

V2



REPRESENTATIVE G. MARK MICKELSON, CHAIR | SENATOR BROCK L. GREENFIELD, VICE CHAIR
JASON HANCOCK, DIRECTOR | SUE CICHOS, DEPUTY DIRECTOR | DOUG DECKER, CODE COUNSEL
500 EAST CAPITOL AVENUE, PIERRE, SD 57501 | 605-773-3251 | SDLEGISLATURE.GOV

April 20, 2017

RECEIVED
APR 21 2017
S.D. SEC. OF STATE

Mr. James D. Leach, Attorney at Law
1617 Sheridan Lake Road
Rapid City, SD 57702

Dear Mr. Leach:

Pursuant to SDCL 12-13-25, this office is required to review each initiated law. Further, this office is required by SDCL 12-13-24 to determine if each initiated law is written in a clear and coherent manner in the style and form of other legislation and that it is worded so that the effect of the initiated law is not misleading or likely to cause confusion among voters. You are under no obligation to accept the suggestions contained in this letter, but please keep in mind the legal standards established in SDCL 12-13-24.

The Guide to Legislative Drafting (<http://sdlegislature.gov/docs/referencematerials/draftingmanual.pdf>) explains more thoroughly the style and form changes we suggest in this letter and as attached. Of note about the submitted draft, you may refer to the sections of the Guide that discuss the use of severability clauses and the use of legislative declarations and findings. The simplest way of stating a proposition is usually the best way. Well-crafted language is concise, specific, uses active verbs, and is consistent and uniform throughout the text.

The proposed language is quite lengthy and includes a great amount of detail for a Constitutional amendment. As discussed more specifically below, most of the draft is more suitable for the South Dakota Codified Laws, not for the Constitution. The Constitution provides a basic framework for the structure and functions of state government and the rights of citizens, leaving the details and policies to be provided within the code or through administrative rules. Where language in the Constitution is concerned, less is more.

Section 1 of the draft is unnecessary and should be removed from the draft. Additionally, the section containing defined terms should be moved to the beginning of Section 2 to provide greater clarity.

Although § 16 provides certain defined terms, the submitted draft includes jargon that would cause confusion, would be subject to interpretation, and does not provide the necessary clarity for an average state citizen to understand the amendment's contents. Instances of jargon include "improper personal gain," "state resources," "significantly exploitative," "in-kind," "pertinent to the public interest," and others.

Referencing Section 2 of the submitted draft, although we provide style and form suggestions for your review and consideration, this section provides declarations and findings, which have no legal meaning or effect. The Constitution is not a platform for political statements or commentary, and as such you will note in the Guide to Legislative Drafting declarations and findings are strongly discouraged in both the Constitution and codified law. This language should therefore be removed from the draft. The first two paragraphs of § 15 should be removed for the same reason, as well as the fact that any Government Accountability Board created in the state constitution would automatically supersede any board by the same name created through statute.

Mr. James D. Leach

April 20, 2017

Page 2

Several sections of the proposed draft include references to specific classes of felonies or misdemeanors. These references would be highly unusual to include in any state constitution and unprecedented within the South Dakota Constitution. Criminal penalties are found in codified law, which is subject to constant change through the legislative process. The state constitution is not a criminal code, but a framework for the function of the state's government and the rights of citizens. We provide style and form suggestions for your review and consideration, however, these criminal penalties should be removed from the draft entirely.

Regarding § 5 of the submitted language, which prohibits contributions and coordinated expenditures by certain "foreign" entities, the South Dakota Constitution considers the term "foreign" to mean anything outside the state, including any other state. This may affect how this section should be drafted. We note, however, that prohibitions of this nature may raise a constitutional question regarding contributions to ballot question committees under the United States Constitution. See *Citizens Against Rent Control, et al. v. City of Berkeley, CA*, 454 U.S. 290 (1981).

Language such as "notwithstanding any other law" is unnecessary in a Constitutional amendment, as the amendment would become part of the supreme law of the state and would therefore override any other state law or regulation that may exist within the code or administrative rules. In § 18 of the submitted draft, the language prohibiting law that would "hamper, restrict, or impair" the provisions of the amendment is unnecessary because any inferior law would automatically be overridden by the Constitution.

Attached is a copy of your initiative with all our suggested style and form changes.

This letter constitutes neither an endorsement of your initiative nor a guarantee of its statutory sufficiency. It does constitute fulfillment of your responsibility pursuant to SDCL 12-13-25 to submit your draft to this office for review and comment. If you proceed with your initiative, please take care to ensure your statements or advertising do not imply that this office endorses or approves your proposal.

Sincerely,



Jason Hancock
Director

JH/DO/ct

Enclosures

CC: The Honorable Shantel Krebs, Secretary of State
The Honorable Marty Jackley, Attorney General

Section 1. This amendment shall be known as the South Dakota Voter Protection and Anti-Corruption Amendment.

Section 2. That Article XXX of the Constitution of South Dakota be created by adding new sections to read as follows:

§1 Whereas the motto of the state of South Dakota is “Under God the People Rule” and whereas the Legislature inherently derives its power from the consent of the people, the people of South Dakota hereby find and declare that in order to protect the public trust:

- (1) Public officials, candidates, and lobbyists must be subject to robust ethics, conflict-of-interest, and anti-corruption laws;
- (2) A strong and independent citizen ethics commission is necessary to oversee and enforce those laws in the name of the people of South Dakota; and
- (3) The will of the people, especially when voiced to ensure the integrity, honesty, and accountability of their government, must be respected.

§2 The offenses of bribery and corrupt solicitation described in Article III, Section 28 shall be Class 4 felonies.

§3 A lobbyist may not knowingly give or offer a gift to an individual who they know or should know is a senior public servant. This prohibition does not apply if the lobbyist is the spouse, fiancée, or fiancé, or is, whether by blood or by marriage, a child, parent, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew of the senior public servant. Any person who violates this section shall be guilty of a Class 1 misdemeanor.

§4 No public official may knowingly use state resources for improper personal gain. Any public official who violates this section shall be guilty of a Class 1 misdemeanor, but a public official who knowingly uses state resources for improper personal gain in a way that is significantly exploitative of the state shall be guilty of a Class 2 felony.

§5 A foreign government, foreign corporation, foreign political party, or foreign national may not make a contribution or expenditure in connection with any state or local candidate or ballot-issue election.

§6 A candidate or person holding elected office may not knowingly use a campaign contribution for personal use. Any person who violates this section shall be guilty of a Class 5 felony.

§7 A labor union or corporation may not, directly or through an intermediary, make a campaign contribution to a candidate or political party.

§8 A candidate may not knowingly solicit, accept, or receive a campaign contribution within the South Dakota capitol building. Any person who violates this section shall be guilty of a Class 1 misdemeanor.

§9 A senior public servant may not become a lobbyist, other than a public lobbyist for state or local government, while they are a senior public servant and for a period of two years after they cease to be a senior public servant. Any person who violates this section shall be guilty of a Class 1 misdemeanor.

§10 A lobbyist may not knowingly deliver a campaign contribution made by another individual or entity. Any person who violates this section shall be guilty of a Class 1 misdemeanor.

As used in this section, “deliver” means to transport, carry, transfer, or otherwise transmit, either physically or electronically. The prohibition in this section does not apply when a person delivers a

campaign contribution to his or her own campaign, or to the campaign of his or her immediate family member, and shall not be interpreted to prohibit any person from making a campaign contribution or from encouraging others to make campaign contributions or otherwise support or oppose a candidate.

§11 A judge shall avoid the appearance of bias, and shall disqualify himself or herself in any proceeding where monetary or in-kind support related to the judge's election or retention creates an appearance of bias to a reasonable person.

§12 A candidate may not accept campaign contributions from a single source that, in total and per election cycle for the office sought, exceed:

- (1) \$500 for the office of member of the South Dakota house of representatives, or for any other local, non-statewide elected office other than member of the South Dakota senate, including, but not limited to, county, municipal, and school board office;
- (2) \$750 for the office of member of the South Dakota senate;
- (3) \$1,500 for the office of attorney general, lieutenant governor, commissioner of school and public lands, auditor, treasurer, and secretary of state, or for any other statewide elected office other than Governor; and
- (4) \$4,000 for the office of Governor.

The limits prescribed in this section do not apply to contributions made by a political party, or to contributions made by the candidate or the candidate's spouse to the candidate's own campaign. The dollar amounts in this section shall be adjusted for inflation by the secretary of state after each general election.

§13 A political party may not accept campaign contributions from a single source that, in total and per calendar year, exceed \$5,000. For the purposes of this section, a state party and its affiliated local committees and/or subdivisions shall be treated as a single political party recipient. The dollar amounts in this section shall be adjusted for inflation by the secretary of state after each general election.

§14 The Legislature shall regulate persons who are employed or otherwise gainfully compensated to act as a lobbyist to influence in any manner legislative, executive, or administrative action, and shall ensure that such persons promptly register with the state as lobbyists and disclose information pertinent to the public interest.

§15 (1) The people of South Dakota find and declare that the Legislature's State Government Accountability Board did not fully respond to the people's demand for strong and accountable ethics oversight, in that:

- (1) The Legislature exempted itself from oversight by that board; and
- (2) The oversight authority of that board was inadequate to protect the public trust.

Therefore, the people of South Dakota find and declare that they are best suited to create an ethics commission that can adequately protect the public trust, and hereby nullify the State Government Accountability Board created by the Legislature in 2017 in House Bill 1076 and in its place create a new State Government Accountability Board to serve as an independent citizen ethics commission.

The State Government Accountability Board shall serve as an independent entity, notwithstanding any other provision of the Constitution of South Dakota, including Article II, and shall conduct itself in a nonpartisan manner with integrity, honesty, and fairness. All rules adopted, investigations conducted, and sanctions imposed by the board are subject to judicial review consistent with the Constitution.

(2) All South Dakota registered voters are eligible to apply for membership on the board. Only registered

voters may be members. The board shall be directed by seven members appointed from those who have applied as follows:

- (1) Two members appointed by the South Dakota Supreme Court, each of whom shall be a former or retired judge, and each of whom shall be registered with a different major political party;
- (2) One member appointed by the Governor from a list of at least three registered voters provided by the speaker of the house of representatives;
- (3) One member appointed by the Governor from a list of at least three registered voters provided by the minority leader of the house of representatives; and
- (4) Three members, at least two of whom shall be nonlawyers, each appointed by majority vote of the four other members.

No member may be registered as a lobbyist or may hold other local, state, or federal public office or political party office while a member. Each member shall have been continuously registered with the same political party, or continuously registered as unaffiliated with any political party, for the two years immediately preceding appointment. Each member shall serve for a period of four years, except that after the initial appointments are made, the secretary of state shall select, in a random public drawing, one member to serve a one-year term and two members each to serve two-year, three-year, and four-year terms, respectively, for their first term only, to achieve staggered ending dates. Members shall not serve more than two terms. Service of a term means service of more than two years of a term. Any vacancy shall be filled within seventy-five days in the manner in which that position was originally filled. If a vacancy is not filled within seventy-five days, the Supreme Court shall fill the vacancy within an additional sixty days. Initial members shall be appointed by September 1, 2019. If all seven initial members are not appointed by this date, the Supreme Court shall appoint the remaining members by November 1, 2019. The secretary of state shall impartially facilitate the member appointment process.

Members may be removed by the Governor, with the concurrence of the senate, only for substantial neglect of duty, gross misconduct, or inability to discharge the powers and duties of office, after written notice and an opportunity for response.

- (3) The board shall have the power, notwithstanding any other provision of the Constitution, to:
 - (1) Investigate allegations of bribery, theft, or embezzlement of public funds, or any other violations of this Article, ethics rules, or state law related to government ethics, campaign finance, lobbying, government contracts, or corruption by any elected or appointed official, judge, or employee of any state or local government, and to issue subpoenas requiring the attendance of witnesses or the production of books, records, documents, or other evidence relevant to an investigation;
 - (2) Adopt ethics rules, subject to rulemaking procedures as defined by law, including, but not limited to, provisions on campaign finance, conflicts of interest, confidential information, use of position, contracts with government agencies, legislative recusal, and financial interest disclosure, to which all elected or appointed officials, judges, and employees of state or local government shall be subject. The process for adopting ethics rules shall include opportunities for public input and public participation. Nothing in this Article shall prohibit the Legislature from enacting laws that are not inconsistent with, or contradictory to, the ethics rules adopted by the board;
 - (3) Issue advisory opinions, which may be relied upon by any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered, and by any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered. Notwithstanding any other provisions of law, any person who relies upon any provision or finding of an advisory opinion in this regard and who acts in good faith in accordance with the provisions and findings of such advisory opinion shall not, as a result of any such act, be subject to any sanction provided by this Article;
 - (4) Adopt rules of procedure for the board, including rules to prevent the abuse or overuse of the

- submission of complaints;
- (5) Hire and supervise staff, including such legal, investigative, and administrative and clerical employees as are necessary to support the functions of the board;
 - (6) Conduct specific or random audits of disclosures required by state campaign finance, ethics, lobbying, and government contracting law;
 - (7) Impose sanctions on any elected or appointed officials, judges, or employees of state or local government, including the power to issue orders, impose fines, and commence administrative actions. The board shall issue written explanations justifying such sanctions;
 - (8) Refer information or complaints alleging violations of this Article, the board's ethics rules, or state laws related to ethics, campaign finance, or corruption to the appropriate prosecutorial authority or to internal or outside counsel hired or selected by the board, before, during, or after an investigation;
 - (9) Conduct educational programs for the benefit of the public and those subject to this Article; and
 - (10) Exercise additional powers not inconsistent with this Article as may be conferred by law.

(4) The board shall convene at least once every quarter. The assent of four members shall be required for the consideration and resolution of matters that involve the exercise of the board's duties and powers under this Article, including the adoption or approval of all motions, procedures, provisions, and appeals, the hiring of staff, the issuance of advisory opinions, the referral to the appropriate prosecutorial authority of complaints alleging potential violations, and the imposition of sanctions, except that the assent of three members shall be required for the convening of meetings, the initiation and carrying out of investigations, including the issuance of subpoenas, the approval of public education materials, the approval of minutes of previous meetings, and actions related to board contracts.

(5) Unless otherwise prohibited by federal or state law, any person acting in good faith may furnish information, or file a complaint, which may be anonymous, alleging a suspected, anticipated, or completed violation, and may request a status update to which the board shall respond in writing within sixty days. Any public employee may file a grievance with the Civil Service Commission, or other appropriate agency or entity, if the employee believes that there has been retaliation from his or her employer because of his or her reporting of a suspected, anticipated, or completed violation through the chain of command of the employee's department, or to the board.

(6) All final reports and findings shall be made available to the public within ten days of completion. The board shall annually report to the people on its activities. The report shall include comprehensive information concerning the board's activities, including the number of complaints received, complaints filed by separate persons, investigations conducted, hearings held, sanctions imposed, and advisory opinions issued.

(7) On an annual basis beginning in 2020, the board shall issue to the Legislature written recommendations for legislation that seeks to increase public trust, transparency, and accountability in government and elections and decrease the risk of corruption and conflicts of interest.

(8) Members shall complete financial interest disclosure statements. Any member who has a personal, private interest in a matter before the board, or with a direct and substantially related interest in a matter, must disclose the fact of such interest and must recuse himself or herself from working on the matter, unless their vote would be necessary to resolve the matter.

(9) All provisions of this section shall be enforceable by any circuit court. The board may intervene as a matter of right in any civil action involving any government entity, agency, or instrumentality alleged to be in violation of any mandate or prohibition of this Article, and in any civil action relating to its powers or to the sufficiency of resources provided for the board's implementation and operation.

§16 Terms used in this Article have the following meanings:

- (1) "Corporation," any corporation, nonprofit corporation, company, limited liability company, limited partnership, business trust, business association, or other similar entity;
- (2) "Elected office," a non-federal office elected by South Dakota voters;
- (3) "Gift," any item, service, or thing of value not given for fair market consideration, but "gift" does not mean purely informational materials or campaign contributions;
- (4) "Local," any subdivision of the state for governmental, political, or related purposes, including, but not limited to, a county, municipal, town, local, or school board subdivision;
- (5) "Major political party," the two parties which polled for their respective candidates for the office of President of the United States the highest and the next highest number of votes at the last general election for such office;
- (6) "Personal use," to fulfill any commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign;
- (7) "Senior public servant," any person holding a non-federal office elected by South Dakota voters, or a non-elected individual who is an appointed officer, director, commissioner, head, or other executive or co-executive of a state agency, board, division, institution, or principal department, including, but not limited to, a member of the State Government Accountability Board and a gubernatorial cabinet member.

§17 Each provision of this Article is intended to be independent and severable, and if any provision is held to be invalid, either on its face or as applied to any person, entity, or circumstance, the remaining provisions, and the application thereof to any person, entity, or circumstance other than those to which it is held invalid, shall not be affected thereby.

In any case of a conflict between any provision of this Article and any other provision contained in this Constitution, the provisions of this Article shall control.

§18 This Article is self-executing and shall take effect sixty days after approval. Each provision shall be justiciable and enforceable by any circuit court. Laws may be enacted to facilitate, safeguard, or expand, but not to hamper, restrict, or impair, the powers this Article grants and the protections it establishes.

Section 3. That Article III, Section 1 of the Constitution of South Dakota be amended to read as follows:

The legislative power of the state shall be vested in a Legislature which shall consist of a senate and house of representatives. However, the people expressly reserve to themselves the right to propose measures, which shall be submitted to a vote of the electors of the state, ~~and~~ Such measures, if approved by a simple majority of those voting on the measure, shall become effective sixty days after approval. Legislation or other action that repeals, amends, or otherwise frustrates the effectuation or implementation of any such measure shall not go into effect until submitted to a vote of the electors of the state and approved by a simple majority of those voting on the question.

The people also expressly reserve the right to require that any laws which the Legislature may have enacted shall be submitted to a vote of the electors of the state and approved by a simple majority of those voting on the question before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, for which the Legislature shall state specific facts evidencing such necessity.

No law substantively changing the rules, requirements, or criteria governing the initiative or referenda process shall take effect until after that law has been submitted to a vote of the electors of the state and

approved by a simple majority of those voting on the question. Not more than five percent of the qualified electors of the state shall be required to invoke either the initiative or the referendum.

This section shall not be construed so as to deprive the Legislature or any member thereof of the right to propose any measure. The veto power of the Executive shall not be exercised as to ~~measures~~ an initiated measure approved by the people or a measure referred to a vote of the people. This section shall apply to municipalities. The enacting clause of all laws approved by vote of the electors of the state shall be: "Be it enacted by the people of South Dakota." The Legislature shall make suitable provisions for carrying into effect the provisions of this section.

Section 4. Each provision of this Amendment is intended to be independent and severable, and if any provision is held to be invalid, either on its face or as applied to any person, entity, or circumstance, the remaining provisions, and the application thereof to any person, entity, or circumstance other than those to which it is held invalid, shall not be affected thereby.