposed initiative measure 2017-2018 #84 concerning Patenting New Technologies

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.

An earlier version of this proposed initiative, proposed initiative 2017-2018 #81, was the subject of a memorandum dated November 28, 2017. Proposed initiative 2017-2018 #81 was discussed at a public meeting on November 30, 2017. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

## **Purposes**

The major purposes of the proposed amendment to the **Colorado Revised Statutes** appear to be:

1. To declare the need for a state-level patent program;
2. To require the establishment of a patent registration program in the Colorado secretary of state's office to protect extraordinary technology within Colorado;
3. To require the state of Colorado to affirm, through a public awareness campaign, the legality of research, development, manufacture, sale, possession, and use of extraordinary technology in Colorado;
4. To give extraordinary technology and related property the same legal status as an energy facility as specified in the USA PATRIOT Act; and
5. To require the state of Colorado to adopt all necessary measures to implement and enforce 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. What will be the effective date of the proposed initiative? In section 6 of the proposed initiative (the effective date), two different numbers are used. Is it your intention that the initiative take effect thirty days or ninety days after enactment? In the phrase, "from and after the date of enactment," are you referring to the date of the governor's proclamation?
3. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
  - a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
  - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?

- c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at [BallotImpactEstimates.ga@state.co.us](mailto:BallotImpactEstimates.ga@state.co.us).
4. A person could patent an extraordinary technology with the federal government and a different person could later patent the same extraordinary technology in Colorado. Alternatively, a person could patent an extraordinary technology in Colorado and a different person could later patent the same extraordinary technology with the federal government. Under the proposed initiative, in both situations:
  - a. Would the federal patent not be enforceable in Colorado? If a state law purports to make a federal patent unenforceable within its borders, would not the state law be preempted by federal law?
  - b. If the federal patent is enforceable in Colorado (particularly when the patent was filed first in Colorado), what is the point or effect of the Colorado patent?
5. Subsection (12) on page 3 of the proposed initiative asserts that businesses can obtain state-level intellectual property protection "if they are not doing interstate commerce." Given the statements in the legislative declaration indicating the proponents' belief that the use of extraordinary technology can or will have expansive, even global impacts (*e.g.*, "patenting extraordinary technology is vital for the progress and fulfillment of human civilization"), is it not likely or even virtually certain that the patenting of extraordinary technology in Colorado will have impacts, including commercial impacts, outside of Colorado? If so, how could a patent issued by Colorado not affect interstate commerce?

## **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 following words are misspelled: "healthcare" should be spelled "health care"; "compliment" should be spelled "complement"; non-polluting" should be spelled "nonpolluting"; "non-hazardous" should be spelled "nonhazardous."

2. When a paragraph contains a series of items, they are usually separated by commas; however, where there is a series within a series, the larger series should be separated by semicolons. So, in subsection (6) of section 7-70-110 of the proposed initiative, semicolons should separate the larger series as follows: "(6) SUPPRESSION OF EXTRAORDINARY TECHNOLOGIES AND PERSECUTION OF THEIR INVENTORS HAS INCLUDED HARASSMENT; INTIMIDATION; COERCION; THREATS; RAIDS; PHYSICAL ASSAULT; DAMAGE OR DESTRUCTION TO REAL, PERSONAL, AND INTELLECTUAL PROPERTY; SEIZED ASSETS; GAG ORDERS; UNLAWFUL SURVEILLANCE; AND MORE."
3. The most widely accepted form of citation to the United States Code, and the form used in the current Colorado statutes, is: "35 U.S.C. secs. 181-188."
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 use capital letters:
  - 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.

In the proposed initiative, the following words need to be capitalized:

In section 1:

- Subsection (10), the first word of the second and fourth sentences;
- Subsection (12), the first word of the first and second sentences;
- Subsection (13), the first word of the first sentence;
- Subsection (21), the first word of the first sentence.

In section 2:

- Subsections (1)(h) and (1)(l), the first word of the first sentence;
- Subsection (2), the word "zero" following the colon.

The words "state," "law," "secretary of state," "congress," "act," "government," "secrecy order," and "patent and trademark office" should not be capitalized.

5. It is standard drafting practice to spell out "United States" rather than abbreviate it.
6. Rather than putting an acronym in parentheses following a phrase, it is better to put the acronym in the definitions section of the Colorado Revised Statutes and define it. For example,

(3.5) "SAWS" means the special application warning system used by the United States patent and trademark office from 1994 to 2015.

(10) "USPTO" means the United States patent and trademark office.

7. The following names need to be corrected: The correct name of the SAWS program is "Sensitive Application Warning System." The correct name of the patent office's procedural manual is "Manual of Patent Examining Procedure."
8. When quoting something, the quote should be identical to the source material.
  - a. In section 7-70-110 (11), the quote from the United States constitution should be changed to mirror the constitution. The words "progress," "science," "arts," "times," "authors," "inventors," "right," "writings," and "discoveries" should not be capitalized. In addition, there should be a comma following the words "times" and "inventors".
  - b. In section 7-70-110 (15), the phrases "relating to the destruction of an energy facility" and "mass transportation" are not part of 18 U.S.C. sec. 2331 (5), which the remainder of the paragraph cites.
9. In a date that specifies month, day, and year, the year should be set off with commas, for example, "September 11, 2001, terrorist ..."
10. In section 7-70-110 (17), the comma is unnecessary.
11. In section 7-70-110 (21), the commas setting off the phrase "to safe and clean energy" are unnecessary. They make the phrase a nonrestrictive phrase, which means the phrase adds descriptive information that is not necessary to the meaning of the sentence.
12. Each statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, if you intend to add a **new** section to article 70 of title 7 of the Colorado Revised Statutes, you would include the following amending clause:

In Colorado Revised Statutes, **add** 7-70-110 as follows:

If you intend to add new subsections to an **existing** section of the Colorado Revised Statutes, you would include the following amending clause:

In Colorado Revised Statutes, 7-70-101, **add** (2.3), (2.5), (2.7), and (8.5) as follows:

Section 2 of the proposed initiative creates section 7-70-101, but that section already exists in the Colorado Revised Statutes. Therefore, instead of adding

section 7-70-101, the amending clause should add new subsections in alphabetical order between the existing subsections. "Extraordinary technology" should be subsection (2.3), "new energy" should be subsection (2.5), "patent" should be subsection (2.7), and "USA PATRIOT Act" should be subsection (8.5).

13. Abbreviations such as "e.g." and "etc." should not be used in the Colorado Revised Statutes. Instead use "such as" or "including."
14. When there is only one paragraph in a section, it should not be subdivided into subsections. For example, in section 3, section 5, and section 6, there should not be a (1) following the headnote.
15. In section 2 of the proposed initiative, the paragraph letters should not be shown in the small caps code, but rather in lowercase type.
16. The words "and" or "or" should be used before the last item in a series.
17. When paragraphs follow an introductory portion and are not complete sentences, they should end with a semicolon, except for the last paragraph, which should end with a period. In section 7-70-101 (1), paragraphs (a) through (k) should end with semicolons and (l) should end with a period.
18. The correct way to cite a public law is, for example, "Pub.L. 107-56."
19. Each section in the Colorado Revised Statutes has a headnote. Headnotes briefly describe the content of the section. Only the first word of the headnote should begin with a capital letter. The headnotes in Sections 3 and 4 of the initiative should be changed so that only the first word in each headnote is capitalized.
20. In section 18-13-131 (2), the words "energy facility" should not be in quotation marks and the comma following "facility" is unnecessary.
21. For purposes of this proposed 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," 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."
22. Section 18-13-131 (2) is an incomplete sentence. Who is requiring that extraordinary technology and related property have the same legal status as an energy facility? Is it the state of Colorado? Or should the subsection be reworded to eliminate the words "require that,"?