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Colorado General Assembly

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MEMORANDUM

TO: Chelsea Stallings and Katherine Stigberg
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: March 4, 2020
SUBJECT: Proposed initiative measure 2019-2020 #287, concerning creating a nicotine and vaping products 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.

This initiative was submitted with a series of initiatives including proposed initiatives 2019-2020 #287 to 292. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiatives 2019-2020 #288 to 292, 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 increase the cigarette tax by twelve cents per cigarette;
2. To allow the cigarette tax to be adjusted for inflation;
3. To remove the discount on the sale of cigarette stamps;
4. To increase the tobacco products tax by twenty-seven percent of the manufacturer's list price;
5. To remove the tobacco products distributor tax reduction;
6. To create a tax on all sales and purchases of all nicotine and vaping products that equals the total sales tax levied on tobacco products;
7. To require distributors of nicotine and vaping products to obtain a license and file quarterly returns;
8. To create the preschool programs cash fund for expanding the number of children in preschool and to require the general assembly to enact legislation for the administration of the cash fund;
9. To allow the programs funded by the tobacco education programs fund to also apply to nicotine and vaping products;
10. To create a tobacco products inventory tax;
11. To create a presumption that all charges included on an invoice of manufacturer or supplier are for the sale of tobacco products;
12. To define "delivery sale" for purposes of the cigarette tax;
13. To distribute the additional total revenue collected from the increased cigarette and tobacco products tax and the new nicotine and vaping products tax to the preschool programs cash fund, the tobacco tax cash fund, and the tobacco education programs fund;
14. Requiring state audits of the new revenue used for preschool programs; and
15. Authorizing the state to keep and spend all the revenue from the tax rate increases on cigarettes, tobacco products, and vaping and nicotine products as a voter approved revenue change.

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. 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.
3. How will the price of the cigarette stamps required in section 39-28-104, C.R.S., be determined?
4. What is the significance of the language "this tax shall be collected by the department" at the end of the introductory portion of section 39-28.5-102 (1), C.R.S., in section 4 of the initiative?
5. Proposed section 39-28.6-101 (2) states that a tax will be created for nicotine products "so that they are taxed in the same manner as tobacco products." What does it mean that nicotine products will be taxed "in the same manner as tobacco products"?
6. Are vaping products, as defined in proposed section 39-28.6-102 (7), products that contain nicotine intended for consumption by inhalation? If so, how does the definition vaping products in proposed section 39-28.6-102 (7) interact with the definition of nicotine products in proposed section 29-28.6-102 (4)?

7. Proposed section 39-28.6-102 (5) refers to "the preschool programs cash fund created in section 39-28.6-118." Should this read "the preschool programs cash fund created in section 24-22-118 (3)"?
8. What comprises "the total state tax on tobacco products" referred to in proposed section 39-28.6-103?
9. When is the nicotine products tax in proposed section 39-28.6-103 imposed and collected by the department of revenue?
10. Is it correct that, in order to have nicotine product distributors who meet the requirements of proposed section 39-28.6-105, if the measure is approved by the voters in the November 2020 election, proposed section 39-28.6-105 only allows approximately one and a half months for the department of revenue to create a nicotine products distributor license and for distributors to apply for and receive such a license?
11. If a nicotine product distributor obtains a license under proposed section 39-28.6-105 on or before June 29, 2021, is that license only valid until June 30, 2021?
12. Proposed section 39-28.6-106 (4)(b) requires the general assembly to appropriate money for the department of revenue to enforce proposed section 39-28.6-106 (4)(a). Is there a similar appropriation requirement for the department of revenue to enforce proposed sections 39-28.5-106 (1) through (3)?
13. Other than via the mechanisms in proposed section 39-28.6-107 (4), does the measure cause additional deposits to the tobacco tax enforcement cash fund that may be appropriated for the enforcement purposes in proposed section 39-28.6-106?
14. Are nicotine product and vaping distributors compensated in any way for the collection and remittance of the nicotine and vaping products tax?
15. Will proposed section 39-28.6-107 (4) be enforced by the department of revenue for nicotine products the same way that section 39-28.5-106 (4), C.R.S., is enforced by the department of revenue for tobacco products?
16. Are the funds collected under proposed section 39-28.6-107 (4)(b) distributed differently than those collected under proposed section 39-28.6-107 (4)(a)?
17. Would proposed section 39-28.6-108 apply if a distributor shipped or transported nicotine products outside of the state directly to a consumer?

18. Proposed section 24-22-118 (1)(a) and (1)(b) detail the money the state treasurer shall transfer from the general fund as dollar amounts rather than percentages of the total revenue from the taxes on cigarettes, tobacco products, and nicotine products. What happens if the total revenue from the taxes on cigarettes, tobacco products, and nicotine products drops below the total of these dollar amounts?
- a. Does the initiative require the state treasurer to transfer these amounts from general fund revenue collected from other sources?
 - b. If the initiative does not require transfers of general fund revenue collected from other sources, and the amount of tax revenue generated under the measure is less than the total amount required to be transferred to the tobacco education programs fund and the tobacco tax cash fund, the initiative appears to require that the transfer to the tobacco education programs fund occur in full before any money is transferred to the tobacco tax cash fund. Is this the proponents' intent?
19. Should the funds deposited in the general fund under proposed sections 24-22-118 (1)(b) and (2)(b) be included in the definition of "gross state cigarette tax" for purposes of section 39-22-623 (1)(a)(II)(A), C.R.S.?
20. In proposed section 24-22-118, both subsections (1)(b) and (2)(b) refer to "voter approved tax increases at the statewide election in November, 2020." Are the tax increases referred to in that language limited to the tax increases in the proposed initiative?
21. What happens if the costs of the department of revenue collecting the nicotine products tax exceed the one percent limit in proposed sections 24-22-118 (1)(c) and (2)(c)? Does the department not get any funds or do they get the full "one percent of the additional cigarette, tobacco, and nicotine taxes approved by voters at the 2020 election"?
22. For the purposes of proposed sections 24-22-118 (1)(c) and (2)(c), what compromises "the additional cigarette, tobacco, and nicotine taxes approved by voters at the statewide election in November, 2020"? Is this amount the same for purposes of proposed sections 24-22-118 (1)(c) and (2)(c)?
23. Why does proposed section 24-22-118 (2)(a) instruct the state treasurer to transfer an amount that is less than half of the amount described in proposed section 24-22-118 (1)(a)?

24. Proposed section 24-22-118 (3)(a) refers to the money credited to the preschool programs cash fund pursuant to proposed section 24-22-118 (1)(c), but not 24-22-118 (2)(c). Was this intentional?
25. What happens to the money in preschool programs cash fund if the legislation required by proposed section 24-22-118 (3)(b) is not enacted?
26. What "quality and program standards" must school-based and community-based programs meet under proposed section 24-22-118 (3)(d)(I)?
27. Does proposed section 39-28.5-113 allow payments received by the department within 20 days of the tax rate increase to be reduced by one percent of what they otherwise would be, such that the amount paid need not exceed 99 percent of the amount that would otherwise be owed?
28. At the time of payment, a taxpayer may not be certain of the date at which his or her payment will be received by the department. Will a taxpayer be able to make a payment of 99 percent of taxes that would otherwise be owed if the taxpayer believes that his or her payment will be received by the department within 20 days of the tax rate increase?
29. Does proposed section 39-28.5-114 only apply to manufacturers and suppliers of tobacco products?
30. Does the restriction on manufacturer's list price in proposed section 39-28.5-114 (2) differ from the restriction in the definition of manufacturer's list price in section 39-28.5-101 (3), C.R.S.?
31. Article X, section 20 (3)(c) of the Colorado constitution requires that the title of a ballot measure that enacts a phased in tax include the final, full fiscal year dollar increase. Given that proposed section 39-21-123 (1), C.R.S., increases the cigarette excise tax rate in perpetuity, in what fiscal year is the tax rate fully phased in?

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. Although the new 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.