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LEGAL MEMORANDUM

TO: Interested Persons

FROM: Office of Legislative Legal Services

SUBJECT: Safety Clauses and Effective Date Clauses[1]

Executive Summary

The language of the safety clause is derived from an exception to the referendum power contained in section 1 (3) of Article V of the Colorado constitution. The exceptions are for: 1) Laws "necessary for the immediate preservation of the public peace, health, and safety"; and (2) Appropriations for the support and maintenance of the departments of state and state institutions.

Case law surrounding the utilization of the safety clause in legislation has held that the General Assembly may prevent a referendum to the people by declaring that an act is "necessary for the immediate preservation of the public peace, health, and safety" and that the General Assembly is vested with exclusive power to determine that question. The question of including the safety clause in legislation is a matter of debate in the legislative process and the body's decision cannot be reviewed or called into question by the courts.

From the mid-1930's until the mid-1990's, the inclusion of the safety clause was presumed. However, in January 1997, as a result of questions raised by legislators and the public, the Executive Committee of Legislative Council directed the Office of Legislative Legal Services to implement new procedures whereby a safety clause is included only upon direction of the requesting member. The 1997 directive requires the Office to advise members in connection with utilizing the safety clause depending on the type of legislation. The General Assembly may want to re-examine the 1997 directive to the Office, the bill examples in the directive, and whether it places sufficient emphasis on the impact of the use of a safety clause.

[1] This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

I. Background

At your request, this memo is being written to explain the origin of the safety clause, the case law on the use of the safety clause in legislative bills, the legislative practice on the use of the safety clause, and the consequences or drafting issues that arise when a safety clause is or is not used in a bill enacted by the General Assembly. The memo also discusses recent developments.

II. Origin of the Safety Clause

A safety clause is a clause placed at the end of a legislative bill. The text of the safety clause is as follows:

> **SECTION ___ . Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

The language of the safety clause is derived from an exception to the referendum power contained in section 1 (3) of Article V of the Colorado constitution. The use of a safety clause arises out of the provisions of subsections (1) and (3) of section 1 of Article V of the Colorado Constitution relating to the power of the people to use the referendum process against any act or portion of an act passed by the General Assembly. As originally adopted by the people, the Colorado Constitution vested the legislative power in the General Assembly and the General Assembly alone. In 1910, Colorado adopted an amendment to the state constitution that gave the people the right to propose laws (the right of the initiative) and the right to approve or reject the laws passed by the General Assembly (the right of the referendum).

Article V, section 1 (1) and (3), of the Colorado Constitution provide:

> **Section 1. General assembly - initiative and referendum.** (1) The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives, both to be elected by the people, *but the people* reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and *also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.*
>
> (3) *The second power hereby reserved is the referendum, and it may be ordered,* ***except as to laws necessary for the immediate preservation of the public peace, health, or safety,*** *and appropriations for the support and maintenance of the departments of state and state*

> *institutions, against any act or item, section, or part of any act of the general assembly, either by a petition signed by registered electors* in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of the secretary of state at the previous general election *or by the general assembly*. Referendum petitions, in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state not more than ninety days after the final adjournment of the session of the general assembly that passed the bill on which the referendum is demanded. The filing of a referendum petition against any item, section, or part of any act shall not delay the remainder of the act from becoming operative. (emphasis added)

Subsections (1) and (3) provide for two types of referendum:

- The General Assembly may refer statutes to the voters in a statewide election by attaching a referendum clause to a bill;[2] or

- The voters may submit a petition to the Secretary of State signed by registered electors equal to five percent of the total number of votes cast for the Secretary of State in the previous general election[3] requesting a referendum vote against any act or item, section, or part of any act of the General Assembly.

The type of referendum exercised by the voters has been called a "rescission" referendum. In effect, it means that a specified number of registered electors can sign petitions and provide the electorate with the opportunity to *rescind* all or part of a statute.

Subsection (3) provides two exceptions to this "rescission" referendum:

- Laws "necessary for the immediate preservation of the public peace, health, and safety"; and

- Appropriations for the support and maintenance of the departments of state and state institutions.[4]

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[2] Such a bill is often referred to as a "referred bill".

[3] This number varies based upon the election. For 2009-10, the number of signatures required for a statewide initiative or referendum petition is 76,047.

[4] The Office of Legislative Legal Services issued a memorandum dated February 3, 1995, to Senator Elsie Lacy on the appropriations exception entitled "Applicability of constitutional referendum provisions to appropriations bills".

III. Colorado Case Law on the Use of Safety Clauses

The case law in Colorado is well-settled that a legislative body may prevent a referendum to the people by declaring that the act is "necessary for the immediate preservation of the public peace, health, and safety" and that the legislative body is vested with exclusive power to determine that question. While the use of the safety clause is certainly a matter of debate in the legislative process by the individual members, once that question has been decided by the legislative body, that decision stands and the judiciary will not overturn it.

Specifically, in 1913, the Colorado Senate asked the Colorado Supreme Court whether the General Assembly could lawfully prevent a proposed act on the eight-hour law for persons employed in mines from being referred to the voters by the use of a safety clause declaring that the act was a law necessary for the immediate preservation of the public health and safety. In *In re Senate Resolution No. 4*, 54 Colo. 262, 130 P. 333 (1913), the Supreme Court held that the General Assembly had the authority under the constitutional language to make such a determination and that "such declaration is conclusive upon all departments of government, and all parties, in so far as it abridges the right to invoke the referendum."[5] The General Assembly passed the bill that was the subject of the interrogatory in *In re Senate Resolution No. 4.* Subsequently, the Supreme Court addressed the issue of whether the General Assembly could use the safety clause to except a bill from the referendum and whether the legislature or the judiciary had the authority to make this determination. In *Van Kleeck v. Ramer*, 62 Colo 4, 156 P. 1108 (1916), the Colorado Supreme Court noted that except as limited by the federal or the state constitutions, the authority of the General Assembly is plenary and the judicial branch cannot exercise any authority or power except that granted by the Constitution. The Supreme Court noted that under article V, section 1, the constitution provided that the power of the referendum may be ordered "except as to laws necessary for the immediate preservation of the public peace, health or safety". The Court held that during the process of the enactment of a law the legislature is required to pass upon all questions of necessity and expediency connected with a bill:

> The existence of such necessity is a question of fact, which the general assembly in the exercise of its legislative functions must determine; and under the constitutional provision...that fact cannot be reviewed, called in question, nor be determined by the courts....The general assembly has full power to pass laws for the purposes with respect to which the referendum

[5] *In re Senate Resolution No. 4*, 54 Colo. 262, 271, 130 P. 333, 336 (1913).

> cannot be ordered, and when it decides by declaring in the body of an act that it is necessary for the immediate preservation of the public peace, health or safety, it exercises a constitutional power exclusively vested in it, and hence, such declaration is conclusive upon the courts in so far as it abridges the right to invoke the referendum.[6]

The Court responded to the argument that the people would be deprived of the right to refer a law, if the legislature either intentionally or through mistake, declares falsely or erroneously that a law is necessary for the immediate preservation of the public peace, health or safety. The Court said:

> The answer to this proposition is, that under the Constitution the general assembly is vested with exclusive power to determine that question, and its decision can no more be questioned or reviewed than the decisions of this court in a case over which it has jurisdiction.[7]

The *Van Kleeck* case has been cited in four other Colorado cases involving the use of the public exception clause in municipal ordinances or actions taken by a governmental body.[8]

IV. Legislative Practice on Using the Safety Clause

Sometime in the mid-1930's, the use of the safety clause in bills became a regular practice of the General Assembly. The inclusion of the safety clause was presumed.

In the mid-1990's, questions were raised regarding the practice of the General Assembly in using the safety clause. The criticism generally was: That the General Assembly was preventing the right of the people to do rescission referendums; and that bills to which the General Assembly had attached a safety clause were not truly measures critical to the immediate preservation of the public peace, health, or safety.

Legislators also began asking the Office of Legislative Legal Services (hereafter the "Office") to not include safety clauses on their bills.

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[6] *Van Kleeck v. Ramer,* 62 Colo. 4, 10-11, 156 P. 1108, 1110 (1916).

[7] *Id.* at 11-12, 156 P. at 1111.

[8] *Fladung v. City of Boulder,* 160 Colo. 271, 417 P. 2d 787 (1966); *Enger v. Walker Field,* 181 Colo. 253, 508 P. 2d 1245 (1973); *McKee v. Louisville,* 200 Colo. 525, 616 P.2d 969 (1980); *Cavanaugh v. State, Dept. of Social Services,* 644 P. 2d 1 (Colo. 1982).

In January of 1997, the Executive Committee of Legislative Council directed the Office to implement a new procedure regarding safety clauses. A copy of the directive is attached (see Attachment A). The directive, which has been continued to the present day, changed the default position of the Office from automatic inclusion of a safety clause to inclusion only upon direction of the requesting member. The directive requires drafters to specifically ask every member whether or not they want a safety clause. The practice of the Office has been to attempt to ask the question either when a legislator initially files the bill request with the Office or prior to putting the bill on billpaper for introduction.

V. Issues for Consideration in Using a Safety Clause under the Executive Committee's Directive

The decision to place a safety clause on a bill should not be made lightly. By exercising this exception, the General Assembly prevents the people from exercising their constitutional right to petition and vote on whether an act or a part of an act passed by the General Assembly should become law.

The 1997 directive directs the Office to inform the members to consider that some bills may require a safety clause if it is necessary for the bills to take effect on or before July 1.

Some of the drafting issues to be considered by a sponsor who elects to not use a safety clause on a bill include the following:

Does the bill have an effective date? As noted in the 1997 directive, in *In re Interrogatories of the Governor*, 66 Colo. 319, 181 P. 197 (1919), the Colorado Supreme Court held that, in order to allow the opportunity for filing a "rescission" referendum petition for ninety days after the legislative session, any bill without a safety clause could not take effect for ninety days. Because of that decision, the Office is directed to inform the member that if he or she wants to be sure that a bill adopted by the General Assembly and approved by the Governor would take effect prior to the ninety-first day after the session, the bill would need to have a safety clause.

This advice is based on the position that the holding in the case cited above means that a bill could not specify an effective date before or during the 90-day period. The rationale for this position is that it would lead to absurd results if a bill was purported to become effective and have consequences imposed under the terms of the bill on one date only to have the bill become ineffective, pending an election, if a petition is filed.

Does a particular bill require a safety clause? The 1997 directive indicates that examples of bills that a member might consider necessary to take effect prior to the end of the 90-day period following adjournment include bills that impose new criminal penalties or bills that relate to fiscal or tax policy that are intended to apply to either the current fiscal year or to the entire upcoming fiscal year.

What should the bill use in lieu of a safety clause? For bills that do not have a safety clause, the Office was directed to develop a series of standard clauses that express an effective day for the bill in the context of the 90-day period to provide for certainty about when a bill takes effect. These effective date clauses build in the contingencies that might occur if a referendum petition is filed, if an election is held and approved by the people, and when the official declaration of the vote is proclaimed by the people.

For example, if a member elects to not have a safety clause and it is intended that the bill take effect *at the earliest possible date*, then the following general effective date clause (sometimes referred to as a "petition clause") is used in the bill:

> **SECTION __. Act subject to petition - effective date.** This act shall take effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 11, 2010, if adjournment sine die is on May 12, 2010); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part shall not take effect unless approved by the people at the general election to be held in November 2010 and shall take effect on the date of the official declaration of the vote thereon by the governor.

The clause above may be customized to add an applicability clause or a statement that a bill takes effect on a specified fixed date subsequent to the expiration of the 90-day period following adjournment.

VI. Recent Developments.

In recent years, increased attention has been focused on the appropriateness of the use of safety clauses. This has particularly been the case when a safety clause is used solely for the purpose of having a bill take effect coincidentally with the start of a fiscal year that commences on July 1 following a legislative session. Accordingly, the General Assembly may want to direct that the Office re-examine the bill examples contained in the 1997 directive for the purpose of providing more appropriate and clearer assistance to the members when

they are making their judgements about whether or not to include a safety clause.

As previously noted in this memorandum, court decisions indicate that the determinations made by the General Assembly regarding the appropriateness of the use of safety clauses are solely the prerogative of the body. However, since this issue has not been formally addressed since 1997, the General Assembly may also want to assess whether the 1997 directive has required this Office and the members to place sufficient emphasis on the fact that the use of a safety clause is in derogation of the right to seek a referendum petition.[9]

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revised: 08/01/2011

[9] As of August 20, 2010, the 1997 directive has not been reviewed.

General Assembly
State of Colorado
Denver

January 15, 1997
MEMORANDUM

TO: Office of Legislative Legal Services

FROM: Executive Committee of Legislative Council

RE: Use of Safety Clauses

For bills prepared after this date, we are hereby directing your Office to implement the following procedures regarding **Safety Clauses**:

(1) You should **no longer assume that members want a safety clause** on their bills. You should **ask each member** making a bill request **whether or not the member wants to include a Safety Clause**.

(2) You should inform the member that a Colorado Supreme Court decision indicates that **bills without a Safety Clause cannot take effect prior to the expiration of the ninety-day period following adjournment** of the General Assembly, the period that is allowed for filing referendum petitions against such bills.

(3) In view of the ninety-day requirement for bills without a safety clause, you should be sure to **inform the members**, particularly newly elected members, that **there are certain bills that may need to take effect on July 1 or before**. These could include bills imposing new criminal penalties and bills that relate to fiscal or tax policy that are intended to apply to either the current fiscal year or to the entire upcoming fiscal year.

(4) For bills that are prepared without a Safety Clause, you should include a standard clause that expresses an effective date for the bill in the context of the requirement for

the ninety-day period, unless the member directs otherwise.

Senator Tom Norton
President of the Senate

Representative Charles Berry
Speaker of the House

Senator Jeff Wells
Senate Majority Leader

Representative Norma Anderson
House Majority Leader

Senator Michael F. Feeley
Senate Minority Leader

Representative Carol Snyder
House Minority Leader

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