

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

To: Suzanne Taheri and Michael Fields

From: Legislative Council Staff and Office of Legislative Legal Services

Date: February 5, 2025

Subject: Proposed initiative measure 2025-2026 #15, concerning penalties for fentanyl crimes

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 initiative 2025-2026 #14. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memorandum for proposed initiative 2025-2026 #14, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in that other memorandum may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum. Only new comments and questions are included in this memorandum. Technical comments 1 through 4 in the memorandum for proposed initiative 2025-2026 #14 are incorporated by reference. The technical comment in this memorandum is new.

Purposes

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

1. Make it a level 1 drug felony if a person knowingly manufactures, dispenses, sells, or distributes; possesses with intent to manufacture, dispense, sell, or distribute; or induces, attempts to induce, or conspires with one or more persons, to manufacture, dispense, sell, distribute, or possess with intent to manufacture, dispense, sell, or distribute, any material, compound, mixture, or preparation that weighs any amount and that contains fentanyl, carfentanil, benzimidazole opiate, or an analog thereof;
2. Repeal the immunity from arrest and prosecution for a person who distributes, manufactures, dispenses, or sells a material, compound, mixture, or preparation that weighs not more than four grams and contains any amount of fentanyl, carfentanil, benzimidazole opiate, or an analog thereof, if the person reports an overdose to an emergency responder and satisfies additional requirements related to the reporting; and
3. Revise the criminal penalties for the knowing possession of any material, compound, mixture, or preparation that contains fentanyl, carfentanil, benzimidazole opiate, or an analog thereof.

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?
3. Sections 2 and 5 of the proposed initiative are identical. The proponents must strike one of the sections and renumber the succeeding sections accordingly.
4. Sections 3 and 6 of the proposed initiative are nearly identical. The differences are that subsection (7) under Section 6 strikes "no" and substitutes "NOT" and Section 3 does not make this change, and subsection (10)(a)(III.5) under Section 6 properly adds "OR" and Section 3 does not make

this change. The proponents must strike one of the sections and renumber the succeeding sections accordingly.

5. Under Section 7 of the proposed initiative, section 18-18-403.5 (2.5)(a) states "on or after July 1, 2022 JULY 1, 2025."
 - a. It appears as though the proponents intend for this provision to be effective on July 1, 2025. The proponents must strike "July 1, 2022" to clarify their intended effective date.
 - b. This proposed initiative is first eligible to be on a ballot before the voters in the next general election in November of 2026. If the voters approve this proposed initiative and it becomes law, this provision would retroactively create a criminal law, also known as an ex post facto law, which is unconstitutional under the United States Constitution and the Colorado Constitution. Do the proponents anticipate that this provision would conflict with the United States Constitution and the Colorado Constitution?
6. Section 7 of the proposed initiative attempts to revise criminal penalties for the knowing possession of any material, compound, mixture, or preparation that contains fentanyl, carfentanil, benzimidazole opiate, or an analog thereof.
 - a. Section 18-18-403.5 (2.5)(a) introductory portion of the proposed initiative makes it a level 4 drug felony if the material, compound, mixture, or preparation contains more than six milligrams of fentanyl, carfentanil, benzimidazole opiate, or an analog thereof, but the language is silent regarding a penalty if the weight of fentanyl, carfentanil, benzimidazole opiate, or an analog thereof is equal to or less than six milligrams. Therefore, the violation is dependent upon the measurement of fentanyl or other applicable controlled substances but not the weight of the material, compound, mixture, or preparation.
 - b. Alternatively, subsections (2.5)(a)(I) and (2.5)(a)(II) of section 18-18-403.5 in the proposed initiative make it a level 4 drug felony or level 1 drug misdemeanor, respectively, based upon the weight of material, compound, mixture, or preparation that contains any amount of fentanyl or other applicable controlled substances.
 - c. Therefore, a person who knowingly possesses five milligrams of a material that is five milligrams of fentanyl or other applicable controlled substances could be charged with a level 1 drug misdemeanor under section 18-18-403.5 (2.5)(a)(II) of the proposed

initiative. However, a person who has 6.5 milligrams of material that has 0.5 milligram of fentanyl or other applicable controlled substances could be charged with a level 4 drug felony. Consequently, a person who knowingly possesses more fentanyl might be charged with a lesser crime than a person who knowingly possesses less fentanyl. What is the proponents' intent?

- d. Section 18-18-403.5 (2.5)(a) consists of an introductory portion followed by subparagraphs (2.5)(a)(I) and (2.5)(a)(II). An introductory portion is a phrase that is completed by the provisions that follow; however, in this case, the introductory portion was rewritten to be a complete idea and the subparagraphs that follow are separate ideas that do not flow from the introductory portion. To correct this structural issue, the new language in the introductory portion should be separated out as its own subparagraph.
7. In Section 9 of the proposed initiative, section 18-1.3-801 (2)(c) is repealed. However, in section 18-1.3-801 (2)(a)(I), there is an internal reference to section 18-1.3-801 (2)(c). A conforming amendment must be added to the proposed initiative to account for the repealed subsection.

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, if you intend to add a new article to title 39 of the Colorado Revised Statutes, you would include the following amending clause: "In Colorado Revised Statutes, **add** article __ to title 39 as follows:". The following amending clause change must be made:
 - a. On page 3 of the proposed initiative, in the amending clause for Section 5, "**(3)**" must not be in bold, as it is currently drafted.