

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

January 21, 2003

TO: Gary D. VanderArk and D. Christopher Sherwin

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2003-2004 #13, concerning Increased Tobacco Taxes

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 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 appear to be:

1. To add a new section 21 to article X of the Colorado constitution entitled "Tobacco taxes for health protection."
2. To declare the following:
 - a. Over four thousand, five hundred Coloradans die each year from tobacco addiction, making it the lead cause of preventable death in our state;

- b. Over seventy-eight thousand children in Colorado are regular smokers, and that addiction will cause a premature death on the part of one-third of them;
 - c. Health care costs in Colorado that are attributable to tobacco use exceed one billion dollars per year;
 - d. Tobacco taxes are an effective means of preventing and reducing tobacco use;
 - e. Coloradans are increasingly unable to afford the rising costs of health care, health insurance, and prescription drugs; and
 - f. That the purpose of the proposed amendment is to increase tobacco taxes in order to promote the public health and to generate revenues to help children and families afford health insurance by expanding the children's basic health plan, developing a prescription drug assistance program, reducing the cost of health insurance for small employers in Colorado, and providing programs to prevent and reduce tobacco use.
3. To define terms as follows:
- a. "Cigarettes" shall have the same meaning as provided in section 39-28-202(4) of the Colorado Revised Statutes, as such provision existed on January 1, 2003;
 - b. "Manufacturer's list price" shall have the same meaning as provided in section 39-28.5-101(3) of the Colorado Revised Statutes, as such provision existed on January 1, 2003;
 - c. "Small employer" shall have the same meaning as provided in section 10-16-102(40) of the Colorado Revised Statutes, as such provision existed on January 1, 2003;
 - d. "Tobacco products" shall have the same meaning as provided section 39-28.5-101(5) of the Colorado Revised Statutes, as such provision existed on January 1, 2003.
4. To impose the following taxes, effective January 1, 2004
- a. A statewide cigarette tax on the sale of cigarettes by wholesalers at the rate of four cents per cigarette; and
 - b. A statewide tobacco products tax on the sale, use, consumption, handling, or distribution of tobacco products by distributors at the rate of fifteen percent of the manufacturer's list price thereof.
5. To specify that the taxes imposed by the proposed amendment shall be in addition to any other taxes, existing as of January 1, 2003, or thereafter adopted, on the sale or use of cigarettes by wholesalers and on the sale, use, consumption, handling, or distribution of tobacco products by distributors.

6. To direct the state department of revenue to collect the taxes imposed by the proposed amendment in the same manner as such other taxes imposed on cigarettes and tobacco products.
7. To specify that the aggregate revenues created by the proposed amendment shall be used for the following purposes, notwithstanding any other provision of law:
 - a. To provide replacement revenue for the state's general fund, equivalent to any inflation-adjusted reduction in the revenues from cigarette and tobacco product taxes that were in effect on January 1, 2003, during the first two years after this proposed amendment becomes effective; and
 - b. To be appropriated annually by the General Assembly, from the funds remaining after the required allocation of revenue, only in the following proportions and for the following purposes:
 - I. Thirty-six percent of the revenues shall be appropriated for the purpose of creating a prescription drug assistance program to increase access to prescription drugs for Coloradans who would not otherwise have access to them;
 - II. Thirty-six and six-tenths percent of the revenues shall be appropriated for the purpose of expanding the children's basic health plan, as provided by law on January 1, 2003, to include more children and the families of children covered by such program;
 - III. Seven and four-tenths percent of the revenues shall be appropriated for the purpose of creating a health care reinsurance pool for small employers in order to lower the health care insurance costs for such businesses and their employees;
 - IV. Nineteen percent of the revenues shall be appropriated for purposes of school and community-based and statewide tobacco education programs designed to reduce initiation of tobacco use by children and youth, promote cessation of tobacco use among youth and adults, and reduce exposure to second-hand smoke, and for purposes of evaluation of such programs, with such programs designed in accordance with best practices for tobacco control programs as established by the Federal Centers for Disease Control and Prevention;
 - V. One percent of the revenues shall be appropriated for purposes of administration and enforcement of this program, but if the costs of such administration and enforcement are less than one percent of the revenues, the excess funds shall revert proportionately in a manner that is consistent with the allocation set forth above.
8. To require that, notwithstanding any other provision of law, revenues raised pursuant to the

proposed amendment that are appropriated for the purposes set forth in subsection (4) (b) (I) through (4) (b) (V) of the proposed amendment but are not expended in any fiscal year shall be carried over and expended in the following fiscal year according to the purpose for which they were originally appropriated.

9. To specify that the revenues appropriated pursuant to subsection (4) the proposed amendment shall be in addition to and not instead of funds otherwise appropriated by the General Assembly for such programs as of January 1, 2003.
10. To specify that neither the taxes imposed by the proposed amendment, nor any taxes existing as of January 1, 2003, on the sale of cigarettes by wholesalers or on the sale, use, consumption, handling, or distribution of tobacco products by distributors, nor any formula, existing as of January 1, 2003, for the distribution to municipalities and counties of revenues attributable to the statewide cigarette tax existing as of January 1, 2003, shall be repealed or reduced by the General Assembly.
11. To require that notwithstanding any other provision of law, all revenues raised or received pursuant to the proposed amendment shall be excluded from fiscal year spending, as that term is defined by section 20 of article X of the state constitution, and the corresponding spending limits upon state government and all local governments receiving such funds.
12. To state that the proposed amendment shall be self-executing, and that any conflicting constitutional or statutory provisions shall be declared inapplicable to the extent of such conflict.
13. To specify that the proposed amendment shall become effective on July 1, 2004.

Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

Technical questions:

1. Concerning the last sentence of subsection (1) of the proposed amendment, would the proponents consider changing "develop" to "developing", "reduce" to "reducing", and "provide" to "providing" in order to be grammatically consistent within the sentence?
2. Concerning subsection (2) (a) through (d):
 - a. Would the proponents consider removing the words "the term" before each definition in order to remain consistent with standard drafting practices?
 - b. Would the proponents consider changing the first letter of the first word in each subsection to a capitol letter? Would the proponents be willing to make similar changes where necessary in the rest of the proposed amendment?

3. Concerning subsection (3) (b) of the proposed amendment, for clarity, would the proponents consider replacing "herein" with "of this section" so the first line to reads "The taxes imposed by subsection (3) of this section..."? Would the proponents be willing to make similar changes where necessary in the rest of the proposed amendment?
4. Concerning the introductory portion to subsection (4) of the proposed amendment, would the proponents consider adding the phrase "for the following purposes" at the end of the sentence?
5. Concerning the introductory portion to paragraph (b) of subsection (4) of the proposed amendment, would the proponents consider replacing the word "paragraph" with "subsection" in order to be consistent with other cross references throughout the proposed amendment?
6. Concerning subsection (4) (b) (II) of the proposed amendment, are the proponents referring to the Children's Basic Health Plan Act created in article 19 of title 26, C.R.S.? If so, would the proponents be willing to add a cross reference to this article for clarity?
7. Concerning subsection (4) (b) (IV) of the proposed amendment:
 - a. Would the proponents consider stating the purpose for which the funds shall be appropriated to school, community based, and statewide programs? For example, "...such revenues shall be appropriated for the purpose of assisting/ funding/ expanding, etc. school and community and statewide programs..."?
 - b. Do the proponents intend the phrase "school and community based" programs to refer to one category of program or two different categories of programs? If it refers to two different categories of programs, would the proponents consider changing that phrase to read "school, community based, and statewide tobacco education programs..."?
 - c. For clarity, would the proponents consider restructuring the sentence as follows: "Nineteen percent of such revenues shall be appropriated to fund and evaluate school and community and statewide tobacco education programs designed in accordance with the best practices for tobacco control programs as established by the federal centers for disease control and prevention, to reduce initiation of tobacco use by children and youth, promote cessation of tobacco use among youth and adults, and reduce exposure to second-hand smoke;"?
 - d. Would the proponents consider adding the word "and" after "Prevention;" to indicate that it is the second to last item in a series?
8. Concerning subsection (4) (b) (V) of the proposed amendment, for consistency, would the proponents consider changing the reference to "paragraphs (1) - (6)" to "paragraphs (I) through (V)"?
9. Concerning subsection (5) of the proposed amendment:

- a. Would the proponents be willing to change the reference to "paragraphs "(4) (b) (I)-(V)" to "subsections (4) (b) (I) through (V)"?
 - b. Would the proponents be willing to replace the phrase "carried over" with the phrase "carried forward" in order to be consistent with constitutional and statutory language?
 - c. For clarity, would the proponents consider inserting the phrase "not revert to the general fund of the state but instead shall" after the word "shall" and before "be" in this subsection so that the sentence reads "...but are not expended in any fiscal year shall not revert to the general fund of the state but instead shall be carried over and expended..."?
10. Concerning subsection (8) of the proposed amendment, would the proponents be willing to replace the phrase "by operation of" with the phrase "pursuant to" to be consistent with standard constitutional and statutory language?

Substantive questions:

1. Concerning subsection (1) of the proposed amendment, from what source did the proponents take the statistics cited concerning smoking related deaths, the number of children who smoke in Colorado, and health care costs that are attributable to tobacco? Are these statistics generally accepted as accurate?
2. Concerning subsection (3) (a) (I) of the proposed amendment, the definition of "cigarettes" pursuant to section 39-28-202 (4) (b), C.R.S. includes "roll-your-own" tobacco that is likely to be offered to or purchased by consumers as tobacco for making cigarettes. Section 39-28-202 (4) (c), C.R.S. states that 0.09 ounces of roll-your-own tobacco shall constitute one individual cigarette. Do proponents anticipate any problems with taxing roll-your-own tobacco per cigarette rather than by weight?
3. Concerning subsection (4) (a) of the proposed amendment:
 - a. What do the proponents mean by the phrase "replacement revenue for the state's general fund..."? Do the proponents anticipate a great reduction in the revenues from cigarette and tobacco product taxes? To what would such a reduction be attributed?
 - b. Is it the proponents' intent that in the third year after the proposed amendment becomes effective, and every year thereafter, that the revenues collected from the tax imposed pursuant to the proposed amendment be distributed only for the purposes specified in subsection (4) (b)? Would the proponents consider clarifying how the revenues will be distributed in the years following the first two years after the effective date of the proposed amendment?
 - c. On what information shall the inflation adjustment be based? Do the proponents intend that the adjustment be based on the consumer price index for the Denver-

Boulder-Greeley area? Would the proponents consider specifying their intent for the inflation adjustment?

- d. In which year do the proponents intend for the measure of "revenues from cigarette and tobacco product taxes" in the state's general fund to start? Would the proponents consider specifying the year on which the inflation-adjusted reduction in revenues shall be based?
 - e. Do the proponents intend that the measure of revenues be based on the state fiscal year or on the calendar year?
4. Concerning subsection (4) (b) of the proposed amendment:
- a. To what state agency or other entity shall the thirty-six percent of the revenues collected pursuant to the proposed amendment be appropriated for purposes of creating a prescription drug assistance program as directed in subsection (4) (b) (I) of the proposed amendment? Does such a program already exist? If not, do the proponents intend to give the General Assembly the discretion to determine how the money should be appropriated? Would the proponents consider specifying to what agency or entity the funds shall be appropriated, or in the alternative, give the General Assembly the authority to appropriate the moneys for the creation of such a program in its discretion?
 - b. To what state agency or other entity shall the seven and four-tenths percent of the revenues collected pursuant to the proposed amendment be appropriated for purposes of creating a health care reinsurance pool for small business employers, as directed in subsection (4) (b) (III) of the proposed amendment? Does such a program already exist? If not, do the proponents intend to give the General Assembly the discretion to determine how the money should be appropriated? Would the proponents consider specifying to what agency or entity the funds shall be appropriated, or in the alternative, give the general assembly the authority to appropriate the moneys for the creation of such a program in its discretion?
 - c. Do the proponents have specific school, community based, or statewide tobacco education programs in mind to receive the revenues pursuant to subsection (4) (b) (IV)? Do the proponents intend that the moneys be used to fund existing programs, the creation of new programs, or both? Is it within the General Assembly's discretion to determine how the moneys should be distributed? Would the proponents consider including more direction as to how these funds shall be distributed?
 - d. Subsection (4) (b) (V) states that one percent of the revenues shall be appropriated for administration and enforcement of the programs specified in subsection (4) (b). What do the proponents mean by the phrase "administrative expenses"? How are "administrative expenses" to be distinguished from other expenses associated with providing the programs and services specified in subsection (4) (b)? Do the proponents anticipate that one percent of the revenue collected pursuant to the

proposed amendment will be sufficient to cover the costs of all of the "administrative expenses" associated with these programs? If not, from what source will the programs get any additional funding necessary for administrative costs?

5. Concerning subsection (5) of the proposed amendment:
 - a. The proposed amendment states that revenues that are not expended in "any fiscal year" shall be carried over and expended in the "following fiscal year". Do the proponents intend the phrase "any fiscal year" to mean the fiscal year in which the revenues were collected?
 - b. Do the proponents intend that the unexpended moneys be carried over for only one fiscal year and require that they be expended in "the following fiscal year", or can the moneys be carried over from year to year until they are expended?
 - c. What is the proponents' intent for any interest earned on revenues collected? Shall it be expended for the purposes specified in the proposed amendment or does the General Assembly have discretion to determine how such interest will be expended? Would the proponents consider specifying how any interest earned on the revenues collected will be utilized?

6. Subsection (7) of the proposed amendment states generally, that the General Assembly shall not repeal any tax imposed on cigarettes and tobacco products or any distribution formula for revenues from such taxes. The tax proposed by the proposed amendment is constitutional and, if enacted, cannot be amended without a vote of the people. However, many of the provisions relating to cigarettes and tobacco are statutory. Do the proponents anticipate any conflict between the provisions of subsection (7) of the proposed amendment and the General Assembly's authority to amend statutory law? May the General Assembly otherwise amend such taxes as long as they are not repealed or reduced?