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Colorado General Assembly

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MEMORANDUM

TO: Nathan Clay and Mark Tejada
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: March 29, 2019

SUBJECT: Proposed initiative measure 2019-2020 #58, concerning Approval Voting

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. To require the use of approval ballots in elections, on which an elector can select any number of candidates on a ballot and the winner is the most-approved candidate, or in the case of a multiple-seat election, the winners are the most-approved candidates.

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. As a statutory change, the proposed initiative may be amended by subsequent legislation enacted by the General Assembly. Is that your intention?
4. The proposed initiative removes two statutory references to requirements that a voter may only select as many names as there are persons to be elected. Are there other statutes that require similar amendments? For example, section 1-5-407 (2), Colorado Revised Statutes, suggests that ballots may include text that will help the voter, "such as 'vote for not more than one'.". In addition, there are several 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".
5. Proposed section 1-7-1102 is titled "Definitions." Standard drafting practice is to indicate in a definitions sections the parts of the Colorado Revised Statutes to which the definitions apply. For example, "as used in this part 11" or "as used in this article 7".
 - a. To what parts of the Colorado Revised Statutes are the definitions in the proposed initiative intended to apply?
 - b. If the definitions apply only to the newly-created part 11, does that create a conflict with the use of the term "ballot" throughout the rest of the "Uniform Election Code of 1992" (code)?
 - c. If the definitions apply to the entire code, would the proponents consider adding them to the definitions in section 1-1-104, Colorado Revised Statutes?
6. The definitions in proposed section 1-7-1102 (1) and (2) describe the ballots as "using an electoral system." What is an electoral system, and what does it mean for a ballot to use it?
7. The definition in proposed section 1-7-1102 (2) defines an approval ballot as one on which "each elector may select ("approve") any number of candidates."

Why is the word approve in parenthesis and quotation marks? What is the intended effect of including it, rather than saying "each elector may select any number of candidates"?

8. Proposed section 1-7-1102 (1) says that "Colorado plurality ballots will instead be approval ballots".
 - a. What does "Colorado plurality ballots" mean? Is this language intended to limit the application to statewide elections? Or to apply to all elections occurring in the state?
 - b. What does it mean to say that plurality ballots "will instead be approval ballots"? Is it the intent of the section to say that approval ballots shall be used in certain elections?
 - c. For which elections is the use of approval ballots required?
 - i. Is the requirement intended to apply to elections conducted under statutes outside of the code, such as article 13.5 of title 1, or the municipal election code?
 - ii. Are there some elections in which an approval ballot could not be used, such as a recall election?
 - iii. How will approval voting work in primary elections? How will it be determined which candidates make the general election ballot?
9. Would the use of approval ballots increase the likelihood of recounts? Does it require any changes to the statutes governing recounts?
10. How will the approval system work in practice? Please illustrate with reference to a state legislative race.
11. Would the use of approval ballots make it more difficult to audit the results of an election?
12. Would the use of approval ballots have any impact on write-in candidates or how ballots are required to be formatted to allow for write-in candidates?
13. How do the approval ballots required by the proposed initiative compare to the ranked voting allowed under part 10 of article 7 of title 1, Colorado Revised Statutes?

- a. Is the proposed initiative intended to replace the ability of local governments to conduct an election using ranked voting? If so, would the proponents consider repealing part 10 as part of the initiative?
 - b. If the proposed initiative is not intended to replace the option to use ranked voting for local election, will it confuse voters to have ranked voting in some elections and approval voting in other elections?
- 14. Can the voting equipment currently used by counties accommodate the use of approval ballots?
- 15. Would the mandatory use of approval voting be vulnerable to a constitutional challenge under the equal protection clause on the grounds that it violates the "one person one vote" rule?
- 16. 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. Each statutory section being amended, repealed, or added is preceded by a separate amending clause explaining precisely how the law is being changed. In

section 1 of the initiative, the amending clause instruction amends all of article 7 of title 1, but it appears that only sections 1-7-201 and 1-7-309 are being amended. Please consider including separate and specific amending clauses for each amended section. Additionally, the amending clause is sufficient for showing an instruction and it is not necessary to also include the word "**AMEND:**" within the statute.

2. The headnote for current section 1-7-309, C.R.S., is "**Determination of improperly marked ballots.**" The headnote for the proposed amendment to section 1-7-309 (1) in the proposed initiative is "**Legislative declaration**". Was this the proponents' intent? If so, what part of the section is the declaration?
3. It is standard drafting practice to use SMALL CAPITAL LETTERS to show language being added to and stricken type, which appears as ~~stricken type~~, to show language being removed from the Colorado Revised Statutes. Current law is shown in regular type. Headnotes are shown in regular type and bold.
4. Section 2 of the proposed initiative adds a new part 11 to article 7 of title 1 of the Colorado Revised Statutes. A part title should be added and replace "ARTICLE 7" in preceding the first section.
5. Subsections (1) and (2) in proposed section 1-7-1103 do not have closing punctuation. Are they intended to be connected as part of a series, or are they intended to be separate sentences?
6. The definitions in proposed section 1-7-1102 should be in alphabetical order.