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Colorado General Assembly

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MEMORANDUM

TO: Steven Ward and Suzanne Taheri
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: March 27, 2024
SUBJECT: Proposed initiative measure 2023-2024 #258, concerning the Air Quality Control Commission

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 change the name of the air quality control commission to the independent air quality control commission;
2. To change the composition of the commission to include three members who are affiliated with the state's largest major political party, three members who

are affiliated with the state's second largest major political party, and three members who are not affiliated with either major political party; and

3. To require approval of the governor's appointments to the commission by a two-thirds vote of the senate.

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?
 - a. You might consider adding an additional section with a specific effective date to the proposed initiative and indicating that the proposed initiative takes effect on the specified effective date or upon the proclamation of the governor, whichever is later.
 - b. Alternatively, you could simply add an additional section to the proposed initiative stating that the proposed initiative takes effect upon the proclamation of the governor, as is provided pursuant to article V, section 1 (4)(a) of the Colorado Constitution.
3. Subsection (1) of the proposed initiative renames the "air quality control commission" as the "independent air quality control commission." There are dozens of references to the "air quality control commission" throughout the Colorado Revised Statutes, including numerous references throughout titles 8, 23, 24, 25, 30, 31, 34, 35, 40, 42, and 43 of the Colorado Revised Statutes. By only changing the name in section 25-7-104, C.R.S., where the commission is created, but not in the dozens of other statutes in which the commission is referenced, the proposed initiative would create a conflict in the statutes regarding the name of the commission. You should consider adding language to authorize the revisor of statutes to change the name of the commission throughout the Colorado Revised Statutes. Sections 8-45-123 and 8-47-101, C.R.S., provide examples of how such language may be written.

Further, you should consider changing the references to "air quality control commission" to "independent air quality control commission" in the headnote

of section 25-7-104, C.R.S., of the proposed initiative, as well as in the second sentence of subsection (1) of the proposed initiative.

4. "Registered elector" is undefined for the purposes of article 7 of title 25, C.R.S. To add additional clarity regarding what the terms "registered" and "elector" mean within the context of subsection (2)(a) of the proposed initiative, you might consider referencing the existing definition of "registered elector" in section 1-1-104 (35), C.R.S.
5. Similarly, what does "voter registration data published by the secretary of state" in subsection (2)(a) of the proposed initiative mean? Are you intending to reference the computerized statewide voter registration list maintained by the secretary of state pursuant to section 1-2-301 (1), C.R.S.?
6. In considering members serving on the commission at the time that the proposed initiative takes effect:
 - a. Do you intend that the members may serve the remainder of their terms, even if the commission as constituted at that time might not meet the new composition requirements related to political affiliation? If so, you might consider adding language indicating that the new requirements apply to terms starting on or after the effective date of the proposed initiative.
 - b. None of the members serving on the commission at the time the proposed initiative takes effect will have been approved by the senate by a two-thirds vote. If you intend to allow current members to continue serving out the remainder of their terms, do you intend that they would be subject to such a vote to continue to serve the remainder of their terms?
7. Under the constitutional separation of powers set forth in article III of the Colorado Constitution, "no person or collection of persons charged with the exercise of powers properly belonging to [the legislative, executive, or judicial department] shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted." Article IV, section 2 of the Colorado Constitution provides that the governor has the supreme executive power of the state. Under section 25-7-104 (1), C.R.S., the air quality control commission is an executive agency created in the department of public health and environment and, therefore, engages in executive functions of the state. Does the requirement in subsection (1) of the proposed initiative requiring that the senate approve the appointment of commission members, and not just

- consent to their appointments, thus violate the constitutional separation of powers that gives the governor the supreme power over executive functions of the state?
8. With respect to the requirement in subsection (1) of the proposed initiative that the senate approve the governor's appointments to the commission by a two-thirds vote:
 - a. Do you intend that commission members appointed by the governor could start serving before the senate votes on their appointment?
 - b. If you intend that commission members appointed by the governor cannot start serving until they are approved by the senate, how would vacancies on the commission be filled when the general assembly is not in session?
 9. In subsections (2)(a) and (2)(b) of the proposed initiative, there are references to the commission as the "independent board." If you intend to change the name of the commission to a board, you should make that change throughout the proposed initiative, including changing the references to the commission in subsection (2) of the proposed initiative. Otherwise, you should change the two references to the "independent board" to the "commission."
 10. In subsection (2)(b) of the proposed initiative, with regard to the examples of persons who are disqualified from serving on the commission because of a conflict of interest:
 - a. Would the disqualified lobbyists, legislators, political party employees, and individuals serving in an official capacity for educational or advocacy organizations related to environmental matters include individuals serving in those capacities in other states and for the federal government? If not, you might consider adding "in Colorado" after the words "lobbyist," "assembly," "employee," and "capacity."
 - b. Regarding the reference in subsection (2)(b) of the proposed initiative to individuals "serving in an official capacity with an entity," what does it mean to serve in an "official capacity"? Is this referring specifically to board members and officers of the entity?

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 Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

X-X-XXXX. Headnote. (1) Subsection (introductory portion):

(a) Paragraph (introductory portion):

(I) Subparagraph (introductory portion):

(A) Sub-subparagraph;

(B) Sub-subparagraph;

(II) Subparagraph.

(b) Paragraph.

(2) Subsection.

(3) Subsection.

When a subsection, paragraph, or subparagraph is followed by a lower-level letter or number, the higher-level number or letter must be an introductory portion that, when read together with the lower-level letter or number, reads as a complete sentence.

In the proposed initiative, a paragraph (a) and a paragraph (b) follow subsection (2), but subsection (2) of the proposed initiative is not written as an introductory portion. There are three ways this can be corrected:

- a. Paragraphs (a) and (b) could be changed to subsection numbers; for example, (2.3) and (2.5), respectively;
- b. Subsection (2) of the proposed initiative could be rewritten as an introductory portion so that the language leads into paragraphs (a) and (b), making each paragraph, when read with (2), a complete sentence; or

- c. If you believe that the three provisions are so closely related that they need to be in one subsection, eliminate the appearance of an introductory portion by changing subsection (2) of the proposed initiative to subsection (2)(a) and relettering the following paragraphs as (b) and (c). For example:

25-7-104. Air quality control commission created. (1) There is created in the department ... in section 24-1-105.

(2) (a) Appointments to the commission ... experience. ~~No more than five commissioners shall be members of one political party.~~

(b) THE INDEPENDENT BOARD SHALL ... FOR WHICH SUCH DATA IS PUBLISHED.

(c) NO PERSON MAY BE APPOINTED ... STANDARDS IN COLORADO.

(3) Terms of members shall be ... of the regular term.

2. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), C.R.S., and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), C.R.S., 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." In subsection (2)(a) of the proposed initiative, the second sentence states "[a]ppointments shall include three members...." Because the subject of the sentence is "appointments" and not a person, you might consider changing "shall" to "must" in that sentence and in other sentences in the proposed initiative where a person does not have a duty.
3. The following word is misspelled: "POLLICAL" in subsection (2)(a) of the proposed initiative should be spelled "POLITICAL."
4. In subsection (2)(a) of the proposed initiative, the word "THE" should be inserted before the word "YEAR" in the second to last line so that it reads "...THE EARLIEST DAY IN JANUARY OF THE YEAR OF APPOINTMENT FOR WHICH SUCH DATA IS PUBLISHED."
5. In subsection (2)(b) of the proposed initiative, the internal reference to "THIS SUBSECTION (3)(b)" is incorrect and should be changed to "THIS SUBSECTION (2)(b)" or to whatever renumbered designation you choose to use for that paragraph.
6. In subsection (2)(a) of the proposed initiative, a serial, or Oxford, comma is missing in the phrase "APPOINTMENTS SHALL INCLUDE THREE MEMBERS APPOINTED FROM THE STATE'S LARGEST POLITICAL PARTY, THREE MEMBERS

FROM THE STATE'S SECOND LARGEST POLITICAL PARTY AND THREE MEMBERS NOT AFFILIATED WITH THE STATE'S LARGEST OR SECOND LARGEST MAJOR POLITICAL PARTIES." Please include a comma after "SECOND LARGEST POLITICAL PARTY" in the list.

7. In subsection (2)(b) of the proposed initiative, a comma is not needed in the first sentence, which features an independent clause followed by a dependent clause. Please consider removing the comma between "COMMISSION" and "IF" in that sentence.