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S.D. SEC. OF STATE

VERSION 1

CONSTITUTIONAL AMENDMENT

ATTORNEY GENERAL'S STATEMENT

Title: An initiated amendment to the South Dakota Constitution changing campaign finance and lobbying laws, creating a government accountability board, and changing certain initiative and referendum provisions.

Explanation:

This constitutional amendment lowers campaign contribution amounts to candidates and political parties. It prohibits contributions to candidates or political parties by labor unions and corporations. Candidates and elected officials are prohibited from using campaign contributions for personal use.

The amendment expands the scope of activities requiring people to register as lobbyists, and places additional restrictions on lobbyists.

The amendment replaces the government accountability board recently created by the Legislature. The new board is granted broad power, including the power to investigate, adopt rules, issue advisory opinions, and conduct audits. It may impose sanctions, including fines, on any elected or appointed official, judge, or State or local government employee. The amendment annually appropriates State funds to be solely administered by the board.

The amendment limits the number of votes necessary for approval of any initiative or referendum to a simple majority. It requires the Legislature to make specific factual findings when enacting laws that are not subject to referral. If the Legislature wants to change the initiative or referendum process, or a law passed by initiative, it must submit the change to the voters.

This multiple-section amendment makes other additions to the Constitution. It will likely be challenged on constitutional grounds.

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

Section 2. That the Constitution of the State of South Dakota be amended by adding a new Article 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 provided under Article III § 28 are felonies punishable as provided by law.

§3. A lobbyist may not knowingly give or offer to give a gift to an individual who they know or should know is a senior public servant. The prohibition under this section does not apply if the lobbyist is the spouse, fiancée, or fiancé of the senior public servant, or is, whether by blood or marriage, a child, parent, sibling, grandparent, grandchild, aunt, uncle, niece, or nephew of the senior public servant. A violation of this section is a misdemeanor punishable as provided by law.

§4. No public official may knowingly use state resources for improper personal gain. A violation of this section is a misdemeanor punishable as provided by law, but a violation of this section where a public official knowingly uses state resources for improper personal gain exceeding ten thousand dollars is a felony punishable as provided by law.

§5. A foreign government outside of the United States may not make a contribution or expenditure in connection with any state or local candidate election.

§6. A candidate or person holding elective office may not knowingly use a campaign contribution for personal use. A violation of this section is a felony punishable as provided by law.

§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. A violation of this section is a misdemeanor punishable as provided by law.

§9. A senior public servant may not become a lobbyist, other than a public lobbyist for state or local government, while holding office as a senior public servant and for a period of two years after holding office as a senior public servant. A violation of this section is a misdemeanor punishable as provided by law.

§10. A lobbyist may not knowingly deliver a campaign contribution made by another individual or entity. A violation of this section is a misdemeanor punishable as provided by law.

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 to a person who delivers a campaign contribution to the person's own campaign, or to the campaign of the person's immediate family member. This section may not be interpreted to prohibit any person from making a campaign contribution or from encouraging others to make a campaign contribution or otherwise to support or oppose a candidate.

§11. A judge shall avoid the appearance of bias, and shall disqualify himself or herself in any proceeding in which 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 state representative, or for any local elective office other than state senator, including any county, municipal, or school district office;
- (2) \$750 for the office of state senator;
- (3) \$1,500 for the office of attorney general, lieutenant governor, commissioner of school and public lands, auditor, treasurer, secretary of state, or any other statewide elective office other than Governor; and
- (4) \$4,000 for the office of Governor.

Any limit prescribed in this section does not apply to a contribution made by a political party, or to a contribution made by the candidate or the candidate's spouse to the candidate's own campaign. The secretary of state shall by administrative rule adjust any dollar amount in this section for inflation 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 five thousand dollars. For purposes of this section, a state political party and its affiliated local committees or subdivisions shall be treated as a single political party. The secretary of state shall by administrative rule adjust the dollar amount in this section for inflation 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 that is 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 is as an independent entity, notwithstanding any other provision of the Constitution of South Dakota, including Article II, that shall be conducted in a nonpartisan manner with integrity, honesty, and fairness. Any rule adopted, investigation conducted, or sanction imposed by the board is 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 who are 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 are nonlawyers, each appointed by majority vote of the other four members.

No member of the board may be registered as a lobbyist or may hold any other local, state, or federal public office or political party office while serving as a member of the board. 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 preceding appointment to the board. Each member of the board shall serve for a term of not more than 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 each member's first term only, to achieve staggered ending dates. No member may 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 the date provided under this section, 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 has the power, notwithstanding any other provision of the Constitution, to:

- (1) Investigate any allegation of bribery, theft, or embezzlement of public funds, or any violation of this Article, ethics rule, 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 related to the investigation;
- (2) Adopt ethics rules, subject to rulemaking procedures as defined by law, including provisions on campaign finance, conflicts of interest, confidential information, use of position, contracts with government agencies, legislative recusal, and financial interest disclosure, to which any elected or appointed official, judge, or employee 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 prohibits the Legislature from enacting any law that is 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 for which the advisory opinion is issued, and by any person involved in any specific transaction or activity that is indistinguishable in all its material aspects from the transaction or activity for which the advisory opinion is issued. Notwithstanding any other provisions of law, a 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 the advisory opinion is not, as a result of the act, 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 any legal, investigative, or administrative and clerical employee who is necessary to support the functions of the board;
- (6) Conduct specific or random audits of disclosures required by state campaign finance, ethics, lobbying, or government contracting law;
- (7) Impose sanctions on any elected or appointed official, judge, or employee of state or local government, including the power to issue orders, impose fines, and commence administrative actions. The board shall issue a written explanation for any sanction;
- (8) Refer information or complaints alleging a violation of this Article, the board's ethics rules, or state law 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 provided 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 any matter that involves the exercise of the board's duties and powers under this Article, including the adoption or approval of any motion, procedure, provision, or appeal, the hiring of staff, the issuance of an advisory opinion, the referral to the appropriate prosecutorial authority of a complaint alleging a violation, 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 with the board, which may be anonymous, alleging a suspected or anticipated 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 the employee reported a 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) Each member of the board shall complete a financial interest disclosure statement. Any member of the board who has a personal, private interest in a matter before the board or with a direct and substantially related interest in a matter before the board shall disclose the fact of such interest and recuse himself or herself from working on the matter, unless the board member's vote is necessary to resolve the matter.

(9) The 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 under this Article, and in any civil action relating to the

board's powers or to the sufficiency of resources provided for the board's implementation and operation.

(10) The Legislature shall annually appropriate, via the general appropriation bill, three hundred and eighty-nine thousand dollars, indexed to inflation, to a separate constitutional Ethics Law Enforcement Fund to be administered solely by the board. This appropriation via the general appropriation bill shall occur, and shall not be subject to item veto by the Governor, notwithstanding any other provision of the Constitution. If the Legislature does not appropriate such funding by the beginning of the fiscal year, the state treasurer shall transfer this amount, less any amount so appropriated by the Legislature, from the state general fund to the Ethics Law Enforcement Fund as soon as such funds are available. The Legislature shall ensure that this money is available in the state general fund for the state treasurer to make such a transfer. This transfer shall occur notwithstanding any other provision of the Constitution. Only the board may authorize the spending or transfer of moneys from the Ethics Law Enforcement Fund. The Legislature may appropriate additional funds to the Ethics Law Enforcement Fund or another fund for use by the board for its various expenses. While serving on business of the board, members shall receive reasonable travel expense reimbursement and per diem compensation. This provision shall be self-executing.

§16. Terms used in this Article mean:

- (1) "Corporation," any for-profit corporation, nonprofit corporation, company, limited liability company, limited partnership, business trust, business association, or other similar entity;
- (2) "Elective 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. The term does not mean any purely informational material or campaign contribution;
- (4) "Local," any subdivision of the state for governmental, political, or related purposes, including a county, municipality, town, township, or school district subdivision;
- (5) "Major political party," the two parties that earned for the party's respective candidates for the office of President of the United States the highest and the second highest number of votes at the most recent general election for such office;
- (6) "Personal use," a commitment, obligation, or expense of a person that would exist irrespective of the candidate's election campaign; and
- (7) "Senior public servant," any person holding a non-federal office elected by South Dakota voters, or an unelected 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 a member of the State Government Accountability Board and any member of the Governor's cabinet.

§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 referendum process may 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.