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## MEMORANDUM

**TO:** Kelly Brough and Joe Blake

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**DATE:** February 17, 2016

**SUBJECT:** Proposed initiative 2015-2016 #98, concerning independent voters in primary elections

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.

### Purpose

The major purpose of the proposed amendment to the Colorado Revised Statutes appears to be to:

1. Allow voters unaffiliated with a major political party to participate in state and local primary elections in order to increase participation and voter turnout in primary elections.

## 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 statutory change, the proposed initiative may be amended by subsequent legislation enacted by the General Assembly. Are you aware of this possibility?
3. Have the proponents considered any fiscal or other impacts that may result from the enactment of the proposed initiative on the state and local governments? Insofar as enactment of the proposed initiative were to lead to a strain on governmental resources, have the proponents considered incorporating a tax, fee, or some other mechanism that would allow some of the costs of the proposed initiative to be recovered?
4. On page 2, paragraph (b), the initiative refers to the "secretary". It is assumed that you are referring to the Secretary of State but, to avoid ambiguity, please specify.
5. For precision, would the proponents consider adding the word "political" before the word "party" where "party" appears in the legislative declaration?
6. Are the proponents aware of any legal impediments to allowing an elector to cast a ballot in the primary election of a political party with which they are not affiliated? Do the proponents know how many other states select their general election candidates in this manner? Are the proponents aware of any successes or problems these other states have encountered in selecting their general election candidates in this manner?
7. How do the proponents address the philosophical arguments that the political parties should be able to restrict their primary election electorate to voters who have affiliated with that political party?
8. Under the changes the proposed initiated measure makes to section 1-4-101 (2) (introductory portion), are these changes intended to apply to major and minor political parties? What determines whether the political party is "entitled to participate in the primary election"? By what manner would an elector select and cast the ballot of any one political party?

9. With respect to the proposed new section 1-4-101 (2) (a), C.R.S. (Section 3 in the proposed initiated measure), do you know how practicable or costly it will be for a county to use (and send to all eligible electors) a single combined ballot that contains the names of the candidates of each of the political parties? Is this requirement only applicable to major political parties? What if an elector wishes to cast a single combined ballot of a minor political party? Are there any implementation difficulties that would arise from the fact that the introductory portion of this amended section appears to refer to all political parties whereas the requirements in this paragraph (a) appear to involve only major political parties? Additionally, current law requires mail ballots to be sent to all active registered electors. Proposed section 1-4-101 (2) (a), however, would require single combined ballots to be sent to all “active electors”.
10. With respect to the proposed new section 1-4-101 (2) (c), C.R.S., would you consider amending this paragraph to require that any rules be adopted in conformity with the “State Administrative Procedure Act”, article 4 of title 24, C.R.S.?
11. With respect to the changes made to section 1-4-502 (1), C.R.S. (section 4), what does this clarification add to the existing language? Stated differently, what do the proponents hope to accomplish with this change and why is it necessary?
12. With respect to the proposed new section 1-4-702, C.R.S. (section 5), how is this section part of the single subject of the proposed initiative? Subsection (1) appears to allow a political party the ability to select all of its candidates by assembly or convention. Is this a correct reading of this subsection (1)? If so, is this subsection (1) compatible with the legislative declaration of the proposed initiative which promotes allowing all voters to vote in primary elections?
13. With respect to the changes made to section 1-4-502, C.R.S. (section 7), why are minor political parties given the ability to prohibit unaffiliated voters from voting in their primary election (if in accordance with such party’s controlling law), which is a course of action seemingly not made available under the proposed initiative to major political parties? Are there any legal reasons for this disparity?
14. With respect to the changes made to section 1-5-402 (2), C.R.S. (section 8), is the “combined primary election ballot to be used by unaffiliated electors” referenced in subsection (2) (introductory portion), the same combined ballot

- referenced in section 1-4-101 (2)? If so, would the proponents consider adding a cross-reference or using a consistent term to make the connection more clear?
15. With respect to the changes made to section 1-7-201 (2), C.R.S. (section 9), why is it necessary to strike language allowing the elector to affiliate with a political party for purposes of the primary election? Under the proposed initiative, will an elector no longer be able to affiliate with a political party for the primary election?
  16. With respect to the proposed new section 1-7-201 (2.3), C.R.S. (section 9), why is it necessary to require an eligible elector to execute a declaration of affiliation form when the section elsewhere allows the elector to vote in a primary election without declaring an affiliation? Is there any conflict between these two provisions? Is there any conflict between the declaration of affiliation requirements in section 1-7-201 (2.3) and the existing statutory language allowing an elector to affiliate with a political party for purposes of the primary election that is being struck from section 1-7-201?
  17. With respect to the changes made to section 1-8.5-101 (5), C.R.S. (section 12), this section uses the term “regular party ballot” in “accordance with section 1-7-201 (2.3)”. However, section 1-7-201 (2.3) does not use the term “regular party ballot”. What is meant by this term and would the proponents consider adding a definition of this term or finding a uniform term for this type of ballot?
  18. Many political observers across the spectrum have come to appreciate the role of political parties as mediating institutions capable of creating broad coalitions of voters that potentially transcend special interests and our tendency to break up into ever smaller and hostile political units. Perhaps the last major role played by political parties is placing their brand name behind candidates for the general election. If enacted, would the proposed initiated measure deprive political parties of even this function? How will the role played by political parties be changed if the proposed initiated measure were enacted?
  19. In terms of the effective date of the measure, do the proponents intend for the measure to take effect upon the date of the governor’s proclamation or do you intend a different effective date?

## 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. 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.
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. If you are *not* amending the entire section, the amending clause should specify which subsection, paragraph, subparagraph, or sub-subparagraph is being amended, repealed, or added. For example, on page 5, the amending clause should read: "In Colorado Revised Statutes, 1-7-201, **amend** (2); and **add** (2.3) as follows:".
3. The separate sections of the legislative declaration should be numbered or lettered, as appropriate.
4. Following standard drafting practice, proposed subsection 1-4-201 (2), C.R.S., should be expressed as an introductory portion (meaning the language ends in a colon and sets up the subsequent paragraphs as a list) or the entire section can be renumbered as (2) (a), (2) (b), (2) (c), and (2) (d).