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Colorado General Assembly

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MEMORANDUM

TO: Daniel Gibbs and Cathy Noon
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: March 6, 2018
SUBJECT: Proposed initiative measure 2017-2018 #152 regarding Transportation Funding

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.

This initiative was submitted with a series of initiatives including proposed initiatives 2017-2018 #152 to #155. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiatives 2017-2018 #153 to #155, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in those other memoranda may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum.

Purposes

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

1. To temporarily increase the rate of the state sales and use tax for 20 years beginning in 2019 from 2.9% to 3.4%.
2. To authorize the executive director of the department of transportation to issue additional revenue anticipation notes with a _____ maximum total principal amount, a _____ maximum total repayment cost, and a 20-year term and to specify that the revenue anticipation notes revenue, not otherwise used for the payment of the notes, "be expended on priority maintenance and priority construction projects, including multimodal capital projects, as determined by the commission."
3. To allocate the revenue from the temporary sales and use tax rate increase as follows:
 - a. 45% to the state highway fund;
 - b. 15% to the multimodal transportation options fund; and
 - c. 40% to the local transportation priorities fund.
4. To further distribute the 45% to the state highway fund:
 - a. As much as is needed to make full payments of amounts allocated by the transportation commission on an annual basis on revenue anticipation notes; and
 - b. The remainder, if any, must be expended on "priority maintenance and priority construction projects, including multimodal capital projects as determined by the commission."
5. To specify that the 45% to the state highway fund may not be used to support toll highways, or, unless certain requirements are met, not be used to support toll lane construction or maintenance.
6. To further allocate the 15% to the multimodal transportation options fund:
 - a. The first \$30 million to "make principal and interest payments on transportation revenue anticipation notes for those multimodal projects selected by the transportation commission";

- b. 85% of the remaining revenue for "local multimodal projects to be determined" by the transportation commission; and
 - c. 15% of the remaining revenue for "multimodal projects that are selected by the transportation commission".
- 7. To further allocate the 40% to the local transportation priorities fund:
 - a. 50% to counties; and
 - b. 50% to cities and counties, cities, and incorporated towns.
- 8. To specify that the revenue from the temporary sales and use tax rate increase does not need to be credited to the old age pension fund as is required by article XXIV of the state constitution because the existing sales tax revenue already fully funds the old age pension fund.
- 9. To specify that the revenue from the temporary sales and use tax rate increase and the proceeds of the additional transportation revenue anticipation notes, including earnings on the revenue and proceeds may be retained and spent by the state, cities, and counties as voter-approved revenue changes and are exempt from all revenue, spending, and other limitations under section 20 of article X of the state constitution or any other law.
- 10. To specify that the increased sales and use tax rate is not imposed on aviation fuels.
- 11. To specify that the revenue from the temporary sales and use tax rate increase that is attributable to retail marijuana sales is not credited to the marijuana tax cash fund.
- 12. To require the department of transportation to annually report to the joint budget committee, legislative audit committee, House of Representatives transportation and energy committee, and Senate transportation committee regarding its use of revenue anticipation note proceeds and to post the reports and certain user-friendly, project-specific information on its website.
- 13. To create the transportation revenue anticipation notes citizen oversight committee to provide oversight of the expenditure by the department of transportation of the proceeds of additional revenue anticipation notes. The committee must annually report to the General Assembly's transportation legislation review committee regarding its activities and findings.

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. As a statutory change, the proposed initiative may be amended by subsequent legislation enacted by the General Assembly. Is this your intention?
3. The proposed initiative specifies that the revenue from the temporary sales tax rate increase and proceeds of the additional transportation revenue anticipation notes, including the earnings or the revenue and proceeds may "be retained and spent by the state, cities and counties as voter-approved revenues changes" and is "exempt from all revenue, spending, and other limitations under section 20 of article X of the constitution or any other law." (known as "De-Bruced")
 - a. Is it possible for this initiative alone to exclude the additional revenue from a local government's fiscal year spending limit or does that require the local government to also seek voter approval? Do all local governments want this revenue to be "De-Bruced"?
4. What do the proponents intend with the language "shall make immediately available and credit without further appropriation" in section 39-26-123 (7)(a)? Does that mean that once the revenue from the temporary sales and use tax rate increase is distributed as specified in the proposed initiative that the General Assembly no longer has the power of appropriation over that revenue?
5. With respect to the distribution of the 45% of the revenue from the temporary sales and use tax rate increase to the state highway fund:
 - a. What is priority maintenance?
 - b. What are priority construction projects?
 - c. What are multimodal capital projects?
 - d. Are these references to the department's priority list for transportation funding and for maintenance of state highways?
 - e. Are you satisfied with delegating that decision-making with respect to what projects will be funded to the transportation commission?

- f. With respect to the proposed initiative's language specified in section 43-4-206 (4.5):
 - i. What does it mean to "support toll highways"?
 - ii. What does it mean to "support toll lane construction or maintenance"?
 - iii. What does "toll revenue remains on the corridor in which it was raised" mean?
- 6. With respect to the distribution of the revenue in the multimodal transportation options fund:
 - a. With respect to proponents' section 39-26-123 (7)(a)(II), please add a reference to section 43-1-106 (8)(t) since that section and section 43-4-1103 specify how the money in the multimodal transportation options fund is to be used. In the alternative, consider combining those two statutory sections and eliminating **SECTION 17.** of the proposed initiative. From a drafting perspective, there is no reason to create a whole new part for the creation of a cash fund.
 - b. The proposed initiative says that "up to \$30 million dollars per year" may be "expended to make principal and interest payments on transportation revenue anticipation notes for those multimodal projects selected by the transportation commission where a state agency, local government or local transit agency has committed to provide required matching funds equal to the amount expended from the fund for a project."
 - i. Is it correct that "transportation revenue anticipation notes" refers to the revenue anticipation notes that the department may issue pursuant to section 43-4-705 (13)(b)?
 - ii. If so, **SECTION 15.** of the proposed initiative specifies that the proceeds from the sale of the revenue anticipation notes, in excess of the amounts needed for payment of the notes, "shall be used for the transportation projects included in the strategic transportation project investment program of the department of transportation" as required in section 43-4-714 (1) and "on priority maintenance and priority construction projects, including multimodal capital projects, as determined by the commission" as required in section 43-4-714 (2). Nothing in these statutes requires matching funds. How does this align with what the first

\$30 million of the multimodal transportation options fund is required to be used for?

- iii. How will the appropriate share of the revenue anticipation notes be determined for this purpose?
- c. The proposed initiative specifies that 85% of the remaining money in the multimodal transportation options fund be used for projects as determined by the commission in a new section 43-1-106 (8)(t)(I). Is that correct? The list in 43-1-106 (8)(t)(I) includes "studies;" , what does that refer to?
- d. The proposed initiative specifies that 15% of the remaining money in the multimodal transportation options fund be used as determined by the commission pursuant to a new section 43-1-106 (8)(t)(II). Is that correct?
 - i. Proponents' section 43-1-106 (8)(t)(II) anticipates that the **commission** creates a formula for this distribution, but 43-1-106 (8)(t)(II)(B) requires the **department** to select projects. Is that the proponents' intent?
 - ii. Proponents strike the words "in the following manner" at the bottom of page 7 of the proposed initiative, but then the proposed initiative keeps the language at the top of page 8. Why is that? What is the proponents' intent in making the amendments to section 43-4-206 (2)(a)?
 - iii. Is the reference to the "transportation advisory committee" the committee of the same name created in section 43-1-1104 (1)(a)?
 - iv. Is the reference to the "transit and rail advisory committee" a reference to the "special interim transit and rail advisory committee" referred to in section 43-1-1104 (1)(b)?
 - v. What do the proponents mean by "transit advocacy organizations"?
 - vi. What do the proponents mean by "bicycle and pedestrian advocacy organizations"?
 - vii. How is money "allocated to" a "metropolitan planning organization"?

7. With respect to the distribution of the money in the local transportation priorities fund:
 - a. Proponents' amendments to sections 43-4-207 and 43-4-208 do not appear to make sense. Assuming the proponents used the language from HB17-1242 and proposed initiative 2017-2018 #23 as guides, that bill and that initiative provided for different distributions of the increased sales tax revenue. Please explain how the distribution is expected to work for your proposed initiative, and consider rewriting sections 11 and 12 of your proposed initiative.
8. With respect to the revenue anticipation notes that the proposed initiative authorizes the department to issue:
 - a. Can the executive director choose not to issue the notes?
 - b. What are the numbers in the blanks?
 - c. Can the notes be issued in more than one issuance over several years? If so, the temporary sales tax rate increase may expire before the notes have been paid off. Is that the proponents' intent?
 - d. The proposed initiative provides that the revenues from the notes "must be expended on priority maintenance and priority construction projects, including multimodal capital projects, as determined by the commission." What are some examples of such projects? Are the proponents satisfied with the commission being delegated the authority to prioritize and distribute that revenue?
 - e. How does the commission's authority to prioritize and distribute the revenues from the notes work with the creation of the "transportation revenue anticipation notes citizen oversight committee" in the proposed initiative and the committee's responsibilities as laid out in the proposed initiative? Can the committee overrule the expenditure decisions of the department or the commission?
 - f. Why does the proposed initiative specify that the notes may be subject to redemption **with or** without penalty? Typically this language is included to specify that notes may be repaid early without penalty.
9. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative

that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.

- a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
- b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
- c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at BallotImpactEstimates.ga@state.co.us.

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. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to and stricken type, which appears as stricken type, to show language being removed from the Colorado Revised Statutes.
2. 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.
3. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "means that a person or thing is required to meet a

condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty."

4. It is standard drafting practice to use the term "except that" rather than "provided, however, that".
5. In **SECTION 5.** of the proposed initiative, section 39-26-123 (7)(a)(I) ends with the word "AND" but the subsequent (7)(a)(II) in the series does not. Was this the proponents intention or can the "AND" be moved to the second last in the series?
6. In **SECTION 7.** and **SECTION 9.** of the proposed initiative, the internal citation should be corrected to "39-26-202 (1)(b)". Also in **SECTION 9.**, the internal citations in section 43-1-106 (8)(t)(III) should be corrected to "UNDER (8)(t)(II)(A) and (8)(t)(II)(B) OF THIS SECTION ..." and "SET FORTH IN SUBSECTION (8)(t)(II) OF THIS SECTION.".
7. In **SECTION 11.** of the proposed initiative, section 43-4-207 (2)(a)(I), (2)(a)(II), and (2)(a)(III) are included in the proposed initiative but are not modified from their existing form. Was this the proponents' intent? If so, they do not need to be included, since the amending clause only includes the (2)(a) introductory portion.