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## MEMORANDUM

**TO:** Ryan Ross and Mark McIntosh

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

**DATE:** March 4, 2016

**SUBJECT:** Proposed initiative measure #113, concerning elections for federal and state office

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 give political parties permission to determine how to nominate candidates for public office and to do so at their own discretion;

2. To create a two-stage election system in which all candidates for federal or state offices qualify for the ballot by party nomination or petition and compete against each other in each stage regardless of their party affiliation or non-affiliation, and where any registered voter can vote for any candidate on the ballot in their district regardless of their declared party affiliation or non-affiliation;
3. To permit second-stage voters to vote for their top three choices among the candidates for each office, with the winner determined by a series of instant runoffs and winning by at least fifty percent of the votes; and
4. To provide public funds to political parties to finance the cost of the nomination system they adopt.

## **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 the proponents 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 state and local governments? Insofar as enactment of the proposed initiative were to lead to a strain on governmental resources, it appears the tax increase in section 12 (1) of the proposed initiative appears to address this issue, at least in part. Is this the proponents' intention?
4. On page 2 of the proposed initiative, section 1-4-103, the language of paragraphs (c) and (d) does not align with the language of the introductory portion of subsection (3) which states "Petitions shall:". Please consider either rephrasing or renumbering.
5. On page 4, section 1-4-104 (1), the proposed initiative refers to "part 13 of article 4." It is assumed that the proponents are referring to part 13 of article 4 of title 1, but, to avoid ambiguity, please indicate to which title the proponents are referring.

6. On page 4, sections 1-4-106 and 1-4-107, the proposed initiative refers to the "secretary". It is assumed that the proponents are referring to the Secretary of State but, to avoid ambiguity, please specify.
7. With respect to proposed section 1-4-102, do these three criteria represent threshold conditions that a candidate must satisfy to appear on the first round ballot or conditions that entitle a candidate to appearing on the first round ballot if met?
8. With respect to proposed section 1-4-103:
  - a. Do the proponents know whether the necessary security safeguards are in place to make the system described in section 1-4-103 (2) operational by January 1, 2018?
  - b. What is the relationship between the petition process and the process by which political parties will nominate candidates?
  - c. How will political parties nominate candidates if the proposed initiative were to become law?
  - d. Are there any legal restrictions on the ability of the proposed initiative to cover candidates for federal office?
  - e. What is the purpose of proposed section 1-4-103 (3) (d) that requires the submission of the names of registered electors to be nominated as presidential electors?
  - f. Does the proposed initiative contemplate the use of both "hard copies" of petitions that would be signed in person and electronic petitions that would be signed online?
  - g. Subsection (4) allows petitions to be signed by "registered voters residing in the state or district from which the officer is to be elected." Do the proponents intend for state residents to be able to sign for statewide office candidates and their own districts candidate only? Or can any state resident sign a petition for any candidate in the state?
  - h. Subsection (4) contemplates "registered voters" signing petitions, while subsection (5) refers to "eligible voters." Are these provisions in conflict?
  - i. Does subsection (5) mean that if a petition for a particular candidate obtains the requisite number of signatures, the candidate is automatically placed on the first round ballot?

- j. How did the proponents determine the number of signatures required to be obtained for each of the specific offices listed?
  - k. To what extent is a candidate required to choose between the nomination and petition route for obtaining placement on the first-round ballot?
  - l. Under the proposed initiative, how does a candidate make the first round ballot? What is the process by which this determination made? Who makes this determination?
  - m. Is there any limit under the proposed initiative on the number of candidates that may be placed on the first round ballot? If so, where is this limitation found in the text of the proposed initiative?
9. With respect to proposed section 1-4-104:
- a. Does the Secretary of State currently certify political parties, or merely make a determination of qualification? To the extent that this is a new duty, do the proponents wish to elaborate on the certification process?
  - b. What is the process by which party members are nominated for the first-round ballot?
  - c. Does subsection (1) (b) mean that each political party may have two nominees placed on the first-round ballot? If not, would you consider clarifying the effects of obtaining the nomination of a political party under the proposed initiative?
  - d. What does it mean to be the nominee of a political party under the proposed initiative?
10. With respect to section 1-4-105 through 1-4-210, when the proposed initiative refers to "ballot", do you mean "general election ballot?" If so, would you consider clarifying this point to eliminate confusion?
11. Section 1-4-109 allows first-round elections to be coordinated with other elections. Do the proponents wish to allow or require such local elections to be held on the first Tuesday in September of even-numbered years to the extent that they aren't currently?
12. With respect to proposed section 1-4-207:
- a. Is it a correct reading of the proposed initiative that, if a candidate does not receive more than 50% of the vote in the first-round ballot, the four

candidates with the highest number of votes in the first round election and any other candidate who obtains at least 3% of the votes cast in the first-round ballot are also to be placed on the general election ballot?

- b. Does subsection (3) mean that the ballot must provide a place for the voters to vote for two write-in candidates, or is some other meaning intended?

13. With respect to proposed section 1-4-210:

- a. Who administers the process of instant runoff voting? Who counts the ballots? Where does this counting take place?
- b. Under the proposed initiative, will there be one round of voting but unlimited rounds of counting ballots until a winner is elected? Will a voter be expected to do anything in addition to casting his or her original general election ballot?
- c. Are there deadlines by which the process of counting ballots is to be completed? Is that deadline specified in the proposed initiative?
- d. Will the instant runoff voting procedures under the proposed initiative be used for federal as well as state elections? To what extent will this system be used in presidential elections in the state? To the extent it will be used, how will the proponents ensure that such a system based on repeating counting of ballot to produce a winner will not cause delays that would adversely affect the timely election of a President of the United States?
- e. Some of the criticisms that have been lodged against instant runoff voting include that such a system: Does not work as advertised, particularly in terms of increasing voter turnout; is not "instant"; confuses the electorate; does not save money but rather increases the costs of elections; does not provide a majority but rewards candidates with less than a majority of the ballots cast; places reliance on more complex election technology at a time when states such as Colorado are returning to emphasizing less complex technologies such as mail ballots; mandates central counting of votes, which provides increased opportunities for wholesale fraud or malfeasance; uses tallying software that makes use of a complex algorithm that makes the process even more opaque; and may adversely affect racial minorities and persons with disabilities. Have the proponents studied these criticisms? If

enacted, how will the instant runoff system under the proposed initiative be administered in a manner that would avoid or ameliorate these possible adverse consequences?

- f. Is there any other state that has adopted this system of instant runoff voting to select all of its federal and state office holders?
  - g. Are you aware that a number of jurisdictions at the local level across the nation that had previously adopted instant runoff voting systems have subsequently rejected such systems? Do you have an explanation for why this has been happening and why the proposed initiative promises a different result? Are there examples of local jurisdictions that have adopted instant runoff voting systems in recent years?
14. With respect to sections 5 through 8 of the proposed initiative, which appear to contain conforming amendments, is the proponents' major objective in drafting and including these sections deleting references to the primary election in favor of substituting references to the first-round election? What becomes of the primary election if the proposed initiative were enacted?
15. With respect to section 12 of the proposed initiative, which deals with funding:
- a. Why did the proponents decide that costs associated with implementation of the proposed initiative would be paid for by increasing the state taxes on alcohol and tobacco products?
  - b. How did the proponents arrive at the figure of \$1.5 million as the amount of revenue to be raised?
  - c. For how many years are the increased taxes to be imposed?
  - d. Is it the proponents' intent that an additional \$1.5 million be raised from each of the taxes imposed upon spirits, beer, wine, cigarettes, and tobacco products? If it is in the aggregate, how will it be determined by which amount the particular taxes on alcohol and tobacco taxes will need to be raised to generate the desired revenue amount? Who makes that determination?
  - e. Once the rates have been increased, do they remain at that level indefinitely or can they be adjusted subsequently?
  - f. What happens if the actual revenues realized from the increased taxes are higher or lower than the \$1.5 million target?

- g. Will the revenue generated by the tax increases count against state fiscal year spending for purposes of section (7)(a) of TABOR?
- h. Section 39-22-623, Colorado Revised Statutes, requires 27% of the proceeds of the cigarette tax to be apportioned to cities, towns, and counties in proportion to the amount of sales tax collected by those local governments. Would a portion of the additional \$1.5 million raised from increasing the cigarette tax rate be apportioned to local governments pursuant to this statute? If not, would the proponents consider appropriate amendments to avoid the distributions to local governments?
- i. What is the proponents' rationale in using the revenue from the increased taxes to (i) pay political parties for financing their nomination contests; and (ii) provide reimbursement to unaffiliated candidates of their expenses in obtaining signatures?
- j. Have the proponents made any sort of calculation of how much increased revenue from the imposition of the next taxes will be available (i) to each of the political parties; and (ii) to unaffiliated candidates?
- k. Do the proponents know how much the political parties currently spend on financing their nomination contests? What types of expenses are the proponents including in referencing the types of expenses political parties spend on financing their nomination contests?
- l. How will the increased revenue under section 12 (2) be allocated among all major and minor political parties?
- m. Do the proponents have any idea of what the "per-signature reimbursement rate" under section 12 (3) would be if the tax successfully generated \$1.5 million in the first state fiscal year in which the tax would take effect?
- n. What is a "registered active unaffiliated voter" as used in section 12 (3) of the proposed initiative?
- o. Are the proponents aware that, under section (3) (c) of the TABOR provisions of the state constitution, the ballot title for the proposed initiative must start with the words "Shall state taxes be increased...."?
- p. How do the funding provisions of the proposed initiative relate to the single subject of the proposed initiative?

16. Section 15 of the proposed initiative directs the general assembly to adopt a bill "making any non-conforming amendments it deems necessary..." Such ameliorative provisions are actually conforming amendments.

## 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. Each statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, on page 1 of the proposed initiative, the amending clause for section 1-2-218.5 should read: "In Colorado Revised Statutes 1-2-218.5, **amend** (2) as follows:". Subsequently, each section being amended, added, or repealed should have its own amending clause and should not be combined with other sections that are being amended, added, or repealed. Additionally, on pages 10 and 11, please include an amending clause with sections 12, 13, and 14 to indicate where these new sections should be placed within statutes.
2. With the exception of definitions, all introductory portions should be numbered. For example:  
**1-4-102. Ballot Access.** (1) Introductory portion:
  - (a) Paragraph;
  - (b) Paragraph; and
  - (c) Paragraph.
3. 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.
4. When amending current law, it is standard drafting practice to include all language as it currently exists in statutes (with small capital letters and/or strikethroughs, as necessary, to show amended text). If your intent is to change the current language of a particular section, rather than just omitting that

language please strike the language you want to amend or repeal and small cap the new language being added.

5. 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.
6. It is standard drafting practice when referencing statutory sections to include the word "section" before the number. For example, "section 24-35-204.5, C.R.S".
7. The following words are misspelled:
  - a. "Ballotting" should be spelled "balloting";
  - b. "Additonal" should be spelled "additional";
  - c. "Subsequenbtly" should be spelled "subsequently";
  - d. "Majority" should be spelled "majority";
  - e. "Recieves" should be spelled "receives";
  - f. "Reimbursment" should be spelled "reimbursement";
  - g. "Multiplied" should be spelled "multiplied";
  - h. "Regiserted" should be spelled "registered"; and
  - i. "Efefctive" should be spelled "effective".
8. On pages 2 and 7, sections 1-4-103 and 1-5-611, the paragraph letters should not be shown in small capitals, but instead should be shown in lowercase lettering.
9. On page 2, please remove the word "if" from section 1-4-103 (3) (a) (I).
10. On page 3, section 1-4-103 (7), when referencing another subsection in the same section it is standard drafting practice to format the reference as "subsection (5) of this section" rather than "1-4-103 (5)".

11. It is not necessary to strike language being taken out of a headnote.
12. If there are definitions in a section, it is standard drafting practice to include the word "definitions" in the headnote.
13. It is not standard drafting practice to underline conforming amendments.
14. It is standard drafting practice to set off nonessential phrases (i.e., introductory, parenthetical, or prepositional phrases) with commas.
15. It is standard drafting practice to insert a semicolon before the phrase "except that".
16. On page 10, subsection (2), there is a stand-alone paragraph (a). It is not standard drafting practice to have a paragraph (a) without a paragraph (b), etc., following it. Please revise.
17. Also in subsection (2), since the proposed initiative is making a reference to the same paragraph the reader is currently in please consider changing "in subsection (2)" to "this subsection (2)".
18. In subsection (3), "determine" should be "determining".
19. In proposed section 1-4-105 (2), "hometown" should be referred to as the municipality or unincorporated area of a county, as applicable, in which the candidate resides.