



April 3, 2023

Mr. Brian Bengs
1314 S. 8th Street
Aberdeen, South Dakota
57401

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SD Secretary of State

Dear Mr. Bengs:

SDCL 12-13-25 requires the South Dakota Legislative Research Council (LRC) to review each proposed initiated constitutional amendment submitted to it by a sponsor, for the purpose of assisting the sponsor in writing the amendment "in a clear and coherent manner in the style and form of other legislation" that "is not misleading or likely to cause confusion among voters."

The initiated constitutional amendment proposes new constitutional language relating to voter-approved measures. Specifically, the amendment attempts to provide:

1. An effective date for initiated or referred measures;
2. For conflicting measures approved simultaneously, that the measure receiving the highest number of votes becomes law;
3. A prohibition on amending measures approved by electors for seven years following enactment of the measure, and
4. The Legislature with the authority to refer a measure for repeal or amendment to the electors upon a three-fourths vote of the House of Representatives and the Senate.

The proposed constitutional amendment is drafted as follows:

Legislative Repeal or Amendment of Initiated Measures

If a majority of votes cast upon an initiated or a referred measure are affirmative, it is enacted. An enacted initiated or referred measure shall become law on the thirty-first day after the election. A referred measure that is rejected is void immediately. If conflicting measures are approved simultaneously, only the one receiving the highest number of affirmative votes shall become law. A measure approved by the electors may not be repealed or amended by the Legislature within seven years from its effective date. Upon three-fourths vote of the members of both the Senate and House of Representatives, a measure for repeal or amendment may be referred to the electors at any subsequent general election.

SDCL 12-13-24 requires an initiated amendment to the Constitution to be written in the "form of other legislation." The LRC suggests several changes and considerations to conform to this requirement.

1. When amending the Constitution, the typical lead-in clause is as follows: "That Article III, § 1 of the Constitution of the State of South Dakota, be AMENDED:". The LRC recommends that this lead-in clause be used to be consistent with the form of other legislation.

2. S.D. Const. Art. III, § 1 provides that the enacting clause of all laws approved by vote of the electors is as follows: "Be it enacted by the people of South Dakota." The LRC recommends that this enacting clause be used for the proposal.
3. When proposing new law language, the new text is underscored. Thus, the LRC recommends that the proposed constitutional amendment language be underscored to show that the language is new.
4. The proposed constitutional amendment language did not include a recommendation for the placement of the language in the constitution. Since the proposed constitutional language addresses voter-approved measures, the assumption is that the language would be placed in S.D. Const. Art. III, § 1. Thus, the LRC recommends that the final proposed constitutional language be drafted as an amendment to S.D. Const. Art. III, § 1.
5. The *Guide to Legislative Drafting*¹ discourages the use of "shall" for statements of law. To say what the law is—that is, to make a statement that is true by operation of law—the present tense should be used. The proposed text uses the phrase, "shall become law..." in two instances. The LRC recommends, in the first instance, that the language be changed to "is effective" and "becomes law" in the second instance.
6. The proposed constitutional language provides that, if a measure is enacted, it becomes law on the thirty-first day after the election. SDCL 2-1-12 provides that an initiated measure or referred law that is approved by the electors is "effective on the first day of July after the completion of the official canvass by the State Canvassing Board." The sponsor may want to consider having the effective date come after the State Canvassing Board certifies the election results, thereby making them official.
7. The use of the sentence providing that a referred measure rejected by the electors is "void" is likely not necessary. The courts have held that the exercise of a referendum is, in effect, the exercise of veto power. See *Brendtro v. Nelson*, 720 N.W.2d 670 (S.D. 2006). Therefore, the rejection of a measure by the electors vetoes the measure, having the effect of preventing the measure from becoming law.
8. The final sentence of the proposed constitutional language may need to be rewritten for clarity. It appears the intent of the sentence is to provide the Legislature a mechanism to enact legislation that amends or repeals an initiated or referred measure that was previously approved by the electors, notwithstanding the temporary prohibition on repeals or amendments in the previous sentence. A few questions are raised by the proposed language.
 - a. Is more exacting language necessary to describe what type of "measure" is being referenced?
 - i. Is the "measure" an enactment of the Legislature that repeals or amends a measure previously approved by the electors of the state? If so, does that need to be stated?
 - ii. Does "measure" include both initiated measures and measures enacted by the Legislature and referred either by the people or by the Legislature?
 - iii. Should it include both initiated and referred measures?
 - b. To repeal or amend a measure, is the Legislature first required to enact Legislation repealing or amending the measure by a three-fourths majority vote and then also required to refer the matter to the electors by a three-fourths majority vote?
 - c. Who or what is referring the "measure" to the electors? Is it the Legislature or the people?
9. Finally, the LRC suggests a several minor changes to the text for clarity. Those changes are reflected below.

¹ See pages 29-30.