

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

**To:** Jessica Presso and Cameron Porter

**From:** Legislative Council Staff and Office of Legislative Legal Services

**Date:** April 30, 2025

**Subject:** Proposed initiative measure 2025-2026 #83, concerning the Colorado Ethics and Anti-Corruption Commission Act

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**

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

1. Establishing a comprehensive anti-corruption framework that addresses bribery, self-dealing, conflicts of interest, and abuses of power within Colorado's government;
2. Creating an independent, nonpartisan Ethics and Anti-Corruption Commission (commission) to investigate and enforce ethical violations by public officials;
3. Strengthening lobbying regulations to prevent undue influence on lawmakers;
4. Enhancing whistleblower protections to encourage reporting of corruption without fear of retaliation;
5. Mandating financial transparency and disclosure for all elected officials and high-ranking government employees;
6. Imposing criminal penalties for misuse of public funds, bribery, and ethical violations that harm public trust; and
7. Ensuring financial sustainability of the commission through fines and penalties.

## **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 each of the proposed initiatives?
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. Does this effective date satisfy your intent?

To comply with this constitutional requirement, you must amend the effective date in section 12 of the proposed initiative because it precedes this constitutional effective date.

4. The proposed initiative does not indicate whether it would amend the Colorado Constitution or the Colorado Revised Statutes. The proposed initiative does not contain any statutory section numbers or constitutional article numbers or indicate where in the law it should be placed. However, the proposed initiative refers to itself as an “Act”. An act is generally associated with a statutory change, and this memorandum assumes that the proposed initiative would be a change to the Colorado Revised Statutes. Is it the intent of the proponents to amend the Colorado Constitution, the Colorado Revised Statutes, or both?
5. The following comments and questions relate to the provisions concerning definitions in proposed section 3 of the proposed initiative:
  - a. Within the definition of “public official” is the term “elected official.” Is an “elected official” anyone elected to an office of the state of Colorado? Does “elected official” include local officials?
  - b. Within the definition of “public official” is the phrase “government employee possessing policymaking or procurement authority.” What does “policymaking authority” include?
  - c. The definition of “self-dealing” includes “action in which a public official uses their position to benefit themselves” or others. Would an employee with policymaking authority who is collecting a salary in compensation for their work as a public official be considered “benefiting themselves” and thus participating in self-dealing?
  - d. How would the commission or a court determine whether a financial or personal interest “compromises, or appears to compromise, a public official’s impartiality?” How, if at all, would this affect partisan public officials who are required to be partial, such as a politically elected representative advocating for their constituents?

- e. The definition of “lobbyist” in the proposed initiative is inconsistent with the definition of “lobbyist” in section 24-6-301 (3.7), Colorado Revised Statutes. Is it the proponents’ intent to supersede the definition of “lobbyist” as defined in section 24-6-301 (3.7), Colorado Revised Statutes?
  - f. Is a volunteer or otherwise unpaid lobbyist subject to the proposed initiative?
6. The following comments and questions relate to the provisions concerning the establishment of the commission in section 4 of the proposed initiative:
- a. Subsection (1)(b) provides that the commission has “original jurisdiction” to hear ethics complaints.
    - i. What is intended by vesting the commission with original jurisdiction?
    - ii. How does the jurisdiction of the commission interact with the jurisdiction of the Independent Ethics Commission (IEC) created in article XXIX of the Colorado constitution? Must a person lodge a complaint with the commission before going to the IEC?
    - iii. What is the scope of the "ethical misconduct" that the commission has original jurisdiction over?
  - b. Subsection (1)(c) requires ethics training as a condition of continued service in public office. The Colorado constitution provides the qualifications for several elected officials, including the governor and members of the general assembly, and the Colorado Supreme Court, in *Reale v. Bd. of Real Estate Appraisers*, 880 P.2d 1205 (1994), held that the general assembly cannot by law add additional qualifications for constitutionally created offices. These constitutional qualifications do not include a training requirement to remain in office. Have the proponents considered whether the ethics training requirement is constitutional or whether it adds an unconstitutional additional qualification?
  - c. Subsection (1)(c) requires “senior appointees” to complete ethics training.
    - i. What is meant by the term “senior appointees?”

- ii. Does the term include senior appointees in the state government?
  - iii. Does the term include local government senior appointees?
  - iv. Are members of the commission “senior appointees?”
- d. Subsection (2)(b) provides that no individual may be appointed to the commission if they have served as an elected official, registered lobbyist, or corporate executive in the past ten years.
  - i. Is an unregistered lobbyist subject to the prohibition on serving?
  - ii. What is the scope of “corporate executive” with respect to the ten-year prohibition?
    - A. Does it include a person in a partnership?
    - B. Does it include a limited liability company?
    - C. Does it only include C-corporations?
    - D. Who is an “executive” for purposes of the proposed initiative?
- e. Subsection (2)(c) establishes that a member of the commission may be removed only for cause. What constitutes cause? Who decides whether a member is removed for cause?
- f. Subsection (2)(d) provides that the remaining members of the commission will choose a replacement for a vacancy on the commission by majority vote. If there is a vacancy on the commission, it will have only six members. What do the proponents intend if there is a tie vote?
- g. Subsection (4) provides the commission with rulemaking authority subject to the notice and comment provisions of the Colorado Administrative Procedure Act.
  - i. Is the rulemaking also subject to the other provisions of the Colorado Administrative Procedure Act?
  - ii. Is the commission as a whole subject to the Colorado Administrative Procedure Act (CAPA)?

- iii. Is the intent that the commission's bylaws be subject to notice and comment?
  - h. Subsection (5) provides that a person or entity subject to an adverse ruling by the commission may seek judicial review in accordance with applicable state law. What state law(s) would be applicable to the judicial review provisions in the proposed initiative?
7. The following comments and questions relate to the provisions concerning the powers and duties of the commission in section 5 of the proposed initiative:
- a. Section 5 provides that the commission shall exercise powers and duties, “categorized by functional authority.” What is the meaning of this phrase?
  - b. Subsection (1)(a) gives the commission the authority to investigate “credible allegations”. What is the meaning of this term?
  - c. Subsection (1)(b) empowers the commission to conduct independent audits of financial disclosures of public officials, state and local government transactions, contracts, grants, and procurement activities, and public disclosures related to conflicts of interest, ethics compliance, or campaign finance when applicable.
    - i. What criteria would the commission consider when evaluating whether to conduct an audit?
    - ii. Would the commission have audit staff, hire outside consultants, or rely on the Office of the State Auditor to conduct the audits?
    - iii. How is an audit different from an investigation, as provided in subsection (1)(a)?
    - iv. What makes an audit “independent”?
  - d. Subsection (1)(c) provides the commission with subpoena power over documents, testimony, communications, and financial records, and such a subpoena is subject to “judicial review under the Colorado Administrative Procedure Act”.
    - i. What is meant by “subject to judicial review under the Colorado Administrative Procedure Act?”

- ii. Is the commission subject to the provisions of CAPA?
  - iii. Are the commission's records subject to the Colorado Open Records Act?
  - iv. Are the commission's meetings subject to the Colorado open meetings law?
- e. Subsection (1)(d) provides that the commission "shall" refer criminal violations of the Act or "any other applicable law" to the Attorney General or a district attorney if "reasonable grounds" are found.
  - i. What is a finding of "reasonable grounds?" Is this a finding made by a majority of the members of the commission?
  - ii. The introductory paragraph of Section 5 of the proposed initiative states that the commission "shall exercise the following powers and duties," then lists a referral to the Attorney General or a district attorney of possible crimes as such a power or duty. Is the commission required to refer all alleged criminal violations of the proposed initiative or other "applicable law" to law enforcement?
  - iii. What is an example of an "applicable law?" What would be an inapplicable law? Who decides whether a law is applicable, thus providing the Commission with jurisdiction to refer a case to law enforcement?
  - iv. If the commission refers a case to the Attorney General or a district attorney, and the Attorney General or district attorney declines to prosecute, does the commission retain jurisdiction to make another referral to the Attorney General or a district attorney of a case under the same facts as the case in which prosecution was previously declined?
  - v. Could the commission be subject to liability for malicious prosecution?
- f. Subsection (1)(e) provides that the commission may "impose administrative fines, sanctions, and civil penalties for violations of this Act".
  - i. How does the commission decide if a violation has occurred?

- ii. What type of due process will be required for the imposition of administrative fines, sanctions, and civil penalties?
  - iii. May a person upon whom a fine, sanction, or penalty is imposed appeal the decision? To whom may the individual appeal?
- g. Subsection (2)(a) states that the Commission will “adjudicate ethics complaints” and issue “formal findings of fact and conclusions of law.”
  - i. By what standards will the commission adjudicate ethics complaints? For example, what evidentiary standard will apply?
  - ii. How will the commission decide the “formal findings of fact?” For example, will the facts be determined by a majority vote of the commission? Unanimous vote?
  - iii. How will the commission adjudicate a complaint? For example, will the determination of law be made by the commission, and if so, by what vote?
  - iv. Who will draft the commission’s opinion about adjudication?
- h. Subsection (3)(a) provides that any “covered official” may request an advisory opinion, which is binding against the requestor if the facts are materially accurate.
  - i. Who is a “covered official” for purposes of the proposed initiative?
  - ii. What is meant by “advisory opinion?” What is the scope of an advisory opinion?
  - iii. What is the meaning of the statement that “opinions shall be binding on the requestor?”
  - iv. If a requestor wants an advisory opinion adjudicating a potential claim, and the commission decides that a provision of the Act is violated, does the requestor then face penalties as provided by the Act or other law?
  - v. May an advisory opinion be appealed? If so, to whom?



8. The following comments and questions relate to the provisions concerning the powers and duties of the commission in section 6 of the proposed initiative:
- a. Subsection (1)(a) prohibits a former elected official from engaging in paid lobbying or influencing legislation for five years after leaving office.
    - i. What is encompassed by “lobbying?”
    - ii. Does “influencing legislation” include testifying at public committee hearings about legislation? Giving interviews to media outlets about their opinion of the legislation?
    - iii. May a former elected official lobby for a nonprofit as an incidental part of their job with the nonprofit within five years of leaving office?
    - iv. May a former elected official lobby on a volunteer or pro bono basis within five years of leaving office?
  - b. Subsection (2)(b) prohibits a public official from accepting gifts, travel, or payments from lobbyists exceeding two hundred fifty dollars per year. Currently, section 3 of Article XXIX of the Colorado constitution provides that a lobbyist may not give *any* amount of fights, travel, or payments to a public official.
    - i. Is it the proponents’ intent to supersede this constitutional provision?
    - ii. Do the proponents intend to weaken the current ban?
  - c. Subsection (2)(d) provides that “these restrictions apply only to financial transactions and material gifts and do not restrict general speech or policy discussions.”
    - i. What kind of speech is “general speech” for purposes of the proposed initiative?
    - ii. May a lobbyist make a campaign contribution in excess of two hundred fifty dollars per year to one person?

- d. Subsection (3) requires a contractor receiving five million dollars or more in cumulative annual payments from the state to file ethics compliance disclosures with the commission and pay a 0.1% compliance fee to fund the commission's operations.
    - i. Are the proponents concerned that the compliance fee may be passed on to the Colorado state government?
    - ii. How would this work if applied to local governments?
    - iii. What amount will the compliance fee be based on? Amounts payable, amounts paid, or some other method?
    - iv. What is required to be included in an "annual ethics compliance disclosure"?
    - v. Who will collect and process the fee? Where will the fee be deposited? What happens to any interest collected?
9. The following comments and questions relate to the provisions concerning the whistle blower protections in section 7 of the proposed initiative:
- a. Subsection (1) prohibits an employer or entity from taking retaliatory action against an employee or affiliated individual who reports suspected violations of the proposed initiative to state authorities.
    - i. What is encompassed by "retaliatory action?"
    - ii. Who is an "affiliated individual?" Could that be the person's spouse? Is the intent to capture individuals affiliated with the employer or entity?
    - iii. What if the suspected violations prove to be false? Is there any recourse against a whistleblower making false allegations? Might they be subject to a defamation or slander claim?
  - b. Subsection (3) requires the state to compensate a whistleblower for lost wages and legal expenses.
    - i. For what period is a whistleblower eligible for lost wages?
    - ii. What if the whistleblower is proved false? Does the state remain liable to pay the whistleblower?

- iii. What if the whistleblower was not employed by the state? Does the state remain liable to pay the whistleblower?

10. The following comments and questions relate to the provisions concerning the powers and duties of the commission in section 8 of the proposed initiative:

- a. Subsection (1)(a) provides that the commission has “original investigative jurisdiction over any allegations of” any conduct that the proposed initiative has criminalized. Subsection (1)(c) of the proposed initiative states that law enforcement may investigate or prosecute criminal conduct concurrently with the commission. What is the meaning of “original jurisdiction” when law enforcement explicitly has concurrent jurisdiction with the commission?
- b. Does the commission have jurisdiction to issue criminal convictions and penalties?
- c. Subsection (2) contains crimes and associated penalties. Some of these crimes already exist in current statute, such as bribery. However, subsection (2)(a) creates the crime of “bribery of a public official.” Is the intent to create a new crime involving a public official or is the intent to enhance the penalty of the current crime of bribery?
  - i. The offense is defined as “knowingly offering, soliciting, or accepting a bribe to influence official action.”
    - A. What is the meaning of “influence official action?”
    - B. What is the meaning of “soliciting?”
- d. The proposed initiative’s penalties for the following crimes involve disqualification from office from a minimum of five years to a maximum lifetime ban: Bribery of a public official, abuse of public office for personal gain, and failure to disclose material conflicts of interest. The Colorado constitution provides the qualifications and requirements for holding public office for certain offices, such as the governor and members of the general assembly. How would an amendment to the Colorado Revised Statutes prohibit these officers from holding office if all other constitutional qualifications and requirements are met?

- e. Subsection (2)(c) prohibits "knowingly failing to file required financial or conflict disclosures involving significant financial interest." What is the difference between a significant financial interest and one that is insignificant?
  - f. Subsection (3)(a) provides that criminal penalties under the proposed initiative "apply only to knowing and willful violations." However, the crimes listed under subsection (2) require only that the crimes were committed "knowingly." These are two different standards of culpability. "Knowingly" means a person is aware of what they are doing and of the likely result of their action and "willfully" means they choose to do it with intent to violate the law. Which standard do you want to use for these crimes?
  - g. Subsection (3)(d) provides that any person convicted of a felony under the proposed initiative is disqualified from holding public office, public employment, or state contract authority for at least ten years, and may serve again only upon restoration by a court.
    - i. This penalty is different from that for the crimes of bribery, abuse of public office for personal gain, failure to disclose material conflicts of interest, and misuse or diversion of public funds. Which disqualification penalties do the proponents intend to impose?
    - ii. What is "state contract authority" and how would one have state contract authority without public employment?
11. The following comments and questions relate to the provisions concerning the powers and duties of the commission in section 9 of the proposed initiative:
- a. Subsection (2) states that violations may result in "possible removal from office" while some of the provisions in section 8 of the proposed initiative result in automatic disqualification or removal. Why do some disclosure violations rise to the level of removal and others do not?
  - b. Subsection (3) requires recording and publishing of all "governmental meetings involving public contracts or policy decisions."

- i. What is a “governmental meeting”? Is it only an official meeting of a formally constituted governmental body or does it include less formal meetings
  - ii. What is a “policy decision”? Is formal adoption of a policy by a public official or public body with legal authority to adopt the policy required for a policy to be a “policy decision”?
  - iii. Would a contract negotiation meeting between the state and a potential contractor be subject to recording and publishing?
  - iv. Would a meeting between two legislators to discuss provisions in a pending bill be subject to recording and publishing?
  - v. Is a telephone call a meeting? Is a video call a meeting? Is a text, email, or other digital communication a meeting?
  - vi. Would a discussion with a contractor about poor public contractual performance constitute a meeting for recording and publishing?
  - vii. There is no penalty for a violation of this provision. Do the proponents intend to impose a penalty?
- c. Subsection (4) prohibits a policymaker from having undisclosed private meetings with corporate representatives regarding legislation.
- i. Who is a “policymaker?” Does that include aides, staff, analysts, or attorneys?
  - ii. Must a private meeting be disclosed before the meeting occurs?
  - iii. Who is a “corporate representative?” Does that include representatives of partnerships (which are not corporations) or nonprofit organizations?
  - iv. What does “legislation” entail? Must a bill be introduced, and therefore actually be legislation, or is the intent to capture meetings occurring before a bill is introduced?

12. The following comments and questions relate to the provisions concerning the powers and duties of the commission in section 10 of the proposed initiative:

- a. Subsection (1)(a) provides that 15% of all fines, forfeitures, and penalties shall be allocated to commission operations.
  - i. What is meant by “operations” of the commission?
  - ii. Is the amount calculated based on fines, forfeitures, and penalties assessed or collected?
- b. Subsection (1)(c) states that a “one-time, voter-approved allocation of three million five hundred thousand dollars” of general fund shall be appropriated for startup expenses and repaid within five fiscal years.
  - i. What happens if fine, forfeiture, and penalty money is not enough to pay back the loan within five fiscal years?
  - ii. Will interest accrue on the loan?
  - iii. Is the intent that this be a separate initiative? What if that initiative is not approved?
- c. Subsection (1)(d) provides that a reserve fund of at least one million dollars is to be established if annual “enforcement revenues” exceed ten million dollars.
  - i. Does “enforcement revenues” mean “fines, forfeitures, and penalties” as discussed in subsection (1)(c)? If not, what does it mean?
  - ii. What is the money in the reserve fund to be used for?
  - iii. How large can the reserve fund grow?
  - iv. Should one million dollars be placed in the reserve fund every year that revenue exceeds ten million dollars?
  - v. Is the revenue measured as net of operating expenses or is it gross revenue?
- d. Subsection (1)(e) of the proposed initiative provides that if revenue falls below 75% of certified operational needs for two consecutive fiscal years, the commission may ask for a one-time supplemental appropriation, contingent on voter approval and submission of a detailed financial analysis.

- i. What would be the result if voters did not approve this measure?
- ii. What happens if funding is insufficient for another two fiscal years?
- iii. May the commission not be allowed to ask for supplemental funding?
- iv. What is a detailed financial analysis and who provides it?

### Technical Comments

The following comments address technical issues raised by the form of the proposed initiatives. 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. 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 add a new article to title 39 of the Colorado Revised Statutes, you would include the following amending clause: "In Colorado Revised Statutes, **add** article \_\_ to title 39 as follows:". Amending clauses are needed for each section of the proposed initiative to clarify where in the Colorado Revised Statutes this new language should be placed.
2. Each section in the Colorado Revised Statutes has a headnote. Headnotes briefly describe the content of the section. A headnote should be added to each section of the proposed initiative and be in bold-face type.
3. 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

(l) Subparagraph

(A) Sub-subparagraph

(B) Sub-subparagraph

(II) Subparagraph

(b) Paragraph

(2) Subsection

(3) Subsection

4. It is standard drafting practice to use small capital letters to show the language being added to and stricken type, which appears as stricken type, to show language being removed from the Colorado Revised Statutes.
5. 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."
6. The following is the standard drafting language used for creating a definition: "As used in this [section][subsection][paragraph], unless the context otherwise requires, '[term]' means (the definition for the term)..."
7. The definitions should be in alphabetical order.
8. It is standard drafting practice to avoid using archaic terms. For example, in section 4 of the proposed initiative, instead of using "There is hereby established" consider using "There is established."