

## SUMMARY OF INITIATED MEASURE ESTABLISHING AN ETHICS COMMISSION

This memorandum is in response to a request for a summary and analysis of the initiated measure<sup>1</sup> for a constitutional amendment establishing a state ethics commission and new ethics requirements for public officials and lobbyists.

### PROCEDURAL TIMELINE

A sponsoring committee of 26 individuals submitted a proposal for the initiated measure to the Secretary of State on March 2, 2018, and the Secretary of State approved the petition for circulation on March 20, 2018.<sup>2</sup> The sponsoring committee submitted signed petitions to place the measure on the ballot to the Secretary of State on June 18, 2018. As of the date of this memorandum, the signatures are under review by the Secretary of State. If the Secretary of State determines the petitions have at least 26,904 valid signatures, the measure will be placed on the general election ballot on November 6, 2018. If the majority of voters approve the measure, the constitutional amendment will become effective 30 days after the election.

### SPONSORING COMMITTEE, CONTRIBUTIONS, AND EXPENDITURES

The sponsoring committee for the initiated measure is named North Dakotans for Public Integrity or North Dakotans for Public Integrity Inc. The committee has submitted campaign finance reports under both names, as well as under North Dakotans for Public Integrity 3. According to the online campaign finance database on the Secretary of State's website, the sponsoring committee has received more than \$500,000 in monetary and in-kind contributions. In addition to smaller contributions, the sponsoring committee reported receiving:

- \$256,050 from an organization based in Florence, Massachusetts, named RepresentUs;<sup>3</sup>
- \$217,090 from an organization based in Sausalito, California, named Voters Right to Know;<sup>4</sup> and
- \$43,804 from an organization based in Washington, D.C., named End Citizens United Non-Federal.<sup>5</sup>

Information regarding the sponsoring committee's expenditures for "circulating" (presumably circulating petitions for signatures) also is available on the Secretary of State's website. According to that information, the sponsoring committee spent about \$265,000 on that activity. The largest recipient of that money was Advanced Micro Targeting<sup>6</sup>, which received at least \$195,000. Another recipient, EMC Research<sup>7</sup>, received at least \$39,500.

### DRAFTING STYLE

The initiated measure is a proposed constitutional amendment that includes both substantive language and language more accurately described as statements of intent. For example, the first sentence has no substantive effect. It says "[t]he people of North Dakota need information to choose candidates for office, vote on ballot measures, and ensure that their representatives are accountable." Contrary to guidance in the *North Dakota Legislative Drafting Manual*, these types of statements will become part of the state constitution if voters approve the measure.<sup>8</sup>

The measure also includes redundant provisions. For example, paragraph 1 of section 4 says the measure is "self-executing," "mandatory," and effective 60 days after approval. However, Article III of the Constitution of North Dakota makes voter-approved measures effective 30 days after approval, and constitutional provisions are inherently mandatory unless the text specifically makes them voluntary.

<sup>1</sup> A copy of the petition for the initiated measure including a list of the sponsoring committee members and text of the measure is available here:

<https://vip.sos.nd.gov/pdfs/Measures%20Info/Petitions%20Being%20Reviewed/Ethics%20Commission/Version%20A%20approved%20petition%20w%20ethics%20commission.pdf>

<sup>2</sup> The Secretary of State's timeline for the initiated measure is available here:

<https://vip.sos.nd.gov/pdfs/Measures%20Info/Petitions%20Being%20Reviewed/Ethics%20Commission/11%20Time%20line%20Ethics%2018June18.pdf>.

<sup>3</sup> The organization's website seems to be [www.represent.us](http://www.represent.us).

<sup>4</sup> The organization's website seems to be <https://votersrighttoknow.org/>.

<sup>5</sup> The organization seems to be part of End Citizens United, which has this website: <http://endcitizensunited.org/>.

<sup>6</sup> The organization's website seems to be [www.amtgotv.com](http://www.amtgotv.com).

<sup>7</sup> The organization's website seems to be [www.emcresearch.com](http://www.emcresearch.com).

<sup>8</sup> See pages 52 and 91 of the *North Dakota Legislative Drafting Manual*. While statements of intent are used in resolutions for constitutional amendments, they are not included in the text of the actual amendment.

The measure also contains ambiguous phrases. For example, paragraph 2 of section 1 requires disclosure of the "ultimate and true source of funds" expended for certain purposes. Litigation may be required to define that phrase. That paragraph also imposes on the Legislative Assembly "an ongoing duty to revise these laws as necessary to promote the purposes of this section in light of changes in technology and political practices." That duty is not clearly defined and likely impossible to enforce.

### **CAMPAIGN FINANCE DISCLOSURES**

Section 1 of the measure would give the Legislative Assembly 3 years to enact statutes requiring "prompt, electronically accessible, plainly comprehensible, public disclosure of the ultimate and true source of funds" in amounts over \$200 (to be adjusted for inflation) spent "to influence" statewide elections or elections for Legislative Assembly members, or "to lobby or otherwise influence state government action." The measure does not define when an expenditure is to "influence state government action." The measure also would require the Legislative Assembly to revise the financial disclosure statutes "as necessary" and authorize "one or more entities" to "implement, interpret, and enforce" them. Additionally, paragraph 2 of section 1 gives resident taxpayers the right to enforce the measure and statutes enacted under the measure in court.

Multiple statutes already require financial disclosures related to campaigns and other political activities. North Dakota Century Code Chapter 16.1-08.1 requires political parties, candidates, candidate committees, and others to report to the Secretary of State any monetary or in-kind contributions of \$200 or more (not adjusted for inflation) as well as several types of campaign expenditures. For persons involved in ballot measure activities, the threshold for reporting is \$100. Contribution and expenditure reports are available in a searchable database on the Secretary of State's website. Chapter 16.1-09 requires candidates, appointees, and their spouses to file statements of financial interests with the Secretary of State. Chapter 54-05.1 requires lobbyists to register with the Secretary of State and submit annual reports of any expenditures over \$60. Filed reports are subject to open records laws.

Provisions of the initiated measure would be less strict than certain statutory campaign finance reporting requirements. The reporting thresholds for lobbyists and measure committees would be higher than current levels. Also, the measure does not require in-kind contributions to be reported. Instead, the measure refers to "funds," which may be interpreted as monetary contributions.

### **LOBBYISTS AND PROHIBITION ON GIFTS TO PUBLIC OFFICIALS**

Section 2 of the measure would prohibit several activities by lobbyists, public officials, certain state employees, and others. It also would require the Legislative Assembly to establish "civil and criminal sanctions" for violations of the prohibitions.

The measure would prohibit a public official from knowingly accepting a gift from a lobbyist and prohibit a lobbyist from knowingly giving, offering, soliciting, initiating, or facilitating a gift to any public official unless the lobbyist is an "immediate family member" of the public official. The terms "public official" and "public office" are defined in paragraph 2 of section 4 to include "any elected or appointed office or official of the state's executive or legislative branch," members of the Governor's cabinet, legislative branch employees, and members of the ethics commission established under the measure.

The measure also would prohibit:

1. Elected public officials from being lobbyists until 2 years after holding office;
2. Lobbyists from knowingly delivering a campaign contribution made by someone else;
3. Certain candidates and public officials from using campaign contributions for personal use;
4. Foreign entities from making contributions or expenditures in connection with elections; and
5. Directors, officers, commissioners, heads, or other agency executives from appearing biased or participating in quasi-judicial proceedings in which they have certain financial interests. "Agency" is defined to include executive agencies, boards, bureaus, commissions, and other administrative units of the executive branch, as well as "persons directly or indirectly purporting to act on behalf or under the authority of the agency."

Most of those prohibitions currently exist in statute. The second prohibition is addressed in Section 16.1-08.1-03.14, which requires "conduits" that transfer contributions to identify the source of the contribution. The third and fourth prohibitions exist in Sections 16.1-08.1-04.1 and 16.1-08.1-03.15, respectively. The fifth prohibition or portions of it are found in multiple statutes, such as Sections 28-32-31, 38-14.1-38, 43-41-08, 44-04-22, 61-02-04.1, and others.

Section 28-32-27 allows a party in any administrative proceeding to have a hearing officer disqualified for good cause.

### **ETHICS COMMISSION**

Section 3 of the measure would establish a North Dakota Ethics Commission comprised of five members appointed to 4-year terms. There is no limit on the number of terms a member could serve. The Governor, Majority Leader of the Senate, and the Minority Leader of the Senate would be required to appoint the members "by census agreement." The commission would have authority to adopt ethics rules applicable to lobbyists, public officials, and candidates for public office. The commission also would have authority to investigate alleged violations of the rules, the measure, and "related state laws." This provision does not specifically provide the investigations must satisfy due process requirements, provide the commission would have to follow the Administrative Agencies Practices Act, or address whether the commission could impose any of the civil and criminal penalties mandated by the measure. The measure also would require the commission to maintain a whistleblower hotline and require the Legislative Assembly to provide "adequate funds" for the commission. There is no provision specifically requiring staff for the commission.

### **RELATIONSHIP TO OTHER CONSTITUTIONAL PROVISIONS**

In cases in which two or more constitutional provisions seem to conflict, a court generally would try to reconcile the provisions or make a determination regarding the relationship of the measures to each other. However, this measure contains a provision that allows any provision in the measure to trump any other provision in the state constitution in the case of a conflict. Thus, it appears even Article I rights could be supplanted by the measure if a conflict between the two were found.