

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

December 28, 2005

TO: Ryan Call and John Zakhem

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2005-2006 #67, concerning campaign and political 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 initiative appear to be:

1. To repeal and reenact article XXVIII of the Colorado constitution;
2. To declare purposes and findings;
3. To require all candidate committees, political parties, political committees, and issue committees to register with and report to the appropriate officer the following information:

- a. Contributions received, including the name and address of each person who has contributed twenty dollars or more;
 - b. Expenditures made; and
 - c. Obligations entered into by the committee or party.
4. To require natural persons making certain types of contributions that are required to be disclosed to include the person's occupation and employer;
5. To require that the reports that are required to be filed with the appropriate officer be filed within forty-eight hours of the receipt of any contribution, expenditure, or obligation entered into;
6. To require any person who spends one thousand dollars or more per calendar year on independent expenditures or electioneering communications to report to the appropriate officer the amount spent on the communications and the name and address of any person that contributes more than twenty dollars per year to the person expending one thousand dollars or more on the communications;
7. To require the report to be filed with the appropriate officer within forty-eight hours after making or obligating funds for certain expenditures;
8. To require the secretary of state to:
 - a. Develop an online and electronic filing system, online search and retrieval system, and other processes for use by candidate committees, political parties, political committees, issue committees, and other persons required to file statements and reports with the secretary of state as required by law;
 - b. Promulgate rules to administer and enforce campaign finance and disclosure law.
9. To require the General Assembly to:
 - a. Enact definitions of terms pertaining to the proposed initiative and to any statutory provisions pertaining to campaign finance and disclosure;
 - b. Enact contribution limits for candidate committees, political parties, and political committees, not inconsistent with the proposed initiative, provided that the limits be not repugnant to other provisions of the Colorado constitution or the constitution of the United States.
10. To declare any provisions in the statutes of the state, or adopted at any county, municipal, special district, or other local level, in conflict or inconsistent with the proposed initiative inapplicable to the matters covered and provided by the proposed initiative;

11. To establish that the proposed initiative will take effect on December 4, 2006, and will apply for all elections thereafter;
12. To allow legislation to be enacted to facilitate its operations, but in no way limit or restrict the provisions of the proposed initiative or the powers granted by the proposed initiative; and
13. To declare the provisions of the proposed initiative severable.

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

1. To conform to standard drafting practices, would the proponents consider showing the language of the proposed initiative in "SMALL CAPS"?
2. The purpose of the review and comment process is to review the text of the proposed law or constitutional amendment. The submission appears to contain language for a proposed ballot title. Given that the ballot title and submission clause are determined by the title board and that our offices do not have the authority to review and comment on proposed ballot titles, would the proponents consider removing the text of the proposed ballot title?
3. To conform to standard drafting practices, would the proponents consider breaking up section 1 of the proposed initiative into subsections and paragraphs, as follows:
"(1) The people of the state of Colorado hereby find and declare that:
(a) Technological advances have and will . . .
(b) Information regarding contributions . . ."?
4. To conform to standard drafting practices, in section 2 (1) would the proponents consider breaking up the section, as follows:
"(1) (a) (I) All candidate committees, political parties, political . . .
(A) Contributed twenty dollars or more;
(B) Expenditures made; and
(C) Obligations entered into by the committee or party
(II) If the person making such contribution of twenty. . .
(2) Any person who spends one thousand dollars or more . . ."?
5. To conform to standard drafting practices, would the proponents consider writing out the number 48 used in section 2 (1) (a) (I) and (II) so that it reads "forty-eight"?
6. To conform to standard drafting practices, in the last sentence of section 2 (1) (a) (I), would the proponents consider adding a comma after the word "expenditure"?
7. To conform to standard drafting practices, would the proponents consider putting the word

- "article" in lower case letters when using the term throughout the proposed initiative?
8. To conform to standard drafting practices, in section 4 would the proponents consider adding a comma after "December 4, 2006"?
 9. To conform to standard drafting practices, would the proponents consider putting the words in the head note in section 4 of the proposed initiative that currently read "APPLICABILITY AND EFFECTIVE DATE" in lower case letters?
 10. To promote clarity, in the last clause of section 1 of the proposed initiative, would the proponents consider setting off the clause that reads "and independent expenditures and electioneering communications made on behalf of" in commas?
 11. It appears there may be an extra "and" in the clause that reads "reports with the secretary of state [and] pursuant to this Article" in section 3 (1) (a) of the proposed initiative. If so, would the proponents consider deleting this arguably redundant "and"?
 12. The second reference to "pursuant" in section 3 (1) (a) of the proposed initiative may cause confusion. Insofar as the proponents really intend to state that the rules should be promulgated "*in accordance with* article 4 of title 24, Colorado Revised Statutes," would the proponents consider stating this portion of the text in this manner?
 13. To promote clarity, would the proponents consider, in the last clause of section 3 (1) (b) of the proposed initiative, substituting the phrase "and other provisions of law regarding campaign finance and disclosure *consistent with this Article*" for the phrase that appears in the text "not inconsistent with this Article"?
 14. To promote clarity, would the proponents consider, in section 3 (2) (b) of the proposed initiative, substituting a phrase such as "are consistent with" or "do not conflict with" for the phrase "provided such limits be not repugnant to other provisions...."?
 15. Would the proponents consider deleting the word "state" prior to the first reference to "constitution" in the last line of section 3 (2) (b) of the proposed initiative?
 16. There appears to be formatting marks and language in the margins next to the first section 3 (2) (b) of the proposed initiative. Would the proponents consider removing these items?
 17. It appears the proposed initiative contains two sections enumerated as "Section 3." Would the proponents consider correcting this apparent error and renumbering the subsequent sections?

Substantive questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed measures to have a single subject. The proposed initiative, among other things, requires the disclosure of political contributions and expenditures, establishes an electronic filing and retrieval system, and requires the General Assembly to enact political contribution limits. In light of these and other components, what is the single subject of the proposed initiative?
2. The proposed initiative is subtitled "21st Century Campaign and Political Finance". What is the connection between the proposed initiative and the "21st Century"? Does this heading mean that the proposed initiative, if it were to become law, would no longer be valid or relevant at the end of this century?
3. By repealing and reenacting the current Article XXVIII of the Colorado constitution, is it the proponents' intent that the current Article XXVIII be superseded and replaced by the provisions of the proposed initiative?
4. With respect to section 1 of the proposed initiative ("Purpose and Findings"):
 - a. What is the basis for the statement that "current campaign finance laws have been ineffectual at limiting the disproportionate influence of wealthy individuals, corporations, and special interest groups over the election process..."? How will the proposed initiative better limit any such disproportionate influence of these persons or entities than the current system?
 - b. What is the basis for the statement that "current contribution limits have served to strengthen the disproportionate influence of wealthy individuals, corporations, and special interest groups over the election process at the expense of candidates and political parties that may be held more easily accountable by the public"? Insofar as any such imbalance exists, how will the proposed initiative strengthen the influence of candidates and political parties relative to these other persons or entities in the political process?
 - c. What is the basis for the statement that "political contributions are tantamount to political speech"?
 - d. What is the basis for the statement that "undisclosed campaign contributions to and independent expenditures and electioneering communications made on behalf of candidates and political parties prevent public accountability and undermine public trust in the electoral process"? How will the proposed initiative better promote public accountability and public trust in the electoral process?
5. As a general proposition, the text of the proposed initiative does not provide definitions for any of the basic terms used, including "expenditures", whether independent or otherwise, "contributions", any of the types of committees referenced, or "electioneering communications". What do the proponents intend these terms to mean? Do the proponents

foresee or intend any process by which a legal definition for each of the relevant terms will be provided?

6. With respect to section 2 (1) (a) (I) of the proposed initiative:
 - a. Who is the "appropriate officer" for purpose of the proposed initiative? Would the proponents consider clarifying their intended meaning for this term?
 - b. What do the proponents mean by "obligations entered into"? What are some examples of these types of "obligations"? Would the proponents consider clarifying their intended meaning for this term?
 - c. What would registration with the appropriate officer consist of under the proposed initiative? Why is such registration required? How would this registration differ from the manner in which committees or parties currently report to the appropriate officer under current law? *See* section 1-45-108 (1) (a) (I), Colorado Revised Statutes.
 - d. What is the basis for the twenty dollar threshold specified in subparagraph (I)? How did the proponents arrive at this number? Is this threshold limitation intended to represent an aggregate amount for contributions made in a particular time, such as over the course of an election cycle, or does it only represent a single contribution that is twenty dollars or more?
 - e. Do the proponents intend that the reports required by subparagraph (I) would be able to be filed electronically?

7. With respect to section 2 (1) (a) (II) of the proposed initiative:
 - a. Would the proponents consider providing a definition of "independent expenditures" or "electioneering communications" for purposes of the proposed initiative?
 - b. Would the proponents consider providing a definition of "person" for purposes of the proposed initiative? Specifically, do the proponents intend this word to mean only "natural persons", is it intended to cover "natural" persons and all forms of business entities such as committees, or is some other meaning intended?
 - c. What is the basis for the one thousand dollar threshold in connection with total expenditures that necessitates reporting under this subparagraph? How did the proponents arrive at this number? What is the proponents' rationale in not requiring the reporting of an expenditure on these items that is in an amount less than one thousand dollars?
 - d. What is the basis for the twenty dollar threshold for individual contributions to the person making the expenditure that necessitates reporting under subparagraph (II)? How did the proponents arrive at this number?

- e. What is the proponents' rationale for regulating independent expenditures and electioneering communications in the manner required by subparagraph (II)?
 - f. What is the proponents' rationale for requiring disclosure of personal information about a contributor who contributes twenty dollars or more to the person making the expenditure? Why do proponents set the threshold at such a low amount when compared to analogous provisions under section 6 (1) of Article XXVIII of the Colorado constitution, i.e., two hundred fifty dollars.
 - g. Do the proponents intend that any type or person or entity be prohibited from making an independent expenditure or an electioneering communication under the proposed initiative?
 - h. Do the proponents intend that the reports required by subparagraph (II) would be able to be filed electronically?
 - i. Subparagraph (II) begins by placing a reporting requirement on persons making independent expenditures or electioneering communications but subsequent references to the contents of the disclosure appear to address only the "communications" and not the "expenditures". Assuming this is an oversight, and that "communications" is not intended to cover both types of political communication, would the proponents consider rewriting this subparagraph so that references to "communications" also include references to "expenditures"?
8. No mechanism appears to exist within the text of the proposed initiative that would adjust the threshold amounts over time for the effects of inflation, which would presumably mean that these limits would increasingly represent smaller and smaller amounts in real money. If so, would the proponents consider adding to the text of the proposed initiative some mechanism whereby the dollar amounts would be adjusted over time to account for the effects, if any, of inflation?
9. With respect to the first section 3 (1) (a) of the proposed initiative:
- a. How would the electronic filing system required by this first section 3 intersect with the electronic filing and disclosure system currently in place? Perhaps stated differently, what would the proposed initiative require that is not currently part of the electronic filing and disclosure system already required to be in place by section 1-45-109 (6), Colorado Revised Statutes?
 - b. By what time is the electronic filing system required by the proposed initiative to be completed? Would the proponents consider specifying a deadline in the text of the proposed initiative for this task to be completed?
 - c. Insofar as satisfying the requirements of first section 3 requires the installation and maintenance of a new electronic database system, what source of revenue do the

proponents contemplate be used to finance the installation and maintenance?

- d. Would information contained in the electronic database be made available to the public? If so, would the proponents consider explicitly requiring such access in the text of the proposed initiative? If so, do the proponents contemplate any delay between the submission of information by the relevant persons and the disclosure of information on the database?
10. With respect to first section 3 (2) of the proposed initiative:
- a. By what time is the General Assembly required to provide definitions and contribution limits required by the proposed initiative to be completed? Would the proponents consider specifying a deadline in the text of the proposed initiative for these tasks to be completed? Are the definitions and contribution limits to be supplied by a duly enacted or is some other process contemplated? What if the General Assembly fails to pass legislation (or fails to pass legislation that the Governor will sign) that will accomplish these tasks?
 - b. In providing definitions and enacting contribution limits pursuant to the proposed initiative, is the General Assembly to be guided by any particular principles or beliefs? If so, what would those principles or beliefs be? Do the proponents have in mind a certain type or level of contribution limit that is "repugnant to other provisions of this state constitution or to the constitution of the United States"?
11. Section 4 of the proposed initiative states in relevant part that "[l]egislation *may* be enacted to facilitate its operations". However, first section 3 (2) presumably *requires* legislative action on the part of the General Assembly. Insofar as these two sections may be in conflict, would the proponents consider modifying the text of the proposed initiative to ameliorate any such conflict?
12. Is it the intent of the proponents that the proposed initiative apply to all elections conducted by any political subdivision in the state held on or after December 4, 2006? Do the proponents intend that any such elections be excluded from the requirements of the proposed initiative? For example, to what extent would the proposed initiative cover municipal elections conducted by home rule municipalities? Would the proponents consider clarifying their intent with respect to this issue?
13. With respect to section 4 of the proposed initiative:
- a. What is the proponents' rationale for making December 4, 2006, the effective date for the proposed initiative?
 - b. What effect, if any, will the December 4, 2006, effective date have on contributions made or received, or expenditures made, prior to that date that are still within an election cycle that terminates in December 2006? Insofar as there are any effects, have the proponents considered an effective date that would correspond with the

commencement of a new election cycle?

- c. Have the proponents considered the fact that the proposed initiative would presumably take effect prior to when the General Assembly would have the opportunity to perform the tasks to which it has been delegated under section 2, which means the proposed initiative may take effect prior to when contribution limits or applicable definitions may be in place? If so, how do the proponents intend for this potential gap between the proposed initiative's effective date and its full implementation to be addressed? For example, what would the contribution limits be during any such period of time prior to when contribution limits have been enacted?
14. With respect to the section of the proposed initiative addressing "conflicting provisions", what does it mean to state that conflicting or inconsistent provisions are "hereby declared to be inapplicable to the matters covered and provided for in this Article"?
15. Under section 1 (4) of article V of the Colorado constitution, initiated measures take effect from and after the date of the official declaration of the vote by the proclamation of the Governor, which typically takes place in late December or early January following the general election. Are the proponents aware that the proposed measure would take effect prior to the time when the Governor issues his or her proclamation?