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Colorado General Assembly

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MEMORANDUM

TO: Michele Haedrich and Steven Ward
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: April 3, 2024

SUBJECT: Proposed initiative measure 2023-2024 #283, concerning government fees

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 amendments to the Colorado Revised Statutes appear to be:

1. To define "fee", for purposes of article 77 of title 24, C.R.S., as "a voluntarily incurred governmental charge in exchange for specific benefit conferred on the payer, which fee should reasonably approximate the payer's fair share of the costs incurred by the government in providing said specific benefit."; and

2. To add a new statutory section to article 77 of title 24, C.R.S., that prohibits the assessment of a "fee unless the assessed amount is in compliance with C.R.S. 24-77-101."

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. With regard to section 1 of the proposed initiative:
 - a. The existing definitions section for article 77 of title 24, C.R.S., is in section 24-77-102, C.R.S., not section 24-77-101, C.R.S., which contains only legislative declarations. Section 1 should therefore add subsection (5.5) to section 24-77-102, C.R.S., not section 24-77-101, C.R.S., making the change both to the amending clause and to the statutory section number in the **bold** portion of the text of section 1.
 - b. Why does "fee" need to be defined as proposed in section 1 of the proposed initiative? What is the purpose of defining fee at all? What is the purpose of defining fee in this particular manner?
 - c. What is the intended meaning of the phrase "voluntarily incurred" in the proposed definition of "fee"?
 - i. What sort of action is required to demonstrate voluntary incurrence by a person of a particular fee?
 - ii. Does "voluntarily incurred" refer to a payer's ability to choose to make use of the program or service for which a governmental charge is imposed, from which use voluntary incurrence is inferred?
 - d. What is the intended meaning and scope of the term "governmental charge"? In addition to the state and local governments, what other entities are intended to be encompassed by this term? For example, would "charges" by any of the following be a "governmental charge" for purposes of the proposed initiative:

- i. An enterprise, as defined in section 20 (2)(d) of article X of the state constitution;
 - ii. A special purpose authority;
 - iii. A public institution of higher education;
 - iv. A special district, such as a fire protection district,
 - v. The regional transportation district;
 - vi. The scientific and cultural facilities district; or
 - vii. A private entity?
- e. How will the requirement that a fee "reasonably approximate the payer's fair share of the costs incurred by the government in providing said specific benefit" be determined, administered, and enforced?
- i. Who would make such a determination?
 - ii. Is mathematical exactitude required? If not, what would be the standard?
 - iii. Would there need to be further legislation or rule-making to provide a specific formula or standard of some kind? If so, which legislative or executive bodies should be involved in those processes?
- f. The Colorado Supreme Court has held that "a charge is a 'fee' and not a 'tax,' when the express language of the charge's enabling legislation explicitly contemplates that its primary purpose is to defray the cost of services provided to those charged." *Barber v. Ritter*, 196 P.3d 238, 250 (2008). In a subsequent footnote, the Colorado Supreme Court also noted that "a statutory charge may be labeled a fee, but in effect be a tax, if the statutory rate of the charge is unreasonably in excess of the cost of services the charge is designed to defray. The rate of fees imposed on users must bear some reasonable relationship to the cost of services provided." *Barber v. Ritter*, 196 P.3d 238, 250 (2008). How is your definition of "fee" different from the Colorado Supreme Court's? And if different, what effect does your definition have on law? Are you intending to supersede the Colorado Supreme Court's definition?

- g. The Colorado Supreme Court also held in *Barber v. Ritter* that "when determining whether a charge is a fee or a tax, courts must look to the primary or principal purpose for which the money was *raised*, not the manner in which it was ultimately *spent*." 196 P.3d 238, 249 (2008). How does your definition of a "fee" work with this decision? Would the proposed initiative affect the ability of the state to transfer fee revenues to the general fund, as was permitted by the Colorado Supreme Court in *Barber v. Ritter*?
3. With regard to section 2 of the proposed initiative:
- a. The amending clause for section 2 proposes to "add" section 24-77-108, C.R.S., with the headnote "**Prohibited fees**"; however, section 24-77-108, C.R.S., with the headnote "**Creation of a new fee-based enterprise**", already exists.
 - i. Is section 2 intended to amend existing section 24-77-108, C.R.S.? If not, the amending clause for section 2, as well as the statutory section number in the **bold** portion of the text of section 2 of the proposed initiative, should be changed to **add** section 24-77-109, C.R.S.
 - ii. How, if at all, is the prohibition on fees set forth in section 2 of the proposed initiative intended to interact with and be implemented together with the requirements set forth in existing section 24-77-108, C.R.S., regarding the creation of a new fee-based enterprise? Consider whether conforming amendments to existing section 24-77-108, C.R.S., are needed to give full effect to the purpose of the proposed initiative.
 - b. Section 2 of the proposed initiative prohibits assessment of a fee "unless the assessed amount is in compliance with C.R.S. 24-77-101."
 - i. If the intent is to require compliance with section 1 of the proposed initiative, the cross-reference, as previously noted in the comments reading section 1 of the proposed initiative, should be corrected to "section 24-77-102", which sets forth the definitions for article 77 of title 24, C.R.S.
 - ii. Are there definitions in addition to "fee" set forth in section 24-77-101, C.R.S., that are relevant to the prohibition in section 2 of the proposed initiative? If not, consider changing the

cross-reference to "section 24-77-102 (5.5)" to make the provision more specific and clear.

- c. What is the intended meaning of "person" in section 2 of the proposed initiative? Natural persons or persons and entities?
- d. What is the intended scope of the prohibition set forth in section 2 in terms of applicability, if any, to existing "governmental charges" or "fees"?
 - i. Do all existing state and local governmental charges meet the proposed initiative's definition of fees? Can the proponents provide examples of governmental charges that do not meet the definition? What would happen to any existing state and local governmental charges that fall outside of the definition?
 - ii. Will all governmental charges in existence when the proposed initiative takes effect be subject to review for compliance with the standard set forth in section 1 of the proposed initiative?
 - iii. What will be the consequence if it is determined that an existing governmental charge does not "reasonably approximate the payer's fair share of the costs incurred by the government in providing the specific benefit"?
 - iv. Will such "prohibited fees" have to stop immediately and completely?
 - v. Will such "prohibited fees" be deemed taxes for purposes of section 20 of article X of the state constitution and related statutory provisions?
 - vi. Will past payments of existing fees or charges found to violate the requirements of the proposed initiative have to be refunded? If so, how will such refunds be calculated and administered?
- e. How will the prohibition operate as applied to any newly created "fees"?
 - i. Must compliance with the requirement that the fee "reasonably approximate the payer's fair share of the costs incurred by the government in providing said specific benefit" be made at the outset of the legislative process or at some point prior to the enactment of any legislation authorizing a "governmental charge"? If so, who will be charged with determining compliance,

how will compliance be determined, and how will such an analysis be incorporated into the legislative process?

- ii. What will be the consequence if it is determined that a "governmental charge" contained in proposed legislation does not comply with this requirement? What happens to that legislation, if anything?
 - iii. What will be the consequence if such a determination is not made until after a bill becomes law? How will the requirement of the proposed initiative be enforced at this stage? Through judicial challenge to strike down the law completely as a "prohibited fee"? Through modification of the "fee" amount to comply with the requirement in section 1 of the proposed initiative?
- f. Is the proposed initiative intended to affect a state or local government's ability to assess a fine?
 - g. Does the state or a local government have the authority to adjust a fee if the cost of a program changes? Are you intending that there be any limitations on such adjustments?
- 4. Who could enforce the provisions of the proposed initiative?
 - 5. What would the consequence be for treating a charge that does not meet the definition of a fee in the proposed initiative as a fee?
 - 6. Would any fiscal or other impacts that result from the enactment of the proposed initiative on the state or local governments? If so, what would those impacts be?
 - 7. If certain fees are eliminated under the new definition and prohibition, how would the programs and services that were funded by those fees be funded?
 - 8. With regard to section 3 of the proposed initiative, the effective date of every proposed initiative is governed by section 1 (4) of article X of the state constitution, which provides that an initiative takes effect from the date "of the official declaration of the vote thereon by proclamation of the governor" not signature of the governor. Section 3 could therefore should either be eliminated or revised to reference and accurately reflect this constitutional standard for the effective date of the proposed initiative.

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, if you intend to add a new article to title 39 of the Colorado Revised Statutes, you would include the following amending clause: "In Colorado Revised Statutes, **add** article __ to title 39 as follows:".
2. As previously noted in substantive comment 2.a., the amending clause for section 1 purports to add the new defined term "fee" to section 24-77-101, C.R.S. However, section 24-77-101, C.R.S., is the legislative declaration section of article 77 of title 24, C.R.S. The references to 24-77-101 in the amending clause, and as the statutory section number in the body of section 1 of the proposed initiative, should be changed to section 24-77-102, C.R.S., which is the definitions section for article 77 of title 24, C.R.S.
3. This same erroneous cite to section 24-77-101, C.R.S., needs to be corrected in section 2 of the proposed initiative.
4. It is standard drafting practice when referencing statutory sections to include the word "section" before the number. For example, "section 24-35-204.5."
 - a. In section 2 of the proposed initiative, "C.R.S. 24-77-101" should be changed to "section 24-77-102 (5.5)".
5. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), C.R.S., and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), C.R.S., "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."
 - a. Consider whether it would make more sense in terms of the placement of the legal duty to rephrase section 2 to state something like: "A state or local government shall assess a fee only in compliance with the requirements set forth in section 24-77-102 (5.5). Any fee that does not comply with section 24-77-102 (5.5) is prohibited."