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MEMORANDUM

To: Jonathan Ambler and Rick Van Matre
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: March 22, 2021
SUBJECT: Proposed initiative measure 2021-2022 #22, concerning campaign expenditure limits

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 Revised Statutes appear to be:

1. Limiting campaign expenses to less than 150% of eligible elector's donations;
2. Defining what qualifies as an eligible elector donation and a general donation, and setting reporting requirements for such donations;

3. Authorizing the secretary of state to issue fines for violations;
4. Excluding home rule elections from such limitations on campaign expenses.

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. The proponents state that they would like to add a new article 119 to title 45, but there is no title 45 in the C.R.S. Given the topic of the initiative, do the proponents mean to add a new section to article 45 of title 1? If so, the proponents should correct the amending clause to add a new section 1-45-119.
4. What problem with Colorado's current campaign finance system is the proposed initiative intended to address? How will enactment of the proposed initiative "assure representative government"?
5. To what elections is the proposed initiative intended to apply?
6. Is the first sentence of the proposed initiative intended as a declaration of the proponents' intent or a legal command? What does it mean for campaign expenditures not to exceed 150% of eligible electors' donations? Does this phrase mean to cover all eligible electors in the state or only the eligible electors that have donated to a particular candidate?
7. With respect to basic terms in the proposed initiative:
 - a. What do the proponents mean by "eligible electors"?
 - b. What do the proponents mean by the word "donations"? Does "donations" have the same meaning as the more commonly used word in campaign finance terminology of "contributions"?
 - c. The proposed initiative uses the terms donations and contributions, perhaps interchangeably. Insofar as the term is intended to describe a gift or payment made to a political campaign, would the proponents consider using the term "contribution" on a consistent basis throughout

the proposed initiative instead of "donations" to conform to prevailing word usage in Colorado campaign finance law?

8. To confirm what seems to be the intent of subsection (7) of the proposed initiative, does "committee" mean issue committees, small donor committees, and political committees besides candidate committees?
9. What do the proponents mean by the word "expenses"? Does "expenses" have the same meaning as the more commonly used word in campaign finance terminology of "expenditures"? If so, would the proponents consider using the term "expenditures" to mean a purchase or payment by a person for the purpose of undertaking express advocacy in support of or opposition to a candidate or ballot measure, instead of "expenses", to promote consistency of terms in Colorado campaign finance law?
10. Under the proposed initiative, would donations to political campaigns in the state be limited to those made by eligible electors? How would donations made by "ineligible" electors be treated under the proposed initiative?
11. What is the applicable time period during which expenses are to be restricted to a proportion of eligible electors' donations? Is the applicable time period a calendar year? During the applicable election cycle? Or is some other time period intended?
12. Are the proponents familiar with the landmark case of *Buckley v. Valeo*, 424 U.S. 1 (1976), in which the U.S. Supreme Court held in relevant part that mandatory restrictions on campaign expenditures violate the First Amendment to the U.S. Constitution? Assuming the proposed initiative intends to impose mandatory restrictions on campaign expenditures, how can the proposed initiative be reconciled with the *Buckley* case, which is still good law 45 years later?
13. How did the proponents make the determination that the limitation on expenses as a percentage of donations is 150%?
14. How does the proposed initiative intersect with existing constitutional and statutory provisions governing campaign and political finance? How do the proponents foresee that conflicting requirements as between state statute and the proposed initiative would be harmonized?
15. The campaign finance provisions of the state constitution (Article XXVIII) impose only *voluntary* spending limits and presume that contributions from any person, with limited exceptions, in the amounts permitted may be accepted by a candidate committee. Have the proponents researched whether the provisions

of the proposed initiative may be harmonized with the provisions of Article XXVIII, which would prevail in the case of any conflict with statutory provisions?

16. With respect to subsection (1) of the proposed initiative:

- a. Does this provision mean that only donations accompanied by a valid voter registration number may be accepted by a candidate committee?
- b. What is the rationale for requiring an elector to include their voter registration number with their donation?
- c. Who is responsible for providing the valid registration number? If the donor, how will an eligible elector find their voter registration number? What if the donation comes from an out-of-state elector?
- d. Under current law, there is no requirement that a natural person contributing to a candidate campaign be an eligible elector or even a resident of Colorado (although they must be a U.S. citizen). Does the proposed initiative intend to change these conditions affecting the permissibility of campaign contributions?
- e. Have the proponents considered whether and to what extent requiring an elector to include a voter registration number with a donation may have a chilling effect on political participation?

17. With respect to subsection (2) of the proposed initiative:

- a. Are the proponents aware of detailed statutory provisions governing the disclosure of campaign contributions as specified in sections 1-45-108 and 1-45-109, C.R.S.? Instead of adding to the existing disclosure requirements by placing this item in a new section, have the proponents considered merely adding any new requirements to existing disclosure requirements under existing law?
- b. What if the secretary of state is not the official to whom a candidate committee must provide disclosure under existing law (see Section 1-45-109 (1), C.R.S.)? Does this mean that the proposed initiative may require multiple filings to multiple officers?

18. With respect to subsection (3) of the proposed initiative:

- a. What does this provision mean? Specifically, what does it mean to say that donations "will be totaled with the committee's general contributions"?
- b. Does the phrase "donations not including an eligible elector's registration" mean donations that are not accompanied by an eligible elector's voter registration number?
- c. What are a "committee's general contributions"? How are these contributions different from contributions from eligible electors?

19. With respect to subsection (4) of the proposed initiative:

- a. What is the specific violation that is proscribed by this subsection (4)?
- b. Is the violation committed by the donor who omitted the voter registration number with the donation or the committee that accepted the same?
- c. What does it mean that "violations shall be determined at each reporting period" What is the reporting period?
- d. Under section 10(1) of article XXVIII of the Colorado constitution, violations of contribution or voluntary spending limits are subject to a civil penalty of at least double and up to 5 times the amount contributed, received, or spent in violation of the applicable provisions. What is the rationale for subjecting violations of the proposed initiative to a civil penalty of 10 times the amount of the violation?
- e. Is the violation under the proposed initiative assessed on a per occurrence basis?
- f. Does the proposed initiative contemplate a process by which deficiencies in the legal requirements may be cured by the potential violator? Have the proponents considered whether the cure provisions specified in section 1-45-111.7, C.R.S., would be applicable to provisions of the proposed initiative?

20. With respect to subsection (5) of the proposed initiative:

- a. Is it possible to provide fraudulent voter registration information without knowing about the same?
- b. How does one "subvert" the provisions of the article? Is that word intended to mean something other than violating the provisions?

21. With respect to subsection (6) of the proposed initiative:

- a. How are "eligible elector's donations" different from "totals for eligible electors' donations" as the two phrases are used in subsection (6)?
- b. What are "general donations"? Is that the same thing as "general contributions" as used in subsection (3)?
- c. Are the proponents aware that the Secretary of State has been providing electronic means of reporting campaign finance information for several years in Colorado? Does the proposed initiative anticipate a different means of providing electronic disclosure?
- d. What entity is responsible for calculating and reporting donations and campaign expenses?
- e. What does it mean for campaign reports to include the proportional relationship between eligible electors' contributions and campaign expenses?
- f. What is the "regular campaign reporting process"? Do the proponents intend for this information to be disclosed in accordance with existing disclosure rules and requirements or is something else intended?

22. With respect to subsection (7) of the proposed initiative:

- a. Which committees are under the jurisdiction of the secretary of state?
- b. What is a home rule election? An election in a home rule municipality? Does this mean that the provisions of the proposed initiative are not applicable to elections in home rules municipalities or is something else intended?

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. Each section in the Colorado Revised Statutes has a headnote. Headnotes briefly describe the content of the section. A headnote should be added to the

newly added section in the proposed initiative and be in bold-face type. For example, "Campaign expenditure limits" could be repositioned as the headnote.

2. The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

X-X-XXXX. Headnote. (1) Subsection.

- (a) Paragraph
 - (I) Subparagraph
 - (A) Sub-subparagraph
 - (B) Sub-subparagraph
 - (II) Subparagraph
- (b) Paragraph
 - (2) Subsection
 - (3) Subsection

The proposed initiative contains a sentence prior to subsection (1) that is not numbered. The proponents should consider making that language subsection (1) of the newly added section and renumbering the subsequent subsections accordingly.

3. As was previously stated, the proponents appear to be adding a new section to the C.R.S. rather than a new article. The proponents should change references to "this article" to "this section where prudent, unless the proponents do mean to reference all of article 45.
4. 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.
5. The proponents should avoid placing statutory language in parentheses. For example, "(Not to include home rule elections)" is not a complete sentence and does not need to be set in parentheses.