

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

January 25, 2012

TO: Ashley McCarter and Amber Crowe

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #53, concerning campaign finance

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 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 appear to be to amend certain constitutional and statutory provisions governing campaign finance to:

1. Create additional disclosure requirements for electioneering communications produced by an independent expenditure in excess of \$1,000 per calendar year if the person making the expenditure is not a natural person and receives more than 10% of its funds from any one person other than a natural person.
2. In the case of a person that is not a natural person and that expends \$1,000 or more per calendar year on electioneering communications, include in the report submitted to the secretary of state additional information about any person that contributes more than \$250

per year to the person that expends \$1,000 or more per calendar year on electioneering communications.

3. Create additional disclosure requirements for electioneering communications produced by an expenditure in excess of \$1,000 made by an issue committee supporting or opposing a ballot issue or ballot question if the issue committee making the expenditure receives more than 10% of its funds from any one person other than a natural person.

### **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. It is standard drafting practice to insert a left tab at the beginning of the first line of each new section, subsection, paragraph, or subparagraph, including amending clauses and section headings.
2. Constitutional and statutory provisions are usually divided into component parts using the following structure: Subsection, or, for example, "(1)", followed by paragraphs, or, for example, "(a)" followed by subparagraphs, or, for example, "(I)", ending with sub-subparagraphs, or, for example, "(A)".
3. Beginning with the 2012 legislative session, the Office of Legislative Legal Services has adopted a new format for amending clauses. Please consider incorporating the following suggested amending clauses into the proposed initiative:
  - a. For section 1 of the proposed initiative: "**SECTION 1.** In the constitution of the state of Colorado, section 5 of article XXVIII, **amend** (1) as follows:"
  - b. For section 2 of the proposed initiative: "**SECTION 2.** In the constitution of the state of Colorado, section 6 of article XXVIII, **amend** (1) as follows:"
  - c. For section 3 of the proposed initiative: "**SECTION 3.** In Colorado Revised Statutes, 1-45-108.3, **amend** (1) as follows:"
4. It is standard drafting practice to use SMALL CAPITAL LETTERS, rather than ALL CAPS, to show the language being added to the Colorado constitution or Colorado Revised Statutes. For example: "If THE PERSON IN QUESTION IS NOT A NATURAL PERSON . . ."

Note that although the text of new language should be in small capital letters, a large capital letter should be used to indicate capitalization where appropriate, such as at the beginning of each sentence.

5. Each section in the Colorado Revised Statutes and Colorado constitution has a headnote. Headnotes briefly describe the contents of the section, follow the section number, appear in bold-faced type, and are written in lower case letters. For example, in section 1 of the proposed initiative, the constitutional text should be preceded by the following headnote: "**Section 5. Independent expenditures.**"
6. As currently drafted, section 1 of the proposed initiative adds a series of provisions after subsection (1) of section 5 of article XXVIII of the Colorado constitution. This does not conform to standard drafting practice, however, as subsection (1) is not structured as an introductory portion that can introduce a series of new provisions. A possible solution would be to amend subsection (1) by designating the existing text as subsection (1) (a) and then adding new paragraphs (b), (c), and (d) after paragraph (a).
7. Internal references should be written accurately and in the proper format. The following citations used in the proposed initiative should be corrected:
  - a. In section 1, there is a reference to "section (B)II". This reference is incomplete, and it is not readily apparent what statutory or constitutional citation you are referring to. When used in the Colorado constitution, references to the Colorado Revised Statutes should be written like the following example: "section 1-45-108.3 (2) (c) (II), Colorado Revised Statutes". References to other constitutional provisions should be written as follows: "section 4 (1) (d) of article XXVIII of this constitution". If you are referring to a provision within the same article of the constitution, write the reference as follows: "section 4 (1) (d) of this article".
  - b. In section 4, there is a reference to "1-45-108.3 (B) II". It is not clear what provision this is intended to reference. Additionally, references to provisions within the same statutory section should be written as follows: "subparagraph (II) of paragraph (c) of subsection (2) of this section". References to provisions of other statutory sections should be written as follows: "section 1-45-108.3 (2) (c) (II), C.R.S."
8. Sections of the proposed initiative should be numbered in correct numerical order. Currently, the initiative skips from section 2 to section 4.
9. Numbers should be spelled out. For example, "10%" should be written as "ten percent".
10. Each sentence should end with a period.
11. Under Colorado law, the singular includes the plural and the plural includes the singular. See section 2-4-102, Colorado Revised Statutes. Accordingly, if you use the singular "person" in appropriate places in the proposed initiative, such usage will encompass more than 1 person and sometimes language is easier to follow when references are kept in the singular form.

12. After incorporating the technical changes suggested above, the overall format of the proposed initiative would appear as follows:

**SECTION 1.** In the constitution of the state of Colorado, section 5 of article XXVIII, **amend** (1) as follows:

**Section 5. Independent expenditures.** (1) (a) Any person making an independent expenditure in excess of one thousand dollars per calendar year shall deliver notice in writing to the secretary of state of such independent expenditure . . .

(b) IF MORE THAN ONE PERSON IN QUESTION IS NOT A NATURAL PERSON . . .

(c) SHOULD THOSE PERSONS DISCLOSED IN THE COMMUNICATION OBTAIN . . .

(d) SECTION [INSERT PROPER CITATION] SHALL BE APPLIED TO ALL DISCLOSED PERSONS . . .

**SECTION 2.** In the constitution of the state of Colorado, section 6 of article XXVIII, **amend** (1) as follows:

**Section 6. Electioneering communications.** (1) Any person who expends one thousand dollars or more per calendar year on electioneering communications . . .

**SECTION 3.** In Colorado Revised Statutes, 1-45-108.3, **amend** (1) as follows:

**1-45-108.3. Issue committees - disclaimer.** (1) (a) An issue committee making an expenditure in excess of one thousand dollars on a communication that supports or opposes a statewide ballot issue or ballot question . . .

(b) IF THE ISSUE COMMITTEE RECEIVES MORE THAN TEN PERCENT . . .

(c) SHOULD THOSE PERSONS DISCLOSED IN THE COMMUNICATION . . .

(d) [INSERT PROPER CITATION] SHALL BE APPLIED TO ALL DISCLOSED PERSONS . . .

**SECTION 4.** This act shall take effect January 1, 2013.

### **Substantive Comments and Questions**

The substance of the proposed initiative raises the following comments and questions:

1. Section 1 (5.5) of article V 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 change to the Colorado constitution, sections 1 and 2 of the proposed initiative may only be amended by a subsequent amendment to the constitution. Is this your intention?
3. As a statutory change, section 4 of the proposed initiative may be amended by subsequent legislation enacted by the General Assembly. Is this your intention?
4. The term "corporation" is used in section 1 of the proposed initiative, but it is not defined in article XXVIII of the Colorado constitution. Should the term be defined to clarify its meaning?
5. Standard drafting practice is to use the word "fund" to refer to an account into which "moneys" or "revenues" are placed. Therefore, the word "fund" or "funds" is not typically not used to refer to the moneys or, in the case of the proposed initiative, campaign funding. Would you consider changing the phrase "funds" to "funding" or "moneys"?
6. With respect to section 1 of the proposed initiative, what is your rationale in:
  - a. Requiring the communication produced by the independent expenditure to disclose the name of the person if the person making an independent expenditure is not a natural person and receives more than 10% of its moneys from any one person other than a natural person?
  - b. Making the threshold for additional disclosure 10%?
  - c. Requiring the disclosure to include the names of additional persons if the persons addressed in "A" obtain more than 10% of their funding from any one person other than a natural person?
7. Is there any concern that disclosure of the number of names of such persons will use up an inordinate portion of the text or air time of the communication?
8. Have you considered whether these requirements would satisfy governing legal standards concerning content-based speech restrictions?
9. What is your rationale in having the terms of "B" apply to all "disclosed persons until the funding of the corporation initiating the independent expenditure is traced back to groups accepting de minimis contributions from sources other than natural persons"? Please describe how this requirement will work as a practical matter?

- a. What does "disclosed persons" mean in this context?
  - b. How will the funding be "traced back"?
  - c. If one or more persons satisfy "B", what additional disclosure is required under "C"?
  - d. What does de minimis mean in this context? Would you consider providing a definition of this term? What if all contributions are not de minimis?
10. With respect to the section 2 of the proposed initiative:
- a. The requirement that the report include the name and address of any person that contributes more than \$250 to the person making the electioneering communication is already part of the state constitution. See section 6 A (1) of article XXVIII. Thus, it need not appear in the proposed initiative.
  - b. Please describe the mechanics of how this requirement would work as a practical matter in tracing back funds spent on electioneering communications to persons accepting de minimis contributions from sources other than natural persons?
  - c. What if the funding is not traced back to de minimis contributions?
  - d. What does de minimis mean in this context? Would you consider providing a definition of this term? What if all contributions are not de minimis?
  - e. What do you mean by the "same disclosure requirement shall apply?"
  - f. What are "sources"? Would you consider providing a definition of this term?
11. The proposed initiative appears to apply only to corporations? Is the term "corporation" intended to cover all business entities or is a narrower definition intended? How is the word "corporation" to be understood?
12. By using the word corporation, it appears that the measure does not apply to labor organizations? Is this assumption correct? Did you consider having the measure apply to labor organizations as well as corporations?
13. Have you considered the possibility of making all of the changes in sections 1 and 2 by statutory enactment instead of by means of constitutional change?
14. Focusing on section 3 of the proposed initiative:
- a. What is your rationale in requiring the communication produced by the expenditure made by an issue committee to disclose the name of the person if the issue committee receives more than 10% of its moneys from any one person other than a natural person?

- b. How did you arrive at the 10% limitation for purposes of this requirement of the proposed initiative?
  - c. What is your rationale for requiring the disclosure to include the names of additional persons if the persons addressed in "A" obtain more than 10% of their funding from any one person other than a natural person?
  - d. Is there any concern that disclosure of the number of names of such persons will use up an inordinate portion of the text or air time of the communication?
  - e. Have you considered whether these requirements would satisfy governing legal standards concerning content-based speech restrictions?
15. With respect to proposed "C" of section 4 of the proposed initiative:
- a. What is your rationale in having the terms of "B" apply to all disclosed persons until the funding of the corporation initiating the independent expenditure is "traced back to groups accepting de minimis contributions from sources other than natural persons"? Please describe how this requirement will work as a practical matter?
  - b. What if the funding is not traced back to de minimis contributions?
  - c. What does de minimis mean in this context? Would you consider providing a definition of this term? What if all contributions are not de minimis?
  - e. What do you mean by "all disclosed persons"?
  - f. What are "sources"? Would you consider providing a definition of this term?
16. What if the "trace back" leads to corporations with absolutely no connection to the independent expenditure or electioneering communication? If so, what is the public purpose or legal authorization in such disclosure?