

# STATE OF COLORADO

## Colorado General Assembly

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## MEMORANDUM

**TO:** Mike Spalding and Marty Neilson  
**FROM:** Legislative Council Staff and Office of Legislative Legal Services  
**DATE:** September 15, 2017

**SUBJECT:** Proposed initiative measure 2017-2018 #52, concerning state income tax.

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 Revised Statutes appear to be:

1. To lower the rate of Colorado state income tax from 4.63% to 4.6%.
2. To modify the state's income tax return filing requirements, including the format of forms, deadlines, penalties, and audit processes.

3. To dismiss all pending state income tax criminal cases and render void all prior state income tax criminal cases.
4. To modify the method for calculating the allowable maximum annual percentage change in state fiscal year spending under section 20 (7)(a) of Article X of the state constitution (TABOR).

## **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. What is the effective date of the proposed initiative?
3. The proposed initiative levies a 4.6% income tax. Current law imposes an income tax of 4.63%. Is the proposed initiative intended to reduce income tax revenue?
4. An initiative typically shows what statute or constitutional section the initiative is amending. It appears to this office that the proposed initiative intends to amend or repeal the income tax statutes in the Colorado Revised Statutes. State income tax law is currently set forth in article 22 of title 39, and much of article 21 of title 39 sets forth the administration of the income tax. Is it your intention to repeal all of those sections of law and replace it with what you have set forth in your proposed initiative? If not, please indicate on refiling or in your title board submission which statutory sections the proponents intend to repeal or amend. If the intent is to repeal all existing law and replace with only what is set forth in the proposed initiative, here are some additional questions:
  - a. Current law sets forth additions and subtractions to federal taxable income. Is it your intention to repeal those additions and subtractions?
  - b. How does the proposed initiative deal with income tax filers who pay tax in multiple states?
  - c. How does the proposed initiative deal with income tax filers who are nonresidents for purposes of Colorado income tax?
  - d. How does the proposed initiative deal with apportionment of income in the case of a part-year resident?

- e. Does the proposed initiative intend to repeal all of the income tax credits set forth in current law?
  - f. Does your proposed initiative apply to partners and partnerships, C corporations, S corporations, estates, and trusts? If not, please indicate that clearly on your resubmission or your submission to title board. If so:
    - i. Are there any additions or subtractions to federal taxable income other than as set forth in "Line 2"?
    - ii. How does the proposed initiative tax nonresident partners?
    - iii. How will apportionment of income work under the proposed initiative?
    - iv. How must two or more affiliated C corporations file their return?
    - v. How is "foreign source income" treated in Colorado?
5. The description of Line 2 and how that number is calculated implies that someone will figure out what the number is and print that number on the form.
- a. Is that correct?
  - b. Who will figure out that number?
  - c. Line 2 can be represented by the following equation:  $Y \times (\text{number of income tax returns}) = (\text{all income tax credits in 2018} + \text{all illegal and excess revenue})$ . This can also be represented as follows:
 
$$Y = (\text{all income tax credits in 2018} + \text{all illegal and excess revenue}) / (\text{number of income tax returns})$$
    - i. If Y represents the number that must be calculated, are those equations correct?
    - ii. Who determines the number of income tax returns? By what date? What about returns that are filed late?
6. The proposed initiative states that the Line 2 number "equals all income tax credits in 2018 and all illegal and excess revenue."
- a. What income tax credits does this refer to?
  - b. Is this number supposed to provide an average of all income tax credits to each person in the state? How would that be calculated?

- c. What if the person who gets the benefit of that average income tax credit number didn't qualify for the income tax credit in the first place?
  - d. What happens for the years after 2018 when income tax credits will undoubtedly have changed?
  - e. What does "all illegal and excess revenue" refer to? Is "illegal and excess revenue" the same as what's described in subsection (4) of the proposed initiative as "excess revenue"?
7. The proposed initiative states that "Colorado residents may list that amount (doubled for joint returns) or less."
- a. What if a Colorado nonresident is required to pay income tax in Colorado? What does such a taxpayer put in Line 2?
  - b. What do you mean by "or less"?
8. The following questions concern Line 3:
- a. This line presumably describes withholding, correct?
  - b. Does "attachments" refer to the W-2 statement? What else does "attachments" refer to?
  - c. What does "4.6% of income subtractions and income not from Colorado sources" mean?
    - i. What are "income subtractions"?
    - ii. What is "income not from Colorado sources"?
9. What does "the state shall start its income tax claims within one year after state and federal returns are filed or due" mean? Does this mean that the state cannot commence any audit until one year after the return is filed? What if the return is filed late?
10. What is a "civil audit"?
11. What does the proposed initiative mean by a "local civil jury"? What determines what locality the matter must be filed in? Is the proposed initiative intended to remove all administrative remedies in the case of an income tax conflict?
12. In subsection (3), the proposed initiative specifies that "all state income tax criminal cases, both prior and pending, shall be dismissed and void." Can the

decisions rendered in previous state income tax criminal cases and the decisions in any previous administrative appeals be used to determine future income tax questions filed in the civil audit and "local civil jury"?

13. Is it the proponents' intent to increase the burden of proof on the state to prove a problem with an income tax filing?
14. What does "receive three times a state overcharge, plus \$300" mean? Does the "plus \$300" apply only to the state overcharge? (i.e. if it's determined that the taxpayer has a tax deficit the state may only include interest, but no penalty?)
15. Is it correct that if a taxpayer has a tax deficit, he or she is required to pay three times the amount of the deficit?
16. Concerning the phrase "[l]ate payments bear 0.75% monthly interest and no penalty" in subsection (3):
  - a. Is it the proponents' intent to reduce the current interest rate (set as prime or prime plus certain points depending on the level of the deficiency) and instead set the interest rate as 0.75% in perpetuity?
  - b. May the General Assembly change that amount in the future?
  - c. Is a tax deficit a "late payment" that bears monthly interest?
  - d. When does the clock start ticking on "late payments" for purposes of calculating the interest charge?
17. How does the calculation described in subsection (4) of the proposed initiative fit under the single subject of the proposed initiative?
18. Does "the state shall adjust its 1993 fiscal year spending each later year only for changes..." mean that there must be an annual adjustment?
19. The following questions concern the adjustments to 1993 fiscal year spending in subsection (4) of the proposed initiative:
  - a. Article X, Section 20 (7)(a) of the Colorado Constitution limits state fiscal year spending to prior year spending, grown by inflation and the change in state population, adjusted for revenue changes approved by voters after 1991. Is the proposed initiative intended to amend this limit? If so, can a change to this constitutional requirement be accomplished in a statutory measure?

- b. Article X, Section 20 (7)(d) of the Colorado Constitution states that "[d]ebt service changes [and] reductions" are not part of any district base. Does the word "only" in subsection (4) of the proposed initiative require that debt service changes not be omitted from the annual computation of state fiscal year spending?
- c. What are "legal enterprises"?
- d. What are "fixed dollar amounts of voter-approved taxes"? Does this refer to the requirement later in paragraph (4) that "[i]ncreases shall list a fixed yearly dollar amount in their ballot titles"?
- e. In 2004, voters approved Amendment 35, which assessed a fixed 1 cent excise tax on cigarettes. Does this tax have a "fixed dollar amount" for the purpose of determining the fiscal year spending adjustment in paragraph (4)? If so, what is the amount?
- f. Since 1991, voters have approved measures that assess taxes on a percentage basis, such as the tobacco tax in Amendment 35, the tax on proceeds from extended limited gaming in Amendment 50, or the retail marijuana taxes in Proposition AA. Do these voter-approved taxes have "fixed dollar amounts" for the purpose of determining the fiscal year spending adjustment in subsection (4)? If so, what are the amounts?
- g. If a fixed dollar amount cannot be determined for a voter-approved tax enacted after 1991, is this tax omitted from the calculation of the fiscal year spending adjustment in subsection (4)? Does the measure intend that revenue collected from voter-approved taxes without a fixed dollar amount be refunded in future fiscal years?
- h. Article X, Section 20 (7)(a) of the Colorado Constitution requires the adjustment of the fiscal year spending limit for "revenue changes approved by voters after 1991." If the proposed initiative concerns the same fiscal year spending limit as imposed in the constitution, how does it account for voter-approved revenue changes that are not taxes?
- i. Does the proposed initiative intend to require the state to refund revenue that it is currently authorized to retain and spend under the excess state revenues cap created in Referendum C?

20. What does "the adjustment shall also limit yearly changes after tax year 2019 in net state income tax" mean?

21. The proposed initiative specifies that "[i]ncreases shall list a fixed yearly dollar amount in their ballot titles, start the next tax year, and expire in four years." Is this in addition to the requirements in section 20 of article X of the state constitution? Since it appears that this language is going to be included in the Colorado Revised Statutes, can the General Assembly change this requirement in the future?
22. How should a "fixed yearly dollar amount" be determined? Should this amount reflect the tax revenue anticipated in the first year of the tax, the final year, the year expected to generate the greatest amount of revenue, or the average amount expected?
23. In years for which actual revenue falls short of the fixed yearly dollar amount printed in the ballot title, does the measure intend that the fiscal year spending adjustment reflect the fixed yearly dollar amount or actual revenue from the tax?
24. Does "[e]xtension of an expiring tax rate shall have a tax increase ballot title" mean that if after four years (the expiration set forth in the previous sentence) the legislature wishes to continue the increased income tax rate that the legislature would need to seek voter approval for the increase? How is this different from what's required under section 20 of article X of the state constitution?
25. Does the requirement that the increase "start the next tax year" mean that the extension of the expiring tax would need to be filed in the third year of the four-year period of the increased tax?
26. Does the requirement that a tax rate increase "expire in four years" preclude voters from authorizing a tax rate increase that expires in fewer than four years?
27. Immediately before listing requirements for tax increases, the proposed initiative states that "[t]he 4.6% tax rate may be lowered any year." Does the sentence in subsection (4) concerning tax increases apply only to the income tax? If it applies to all taxes, would the proponents consider rephrasing this paragraph to make it clear to which tax increase measures these requirements apply?
28. The measure states that "[i]ncreases shall list a fixed yearly dollar amount in their ballot titles, start the next tax year, and expire in four years." Do these requirements apply to measures that create new taxes rather than increasing the rates of existing taxes?

29. 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](mailto: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. 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: "In Colorado Revised Statutes, **add** 39-22-130 as follows:", and "In Colorado Revised Statutes, **repeal** 39-22-104 as follows:".
2. Before the amending clause, number each section, part, etc. that is being amended or added with a section number (e.g., SECTION 1., SECTION 2.). For example:  
**SECTION 1.** In Colorado Revised Statutes, **add** 39-22-130 as follows:  
**SECTION 2.** In Colorado Revised Statutes, **repeal** 39-22-104 as follows:
3. It is standard drafting practice to use SMALL CAPITAL LETTERS to show the language being added to and strike type, which appears as ~~stricken type~~, to show language being removed from the Colorado constitution or the Colorado Revised Statutes.



4. 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."
5. In subsection (1) of the proposed initiative, you refer to "this 'Fair and Simple Tax' law". It is standard drafting practice to refer to such as a short title, and to formalize the name and the section to which it applies thusly:

THE SHORT TITLE OF THIS SECTION IS THE "FAIR AND SIMPLE TAX ACT".