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Colorado General Assembly

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MEMORANDUM

TO: Jason Bertolacci and Owen Alexander Clough
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: February 20, 2024
SUBJECT: Proposed initiative measure 2023-2024 #186, concerning the conduct of 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.

This initiative was submitted with a series of initiatives including proposed initiatives 2023-2024 ##186 to 196. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiatives 2023-2024 ##187 to 196, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in those other memoranda may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum.

Purposes

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

1. To require an all-candidate primary election for covered offices to be held in which one ballot containing the names of all candidates that have petitioned onto the ballot are listed regardless of political party affiliation and all eligible electors regardless of political party affiliation are allowed to vote for candidates on the ballot;
2. To define the term "covered office";
3. To generally require the four candidates that receive the highest number of votes at the primary election to be placed on the ballot for the general election for the corresponding covered offices and provide for exceptions when there are fewer than four candidates or when a candidate who would otherwise be placed on the ballot becomes unavailable to be placed on the ballot;
4. In the event of a tie for the final advancing position, to require the final candidate to advance to the general election to be determined by lot;
5. To establish thresholds for candidates for a covered office to petition onto a primary election ballot;
6. To establish the manner in which ballots are prepared for a primary election for covered offices;
7. To establish the manner in which voting is conducted for a primary election for covered offices;
8. To require that general elections for covered offices be conducted by instant runoff voting;
9. To establish requirements for the formatting of general election ballots for covered offices for elections that will be conducted by instant runoff voting;
10. To establish that voters may rank as many or as few candidates as they wish for covered offices, including ranking just one candidate per office, in an election conducted by instant runoff voting;
11. To establish the mechanism for tabulating votes in an instant runoff election;

12. To require the secretary of state to promulgate rules to implement certain changes to the election code as added or amended by the proposed initiative; and
13. To make necessary conforming amendments in the election code regarding primary elections, petitions, and general elections to implement 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. Is it your intent that the language in the "Declaration of the People of Colorado" in proposed Section 1 appear in the Colorado Revised Statutes? If so, the declaration will need to be added in small caps and with a new statutory section as you have done elsewhere when adding new statutory sections throughout the proposed initiative.
3. Section 1 of the proposed initiative setting forth the "Declaration of the People of Colorado" states that "this equal access...holds elected officials more accountable." Can you explain this statement?
4. Proposed section 1-1-104 (1.05) defines an "active candidate" as a candidate who has not been eliminated or elected. What does eliminated mean in this context?
5. The proposed initiative's definition of "state officer" includes "the governor and lieutenant governor". Currently, a candidate for governor selects a running mate for lieutenant governor, and, pursuant to section 3 of article IV of the state constitution, the "governor and the lieutenant governor shall be chosen jointly by the casting by each voter of a single vote applicable to both offices." Is it your intent that the initiative will change the way in which a candidate for lieutenant governor currently accesses the ballot?
6. The following comments and questions relate to the provisions concerning the addition of section 1-4-101.5 relating to all-candidate primary elections for covered offices:

- a. Is it the proponents' intent that voters receive two ballots for primary elections conducted on the last Tuesday in June of even-numbered years, one ballot for non-covered office candidates, and one ballot for covered office candidates?
 - b. Can a candidate list anything in the "political party affiliation" space next to his or her name on the ballot or only major and minor political parties and qualified political organizations as defined by the secretary of state?
 - c. It appears that under the proposed initiative, candidates for a general election could all be from the same political party. Is that the proponents' intent?
7. The following comments and questions relate to the provisions concerning the addition of section 1-4-207 regarding the final four general elections for covered offices:
- a. Proposed section 1-4-207 anticipates an election ranking scheme, ranked tally voting, multiple rounds, and other types of voting which are not currently implemented and which would require new procedures in order to administer and count ballots. Are districts equipped with sufficient resources to develop and administer these new procedures?
 - b. Who is responsible for the tabulation of the ballots? County clerks and recorders? The designated election official? The secretary of state?
 - c. Does the proposed initiative require any change to the current mechanisms of reporting votes and election returns to implement?
 - d. How should withdrawn or deceased candidates be treated under the proposed initiative?
 - e. Subsection (7) of proposed section 1-4-207 states that "If there are two candidates tied with the highest number of votes and the ranked voting tally is complete, the candidate to be elected shall be determined in the manner provided by law or by lot, as applicable."
 - i. How would the determination be made "in the manner provided by law"? Is there currently provision for this in law?
 - ii. If there is not a manner provided by law to make the determination, is it the proponents' intent that by default lot be used to determine the winning candidate?

- f. Should risk limiting audits be required for elections conducted by ranked choice voting as contemplated under the proposed initiative?
8. Regarding the nomination petition process in proposed section 1-4-802.5:
 - a. If a candidate for a covered office is affiliated with a political party, is it the proponents' intent that the candidate may obtain signatures from electors registered with any political party, even if it is not the party with which the candidate is affiliated?
 - b. Under current law, the thresholds for signatures are different for candidates from a major political party and a minor political party or unaffiliated candidates. The proposed initiative does not make a similar distinction in establishing the threshold of signatures for candidates petitioning onto the ballot. Is that the proponents' intent?
9. Proposed section 1-4-904 (2.5) states that petitions to nominate candidates for the all-candidate primary may be signed by any eligible elector who has not signed any other petition for any other candidate for the same office. How is this verified under current law? Do the proponents intend for verification to be through the same process, if any?
10. Regarding the proposed amendment to section 1-5-404, is it the proponents' intent that ballot positions of candidates at a general election be organized notwithstanding political party affiliation? If, so would this apply only to candidates for covered office or also to other candidates such as candidates for the offices of president and vice-president of the United States?

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. For purposes of this statutory 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," which is 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."

2. 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. This includes pluralizing language. For example: "~~section~~ SECTIONS".
3. In (23.4), the term "overvote" is defined to include "the assignment of more than name to one ranking." Is this section meant to say "the assignment of more than one name to one ranking"?
4. 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, specifically:
 - a. Headnotes may be changed or added without showing strikes and small caps.
 - b. When adding a section number to a list of existing section numbers, in order to make the addition clear, the new section number should be expressed in *bold italics*. This applies to "1-5-402.5" in section 25 of the proposed initiative.
 - c. When pluralizing language, strike the word and add it in small caps. For example, "~~section~~ SECTIONS".
5. Text of the proposed initiative should be in small capital letters when proposing new language with some exceptions. In cross references, paragraph letters should not appear in small caps. For example, the cross reference in section 26 of the proposed initiative should be, 1-4-101.5(2)(d)(IV), rather than 1-4-101.5 (2)(D)(IV).
6. Amending clauses have a specific form. Take into consideration the following:
 - a. When adding a subsection (2) to a section that does not have subsections, taking section 6 of the proposed initiative as an example, the amending clause should read, "In Colorado Revised Statutes, **amend** 1-4-102, as follows: [...]." because 1-4-102 does not have a subsection (1).
 - b. Taking section 18 of the proposed initiative as an example, it isn't accurate for the amending clause to indicate that "(1)" is being amended unless the entirety of subsection (1) is being amended. This is referred

to, for purposes of the amending clause, as "(1) introductory portion" to distinguish this from all of subsection (1).