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MEMORANDUM

April 3, 2012

TO: Andrew Schmidt and Vija Handley

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #85, concerning appointment of state nonpartisan election administrator

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 to the Colorado constitution appear to be:

1. To establish a new state nonpartisan election administrator to, beginning October 1, 2013, assume the duties and powers of the secretary of state concerning elections and campaign finance;
2. To require the state nonpartisan election administrator to adopt rules pursuant to the authority set forth in the Colorado constitution and Colorado Revised Statutes;
3. To specify the qualifications of the state nonpartisan election administrator;

4. To prohibit the state nonpartisan election administrator from engaging in certain political activities;
5. To set forth the process of nomination by legislative officers, appointment by the governor, and confirmation by the general assembly of the state nonpartisan election administrator, the term of the administrator, and procedures for filling a vacancy, as well as an alternate process if such nomination or appointment is not made;
6. To require the general assembly to enact legislation to conform the Colorado Revised Statutes with the proposed initiative;
7. To require the general assembly, or a joint legislative committee, to review all election-related rules adopted by the state nonpartisan election administrator and to establish a bipartisan advisory board of retired state or federal judges with whom the administrator may consult on rules and policies dealing with elections and campaign finance; and
8. To allow for the impeachment of the state nonpartisan election administrator.

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. Section 1 (8) of article V of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, please add the words "the state of".
2. The proper format for constitutional amending clauses is: "In the constitution of the state of Colorado, **add** section __ to article __ as follows:". Please rewrite the amending clause for the proposed initiative as follows in order to conform to this standard practice:

In the constitution of the state of Colorado, **add** section 13 to
article VII as follows:
3. 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. It is standard drafting practice for the first subsection to immediately follow the headnote on the same line instead of the first subsection appearing on a separate line from the headnote. Additionally, it is standard drafting practice to not small capitalize the language in a headnote.

The headnote and first subsection of the proposed initiative should appear as follows:

Section 13. State nonpartisan election administrator. (1)
Legislative declaration. NOTHING IS MORE IMPORTANT TO OUR SYSTEM OF
DEMOCRACY . . .

As another illustration, subsection (3) of the proposed initiative should appear as follows:

(3) AS A CONDITION TO APPOINTMENT, THE STATE NONPARTISAN
ELECTION ADMINISTRATOR SHALL:
(a) HAVE AT LEAST FIVE YEARS OF EXPERIENCE IN ELECTION
ADMINISTRATION;
(b) NOT HAVE PROFESSIONALLY REPRESENTED, BEEN AN OFFICER
OF, OR OTHERWISE BEEN EMPLOYED BY A MAJOR POLITICAL PARTY FOR AT
LEAST THREE YEARS PRIOR TO NOMINATION; AND
(c) BE A REGISTERED VOTER IN COLORADO PRIOR TO
APPOINTMENT.

The same format should be followed for subsection (7) of the proposed initiative:

(7) (a) THE GENERAL ASSEMBLY SHALL ENACT SUCH
LEGISLATION . . .
(b) THE GENERAL ASSEMBLY, OR SUCH JOINT LEGISLATIVE
COMMITTEE TO WHICH IT DELEGATES . . .
(I) READOPTED IN A FORM THAT IS WITHIN DELEGATED
CONSTITUTIONAL OR STATUTORY AUTHORITY; OR
(II) DECLARED TO BE WITHIN SUCH DELEGATED AUTHORITY . . .

4. The first word of each constitutional subdivision should be capitalized. For example, in subsection (3) of the proposed initiative, the first word of paragraphs (a), (b), and (c) should be capitalized as illustrated in question 3. above.
5. The first word following a colon should be capitalized.
6. References to other constitutional provisions should be written in the following format: "section __ of article __ of this constitution". For example, in subsection (2) (b) of the proposed initiative, the references to other constitutional provisions should be written as follows:

". . . AS SPECIFIED IN THE FOLLOWING PROVISIONS OF THIS CONSTITUTION:
SECTION 3 OF ARTICLE IV; SECTIONS 1 (6) AND (7) AND 48 (1) (e) OF
ARTICLE V; SECTION 25 OF ARTICLE VI; SECTION 12a(1) AND (2) OF ARTICLE
XXVIII; SECTIONS 2 (3), 3 (13), 4 (1), (3), AND (7), 5 (1), 6 (1), 8, 9 (1) (c), (1)
(e), AND (2) (a), AND 10 (2) (a), (2) (b) (I), (2) (b) (II), AND (2) (c) OF
ARTICLE XXVIII OF THIS CONSTITUTION."

7. The following internal references should be corrected or clarified:
 - a. In subsection (5) (b), "SECTION 3 OF THIS ARTICLE" should be "SUBSECTION (3) OF THIS SECTION".

- b. In subsection (5) (d), "UNDER THIS SUBSECTION (D)" should be "UNDER THIS PARAGRAPH (d)".
 - c. In subsection (7) (a), "TO CONFORM THE COLORADO REVISED STATUTES WITH THIS ARTICLE" should be "TO CONFORM THE COLORADO REVISED STATUTES WITH THIS SECTION".
 - d. In subsection (7) (b), the reference to "SUBSECTION (3) OF SECTION 2 OF THIS ARTICLE" should be corrected. It is unclear what this reference is meant to refer to.
 - e. In subsection (7) (c), the reference to "SUBSECTION (A) OF SECTION 3 OF THIS ARTICLE" should be corrected. Is your intent to refer to "SUBSECTION (3) OF THIS SECTION"?
 - f. In subsection (8), "SECTION 2, ARTICLE XIII OF THE CONSTITUTION" should be "SECTION 2 OF ARTICLE XIII OF THIS CONSTITUTION".
 - g. In subsections (9) and (10), references to "THIS ARTICLE" should be changed to "THIS SECTION".
8. When referencing a subsection, paragraph, subparagraph, or sub-subparagraph, it is standard drafting practice to repeat the letter or number of the subsection, paragraph, subparagraph, or sub-subparagraph. For example, in subsection (5) (a) of the proposed initiative, "UNDER THIS SUBSECTION" should be changed to "UNDER THIS SUBSECTION (5)". This practice should be followed consistently throughout the proposed initiative.
 9. General references to the Colorado constitution or to state law should use the terms "this constitution" or "Colorado Revised Statutes". For example, in subsection (2) (c) of the proposed initiative, consider writing ". . . THE SPECIFIC GRANTS OF AUTHORITY IN THIS CONSTITUTION AND THE COLORADO REVISED STATUTES . . ."
 10. It is standard drafting practice to use gender neutral language. For example, the reference to "HIS OFFICE" in subsection (2) (a) of the proposed initiative should be changed to "HIS OR HER OFFICE". This change should be made consistently throughout the proposed initiative.
 11. It is standard drafting practice to use the present tense whenever possible. For example, in subsection (2) (b) of the proposed initiative, rather than saying "THESE PROVISIONS WILL BE AMENDED", consider saying "THESE PROVISIONS ARE AMENDED".
 12. Standard drafting practice is to only use the term "rules" when referring to rules promulgated by a state agency or department. With this in mind, all references to "rules and regulations" should be restated a "rules". For example, subsection (2) (c) of the proposed initiative should read as follows: "THE STATE NONPARTISAN ELECTION ADMINISTRATOR SHALL ADOPT RULES WITHIN THE . . ."
 13. In subsection (4) (c) of the proposed initiative, consider changing "VOTES" to "A VOTE", since the administrator would be allowed to only cast a single vote at any election.

14. In subsection (4) (d) of the proposed initiative, consider removing the comma after "local office". Additionally, in subsection (2) (a), a comma should be placed before the word "who" as follows: "ADMINISTRATOR, WHO SHALL HAVE AUTHORITY . . ." A similar change should be made in subsection (7) (d): "ADMINISTRATOR, WHO HAS FINAL DECISION-MAKING AUTHORITY . . ."
15. It is standard drafting practice to avoid the use of archaic terms. In subsection (5) (a) of the proposed initiative, instead of using "HEREIN", use "IN THIS SUBSECTION (5)".
16. Terminology should be used consistently throughout the proposed initiative. For example, subsection (5) (d) uses the term "state nonpartisan elections administrator", but the rest of the initiative uses the term "state nonpartisan election administrator". Please make any necessary corrections to ensure consistency.
17. Compound adjectives should be hyphenated. For example, in subsection (6) (b) of the proposed initiative, "four year terms" should be written as "four-year terms". In subsection (7) (d), "decision making authority" should be written as "decision-making authority".

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, the proposed initiative may only be amended by a subsequent amendment to the constitution. Is this your intention?
3. Have you considered any fiscal impact on the state that may result from the enactment of the proposed initiative? Currently, statewide election administration is supported by the department of state cash fund, which is funded by, *inter alia*, business filing fees paid to the secretary of state. Because the nonpartisan election administrator's office created in the proposed initiative must "in all respects" operate completely independently of the secretary of state's office, it appears that these funds will be unavailable for such election-related uses. Is that correct?
 - a. If not, how must the moneys be disbursed, by whom, when, and in what amounts? Can the office of the nonpartisan election administrator achieve independence from the secretary of state in this scenario?
 - b. If so, how do you intend that the nonpartisan election administrator's office will be funded? Insofar as enactment of the proposed initiative will almost certainly drive costs and potentially lead to a strain on governmental resources (see, for example, section (7) (c) of the proposed initiative, requiring the general assembly to find the nonpartisan election administrator), have you considered incorporating a tax, fee, or some other mechanism that would allow some of the costs of the proposed initiative to be recovered?

4.
 - a. Where would the nonpartisan election administrator be housed administratively? Because the secretary of state heads the department of state, the proposed initiative seems to require that the nonpartisan election administrator be relocated to a different (extant or newly created) department. Is this correct?
 - b. In order to properly effect a transfer of functions from one administrative entity to another, the "Administrative Organization Act" (article 1 of title 24, C.R.S.) should be amended and the type of transfer described. Depending on where the nonpartisan election administrator is located, inasmuch as the proposed initiative divests the secretary of state of all elections-related powers and duties and transfers them to the nonpartisan election administrator, it is likely a **type 1** or **type 2** transfer.
5. The legislative declaration in subsection (1) of the proposed initiative sets forth the rationale for creating the office of the nonpartisan election administrator, including allusions to transgressions committed by persons elected to that office due to such persons' partisan affiliations.
 - a. Inasmuch as the secretary of state is an elected official, do traditional democratic processes contain sufficient checks and balances on the actions of persons who serve in that position? Are the voters of Colorado able to adequately vet the qualifications and partisan political influences of candidates for secretary of state, and able to recall or decline to reelect persons who comport themselves in biased or inept ways?
 - b. Relatedly, are public scrutiny and the potential impact on a candidate's election or reelection prospects an inadequate mechanism to prevent improper partisan influences on election administration? And, absent such considerations, what incentive will nonpartisan election administrators have to acquit themselves fairly and faithfully?
6. In connection with the transfer of elections-related powers and duties occurring on October 1, 2013, do you wish to transfer the employees, equipment, and resources principally used for elections in the secretary of state's office? (This type of provision is typical when such transfers are effected.)
7. Subsection (2) (a) of the proposed initiative cites constitutional provisions that "will be amended" as of the effective date of the transfer. How do you intend that such amendments will be accomplished? (Alternatively, standard drafting practice dictates that the proposed initiative itself make conforming amendments where necessary, so that there is no gap in timing and so that the intent of the proponents is thoroughly realized.) Would you consider clarifying this provision?
8. The nonpartisan election administrator is empowered to promulgate rules in subsection (2) (c) of the proposed initiative, so long as such rule-making does not exceed the authority set forth in the state constitution and Colorado Revised Statutes. Until such time as the nonpartisan election administrator adopts such rules, do you intend that all elections-related rules of the secretary of state continue to be in full force and effect? What is the status of existing rules after the system is set up?

9. Under subsection (2) (e) of the proposed initiative, the nonpartisan election administrator is prohibited from acting for the purpose of giving advantage to a particular political party or person. Would this include merely ruling in favor of one party? How could an administrator not end up favoring one party over another in resolving disputes? Why is a system that ensures fair outcomes, though such outcomes may incidentally "favor" a particular person or party, something that should or needs to be changed?
 - a. Under the current regime, is the secretary of state permitted to take such actions?
 - b. If such an action is filed and the court finds that the nonpartisan election administrator did, in contravention of this provision, act in favor of a person or political party, what result (especially in light of the fact that he or she can be removed only through impeachment)? Is he or she subject to sanctions?
 - c. The proposed initiative requires that such malfeasance be established by clear and convincing evidence. Why was this standard selected? Do other states with similar offices so require?
10. The nonpartisan election administrator is required, under subsection (2) (f), to "protect the constitutional right of every Colorado registered voter to cast his or her ballot". What sort of actions do you contemplate that the administrator must undertake pursuant to this provision? How can the nonpartisan election administrator fulfill this duty? What liability exists for the nonpartisan election administrator if a voter asserts an infringement of the right to cast a ballot? Is there an affirmative duty to protect individual voters, or is this a systemic requirement? Would you consider clarifying the meaning and scope of this provision?
11. Subsection (3) of the proposed initiative sets forth the nonpartisan election administrator's qualifications.
 - a. What type of "experience in election administration" is sufficient? Could a potential nonpartisan election administrator have 5 years of experience in a low-level position and be eligible for the office? Does the requirement for five years of election administration experience unduly limit the pool of potential nominees?
 - b. Why is participation only restricted for persons involved with "*major* political parties" (emphasis added)?
 - c. The measure precludes employees, officers and representatives of political parties. Can the nonpartisan election administrator be registered as a member of a party?
12. Under subsection (4) of the proposed initiative, the governor appoints the nonpartisan election administrator from a list provided by leaders of the state house and senate. Does this method of selecting nominees adequately insulate the candidate pool from partisan influence? And does the creation of a "nonpartisan" election administrator allow a partisan actor to assume the position and implement his or her agenda while maintaining the appearance of neutrality?

13. Regarding the confirmation process set forth in subsection (5) of the proposed initiative, why require three-fifths confirmation from each chamber of the state house? Does this increase the potential for gridlock, which would regularly push the selection to the chief justice of the Colorado Supreme Court? And again, is this process sufficiently "nonpartisan"?
14. Section (6) (b) of the proposed initiative limits nonpartisan election administrators from serving "more than two consecutive four-year terms". Use of the modified "consecutive" here begs the question: Could a person serve more than two terms, provided that they were not consecutive? Why are term limits necessary or desirable, given the other requirements for the nonpartisan election administrator to take office? Would turnover create problems in election administration?
15. Section (7) (b) requires a legislative review, within fifteen days, of rules adopted by the nonpartisan election administrator.
 - a. Does the rule review process in subsection (7) (b) replace or supercede the existing legislative rule review process described under the state "Administrative Procedures Act" (article 4 of title 24, C.R.S.)?
 - b. Do you wish to establish any guidelines for the selection or appointment of a joint committee (e.g., who selects the members, how many members are there, how can the members act, etc.)? If not, is there a chance that partisan considerations may interfere with the committee's operation?
 - c. Is rule review by the general assembly (or a joint committee thereof) feasible within fifteen days of promulgation? What about during the legislative interim?
16. Regarding the advisory board created under (7) (d) of the proposed initiative, why is the advisory board "bipartisan"? Because judges affiliated with a political party cannot constitute a majority of the board, would it be more appropriate to denominate the board "nonpartisan"? Under section (7) (b), could a majority of the board consist of unaffiliated judges, or judges affiliated with minor political parties? How is the general assembly expected to select judges to serve on the board? How likely is it that four unaffiliated former judges will be found?
17. Subsection (8) of the proposed initiative subjects the nonpartisan election administrator to impeachment pursuant to article XIII, section 2, of the state constitution. Such provision exempts the nonpartisan election administrator from removal for misconduct or malfeasance; is that your intent?