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MEMORANDUM

March 8, 2012

TO: Samuel Babcock and Elise Van Grinsven

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #61, concerning open primaries

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 initiative appear to be:

1. To add a new section to article VII of the Colorado constitution requiring candidates for elected office who wish to be included on the general election ballot to participate in an open and general primary election;
2. To create an open and general primary election in which all Colorado voters vote on all candidates, regardless of political party affiliation; and
3. To allow only the two candidates with the highest number of votes for each office in the open and general primary election, regardless of political party affiliation, to be included on the general election ballot.

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 amending clause should read as follows: "In the constitution of the state of Colorado, **add** section 13 to article VII as follows:"
2. The section number and headnote should not be in small capital letters. For example: "**Section 13. Open general primary.**"
3. The headnote for the new section 13 uses the term "open general primary", but the text of subsection (1) of the proposed initiative refers to an "open and general primary". Should the terminology be made consistent throughout the proposed initiative?
4. In the second to last line of subsection (1), add the word "in" before "Colorado" so that the sentence reads "qualified to vote in Colorado may vote for any candidate".
5. End subsection (1) with a period instead of a semicolon.
6. Because standard drafting practice is to express a mandatory command with the word "shall", substitute "shall" for "must" in subsection (1) of the proposed initiative.
7. Consider adding the word "affiliation" to follow "political party" in the middle of subsection (2) of the proposed initiative.

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. What will be the effective date of the proposed initiative?
3. 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?
4. Have the proponents considered any fiscal or other impacts that may result from the enactment of the proposed initiative on the state or local governments in this state? Insofar as enactment of the proposed initiative were to lead to a strain on governmental resources, have the proponents considered incorporating a tax, fee, or some other mechanism that would allow some of the costs of the proposed initiative to be recovered?

5. What is the rationale for the proposed initiative?
6. What do the proponents mean by the term "open general primary"?
7. Assuming "open general primary" means, to some extent, that a person who has not affiliated with a major political party may vote in that party's primary elections, what is the justification for "opening" a primary held for the express purpose of selecting the nominee of a particular party to individuals who have not expressly affiliated with that party? Since you are eliminating traditional party primaries, what is the purpose of calling it an "open general primary"?
8. The language of subsection (1) of the proposed initiative states in relevant part that "all electors that are qualified to vote in Colorado may vote for any candidate on the primary ballot". Does this mean any elector is entitled to vote in any primary race conducted anywhere in the state, regardless of whether the elector lives in the applicable district (legislative or otherwise) that is selecting representation by means of the primary election? If this is not your intent, would you consider clarifying the language of the proposed initiative on this point? Additionally, what is intended by the phrase "qualified to vote in Colorado"? Would it be more appropriate to say "registered to vote in Colorado"?
9. To what primary elections would subsection (1) of the proposed initiative apply? Do you mean for it to apply to any primary election to select candidates for the general election, or is some other application intended? What is its application, if any, to off-year election contests?
10. Nonpartisan municipal elections frequently do not require a run-off election if a candidate in the first round of voting receives more than 50% of the vote. What effect, if any, would the proposed initiative have on this type of voting system?
11. If the proponents' intent is to require an open general primary, it may be clearer to have subsection (1) begin with words such as: "Any primary election in the state shall be considered to be open in which any elector that is qualified may vote . . ." This construction avoids complications in meaning resulting from the initial focus, as drafted, on the "wishes" of the candidate. Would you consider making this change?
12. What would be the effect of subsection (1) of the proposed initiative if there is no primary election to select candidates for a particular general election contest?
13. It appears that subsection (2) of the proposed initiative would effectively end partisan election contests in Colorado (at least for candidates for a state office). Is this your intent? If not, would you consider modifying the language of this subsection? If this is your intent, what is your rationale in wanting to end partisan election contests in Colorado (at least for candidates for a state office)?
14. What would be the effect of subsection (2) of the proposed initiative if there is no primary election for a particular election contest?

15. Subsection (2) of the proposed initiative appears to limit placement on the general election ballot to the top two primary election finishers. Is this accurate? If so, that would appear to preclude placement on the ballot of any minor political party candidates unless they are one of the top 2 primary election finishers, which seems unlikely. Is this an accurate depiction of how the proposed initiative will work? If so, are the proponents aware of any legal restrictions on using the open general primary in such a way that would probably result in the preclusion of minor political party candidates from general election ballots?
16. What effect, if any, would the proposed initiative have on the system used in the state of precinct caucuses as the first step in the traditional path for placing candidates on the primary ballot (the alternative being candidates petitioning onto the primary ballot)? In the case of the process used to select the state's delegates to the presidential nominating conventions, would the state be forced to schedule presidential primaries instead of using the caucus system to select such delegates?
17. Given the possible significance of subsection (2) of the proposed initiative, is it accurate to state the headnote of the proposed new section 13 of article VII as "**Open general primary**"? Stated differently, does this headnote accurately identify the essence of both subsections (1) and (2) of the proposed initiative?
18. Are you aware of any other states that have adopted the procedures specified in the proposed initiative?
19. Some commentary on open primary proposals suggests that such proposals tend to favor incumbents and fringe candidates. Have the proponents considered this possibility? Are such concerns accurate or fair?
20. Given the existing statutory requirements based upon partisan elections, have the proponents considered the manner in which the proposed initiative would need to be implemented?
21. What effect, if any, would the proposed initiative have on campaign finance laws in the state?