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MEMORANDUM

April 1, 2014

TO: Ryan Ross and Mark McIntosh

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2013-2014 #114, concerning the appointment of a nonpartisan secretary of state.

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 purpose of the proposed amendment to the Colorado constitution appears to be:

1. Converting the office of the secretary of state from an elected office filled by a partisan candidate in partisan elections to an office appointed by the governor and filled by a nonpartisan officer.

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 number each section, part, etc. that is being amended or added with a section number (e.g., SECTION 1., SECTION 2.) before the amending clause. For example:

SECTION 1. In the constitution of the state of Colorado, **amend** section 1 of article IV as follows:

SECTION 2. In the constitution of the state of Colorado, **amend** section 3 of article IV as follows:

SECTION 3. Effective date.

2. It is standard drafting practice to use a capital letter only in the first word of a headnote.
3. It is standard drafting practice to set off nonessential phrases (i.e., introductory, parenthetical, or prepositional phrases) with commas instead of dashes.
4. Constitutional provisions are usually divided into component parts using the following hierarchy: Subsections, [denoted by numbers "(1)", "(2)", etc.]; followed by paragraphs, [denoted by lowercase letters, "(a)"], followed by subparagraphs, [denoted by Roman numerals "(I)"], followed by sub-subparagraphs, [denoted by capital letters "(A)"].
5. Although the text of new language being added in the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate such as the first letter of the first word of each sentence.
6. It is standard drafting practice to completely spell out months of the year, for example: "DECEMBER" instead of "DEC."
7. In (3) (b) of section 3 of the proposed initiative, the first sentence should read: "EACH APPOINTMENT IS SUBJECT TO CONFIRMATION..."

8. Numbers should be spelled out as words, for example: “THIRTY” instead of “30”.
9. It is standard drafting practice to only have one period at the end of each sentence.
10. In (3) (d) of section 3 of the proposed initiative the roman numerals should be consecutive from (I) to (VII).
11. On the last line of (3) (e) of section 3, the text of the proposed initiative should read: “DURING THE NEXT REGULAR SESSION OF THE GENERAL ASSEMBLY.”
12. Will the proponents fix all spelling errors in the text of the proposed initiative, e.g., the word “appointment” in section 3 (3) (B)?
13. With respect to the introductory portion of section 3 (3) (D) of the proposed initiative, the possessive “their” is not in agreement with the singular “secretary of state” that follows it.
14. Given that existing law governs such topics as self-execution, severability, conflicting provisions, and the effective date of a proposed initiative, standard drafting practice would be to exclude these provisions in an initiative unless the proponents intend to do something not provided by existing law, as, for example, having the proposed initiative take effect before the proclamation of the governor rather than upon the proclamation of the governor.

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 are the public policy objectives of the proposed initiative?
3. What is the proponents’ intent in making the secretary of state a nonpartisan officer?
4. What is the proponents’ intent in making a single term of a secretary of state six years (as contrasted with, for example, four years, or eight years)?

5. Under the proposed initiative in section 3 (3) (A), are there any limits on the number of six-year terms to which a single individual could be appointed?
6. What is the proponents' intent in exempting from Senate confirmation the governor's potential third appointment to the position? Would this give the governor an incentive to reserve his or her ultimate appointment for a particularly contentious or controversial nominee knowing that he or she is not subject to senate confirmation?
7. With respect to section 3 (3) (B) of the proposed initiative, what happens if an appointment to secretary of state is made during a legislative interim in which the state senate is not in session?
8. With respect to section 3 (3) (C) of the proposed initiative, how do the proponents define "public office" or "officeholder" for purposes of the proposed initiative? For example, would these terms include an office in a special district? A school board? A federal office? Would the proponents consider adding a definition of these terms?
9. With respect to section 3 (3) (C) of the proposed initiative, would a (prior) candidate for public office in a nonpartisan election be barred from accepting appointment to secretary of state under the proposed initiative?
10. It appears that an employee of a "partisan" officeholder who happens to be unaffiliated would be barred from accepting appointment as secretary of state under the proposed initiative. If this assumption is correct, what is the rationale for drawing the line so strictly against any possible taint of a partisan connection? If not, would the proponents consider modifying the relevant text of the proposed initiative?
11. How did the proponents arrive at three years as the dividing point for the requirements in section 3 (3) (C) of the proposed initiative?
12. Does the term "political party" mean a "major political party" and any "minor political party" as those terms are defined in the "Uniform Election Code of 1992"? If not, would the proponents consider adding a definition of those terms?
13. Are the proponents aware of whether it would be legal under the federal constitution to condition appointment as a public officer on the requirement that the appointee not be affiliated with any political party?
14. Does the three-year period for an appointee to not have held certain positions date back from the individuals' appointment as secretary of state

- or is some other date intended? Would the proponents consider clarifying the text of the proposed initiative on this point?
15. Would the restrictions in section 3 (3) (D) apply to assisting candidates in nonpartisan elections? If so, what is the rationale for prohibiting a prospective secretary of state from participating in nonpartisan campaigns? If not, would the proponents clarify the text of the proposed initiative on this point?
 16. With respect to section 3 (3) (D) of the proposed initiative, what does it mean for the secretary of state to “undertake and execute the responsibilities of the office in a nonpartisan manner...”?
 17. Up until now, all Colorado secretaries of state have been elected as partisan candidates in partisan elections and yet most observers would say that, regardless of the partisan affiliation of the occupant, the job has generally been performed on a fair, responsible, and professional basis. Assuming the proponents agree with this assessment, why is it necessary to change 138 years of constitutional practice?
 18. With respect to section 3 (3) (D) (III) of the proposed initiative, what does it mean to “assist in any manner the campaign of any candidate”? Would the proponents further specify what is meant by this phrase?
 19. With respect to section 3 (3) (D) (IV) of the proposed initiative, would the secretary of state be permitted to accept employment or contract work if it did not relate to his or her primary employment as secretary of state?
 20. With respect to section 3 (3) (D) (VI) and (IX) of the proposed initiative, what do the proponents mean by “partisan organization”? How would that differ, if at all, from a “political party”? Would the proponents add a definition of this term?
 21. Do the proponents intend for any of the restrictions on the involvement of the secretary of state in partisan campaigns specified in section 3 (3) (D) of the proposed initiative to apply to any of the employees of the secretary of state?
 22. What means may be employed to enforce section 3 (3) (D) if a secretary of state were to violate the requirements of that section?
 23. With respect to section 3 (3) (E) of the proposed initiative, would it still be possible to recall an appointed secretary of state or is the only remedy for removing an appointed secretary of state the removal provisions in this subparagraph (E)?

24. If a secretary of state is removed by the governor, how would any claims by the secretary of state that the removal action lacked malfeasance or just cause be adjudicated?
25. It would seem that a replacement secretary of state appointed during the legislative interim in a general election year would oversee the general election (and possibly the primary election as well) during that year and not be up for Senate confirmation until the legislative session convenes in January following the election. Is this your intent? Is there any reason to be concerned that an unelected and unconfirmed secretary of state would be overseeing a state general election?
26. Is the proposed initiative intended to have any effect on the functions of the department of state not related to the administration of elections? If so, what are those intended effects?
27. Do the proponents know whether any other states require their secretaries of state (or chief election officers) to be nonpartisan appointees? If 'yes', what are those states and did the proponents model the proposed initiative on the laws from these other states?
28. Is there any reason for concern that the governor would have difficulty in finding able appointments for the secretary of state position who will be able to satisfy the requirements of section 3 (3) (D) of the proposed initiative?
29. If a prospective secretary of state is not permitted to hold prior elective office, this restriction would seem to eliminate recently serving county clerk and recorders or municipal clerks from consideration for the position. Is this your intent?