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MEMORANDUM

TO: Jacob Williams and Frank McCurdy
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: April 6, 2016
SUBJECT: Proposed initiative measure 2015-2016 #143, concerning new cigarette and tobacco taxes

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 amendment to the Colorado constitution appear to be:

1. To impose an additional tax on cigarettes sold by wholesalers at the rate of 8.75 cents per cigarette;

2. To impose an additional tobacco tax on the sale, use, consumption, handling, or distribution of tobacco products by distributors at the rate of 22% of the manufacturer's list price;
3. To restrict how the new tax revenue is used;
4. To establish new programs related to the distribution of the new tax revenue; and
5. To establish a minimum amount of funding from other sources of revenue for existing programs that will receive funding from the new tax revenue.

Substantive Comments and Questions

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

1. Section 1 (5.5) of article V of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. As a change to the Colorado constitution, the proposed initiative may only be amended by a subsequent amendment to the constitution. Is this the proponents' intention?
3. The following questions relate to the phrase "which shall be in addition to the increased rates imposed January 1, 2005, by subsection (2) of this section" in paragraph (b) of subsection (10) of the proposed initiative¹:
 - a. Is there a reason the date is referenced? Are the new taxes imposed in addition to the rates imposed as of January 1, 2005?
 - b. Are the increased rates also in addition to the tax that is imposed in accordance with §39-28-103 and §39-28.5-102, C.R.S.?
 - c. Does this phrase add anything to the first sentence of paragraph (c) of subsection (10)?
4. Neither the state constitution nor the proposed initiative defines "tobacco products." Is it the intention of the proponents that the tax imposed in subparagraph (b) (II) not apply to tobacco cigarettes?

¹ Subsection (10) of section 21 of article X of the proposed initiative will hereafter be referred to as "subsection (10)."

5. Section 21 (2) of article X of the state constitution imposes additional cigarette and tobacco taxes and establishes the distribution, and section 21 (3) of article X of the state constitution limits the authority of the General Assembly to repeal the statutory cigarette and tobacco taxes and their distribution. Therefore, does the second sentence in paragraph (c) of subsection (10) change current law in any way?
6. Subparagraph (I) of paragraph (d) of subsection (10) uses the phrase "that would otherwise be transferred for this purpose." Given that subsection (5) of article X of the state constitution requires annual appropriations and not transfers, do you mean "that would otherwise be appropriated for this purpose"?
7. The allocation in subparagraph (I) of paragraph (d) of subsection (10) is 18% of the new tax revenue, up to a capped amount, and the the allocations in subparagraph (II) of the paragraph (d) sum to 82%.
 - a. Do the proponents intend that the percentage amounts appropriated in subparagraph (II) be applied to the total amount of tax revenue collected, or to the remaining 82% of tax revenue after the allocation in subparagraph (I)?
 - b. If the percentage amounts in subparagraph (II) apply to the total amount of tax revenue collected, then does the initiative specify a use for the final 18% of any amount in excess of \$36 million allocated pursuant to subparagraph (I)?
 - c. If the percentage amounts in subparagraph (II) apply to the remaining 82% of tax revenue after the allocation in subparagraph (I), then does the initiative specify a use for the final 18% of this 82%?
8. The following questions relate to sub-subparagraph (A) of subparagraph (II) of paragraph (d) of subsection (10)², which requires a percentage of the new tax revenue to be appropriated "for tobacco education, prevention, and cessation as part of the revenue provided by subsections (5) (c) and (5) (d) of this section."
 - a. Does "as part of" mean "in the same manner as"?
 - b. Paragraph (a) of subsection (5) requires revenue to be appropriated through the "Tobacco Education, Prevention and Cessation Act," or any

² Additional sub-subparagraphs in this subparagraph (II) will simply be referenced as "sub-subparagraph ____."

successor act. To the extent that the new revenue is appropriated in the same manner as revenue under paragraph (a), must the General Assembly appropriate money through this act?

- c. Subsection (5) (d) requires money to be appropriated for the prevention, early detection, and treatment of cancer and cardiovascular and pulmonary diseases. How does this relate to education, prevention, and cessation?
- d. As used in sub-subparagraph (A), does the phrase "for tobacco education, prevention, and cessation" alter in any way the distributions otherwise required by paragraphs (c) and (d) of subsection (5)?

9. The following questions relate to sub-subparagraph (B):

- a. What is "to be administered by the Colorado department of public health and environment, or its successor agency"?
- b. Is all 27% required to be used for grants?
- c. What is a Colorado entity?
- d. Does in-state research mean that the research must be entirely done in Colorado?
- e. Is the "open, competitive peer review process" the mechanism for awarding grants? If so, how do the proponents intend this process to function?
- f. What happens if there are an insufficient number of eligible grant applicants for the department to distribute 27% of the new tax revenue?
- g. The proposed grant program appears to facially discriminate against non-Colorado entities. Is this allowable under the dormant Commerce Clause of the U.S. Constitution?

10. The following questions related to sub-subparagraph (C):

- a. The programs are "to be administered by the Colorado department of public health and environment," yet the department is also required to develop a "grant-making process." Is the department supposed to operate its own veteran-related programs, make grants for other programs, or a combination of both?

- b. The Department of Local Affairs operates a supportive residential community for individuals who are homeless that is operated at the Fort Lyon property. Could the Department of Public Health and Environment make a grant to the Department of Local Affairs for its costs related to this program? If so, could that supplant existing general fund appropriations?

11. The following questions related to sub-subparagraph (D):

- a. In sub-subparagraph (D) the term "including" is used to introduce programs, while in sub-subparagraphs (C) and (E) the phrase "including but not limited to" is used. Was this difference intentional?
- b. Is this list of types of behavior programs meant to be illustrative or exhaustive?

12. The following questions relate to sub-subparagraph (E):

- a. "Provider" is defined in §25.5-4-103 (19), §25.5-4-414 (1) (d), and 25.5-5-4-416 (1) C.R.S. "Qualified provider" is defined in §25.5-4-417 (1) (c), C.R.S. "Colorado qualified provider" is *not* defined in the "Colorado Medical Assistance Act." What term are you cross-referencing?
- b. Is §330 of the "U.S. Public Services Act" currently codified at 42 U.S. Code §254b? And by "U.S. Public Services Act" are you referring to the "Public Health Service Act"?
- c. Will there always be a provider that meets the requirements of (i) or (ii)?
- d. What is the "Colorado health safety net infrastructure"?
- e. The introductory portion of the sub-subparagraph requires revenue to be used "for construction, improvement, and new technologies for any Colorado qualified provider," but the end requires the revenue to be appropriated to the Department of Health Care Policy and Financing "for the purpose of funding Colorado health safety net infrastructure improvements." It is unclear how these dual requirements work together. What is the proponents' intent?

13. The following questions relate to sub-subparagraph (F):

- a. Is one purpose of this allocation to provide money to a health professional who works in rural and underserved areas of the state to assist the professional in repaying his or her educational loans?

- b. What are professional training tracks?
 - c. Does "community dental health coordinators" refer back to professional training tracks, or is it the third category of appropriations that are allowable for this allocation?
14. In several of the sub-subparagraphs, a department is required to administer a program.
- a. May the department expend the revenue to fund an existing program, if one exists?
 - b. If no program currently exists, it appears that the department will be required to create one. Is that your intention?
 - c. May the department create a new program without further legislation enacted by the General Assembly?
15. Insofar as the proposed initiative requires various departments to operate programs, can the departments use some of the new tax revenue for their administrative expenses?
16. In Legislative Council's report it is required to identify programs funded, the "amounts appropriated," and "the purposes of the expenditures." Was the difference in terminology intentional? What is Legislative Council required to include?
17. Where the Department of Public Health and Environment is mentioned in subparagraph (II) of paragraph (d), the proposed initiative includes the phrase "or its successor agency." This phrase is not included in reference to the Legislative Council. Is this distinction intentional?
18. When is the information required to be published? Is it required to stay on the website forever? Is the General Assembly required to maintain a website forever in order to publish this information?
19. Can Legislative Council use any of the new tax revenue to pay for its expenses related to publishing the information?
20. What is "any other spending limitation existing in law"?
21. In paragraph (g) of subsection (10), what revenues appropriated by the General Assembly as of January 1, 2016 are the new tax revenues supplementing? Any revenues? Revenues used for programs that are identified in subsection (10)?

22. For any program that falls within the scope of paragraph (g) of subsection (10), is it your intention that the General Assembly is required to always appropriate money at least to the level that existed on January 1, 2016?
23. Subsection (4) of Article X, Section 21, states that all revenues received by operation of subsection (2) shall be excluded from fiscal year spending. The proposed initiative does not include corresponding language for revenue collected pursuant to subsection (10). Do the proponents intend that revenue collected pursuant to subsection (10) be included in fiscal year spending? Will the state be allowed to retain and spend the new tax revenue as a voter-approved revenue change?

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. Each constitutional and statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. The amending clause for the proposed initiative should be, "In the constitution of the state of Colorado, section 21 of article X, **add** (10) as follows:".
2. Each section in the Colorado Revised Statutes and the Colorado constitution has a headnote. Headnotes briefly describe the content of the section. The headnote for section 21 of article X of the state constitution should be added to section 1 of the proposed initiative and be in bold-face type:

Section 21. Tobacco Taxes for Health Related Purposes

3. 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.

4. The comma after "physical" in subparagraph (V) of paragraph (a) of subsection (10) is unnecessary.
5. Constitutional provisions are often divided into subsections, paragraphs, subparagraphs, and sub-subparagraphs for ease of reading. However, standard drafting practice is that they are not divided any further than sub-subparagraphs, as in sub-subparagraph (E) of subparagraph (II) of paragraph (d) of subsection (10) of section 1 of the proposed initiative. Consider relettering or renumbering sub-subparagraph (E) to remove further subdivisions.
6. It is standard drafting practice, when citing to the Colorado Revised Statutes, to capitalize all three words. Please consider capitalizing the words "Revised Statutes."