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MEMORANDUM

To: Raef VonBrutt and Deborah VonBrutt

From: Legislative Council Staff and Office of Legislative Legal Services

Date: February 28, 2025

Subject: Proposed initiative measure 2025-2026 #36, concerning civil actions for price manipulation

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 and questions 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 and questions intended to aid designated representatives, and the proponents they represent, in determining the language of their proposal and to avail the public of the contents of the proposal. Our first objective is to be sure we understand your intended purposes of the proposal. We hope that the comments and questions in this memorandum provide a basis for discussion and understanding of the proposal. Discussion between designated representatives or their legal representatives and employees of the Colorado Legislative Council and the Office of Legislative Legal Services is encouraged during review and comment meetings, but comments or discussion from anyone else is not permitted.

Purposes

Purposes for Proposed Initiative 2025-2026 #36

The major purposes of the proposed amendments to the Colorado Revised Statutes appear to be:

1. To make a tacit agreement to engage in consciously parallel pricing coordination an illegal restraint of trade or commerce and a violation of the “Colorado State Antitrust Act of 2023”;
2. To establish that two or more persons commit consciously parallel pricing coordination when they, with respect to pricing and having a substantially similar motivation to coordinate their efforts to raise, lower, change, maintain, or manipulate pricing, including for the purchase or sale of reasonably interchangeable commodities or services, engage in substantially similar actions within a substantially similar time period; and
3. To establish and clarify the evidentiary basis, burden of proof, presumptions, and procedures for cases brought under the “Colorado State Antitrust Act of 2023” related to consciously parallel pricing coordination.

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. 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 must be added to the beginning of the proposed initiative.

3. Article V, section 1 (4)(a) of the Colorado Constitution requires that, when the majority of voters approve an initiative, the initiative is effective on and after the date of the official declaration of the vote and proclamation of the governor.

Because the proposed initiative does not contain an effective date, this would be the default effective date. Does this default effective date satisfy your intent? If not, the designated representatives should include a desired effective date that is not earlier than the default effective date in order to comply with this constitutional requirement.

4. Section 6-4-123 (2)(a) of the proposed initiative references “subsection (6) of section 6-4-104,” but there is no section 6-4-104 (6), C.R.S. That entire section was repealed and reenacted in 2023 by [House Bill 23-1192](#). However, even in 2022, prior to the repeal and reenactment, there was no subsection (6). Is your intent simply to reference section 6-4-104, C.R.S., here? If so, you should consider removing the wording “subsection (6) of” in section 6-4-123 (2)(a) of the proposed initiative.

2023 Version of Statute

6-4-104. Illegal restraint of trade or commerce. (1) Entering into or engaging in any of the following in restraint of trade or commerce is illegal:

- (a) A contract;
- (b) A combination in the form of a trust or other form of combination;
- or
- (c) A conspiracy.

2022 Version of Statute

6-4-104. Illegal restraint of trade or commerce. Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce is illegal.

The language quoted in section 6-4-123 (2)(a) of the proposed initiative is similar to the language in both versions of the statute.

5. In section 6-4-123 (2)(a) of the proposed initiative, you state that a “tacit agreement constitutes a form of ‘a contract; a combination in the form of trust or other combination; or a conspiracy’ under ... section 6-4-104.”
 - a. Have you considered incorporating “tacit agreement” directly into section 6-4-104, C.R.S., so that it constitutes an “illegal restraint of trade or commerce,” rather than developing a new section in statute?

- b. Have you considered adding a definition of “tacit agreement” to the definitions in section 6-4-123 (1) of the proposed initiative?
- 6. Does a “tacit agreement” only apply to an action that violates section 6-4-104, C.R.S., in order to constitute illegal restraint of trade or commerce? Or would a tacit agreement also apply to violations of other sections of the “Colorado State Antitrust Act of 2023,” such as sections 6-4-105 (monopolization), 6-4-106 (bid rigging), 6-4-107 (mergers), and 6-4-108 (aiding and abetting), C.R.S.?
- 7. Throughout the proposed initiative, you refer to a “*per se*’ violation” and a “*prima facie*’ case.”
 - a. What do you mean by a “*per se*’ violation”?
 - b. What do you mean by a “*prima facie*’ case”?
 - c. Statutes should be written in “plain language,” according to Colorado’s statutory conventions. Have you considered using plain language to convey these legal concepts?
- 8. In some portions of the proposed initiative regarding how evidence should be perceived, it refers to the “trier of fact,” such as in section 6-4-123 (3)(b)(I) of the proposed initiative, but in section 6-4-123 (4)(b) of the proposed initiative, it refers to a “court.” Because a relevant civil action could be heard by a jury and not a court, you might consider changing the reference in section 6-4-123 (4)(b) of the proposed initiative from “A court” to “A trier of fact.”
- 9. In section 6-4-123 (3)(a)(I) of the proposed initiative, the phrase “consciously parallel conduct” is used instead of the defined term “consciously parallel pricing coordination.”
 - a. Should the defined term “consciously parallel pricing coordination” be used there instead?

10. If not, you might consider adding a definition of the term “consciously parallel conduct.”
11. Throughout section 6-4-123 (4) of the proposed initiative, you quote language similar to that in section 6-4-104, C.R.S. — “a contract; a combination in the form of trust or other combination; or a conspiracy.” Have you considered simply referring to a “violation of section 6-4-104” instead?
12. Do the factors related to “consciously parallel pricing coordination” in section 6-4-123 (4)(a) of the proposed initiative, the presumptions established in section 6-4-123 (4)(b) and (4)(c) of the proposed initiative, and the evidentiary standards and burdens of proof established in section 6-4-123 (4)(d) and (4)(e) of the proposed initiative apply to “tacit agreements” as well, or do they apply to only the type of agreements and violations alleged under section 6-4-104, C.R.S.?
13. In section 6-4-123 (4)(b) of the proposed initiative, there are references to “another defendant.” Are there circumstances in which only one of the parties that has allegedly engaged in “consciously parallel pricing coordination” would be a named defendant in a civil action filed? If so, the reference to “another defendant” would not apply. You might consider changing the references from “another defendant” to “another person” or “another seller.”
14. In section 6-4-123 (4)(b)(II) of the proposed initiative, the phrase “anticompetitive harm” is used and is followed by “as defined by the United States Department of Justice or Federal Trade Commission.” You might consider adding a citation to any such definition adopted by either federal agency to help clarify the intended meaning of the term used.
15. In section 6-4-123 (4)(f)(III) of the proposed initiative, it references a “naked contract.” What does the term mean? Should it be defined in this section?
16. In section 6-4-123 (4)(f)(II) and (4)(g) of the proposed initiative, it references “defending party.” Elsewhere in the proposed initiative, the word “defendant”

is used. You might consider aligning the references throughout the proposed initiative to use only “defendant” or only “defending party.”

17. Section 6-4-123 (5) of the proposed initiative states that “a court shall not dismiss the suit on a motion to dismiss or motion for summary judgment solely because the conduct alleged is consistent with ‘tacit collusion’, ‘oligopolistic price coordination’, or ‘conscious parallelism’ where the plaintiff plausibly alleges actions described in subsection (4)(a).”

- a. Typically, the legislature may make substantive rules regarding the court, but the court has jurisdiction over its procedural rules. If the legislature makes a law regarding procedural rules for the court, it could be considered unconstitutional, as it likely conflicts with the separation of powers. Have you considered whether section 6-4-123 (5) of the proposed initiative is a substantive law or a procedural law?
- b. What is meant by the terms “tacit collusion,” “oligopolistic price coordination,” and “conscious parallelism”?
 - i. Should these terms be added to the list of definitions to provide a uniform, generally understood meaning of the terms?
 - ii. If the terms are not defined in this section, how will a judge know when reviewing a motion to dismiss or a motion for summary judgment that the conduct alleged is consistent with any of these terms?

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 hearing only if the designated representatives so request. You will have the opportunity to ask questions about these comments at the review and comment hearing. Please consider revising the proposed initiative as follows:

1. Before the amending clause, number each section that is being amended or added by including a section number (e.g., **SECTION 1.**, **SECTION 2.**). Additionally, the amending clause as written in the proposed initiative is incorrect. The amending clause should read:

SECTION 1. In Colorado Revised Statutes, **add** 6-4-123 as follows:

2. When adding new language to the Colorado Revised Statutes, show the new language in small capital letters. See technical comment (5)(d) for an example of small capital letters. To format text as small capital letters in Microsoft Word, highlight the relevant text, go to the Home tab, click the arrow in the bottom-right corner of the Font group, and, within the Font tab, check the “Small caps” checkbox under Effects, then click OK.
3. Instead of beginning the headnote for section 6-4-123 of the proposed initiative with “Definitions,” consider starting with the most important subject matter of the section.
4. In the headnote for section 6-4-123 of the proposed initiative, it states “motion to dismiss or motion for summary judgment prohibited,” but section 6-4-123 (5) of the proposed initiative concerning motions to dismiss and motions for summary judgment does not prohibit them; rather, it indicates certain bases upon which they should not be granted. Please consider rewriting that portion of the headnote to read “motion to dismiss or motion for summary judgment limitations” or something that similarly does not incorrectly imply that the proposed initiative prohibits the filing of such motions.

5. Definitions.

- a. It is standard drafting practice to write an introductory portion to a definitions provision as follows:

As used in this section, unless the context otherwise requires:

“[Defined term]” means [definition of term].

or

“[Defined term]” has the meaning set forth in [Colorado Revised Statutes section number].

- b. Definitions should be in alphabetical order so that readers can navigate them more easily.
- c. When a definition is citing to another definition in a different section of the Colorado Revised Statutes, cite the section number and then the subsection number in parentheses. For example, instead of writing “subsection (1) of section 6-4-103,” write “section 6-4-103 (1).” See technical comment (7) for additional information on writing references.
- d. If you incorporate the suggestions in technical comments (5)(a) and (5)(b) into the proposed initiative, the definitions in section 6-4-123 (1) of the proposed initiative would be reorganized and reworded as follows:

(1) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

- (a) “COMMODITY” HAS THE MEANING SET FORTH IN SECTION 6-4-103 (1).
- (b) “CONSCIOUSLY PARALLEL PRICING COORDINATION” MEANS A TACIT AGREEMENT
- (c) “MOTION FOR SUMMARY JUDGMENT” MEANS A MOTION
- (d) “MOTION TO DISMISS” MEANS A MOTION
- (e) “PERSON” HAS THE MEANING SET FORTH IN SECTION 6-4-103 (3).
- (f) “PRICING” MEANS MONEY REQUIRED....
- (g) “SERVICE” HAS THE MEANING SET FORTH IN SECTION 6-4-103 (4).

6. **Stylistic Conventions of the Colorado Revised Statutes.** You can find the style guide to the Colorado Revised Statutes as well as other resources on the [OLLS website](#).

- a. Only capitalize the names of private entities, private publications, and proper nouns. Consider the following revisions:
 - i. Write “Colorado rules of civil procedure” in section 6-4-123 (1)(c) and (1)(d) of the proposed initiative; and

- ii. Write “federal department of justice or federal trade commission” in section 6-4-123 (4)(b)(II) of the proposed initiative.
- b. Use “money,” not “monies,” in section 6-4-123 (1)(e) of the proposed initiative.
- c. Spell out numbers instead of using digits in section 6-4-123 (4)(b)(I) of the proposed initiative.

7. **Writing References.**

- a. To reference another provision within the section, use this template:

subsection (#) of this section

For instance, in section 6-4-123 (6)(a) of the proposed initiative, you wrote “subsection (4)(a) or (4)(b) of this section,” which is correct. However, section 6-4-123 (5) of the proposed initiative ends with “the actions described in subsection (4)(a)” when it should end with “the actions described in subsection (4)(a) of this section.” Similar corrections are needed for the reference to “subsection (4)(b)” in section 6-4-123 (4)(c) of the proposed initiative, the reference to “subsection (4)(e)” in section 6-4-123 (4)(d) of the proposed initiative and the references to “subsection (4)(e)” and “subsection (4)(a)(I)” in section 6-4-123 (4)(f)(I) of the proposed initiative.

- b. When referencing another section in the Colorado Revised Statutes, simply use the section number. In section 6-4-123 (5) of the proposed initiative, “section 6-4-104 of this article 4” should be “section 6-4-104.”
 - c. When referencing the section created by the proposed initiative in section 6-4-123 (6)(b) and (6)(c) of the proposed initiative, write “this section” instead of “this section 6-4-123.”
- 8. **Punctuation.** In both section 6-4-123 (4)(b)(I) and (4)(b)(II) of the proposed initiative, a comma is missing after “services” in the phrase “including for its commodities or services.”
- 9. Please delete the extra “the” in section 6-4-123 (4)(f)(I) of the proposed initiative in the phrase “or was not the the predominant motivating factor.”

10. You do not need the “and” at the end of section 6-4-123 (4)(b)(l) of the proposed initiative or the “or” at the end of section 6-4-123 (4)(f)(l) of the proposed initiative. Please consider deleting them.