

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: March 27, 2023
SUBJECT: Proposed initiative measure 2023-2024 #27 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 purposes of the proposed amendment to the **Colorado constitution** appear to be:

1. To prohibit a private entity or the state from implementing, using, or relying on environmental, social, and governance (ESG) standards;

2. To prohibit a private entity or the state from granting "special privileges, franchises[,] or immunities";
3. To prohibit the state from enacting any law that recognizes climate change or expends state money to fund "green new deal projects," "social justice, equity, and inclusion causes," or "abortion providers".
4. To prohibit the state from infringing on "parental rights" through the use of ESG; and
5. To prohibit the state from mandating curriculum for public education that "forc[es] social justice, slavery, [and] anti-American causes" on students or that teaches a "flawed history of America to students".

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. If the single subject is to prohibit a private entity or the state from implementing, using, or relying on ESG standards, have the proponents considered that prohibiting a private entity from expressing a certain ESG viewpoint may violate the First Amendment to the U.S. Constitution?
3. 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?
4. Section 8 of the proposed initiative states that "[n]either business, nor any government agency foreign or domestic shall violate any person's right to life, liberty[,] or property without due process or equal protection".
 - a. Have the proponents considered that this portion of the proposed initiative may have a broader application than the prohibition of ESG?
 - b. Have the proponents considered that article II, section 25 of the Colorado constitution already offers these protections with respect to deprivation of life, liberty, or property without due process of law resulting from state action?

- c. Have the proponents considered amending Article II, section 25 of the Colorado constitution to apply to private conduct?
 - d. If so, how would a private entity provide a person with due process of law?
- 5. Section 10 of the proposed initiative states, "No State, local, township, city, county government shall not deprive any person of their right to enjoy freedom to pursue a business activity nor prevent the sale of any goods."
 - a. This portion of the proposed initiative uses a double negative. Do the proponents intend for this portion of the proposed initiative to provide that a person shall not be deprived of the right to enjoy freedom to pursue a business activity and shall not be prevented from the sale of any goods?
 - b. If so, what does the right to enjoy freedom to pursue a business activity mean?
 - c. Is the right to enjoy freedom to pursue a business activity different from the right to life, liberty, or property?
 - d. What does it mean to prevent the sale of any goods?
- 6. Section 12 of the proposed initiative states in relevant part that "[n]o State, local, city, county, or township shall interfere or deprive any person's life or liberty or property nor tell or force any person to wear or inject or consume biological drugs into their bodies without consent." How does this portion of the proposed initiative relate to the proposed initiative's definition of ESG?
- 7. Section 13 of the proposed initiative prohibits "ESG Transformation or Re-imagining of society". What does it mean to "transform" or "reimagine" society?
- 8. Section 17 of the proposed initiative states that "[no] bank in Colorado can push this credit scoring standard on any person residing in Colorado or any business in obtaining or seeking financing."
 - a. Does the phrase "this credit scoring standard" refer to ESG?
 - b. If so, what does it mean to "push" ESG on a person?
- 9. Subsection (18)(a) of the proposed initiative states, "Any Colorado citizen affected by ESG prior to this amendment may hold its elected officials, and any

institutions colluding with the United Nations liable for losses in the Colorado Court."

- a. Do the proponents intend for the proposed initiative's ESG prohibition to apply retroactively?
- 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, have the proponents considered specifying in which Colorado court a private right of action should be brought?
- d. What does it mean to collude with the United Nations?

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** article XXX as follows:

2. Each constitutional section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, "In the constitution of the state of Colorado, **add** section __ to article X as follows:"
3. Because 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. The headnote should be in bold; however, no other text in the initiative should be in bold font. For example:

Section 8. Corporate environmental, social, governance scoring standards – definition – prohibitions. (1) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES, CORPORATE ENVIRONMENTAL, SOCIAL, AND GOVERNANCE (ESG) SCORING MEANS . . .

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.
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. The following is the standard drafting language used for creating a definition:
"As used in this article, unless the context otherwise requires, 'elective' means in an office subject to regular, special, or retention election, even if term-limited".