

STATE OF COLORADO

Colorado General Assembly

Natalie Mullis, Director
Legislative Council Staff

Colorado Legislative Council
200 East Colfax Avenue Suite 029
Denver, Colorado 80203-1716
Telephone 303-866-3521
Facsimile 303-866-3855
Email: lcs.ga@state.co.us



Sharon L. Eubanks, Director
Office of Legislative Legal Services

Office of Legislative Legal Services
200 East Colfax Avenue Suite 091
Denver, Colorado 80203-1716
Telephone 303-866-2045
Facsimile 303-866-4157
Email: olls.ga@state.co.us

MEMORANDUM

TO: Joseph Vahle and Shelly Lucas
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: February 14, 2020
SUBJECT: Proposed initiative measure 2019-2020 #258, concerning Instant Runoff Voting for Elections of United States Representatives

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 purpose of the proposed amendment to the Colorado Revised Statutes appear to be:

1. To require the use of instant runoff voting, which is a system of ranked choice voting that allows voters to rank any number of candidates in order of preference, in elections for members of the United States House of Representatives.

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 article V, section 1 (2) of the Colorado constitution, proposed initiatives amend either the Colorado constitution or the Colorado Revised Statutes. Additionally, in accordance with section 1-40-102 (4), Colorado Revised Statutes, and for publication purposes, an amending clause should be used to show where in the Colorado constitution or Colorado Revised Statutes a proposed initiative's provisions should be inserted. Where will the proposed initiative be placed? (Please indicate through an amending clause where the proposed initiative will be placed.)
4. Article V, section 1 (5) of the Colorado constitution and section 1-40-102 (4), Colorado Revised Statutes, require a proponent to submit for review and comment the full text of the measure being proposed, which, if passed, becomes the actual language of the constitution or statute. The document you submitted includes specific statutory references, but is not formatted as new or amended statutory text. Is the language you submitted intended to be the actual language? If not, please amend your proposal to include the actual text of your proposed constitutional or statutory change in conformance with the technical comments below.
5. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado:". To comply with this constitutional requirement, this phrase should be added to the beginning of the proposed initiative.
6. Regarding the second bullet under "1-7-1101 Short title":
 - a. The second bullet says that the new part "shall be implemented by the next eligible general election." What does this mean? How is it determined whether a general election is eligible?
 - b. Do you intend for the proposed initiative to apply to United States Senate elections?

7. The proposed initiative defines "voting system" to mean a method by which the winner of an election is selected. The term "voting system" is already defined for purposes of the "Uniform Election Code of 1992," including article 7 of title 1, Colorado Revised Statutes, to mean "a process of casting, recording, and tabulating votes using electromechanical or electronic devices or ballot cards and includes, but is not limited to, the procedures for casting and processing votes and the operating manuals, hardware, firmware, printouts, and software necessary to operate the voting system" in section 1-1-104 (50.8), Colorado Revised Statutes. To avoid a conflict, please consider using a different term for the method by which the winner of an election is selected, if your text requires a defined term for that purpose.
8. How is the instant runoff voting described in the initiative different from the ranked voting method described in section 1-7-1003 (3), Colorado Revised Statutes?
9. Under the instant runoff voting method, what happens if a voter's ranking of candidates includes a tie, for example, if a voter ranks two candidates as second?
10. Under the instant runoff voting method, what happens if a voter skips a ranking? For example, what if a voter ranks three candidates as first, second, and fourth, but does not include a third?
11. The first bullet under "1-7-1103 Ballot" states that "IRV ballots must allow the voter to rank any number of candidates." What happens if a county's voting system cannot accommodate a number of rankings equal to the number of candidates in the race?
12. How would write-in candidates be handled in a race using instant runoff voting? Do you intend to require the ballots used for instant runoff voting to allow write-in candidates, and if so, how many should be allowed?
13. The first bullet under "1-7-1104 Conduct" states that all "Elections in Colorado for the United States House Of Representatives will use the IRV voting system to select congressional representatives in Single Member Districts."
 - a. Why is the system only required for elections of members of the United States House of Representatives, and not for any other elections?
 - b. Would this requirement apply to primary elections for candidates for the United States House of Representatives or only the general election?

- c. Given the requirement in section 44 (2) of article V of the Colorado constitution that the state be divided into as many congressional districts as there are representatives in congress apportioned to the state, is there a need to define "single member district" and specify that only those districts will use instant runoff voting to elect members of the United States House of Representatives?
14. Is it your intent that instant runoff voting elections would use a separate ballot, and if so, do you have an estimate of the cost of requiring a separate ballot?
15. The second bullet under "1-7-1104 Conduct" states that "The State of Colorado may use electronic counting systems or hand counting systems to determine the winner of IRV elections."
- a. Is your intent to require ballots to be received and counted by a state agency for elections to select a member of the United States House of Representatives, rather than by county clerks and recorders, as is currently done?
 - b. What is an "electronic counting system"? Does it refer to a "voting system" as defined in in section 1-1-104 (50.8), Colorado Revised Statutes? Would it be subject to the requirements of part 5 of article 7 of title 1, Colorado Revised Statutes, and other provisions regarding the use of voting systems?
 - c. Would the voting and counting of ballots be subject to other provisions of the "Uniform Election Code of 1992" that apply to the process of voting in person or by mail, the handling by ballots by election officials, the counting of ballots by elections officials, and the use of voting systems, for example, parts 3, 4, and 5 of article 7 of title 1, Colorado Revised Statutes, and parts 1 and 2 of article 7.5 of title 1, Colorado Revised Statutes? Or is it your intent that the ballots using instant runoff voting would be handled differently?
16. The third bullet under "1-7-1104 Conduct" states that "IRV voting systems will not be used to count local state or municipal elections." Does this create a conflict with part 10 of article 7 of title 1, Colorado Revised Statutes, which allows statutory cities and towns and special districts to use ranked voting in elections on some circumstances? Is it your intent to repeal or otherwise alter this authorization for ranked voting?
17. How would the results of the iterations of counting be reported?

18. Would the use of instant runoff voting require any special procedures for recounts?
19. The initiative includes a direction "To **amend** Title 1, Article 5, Part 4, Section 407 Form of Ballots with ... (B) or rank any number of candidate from most preferred to least preferred."
 - a. Where in section 1-5-407, Colorado Revised Statutes, is this statement intended to be placed?
 - b. Is this intended to be an instruction that must go on all ballots, or only where the use of instant runoff voting is allowed?
20. The initiative includes a direction "To **amend** Title 1, Article 7, Part 3, Section 309 add...IRV ballots shall be discarded if it is for any reason not possible to determine the ranking of the first choice candidate".
 - a. Currently, voted ballots are election records that must be retained in accordance with sections 1-7-801 and 1-7-802, Colorado Revised Statutes. Why would ballots with instant runoff voting races be discarded due to a voter's error rather than handling them in the same way other ballots with errors are handled under sections 1-7-309 and 1-7-508, Colorado Revised Statutes? Would the destruction of ballots affect election transparency or have other consequences for the administration of elections?
 - b. What would happen if a voter's first choice can be determined, but not their subsequent choices?
21. Are there other sections of statute that require amendments to accommodate the use of instant runoff voting, or from which the new sections of law should create exemptions? For example, section 1-7-309 (1), Colorado Revised Statutes, states that a vote shall not be counted "if an elector marks more names than there are persons to be elected to an office." In addition, there are other statutory sections addressing overvotes, which is defined in section 1-1-104 (23.4), Colorado Revised Statutes, as "the selection by an elector of more names than there are persons to be elected to an office."
22. 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.

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 Colorado Revised Statutes, **add** part 11 to article 7 of title 1 as follows:
2. Each constitutional and statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, if you intend to amend an existing section within article 5 of title 1 of the Colorado Revised Statutes, you would include the following amending clause: "In Colorado Revised Statutes, **amend** 1-5-407 as follows:".
3. Each section in the Colorado Revised Statutes and the Colorado constitution has a headnote. Headnotes briefly describe the content of the section. A headnote should be added to each new C.R.S. section of the proposed initiative and be in bold-face type. For example: "**1-7-1101. Short title.** Part 11 shall be known...".
4. 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

5. 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.
6. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty."
7. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
 - a. The first letter of the first word of each sentence;
 - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
 - c. The first letter of proper names.
8. All sentences should end with a period.
9. It is standard drafting practice to only capitalize proper nouns, such as "Colorado," and not other words such as "Elections" or "Of".

10. It is standard drafting practice to use commas when listing more than two entities. For example, "local, state, or municipal elections...".
11. The following is the standard drafting language used for creating a definition:
"As used in this part 11, unless the context otherwise requires:".