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MEMORANDUM

TO: Dan Ritchie and Albert Yates

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: March 18, 2016

SUBJECT: Proposed initiative measure 2015-2016 #116, concerning Retention of Excess State Revenue

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed change to the Colorado Revised Statutes appear to be:

1. To de-Bruce all state revenue collected in the 2016-17 fiscal year and all future fiscal years; and

2. To allow the state to use the state revenue it retains and spends as a result of the proposed initiative to fund education and transportation projects, and possibly mental health services and senior services.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. The following comments and questions relate to the phrase "without increasing tax rates or imposing new taxes" in subsection (1) of the proposed initiative:
 - a. While this phrase was used in the ballot title of Referendum C, it was not used in §24-77-103.6, C.R.S. What is the legal effect of this phrase in statute?
 - b. Does this phrase make the retention of the excess state revenues conditional upon tax rates not being increased or new taxes not being imposed? Does it limit the state's ability to increase a tax rate or impose a new tax, without changing the amount of revenues that it retains or spends?
 - c. Other tax policy changes, such as eliminating a tax credit or exemption, are not included in the phrase. Does their exclusion mean that those changes would be treated differently in relation to the voter-approved revenue change?
 - d. Is this phrase merely a legislative declaration or a statement of intent? If so, would it be clearer to identify it as such?
3. In §2-4-401 (13.7) (a), C.R.S., "shall" is defined to mean "that a person has a duty." But in the context of the proposed initiative, does the phrase "shall be authorized" mean that the state "is authorized"?
4. Under the proposed initiative, the state is authorized "to retain and spend all state revenues in excess of the sum of the limitation on state fiscal year spending plus 2005 election excess state revenues."
 - a. Does this mean that the state will be able to retain and spend all state revenues that it would otherwise be required to refund under subsection (7) of the Taxpayer's Bill of Rights (TABOR)?

- b. Under paragraph (7) (a) of TABOR, "[t]he maximum annual percentage change in state fiscal year spending equals inflation plus the percentage change in state population in the prior calendar year, adjusted for revenue changes approved by voters after 1991." Once the voters approved Referendum C, did it become part of the "limitation on state fiscal year spending"? Does this formula double-count the amount of the 2005 election excess state revenues?
 - c. Is the intent of this language for the state to be able to retain and spend all state revenues above the excess state revenues cap set forth in §24-77-103.6, C.R.S., without changing the permitted uses of the revenues that the state retains and spends under Referendum C?
 - d. Can the state decline to retain and spend some or all of the revenues each fiscal year and instead refund them to taxpayers?
- 5. If the proposed initiative is approved by voters, and then voters later approve a new tax for a specific purpose, would an amount equal to the additional tax need to be deposited into the 2016 election general fund exempt account?
- 6. If the General Assembly repealed section §24-77-103.6, C.R.S., would the state be able to retain all of the 2005 election excess state revenues under this measure?
- 7. The following questions relate to the creation of the general fund exempt account in the introductory paragraph of subsection (2) in the proposed initiative:
 - a. What revenues are included in the account?
 - b. If cash fund revenue retained pursuant to the proposed initiative may not be deposited in the account, does future growth in cash fund revenue obligate the state to deposit a corresponding amount of general fund revenue in the account?
 - c. If cash fund revenue grows more quickly than the excess state revenues cap in §24-77-103.6, C.R.S., does the proposed initiative obligate additional general fund revenue for the purposes identified in subsection (2)?
- 8. Is the General Assembly required to appropriate or transfer the full amount of the money in the 2016 election excess state revenues account each year?
- 9. Is the General Assembly permitted to reserve any amount retained under the proposed initiative for appropriation in a subsequent fiscal year?

10. The following questions relate to the requirement that at least 35% of the revenues in the 2016 election general fund exempt account be used for education:
- a. Would appropriations or transfers for education include any capital construction project?
 - b. Would all of the uses identified in §24-77-104.5 (3) (a), C.R.S., qualify as a "public preschool through twelfth grade education" use?
 - c. Would all of the uses in §24-77-104.5 (4) (a) (I) to (VIII), C.R.S., qualify as a "higher education" use?
 - d. Can the General Assembly determine additional means to "fund education"?
 - e. Is it your intention that the appropriations from the 2016 election general fund exempt account for education be in addition to existing funding for that purpose? Could any of the existing appropriations from the general fund, excluding those from the general fund exempt account created in §24-77-103.6 (2), C.R.S., qualify as an appropriation from this account? Could appropriations from the general fund exempt account be used to supplant other general fund appropriations for education, allowing the General Assembly to appropriate those funds for other purposes?
11. There is no §43-2-205 (6) (b), C.R.S. Did you mean §43-4-205 (6) (b), C.R.S.?
12. Paragraph (b) of subsection (2) of the proposed initiative both requires a transfer from the 2016 election general fund exempt account to the highway users tax fund (HUTF) and establishes an allocation from the HUTF. Would it be helpful to include some type of amendment to section §43-4-205, C.R.S., which is the section that allocates the money in the HUTF?
13. How does the phrase "to fund transportation projects, including highways, bridges, underpasses, mass transit or other infrastructure, facility, or equipment used primarily or in large part to transport people" change the allocation required under §43-4-205 (6) (b)? Does it limit or add to the state's allowable uses provided in §43-4-206, C.R.S., for a county's allowable uses provided in §43-2-207, C.R.S., or for a municipality's allowable uses under §43-4-208 (2) (b) and (6) (a)? If not, is it necessary?
14. Under current law, the state treasurer is required to make transfers from the general fund to the capital construction fund and the HUTF under §24-75-219, C.R.S., and the amount of those transfers may decrease or be eliminated altogether if the state is required to make TABOR refunds. If passed, the proposed

initiative would eliminate refunds required under subsection (7) of TABOR. Therefore, the proposed initiative may increase the amounts transferred to the HUTF and capital construction fund under §24-75-219, C.R.S. Is this your intent?

15. Is the transfer from the 2016 election general fund exempt account to the HUTF in addition to the transfer to the HUTF required under §24-75-219, C.R.S.? The transfer made under §24-75-219 to the HUTF is further credited to the state highway fund and expended by CDOT in accordance with §43-4-206 (2) (a), C.R.S. Could this existing transfer be made from the portion of the 2016 election general fund exempt account that is allocated to the state highway fund?
16. What are examples of mental health services?
17. What are examples of senior services?
18. If the money in the 2016 election general fund exempt account was appropriated to a department for payment to a county to provide senior services, would that satisfy the requirement in paragraph (c) of subsection (2) of the proposed initiative?
19. If the proposed initiative is approved by the voters and if the General Assembly later modified the allowable uses for money in the 2016 election general fund exempt account, would such legislation impact the state's ability to retain and spend revenue?
20. Can the General Assembly reduce the minimum amount that must be used for education and transportation projects without impacting the state's ability to retain and spend revenue under the proposed initiative?
21. Is a limitation on how money in the 2016 election general fund exempt account is spent intended to be one of the "other limits" under subsection (1) of TABOR that may only be weakened by future voter approval?
22. As the 2016 election general fund exempt account is part of the general fund, then does subsection (3) of the proposed initiative change the existing law in any way?

23. The limitation in §24-75-201.1 (1) (a), C.R.S., is an appropriation limit. Is a transfer from the 2016 election general fund exempt account to the HUTF subject to the limit?
24. Paragraph (2) (c) of the proposed initiative states that any amount in the 2016 election general fund exempt account not spent on education or transportation may only be used to fund mental health services and senior services. If the general fund budget is constrained by the statutory limitation on general fund appropriations referenced in subsection (3), does the initiative require the General Assembly to decrease appropriations elsewhere in the budget in order to preserve the full allocation of funds in the exempt account for the purposes identified in subsection (2)?
25. Section 24-77-103.6 (3), C.R.S., has language that is similar to subsection (3) in the proposed initiative, but after it was enacted the General Assembly increased the appropriations limit in §24-75-201.1 (1) (a), C.R.S. Could the General Assembly likewise increase the current appropriation limit after voters approved the proposed initiative?
26. Does a report analogous to the one prepared by the director of research of the Legislative Council pursuant to §24-77-103.6 (5), C.R.S., suffice to fulfill the report requirement in subsection (5) of the proposed initiative?
27. Can the director of research of the Legislative Council consolidate the report required by subsection (5) of the proposed initiative with the report required by §24-77-103.6 (5), C.R.S.? If so, does the report need to identify separately the amount of revenue retained under the excess state revenues cap set forth in §24-77-103.6, C.R.S., and the amount of revenue retained under the proposed initiative?
28. The definition of "2005 election excess state revenues" means "those state revenues in excess of the limitation of state fiscal year spending that the state is authorized to retain and spend pursuant to [section] 24-77-103.6." But, as described above, if the voters approve that section, do those revenues become part of the fiscal year spending limit? If so, is the phrase "in excess of the limitation of state fiscal year spending" necessary? Was the authorization referenced granted pursuant to §24-77-103.6, C.R.S., or pursuant to the voters' approval of §24-77-103.6?

29. Does "2016 election excess state revenues" mean all state revenues that the state would otherwise be required to refund in a given year under subsection (7) (d) of TABOR?
30. What happens if the General Assembly passes legislation to repeal the new section? Would the state then be subject to its current fiscal year spending limit, including voter-approved revenue changes such as Referendum C?

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. There can only be one decimal point and then a number in a section number due to our publications program. Therefore, section number "24-77-103.6.5" would not work and the Revisor of Statutes would have to assign a new number to include it in the Colorado Revised Statutes. You should pick a new section number that is either a whole number (for example, §24-77-108) or that only has one decimal (for example, §24-77-103.4) in article 77 of title 24, C.R.S.
2. Each constitutional and statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, the amending clause for a new section 24-77-108, C.R.S., would be "In Colorado Revised Statutes, **add** 24-77-108 as follows:".
3. Each section in the Colorado Revised Statutes and the Colorado constitution has a headnote. Headnotes briefly describe the content of the section. The new section number and the headnote should be in bold-face type.
4. It is standard drafting practice to use SMALL CAPITAL LETTERS to show the language being added to the Colorado Revised Statutes.
5. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
 - a. The first letter of the first word of each sentence;

- b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
 - c. The first letter of proper names.
- 6. The word "web site" should be spelled "website".
- 7. It is standard drafting practice to refer to the constitutional citation of the Taxpayer's Bill of Rights rather than mentioning the common name of the constitutional section. In subsection (4) of the proposed initiative, please consider replacing "Taxpayer's Bill of Rights" with "section (20) of article X of the state constitution."
- 8. When adding definitions to a section, it is standard drafting practice to add "**-definitions.**" to the end of the headnote of that section.
- 9. Proposed §24-77-103.6.5 (6) (b) should end with a period.
- 10. At the end of the definition for "2005 election excess state revenues" the word "section" should precede "24-77-103.6."