

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

TO: Marla Fernandez-Benavides and Debra Carroll
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: May 25, 2023
SUBJECT: Proposed initiative measure 2023-24 # 63, concerning the prohibition of environmental, social, and governance investment standards

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 purpose of the proposed amendment to the Colorado constitution appears to be to prohibit the use of environmental, social, and governance (ESG) investment standards in Colorado.

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. The proposed initiative states that article XI, section 8 of the Colorado constitution is being amended. Article XI, section 8, which related to city indebtedness, was repealed effective January 1, 1972. Did the proponents intend to add a new section to article XI of the Colorado constitution?
3. The summary section of the proposed initiation states, in relevant part, that "[t]his section takes effect November 15, 2023 [sic], or as stated." Do the proponents intend for the proposed initiative to take effect on November 15, 2023 or at a different time? If the proponents intend that the proposed initiative take effect on November 15, 2023, how will this be accomplished, as the earliest the initiative can be submitted to the registered electors of the state for approval is at the general election in November, 2024?
4. Section (1) of the proposed initiative states that "[t]he people of the state of Colorado hereby find that Environmental, Social, Governance (aka ESG) is an umbrella term for a broad range of environmental, social and governance metric scoring systems designed and developed to allow the government to force investors to assess (arbitrarily and comprehensively), report, and score individuals and business entities based on their behaviors and evaluate the future financial performance of companies, (and individuals) in particular with, and manage their risks and compliance with ESG. ESG would be an ex post facto law impairing the obligation of contracts and be retrospective in its operation".
 - a. Do the proponents intend to prohibit the state from enforcing ESG standards or prohibit a person or entity from relying on ESG standards? Or do the proponents intend for the proposed initiative to prohibit both actions?
 - b. Do the proponents intend to prohibit ESG completely, or only to the extent that relying on ESG standards will result in the impairment of existing contract obligations?

- c. Do the proponents also intend to prohibit ESG to extent that relying on ESG standards will impact future contractual obligations?
 - d. Would the proposed initiative prohibit a private person or entity from using ESG standards if they want to use them?
- 5. Section (2) of the proposed initiative states that "[t]he people hereby find E.S.G. unconstitutional and impose a ban on allowing it to further penetrate Colorado society".
 - a. What does it mean for ESG to "further penetrate Colorado society"?
 - b. The language "impose a ban on allowing [ESG] to further penetrate Colorado society" suggests that the proponents intend for the ESG prohibition to apply prospectively. Do the proponents intend for the proposed initiative's ESG prohibition to apply prospectively or retroactively?
- 6. Sections (1), (3), (4), and (5)(c) of the proposed initiative appear to each define the term "ESG".
 - a. Which definition of ESG is controlling?
 - b. Have the proponents considered combining the definitions of ESG in sections (1), (3), (4), and (5)(c) of the proposed initiative into one section?
- 7. Sections (5)(a) and (5)(b) of the proposed initiative appear to define the terms "foreign entity", "corporate responsibility", "corporate social responsibility", "equity and inclusion", "stakeholders", and "sustainability".
 - a. Have the proponents considered combining these definitions and the definition of "ESG" into one definitions section?
 - b. Is your intent in (5)(b) to specify that the terms "corporate responsibility", "corporate social responsibility", "equity and inclusion", "stakeholder", and "sustainability" are other terms that are used in a manner similar to ESG?
- 8. Section (6) of the proposed initiative states that "[b]anning ESG effectively after the November 2024 election to ensure that good Colorado businesses stay in business and don't get pushed into adopting ESG scoring standards. Any business or individual infringed upon by equity and inclusion legislation can seek redress in court".

- a. Does the phrase "equity and inclusion legislation" have the same meaning as ESG?
- b. Do the proponents intend to create a private right of action for the violation of the proposed initiative's ESG prohibition?
- c. If so, does the private right of action apply only to "legislation"? Or does it also apply to private conduct?
- d. Have the proponents considered specifying in which Colorado court a person "can seek redress"?

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** section ___ to article XXX as follows:

2. If the proposed initiative is to be added to the Colorado constitution as a new article, it should include an article heading. For example, the article heading for article XXVIII of the Colorado constitution appears as follows:

ARTICLE XXVIII

Campaign and Political Finance

3. If the proposed initiative is to be added as a new section within an existing article of the Colorado constitution, it should include a section number and headnote. For example, section 6 of article XVIII of the Colorado constitution appears as follows:

Section 6. Preservation of forests. The general assembly shall enact laws in order to prevent the destruction of, and to keep in good preservation, the forests upon the lands of the state, or upon lands of the public domain, the control of which shall be conferred by congress upon the state.

4. If the proposed initiative is to be added as a new section within an existing article of the Colorado constitution, it should be a new section number rather than a section number of a section that has been repealed.
5. The Colorado constitution is divided into articles, and each article may contain sections, subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

Section X. Headnote.

(1) Subsection.

(a) Paragraph

(I) Subparagraph

(A) Sub-subparagraph

(B) Sub-subparagraph

(II) Subparagraph

(b) Paragraph

(2) Subsection

(3) Subsection

6. The following is the standard drafting language used for creating a definition:
"As used in this [section][subsection][paragraph], unless the context otherwise requires, '[term]' means (the definition for the term)...". [For use with a single definition]
7. Definitions should be in one subsection or paragraph and should be in alphabetical order.
8. When referencing the section you are currently in, the section number does not need to be referenced. For all other article and section divisions, the number or letter of what you are referencing should be specified for every level of the reference. For example:

This section

This article XXX

Article XIX of the Colorado constitution

Section 20 of article X of the Colorado constitution

Section 20 (3)(b) of the Colorado constitution

Subsection (5)(b)(II) of section 9 of article XVIII of the Colorado constitution

9. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to and stricken type, which appears as stricken type, to show language being removed from the Colorado constitution or the Colorado Revised Statutes.