

# STATE OF COLORADO

## Colorado General Assembly

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## MEMORANDUM

**TO:** Betty June Nikkel and Greg Brophy  
**FROM:** Legislative Council Staff and Office of Legislative Legal Services  
**DATE:** April 4, 2018  
**SUBJECT:** Proposed initiative measure 2017-2018 #173, concerning campaign contributions

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 directors of 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 allow candidates in an election to collect contributions up to five times the rate authorized in section 3 (1) of article XXVIII of the Colorado constitution if any one candidate provides a loan or contribution of more than one million dollars to their candidate committee or other committee that participates in the

candidate's election, or to any organization or independent expenditure committee, if the secretary of state finds that the contribution is designed to benefit a single candidate for electioneering purposes.

## **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 will be the effective date of the proposed initiative?
3. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
  - a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
  - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
  - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at [BallotImpactEstimates.ga@state.co.us](mailto:BallotImpactEstimates.ga@state.co.us).
4. What is the proponents' rationale for proposed initiative #173?
5. Does "elected office" in the first sentence of proposed new section 3(14) of article XXVIII of the state constitution refer to any elected state, county, or municipal office or is some other meaning intended?
6. The term "political action committee" is not used in either article XVIII of the state constitution or the Colorado "Fair Campaign Practices Act," article 45 of title 1, Colorado Revised Statutes. The Colorado equivalent is "political committee." For purposes of consistency and to eliminate confusion, would the

- proponents consider substituting the term "political committee" for "political action committee," or is some other meaning intended?
7. How did the proponents arrive at a threshold amount of more than \$1 million in contributions or loans as triggering the requirements of increased contribution amounts to the non-benefiting candidates following the necessary determination by the secretary of state under the proposed initiative?
  8. Have the proponents considered whether awarding increased contributions to one or more candidates to offset increased contributions to another candidate, especially to offset money a candidate may contribute to his or her own campaign, as part of an effort to "level the playing field", is compatible with recent holdings of the United States Supreme Court in cases involving campaign finance? For example, in the case of *Davis v. FEC*, 554 U.S. 724 (2008), the Court struck down the so-called "Millionaire's Amendment" provision of the "Bipartisan Campaign Reform Act of 2002" under which, if one candidate pledged to spend a certain amount of personal funds in support of his or her election, the contribution limits for the non-self-financing opposition candidate was tripled and the non-self-financing candidate could additionally receive coordinated contributions and expenditures from his or her national political party. The Court held that campaign finance limitations must apply equally.
  9. What does the term "candidates in the same election" mean for purpose of the provision of larger contribution amounts? Does the proposed initiative separately apply to both a primary and a general election for the same office? If it applies for a primary election, does that mean that the existing system remains in effect at the start of the subsequent general election or would the contribution limits also be increased in the same manner for the general election?
  10. With reference to the second condition triggering the increased contribution amounts to non-benefiting candidates, what would be an example of an "entity" that would be covered by this clause? What does the phrase "participating in the candidate's own election" mean?
  11. Under current law, wouldn't the effect of a candidate contributing more than \$1 million to a committee or other entity that would support his or her own election mean that the contribution would be held to be coordinated by or with the candidate, thereby depriving the committee or other entity of any independent status?

12. With respect to the third condition triggering the increased contribution levels to non-benefitting candidates, it appears this condition applies any time any person contributes or loans more than \$1 million to any committee, organization, or independent expenditure committee regardless of whether the contributions or loans are designed to benefit any particular candidate. As such, it would seem to capture many committees or organizations regardless of whether its election-related spending is designed to support or oppose a particular candidate. Is this your intent? Would the proponents consider modifying their language on this point to clarify their intent?
13. How is the determination to be made by the Secretary of State that a contribution benefits a single candidate for electioneering purposes? How easy will it be to establish the connection between a particular contribution or loan and a benefit realized by a particular candidate on the other side? How would this process work? When is the determination to be made? How will the secretary even know that a triggering contribution or loan has been made?
14. Although the three conditions triggering the increased contribution amounts to non-benefitting candidates all reference "contributions" or "loans," the requirements mandating increased contribution amounts only reference "contributions." Is this an inadvertent oversight by the proponents? If not, what is the effect under the proposed initiative of a loan that triggers any of the three conditions?
15. Do the increased contribution limits take effect the first time in an election cycle that any one candidate or other person makes a triggering contribution or loan that results in a determination by the secretary of state? If so, then do the increased limits apply for the balance of the election cycle for that particular race? Is there any consequence to repeated or multiple triggering contributions or loans affecting a particular election contest?
16. What does "electioneering" mean in the context of the proposed initiative? Does it have the same meaning as used in connection with the term "electioneering communication" or is some other meaning intended?
17. What if a triggering contribution or loan benefits more than one candidate (as, for example, in a school board race or in an intra-party primary) and it is not easy to determine whether the contribution or loan benefited a *single* candidate? Would the increased contribution limits not apply or would each candidate who was presumably targeted by the contribution or loan enjoy the increased limits? What if the contribution or loan pays for an ad targeting a particular candidate

but the race is won by neither the candidate whose side sponsors the ad nor the candidate that the ad targets? Would the proponents consider modifying their language on this point to clarify their intent?

18. If the proposed initiative were to become law, do the proponents anticipate the need for implementation legislation by the General Assembly?
19. Why does the proposed initiative create an exception to the increased contribution limits for contributions from political action committees? Other than contributions from political action committees, assuming the proposed initiative became law, would every other contribution limit in section 3(1) of article XXVIII be increased by a multiple of five if a triggering contribution or loan were made and the secretary of state made the necessary determination?

## 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. Before the amending clause, number each section, part, etc. that is being amended or added with a section number (e.g., SECTION 1., SECTION 2.). For example:  
  
**SECTION 1.** In the constitution of the state of Colorado, article XXVIII, **add** (14) as follows:  
  
2. Each section in Colorado constitution has a headnote. Headnotes briefly describe the content of the section. Please include the headnote for the amended section 3 of the proposed initiative in bold-face type.  
  
3. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to and stricken type, which appears as ~~stricken type~~, to show language being removed from the Colorado constitution or the Colorado Revised Statutes.  
  
4. Per standard drafting practices, please expand the internal citation "subsection (1)" into "subsection (1) of this section" and "this subsection" into "this subsection (14)."