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Colorado General Assembly

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MEMORANDUM

TO: Jon Caldara and Monica Vondruska

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: March 6, 2020

SUBJECT: Proposed initiative measure 2019-2020 #293 concerning Tobacco Tax Revenue for New State Preschool Program

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 and the Colorado Revised Statutes appear to be:

1. To require the General Assembly to enact legislation to enable a state department to create and administer a Colorado preschool program;
2. To require the creation of a preschool cash fund;

3. To modify the current constitutional distribution of revenue from the constitutional tax on cigarettes and tobacco products ("Amendment 35") by:
 - a. Requiring \$100 million to be appropriated to the preschool cash fund, if there is sufficient revenue;
 - b. Limiting other uses of the money to tobacco education, cessation and prevention programs and to fund health, education, research, and treatment programs directly related to tobacco use; and
 - c. If there is any money left after the \$100 million appropriation and the existing 16% allocation for school and community based and statewide programs; requiring the General Assembly to allocate the remainder of the Amendment 35 revenue within the narrower purposes;
4. To prohibit the tax revenues from Amendment 35 from being used for lobbying the state and local governments;
5. To require 75.5% of the money the state receives under the Master Settlement Agreement to be deposited in the preschool cash fund;
6. To prohibit a local government that bans tobacco and nicotine products from receiving a portion of income tax collections, which for purposes of the state budget are referred to as the cigarette rebates, and to instead require this money to be deposited in the preschool cash fund;
7. To require sales and use tax receipts that are attributable to sales of tobacco and nicotine products to be deposited in the preschool cash fund, instead of the general fund; and
8. To require 15% of the statutory tax on cigarettes and tobacco products to be deposited in the preschool cash fund, instead of the general fund.

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. Do you intend for the first three subsections of proposed section 22 to have any legal effect?
3. The phrase "tobacco and tobacco products" in proposed article X, section 22 (1) of the Colorado Constitution is redundant. Do you mean "cigarettes and tobacco products", which is the phrase used in Amendment 35?
4. Is the "Tobacco review committee" the "tobacco education, prevention, and cessation grant program review committee" created in section 25-3.5-804 (5)(a), C.R.S., or another committee that it is not created in law?
5. If the state exceeds its fiscal year spending limit, how is that evidence that new programs should be funded by existing revenues?
6. The following questions and comments relate to proposed section 22 (4):
 - a. Is "tobacco education, cessation and prevention programs" a shorthand for the programs identified in article X, section 21 (5)(c) of the Colorado Constitution?
 - b. The phrase "health, education, research and treatment programs" is not used in article X, section 21 (5) of the Colorado Constitution. Which subsections in said constitutional provision are you referring to? Which programs do you intend to continue to receive Amendment 35 funding?
 - c. To the extent that the existing revenues from Amendment 35 are to be used "to fund a new preschool program for the children of Colorado as set forth herein with no new taxes:", do you intend:
 - i. That the money must be used for an altogether new program and none of the revenues may be used for any existing preschool programs?
 - ii. After the approval of voters of this initiative, would the state be prohibited from establishing a new tax for this new preschool program? For example, could the state subsequently establish a .1% state sales and use tax increase, with prior voter approval, to be used for the program?
 - d. Do you intend for proposed section 21 (4) to limit how the general assembly reallocates the revenue Amendment 35 as required by proposed section 21 (5)?

- e. You might consider directly amending the allocation in Amendment 35 to reflect your new allocation instead of doing it in a new section.
7. The following questions and comments relate to first sentence of proposed section 22 (5):
- a. The first sentence is introduced by the phrase "Notwithstanding any other provision of law", and it requires the General Assembly to enact legislation relating to a Colorado preschool program. Is there a current provision of law that prohibits the General Assembly from doing this? Unless there is a conflicting constitutional provision, is this phrase necessary given that a constitutional provision would supersede a conflicting statutory provision?
 - b. The first sentence is also introduced by the phrase "using existing revenues". Does this phrase refer to the program established by the General Assembly, as opposed to the requirement that the General Assembly enact authorizing legislation?
 - c. What is a "Colorado preschool program"?
 - d. There already exists a state-funded early childhood education program administered by the Colorado Department of Education called the Colorado Preschool Program. Consider changing how the initiative references this new "Colorado preschool program" to make clear that the revenue is being used for a new program and not to fund the existing Colorado Preschool Program.
 - e. What is the voter's intent regarding administration?
 - f. Do you intend for the December 31, 2021, deadline to apply to the General Assembly's enactment of authorizing legislation, or for the program to begin?
8. The following questions and comments relate to second sentence of proposed section 22 (5):
- a. This provision requires the General Assembly to appropriate \$100 million every year beginning January 1, 2022. It is unclear how this calendar year requirement will work given that the state appropriates money on a fiscal year basis, and, therefore, you should consider making this a fiscal year requirement.

- b. Do you intend for this provision to supersede article X, section 21 (5) of the Colorado Constitution?
 - c. Does this sentence create a preschool cash fund, or require the General Assembly to create one?
 - d. Article X, section 21 (5) of the Colorado Constitution requires the General Assembly to appropriate money "for a preschool cash fund." As used in this sentence, is the "appropriation" direction for the state treasurer to deposit revenue received from the Amendment 35 tax revenue to the preschool cash fund?
 - e. Is money in the preschool cash fund required to be used for the Colorado preschool program? Is that actually required in the proposed initiative?
 - f. It is standard drafting practice to state that a cash fund is created in the state treasury, not in the office of the state treasurer.
 - g. This provision establishes two requirements for the Amendment 35 revenue: \$100 million to be appropriated to a preschool cash fund and 16% of the revenue for specified tobacco-related programs. If there is just over \$119 million of revenue, then there would be enough money for those two uses alone. What happens if the Amendment 35 revenue is less than \$119 million? Does the 16% requirement take priority because it is an exception to the \$100 million requirement?
9. The following questions and comments relate to third sentence of proposed section 22 (5):
- a. Does this reallocation only apply if there is more than \$119 million in Amendment 35 revenue?
 - b. It seems that the proposed initiative intends to repeal the Amendment 35 allocations, establish 2 required allocations, and if there is any Amendment 35 revenue remaining, to allow the General Assembly to allocate the remainder of the Amendment 35 revenue for uses identified in the proposed initiative. Why refer to the "percentages set forth in section 21 of this article"? Given the allocations specified in the proposed initiative, are those percentages still relevant?
 - c. Are "the purposes set forth herein," those identified in proposed section 22 (4)? Is the preschool program a purpose?

- d. Are there any limits on how the General Assembly reallocates the remainder of the revenue?
 - e. Could the General Assembly allocate any of the remainder to the new preschool program, which is identified as a purpose of the proposed section 22, or is the \$100 million a cap on the amount the General Assembly can appropriate to that fund?
10. The fourth sentence of proposed section 22 (5) requires the General Assembly to "enact such legislation." Does "such legislation" refer to legislation to reallocate the percentages for the remainder of the Amendment 35 revenue?
 11. The General Assembly is twice required to enact legislation "no later than December 31, 2021." This deadline would arguably limit the General Assembly from enacting legislation after that date to amend legislation enacted prior to that date. Is that your intent?
 12. The proposed initiative adds the requirement that the General Assembly "shall ensure that the total revenue attributed to the preschool cash fund as approved by the voters shall be the maximum allowable under [a]rticle XXIV of the state [c]onstitution". None of the Amendment 35 tax revenue is subject to article XXIV of the state constitution, and therefore, that article does not establish any limit on the amount of Amendment 35 revenue that can be contributed to the preschool cash fund. Therefore, is it your intent to make this revenue subject to said article? If not, then you should remove that provision.
 13. Does the prohibition on lobbying apply to state agencies and any person that receives money from a state agency?
 14. How will a state agency know if a person that receives a grant from the Amendment 35 money uses it for lobbying?
 15. Is there any penalty if Amendment 35 money is used for lobbying?
 16. Does proposed section 22 (6) create requirements for the authorizing legislation referred to in proposed section 22 (5)?
 17. Proposed section 22 (5) refers to "preschool program" while proposed section 22 (6) uses the plural "programs." Was that difference intentional?
 18. The following questions and comments relate to proposed section 22 (6):
 - a. What "quality and program standards" must the "school-based and community-based programs" meet?

- b. What "community needs" are to be prioritized?
 - c. Must all of the programming help prepare children for kindergarten? For instance, if preschool programs start at birth, is there even programming, let alone programming to prepare a child for kindergarten?
 - d. Some community-based providers include kindergarten in their program offerings. When you say that funds must be used for administration that "will support and strengthen the diversity of birth to kindergarten service providers," do you mean to exclude providers that include kindergarten in their offerings?
 - e. Can the Amendment 23 money in the preschool cash fund be used for the existing early childhood systems and initiatives that are coordinated with the newly created program?
 - f. Is there currently "evidence-based parent, family, and community engagement"? What are examples of such engagement?
 - g. Must all of the identified goals be met? Is it possible for one program to satisfy all of those goals?
 - h. Will there be sufficient money in the preschool cash fund to administer a program that fosters all of these goals?
19. The following questions and comments relate to section 2 of the proposed initiative:
- a. Proposed section 22 appears to only relate to the allocation of Amendment 35 tax revenues. Section 24-75-1104.5 relates to the allocation of money the state receives under the Master Settlement Agreement ("MSA"). Therefore, how is the new allocation of the MSA money done "in accordance with" proposed section 22?
 - b. The MSA money is currently allocated on a fiscal year basis, but the proposed initiative establishes a new allocation on January 1, 2022. How will this provision modify the appropriations made for the fiscal year 2021-22?
 - c. Is there a reason that proposed section 24-75-1104.5 (1.7)(e) does not specify that 75.5% of the MSA money is deposited in the preschool cash fund, instead of the remainder?

- d. For fiscal year 2021-22 there is expected to be about \$75 million of MSA funds, which means \$13.5 million will be used for tobacco education, prevention, and cessation purposes under the children's basic health plan. Is that your intent?
- e. The children's basic health plan trust created in section 25.5-8-105, C.R.S., can only be used for the purposes set forth in article 8 of title 25, C.R.S. Under 25.5-8-109 (5)(b), health care providers who provide care under the plan are required to implement policies regarding the integration of evidence-based tobacco use treatments into the regular health care delivery system. Do you expect 18% of the MSA money to be used for this purpose? Is it possible to use approximately \$13.5 million for that purpose?
- f. The MSA reads in part as follows: "The funds provided to the State of Colorado under Section IX of the Agreement are compensation to be held in trust, with specific expenditures to be determined by the General Assembly and Governor through the normal appropriation process. It is the intent and recommendation of the parties to this Agreement that such funds be used for public health purposes only, including but not limited to, State and local governmental entity health service programs, medical research, and tobacco-related health programs."¹ Is using 75.5% of the MSA proceeds for preschool programs consistent with the consent decree? Could the Participating Manufacturer's sue the state to enforce the consent decree?
- g. What will happen to all the programs that will have their funding eliminated?

20. The following questions and comments relate to section 3 of the proposed initiative:

- a. Is the following description correct: If a city enacts a ban on nicotine products, then the portion of money that the city would have received will instead be credited to the preschool cash fund, and this allocation will not affect the distributions to other local governments?

¹ Consent Decree and Final Judgment, Case No. 97-CV-34-32, November 25, 1998, § VI.D.

- b. A local government that bans vaping would not be eligible for the distribution in section 39-22-623 (1)(a)(I)(B), C.R.S., which is based on a portion of the gross state cigarette tax. Is that correct?
- c. "Tobacco and nicotine products" is not defined in section 39-22-623. What does this term mean? Does it include "cigarettes," which is already used in this section?
- d. Does the phrase "in any form" refer to "bans" or "tobacco and nicotine products"?
- e. Would a city ordinance banning possession of cigarettes constitute a ban? Would one that bans sales of cigarettes to minors constitute a ban? Would one that bans only flavored types of tobacco and nicotine products constitute a ban for purposes of this proposed amended section?
- f. Distributions are made on a fiscal year basis. Is it your intent that the distribution for the first half of the fiscal year 2021-22 may be different than the second half?
- g. Who is supposed to certify the amount of revenues from local governments that have enacted a ban on tobacco and nicotine products? Would a state agency know which local governments that have enacted such a ban?

21. The following questions and comments relate to section 4 of the proposed initiative:

- a. Subsection (1) of section 39-26-123, C.R.S., creates definitions that are used in the rest of the section. Proposed section 39-26-123 (1)(a.8) is not a definition. Subsection (3) of section 39-26-123, C.R.S., establishes the distribution of the net revenue from the state sales and use tax. The proposed change would appear to fit better within this subsection.
- b. What are "tobacco and nicotine products"? Does it include cigarettes? Is it limited to products that include tobacco and nicotine or does it include accessories, such as rolling papers, a pipe, a vape pen, etc.? In the absence of establishing a definition, the state treasurer may use a different definition than the one you intend.
- c. Is it your intent that this transfer would come from the 15% that would otherwise go to the general fund?

- d. This allocation does not appear to apply if there are any use taxes collected on tobacco and nicotine products. Is that your intent?
 - e. When remitting sales taxes, a vendor remits payment only, without identifying the source of sales. Accordingly, it is unclear if the state treasurer will be able to calculate this net revenue and make the required transfers. To avoid this issue, you might consider requiring a state agency to estimate this amount and then notify the state treasurer, so that he or she can make the requisite transfers, or establishing a percentage in statute, based on current estimates, that represents this portion of the net revenue. (The latter approach is what the General Assembly did when allocating net revenue from "sales and use taxes attributable to sales or use of vehicles and related items" to the HUTF.)
22. Section 39-28-110, C.R.S., currently allocates 100% of the statutory cigarette revenues, and so there is no remaining 15%. To the extent that you intend for the new 15% allocation in section 5 of the proposed initiative to replace the existing 15% allocation to the general fund, you should amend the existing language as you have done in section 6 of the proposed initiative.
23. What does it mean that the proposed initiative "is self-implementing"? Given that you have delegated authority to the General Assembly to enact several programs or allocations, is the initiative self-implementing?
24. Currently, the title board has set a title for a number of initiatives that would increase the existing cigarette and tobacco products taxes and create a new tax on nicotine products, and the majority of this additional tax revenue is allocated for preschool programs. Given that the intention to fund new preschool programs "with no taxes" is in a declaration, these initiatives and your initiative are arguably not in conflict. Accordingly, if one of these initiatives and your initiative are both on the ballot and approved by voters, do you still intend for the state to use all of the identified statutory revenue sources for preschool programs?
25. 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. 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 the constitution of the state of Colorado, **add** section 22 to article X as follows:" and "In Colorado Revised Statutes, **amend** 24-75-1104.5 as follows:".
2. The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

X-X-XXXX. Headnote. (1) Subsection.

(a) Paragraph

(I) Subparagraph

(A) Sub-subparagraph

(B) Sub-subparagraph

(II) Subparagraph

(b) Paragraph

(2) Subsection

(3) Subsection

3. It is standard drafting practice when referencing statutory sections to include the word "section" before the number. For example, "section 24-35-204.5."
4. 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 constitution or the Colorado Revised Statutes. It is unnecessary to use SMALL CAPITAL LETTERS in an amendment clause.
5. It is standard drafting practice to only capitalize proper nouns. The following words do not need to be capitalized: "Article," "Section," "Title," "Referendum."
6. It is standard drafting practice to put the name of any state or federal act in quotation marks. For example, the federal "Food, Drug, and Cosmetic Act" and the federal "Family Smoking Prevention and Tobacco Control Act."
7. It is standard drafting practice to spell out "United States" rather than abbreviate it as "U.S."
8. It is unnecessary to bold the numbers and letters of subsections, paragraphs, subparagraphs, and sub-subparagraphs.
9. The phrase "as well as" is not typically used as a conjunction in a series of three or more items. You might consider using "and" in proposed article X, section 22 (1) to separate the three regulatory improvements identified.
10. In section 2 of the proposed initiative, the proponents are only amending subsection (1.7) of section 24-75-1104.5. The amending clause should reflect that. Further, the proponents have relettered paragraphs to adjust for stricken language. There seems to have been errant relettering made to (h) and (j), which do not require it because they are being stricken.
11. In section 4 of the proposed initiative, the proponents state that subsection (1)(a) of section 39-26-123 is being amended, but it appears that is not the case. Subsections (1)(a), (1)(a.5), and (1)(a.7) are in the initiative but are unchanged. Please remove. Subsection (1)(a.8) is being added to section 39-26-123, and the amending clause should reflect that. Please also note the above substantive comment about the lack of a definition in newly added (1)(a.8), and how that may be better located elsewhere.
12. In section 5 of the proposed initiative, subsection (1) of section 39-28.5-108 is incorrectly labeled as (1)(a). Please correct. Additionally, please insert the word

"section" before "39-28.5-102.5" to make the language consistent with what is currently in statute.