

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

May 5, 2004

**TO:** Michael Norton and Mike Coffman

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**SUBJECT:** Proposed initiative measure 2003-2004 #162, concerning state rainy day fund - education funding.

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 initiative appear to be:

1. To add a new section 21 titled "Colorado rainy day fund" to article X of the Colorado constitution that would:
  - a. Require the state of Colorado to create a reserve fund known as the Colorado rainy day fund on January 1, 2005;
  - b. For each fiscal year beginning with fiscal year 2005-06, require the state to deposit an

amount equal to one percent of the amount of general fund appropriations from the prior fiscal year into the Colorado rainy day fund;

- c. Starting in fiscal year 2005-06, require the state to annually deposit an amount equal to the one percent increase for K-12 spending required under Amendment 23 into the Colorado rainy day fund;
- d. Starting in fiscal year 2006-07, require the state to annually deposit an amount equal to the one percent increase for K-12 spending required under Amendment 23 into the Colorado rainy day fund;
- e. Allow surplus revenue for fiscal years 2005-06 and 2006-07 to be used, via the Colorado rainy day fund, to balance the budget in fiscal years 2005-06 and 2006-07;
- f. Starting in fiscal year 2007-08, require repayment of the surplus revenue borrowed to balance the budget in fiscal years 2005-06 and 2006-07 by using an additional amount equal to one percent of the prior year's general fund appropriations out of the rainy day fund;
- g. Starting in fiscal year 2005-06, set the interest payable on surplus revenue borrowed to balance the budget at a rate annually adjusted to equal the TABOR inflation rate;
- h. Temporarily suspend the repayment requirement for borrowed surplus revenues when TABOR revenues fall below the TABOR revenue limit until TABOR revenues reach the TABOR revenue limit;
- i. Specify that when inflation exceeds six percent, the statutory spending limit is equal to the TABOR revenue limit;
- j. Starting in fiscal year 2007-08, allow the General Assembly to access moneys in the Colorado rainy day fund when TABOR revenues fall below the TABOR revenue limit to bring TABOR revenues up to the TABOR revenue limit;
- k. Allow the General Assembly to appropriate additional moneys into the Colorado rainy day fund;
- l. Cap the balance in the Colorado rainy day fund at fifteen percent of the prior year's general fund appropriations, and require any moneys above the fifteen percent cap to flow into the permanent school fund;
- m. Require moneys in the Colorado rainy day fund that are expended to stabilize the budget to be counted as TABOR revenue and to cause the readjustment in the TABOR base, and specify that moneys in the Colorado rainy day fund that go to the permanent school fund

are exempt from TABOR; and

- n. Specify that cash funds may be utilized for budget stabilization via the Colorado rainy day fund, and require repayment of borrowed cash funds, with interest as specified by the state treasurer.

### **Comments and Questions**

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

#### **Technical questions:**

1. To conform to standard drafting practice in Colorado, would the proponents consider using lower case letters for the first letter of words in the headings of the subsections in the measure other than the first word? For example, in the heading for subsection (1), would the proponents consider using lower case letters for the first letter of the words "rainy", "day", "fund", and "created"?
2. To conform to standard drafting practice in Colorado, would the proponents consider standard capitalization practices by using lower case letters for the first letter of words that are not proper names? For example, "general fund", "rainy day fund", "general assembly", "permanent school fund", and "state treasurer" should start with lower case letters.
3. To conform to standard drafting practice in Colorado, would the proponents consider removing abbreviations used in the measure? For example, instead of using the abbreviation "FY", would the proponents consider using the term "fiscal year"? Instead of using "K-12", would the proponents consider using the term "kindergarten through twelfth grade"?
4. To conform to standard drafting practice in Colorado, would the proponents consider expressing numbers, other than dates, in words? For example, would the proponents consider expressing "1%", "6%", and "15%" in words as "one percent", "six percent", and "fifteen percent", respectively?

#### **Substantive questions:**

1. What is the proponents' rationale for the proposed initiative?
2. The proposed initiative, among other subjects, requires the creation of the Colorado rainy day fund, specifies the moneys to be deposited into the fund, specifies the uses of moneys in the fund, requires a decrease in the required funding increases under Amendment 23, allows the use of surplus revenues to balance the budget and requires the repayment of any borrowed surplus revenues from moneys in the rainy day fund, specifies the interest on the repayment of borrowed surplus revenues, suspends the repayment when TABOR revenues are less than the TABOR revenue limit, specifies the conditions under which the General Assembly may access moneys in

the rainy day fund, caps the balance in the rainy day fund and specifies excess moneys are to flow to the permanent school fund, specifies when moneys in the rainy day fund are counted as TABOR revenues and when they are not counted as TABOR revenues, and allows the use of cash funds for budget stabilization. Section 1 (5.5) of article V of the Colorado constitution mandates that no measure proposed by petition shall contain more than one subject that shall be clearly expressed in its title. What is the single subject contained within the text of the proposed initiative?

3. With regard to subsection (1) of the proposed initiative:
  - a. The heading states that the Colorado rainy day fund is "created." However, the text of subsection (1) requires the "state of Colorado" to create a reserve fund to be known as the Colorado rainy day fund. Do the proponents intend the proposed initiative to actually create the Colorado rainy day fund? If so, would the proponents consider modifying the language in the text of subsection (1) to actually create the fund, rather than require the creation of the fund?
  - b. What is the intent of creating the rainy day fund on January 1, 2005, when pursuant to subsection (2) of the proposed initiative, no moneys will be deposited into the fund until July 1, 2005?
  
4. With regard to subsection (2) of the proposed initiative:
  - a. Is there a difference between the phrases "Effective July 1, 2005" and "beginning in FY 2005-06"? July 1, 2005, is the first day of the 2005-06 state fiscal year, so it appears that the two phrases may be repetitive. Would the proponents consider eliminating one of the phrases if they are intended to address the same fiscal year?
  - b. Is the deposit in the rainy day fund required only in the 2005-06 fiscal year, or is it the proponents' intent to require the deposit in the 2005-06 fiscal year and each fiscal year thereafter? If the deposit is intended to occur in subsequent fiscal years, would the proponents consider clarifying that intent?
  - c. How is "General Fund appropriations" defined? Does it include positive and negative adjustments (i.e., supplemental bills) to the general fund appropriations in the annual general appropriation act (i.e., the "Long Bill")?
  - d. Do the proponents intend the deposits to occur after the 15% cap described in subsection (12) is exceeded? In other words, if in a particular fiscal year a deposit equal to 1% of the prior year's general fund appropriations would cause the balance in the rainy day fund to exceed the 15% cap on the fund balance, would the full deposit still be required, with excess moneys above the cap flowing to the permanent school fund, or could the deposit be decreased to an amount that would not cause the balance in the fund to exceed the 15% cap? Would the proponents consider modifying the language of the proposed

initiative to make their intent clearer?

- e. When do the proponents intend the deposit into the rainy day fund to occur? Would the full deposit be required on the first day of the fiscal year? Could it be spread over the entire fiscal year? Could it be made on the last day of the fiscal year? If the full deposit is required on the first day of the fiscal year, do the proponents anticipate a cash flow problem during the fiscal year?
  - f. From what fund are the moneys required to be deposited into the rainy day fund to come? Are the moneys required to come from the general fund, or can the moneys come from cash funds?
  - g. Can moneys in the state education fund created in section 17 (4) of article IX of the Colorado constitution be deposited into the rainy day fund? Section 17 (4) (b) of article IX of the Colorado constitution states that moneys in the state education fund "may only be used" to comply with the increased public education funding requirements in section 17 (1) of article IX of the Colorado constitution and for other public education-related purposes specified in section 17 (4) (b). If the proponents intend that moneys in the state education fund can be deposited into the rainy day fund, do the proponents need to include language in the proposed initiative that makes an exception to the limitations on the uses of state education fund moneys pursuant to section 17 (4) (b) of article IX of the Colorado constitution?
5. With regard to subsections (3) and (4) of the proposed initiative:
- a. Do the proponents intend the term "Amendment 23" to refer to section 17 of article IX of the Colorado constitution? If so, would the proponents consider using the proper citation to the section and article of the constitution to which reference is being made? While section 17 of article IX of the Colorado constitution may be commonly referred to as "Amendment 23", that is the amendment number that was assigned to the ballot measure that appeared on the statewide ballot in the 2000 general election, but is not used in the Colorado constitution.
  - b. What is meant by the phrase "and thereafter"? Is it the proponents' intent to require the deposit of an amount of moneys required to fund the one percent increase in fiscal years after the 2005-06 fiscal year? If so, what is the purpose of the language in subsection (4), which appears to be identical to the language in subsection (3), except it refers to the 2006-07 fiscal year "and thereafter". If "and thereafter" is not intended to apply to subsequent fiscal years, what is the meaning of that phrase?
  - c. Is it the proponents' intent to specify that beginning in fiscal year 2006-07, an additional one percent will be deposited into the rainy day fund (i.e., for a total of two percent) and that Amendment 23 spending requirements will be reduced by the same amount?

- d. The language in subsection (3) appears to eliminate the one percentage point increase required by section 17 (1) of article IX of the Colorado constitution and refers to the increase for "K-12 spending". The language of section 17 (1) of article IX of the Colorado constitution requires funding for "public education from **preschool** through the twelfth grade" to increase. [Emphasis added]. Do the proponents only intend the moneys required to increase kindergarten through twelfth grade by an additional one percent be deposited in the rainy day fund, or do the proponents also intend that moneys used to increase **preschool** funding by one percent be deposited into the rainy day fund? Would the proponents consider clarifying the intent?
- e. Section 17 (1) of article IX of the Colorado constitution requires the statewide base per pupil funding for preschool through twelfth grade public education and the total state funding for categorical programs to increase by at least the rate of inflation plus an additional one percent. Do the proponents intend the language "the 1% increase for K-12 spending scheduled under Amendment 23" to apply to both the required increase in the statewide base per pupil funding **and** the total state funding for all categorical programs? Would the proponents consider clarifying the language of the proposed initiative to specify whether the one percent increase requirement is eliminated for both the statewide base per pupil funding and the categorical program funding?
- f. Would the one percent increase requirement be eliminated in the 2005-06 fiscal year only, or would it also be eliminated in subsequent fiscal years for as long as the one percent increase is currently required, i.e., through the 2010-11 state fiscal year? Would the requirement that the statewide base per pupil funding and the categorical programs funding increase by the rate of inflation continue to apply in the 2005-06 fiscal year and subsequent fiscal years?
- g. As described above, section 17 (4) (b) of article IX of the Colorado constitution allows the use of moneys in the state education fund to satisfy the inflation plus one percent funding increase requirements of section 17 (1) of article IX of the Colorado constitution. If the additional one percent increase requirement is eliminated, do the proponents intend that the amount needed to fund the one percent increase that is to be deposited into the rainy day fund must come from the state education fund?
- h. If, by depositing into the rainy day fund an amount equal to the amount needed to fund the one percent requirement under section 17 (1) of article IX of the Colorado constitution, the balance of the rainy day fund would exceed the 15% cap described in subsection (12) of the proposed initiative, would the full amount need to be deposited into the rainy day fund, or could the deposit be reduced so as not to exceed the 15% cap? If the deposit could be reduced, could the amount not deposited into the rainy day fund be used to fund a portion of the increase required by section 17 (1) of article IX of the state constitution?

6. With regard to subsection (5) of the proposed initiative:
- a. What is meant by the phrase "surplus revenue"? Are surplus revenues state revenues in excess of the state fiscal year spending limit as specified in section 20 (7) (a) of article X of the Colorado constitution that are required, pursuant to section 20 (7) (d) of article X of the Colorado constitution, to be refunded to taxpayers in the next fiscal year? If so, would the proponents consider modifying the language in the proposed initiative to clarify what is meant by "surplus revenues"?
  - b. What is meant by the phrase "Surplus revenue in FY 2005-06 and FY2006-07"? Pursuant to section 20 (7) of article X of the Colorado constitution, revenues in excess of the state fiscal year spending limit are required to be refunded in the next fiscal year. Is "surplus revenue" excess revenue collected in the prior fiscal year and required to be refunded to taxpayers in the current fiscal year, or is it excess revenue collected in the current fiscal year and required to be refunded in the next fiscal year? Specifically, is "surplus revenue in FY 2005-06" revenue that is collected by the state in fiscal year 2004-05 and required to be refunded in fiscal year 2005-06, or is it revenue collected in fiscal year 2005-06 and required to be refunded in fiscal year 2006-07?
  - c. If surplus revenue in fiscal year 2005-06 is excess revenue that is collected in fiscal year 2005-06, the state may not know if there will actually be excess revenues collected in fiscal year 2005-06 until the end of that fiscal year or later. How do the proponents intend surplus revenue in fiscal year 2005-06 to be used in fiscal year 2005-06 if the existence of "surplus revenue" is not known?
  - d. What is meant by the phrase "via the Colorado Rainy Day Fund"? Do the proponents intend that surplus revenue would be deposited into the rainy day fund and then used to balance the state budget? Would the proponents consider using clear language, and avoid using the term "via", to specify the intent of this provision?
  - e. Surplus revenue may be used (via the rainy day fund) to balance the budget. What does "balance the budget" mean, since expenditures can be cut to "balance the budget"? Is it the intent of the proponents to allow surplus revenues to be used to raise general fund appropriations to the statutory six percent limit? If excess state revenues are transferred to the general fund to balance the budget, would the TABOR spending limit be adjusted upward by a corresponding amount? If excess state revenues are transferred in subsequent fiscal years, would surplus revenue only include those revenues exceeding the higher (re-based) TABOR spending limit?
  - f. What do the proponents mean by the phrase "The Colorado Rainy Day Fund will take the surplus from FY 2005-06 and FY 2006-07"? Is it the proponents' intent that the total amount of any revenues in excess of the state fiscal year spending limit for the specified year is to be deposited into the rainy day fund? Could the surplus revenues be used to

satisfy the deposit required in subsection (2) of the proposed initiative? Would the deposit of surplus revenues be considered a voter-approved revenue change for purposes of calculating future state fiscal year spending limits pursuant to section 20 (7) (a) and (7) (d) of article X of the Colorado constitution?

7. With regard to subsection (6) of the proposed initiative:

- a. To whom is the repayment of the borrowed surplus revenue made? If the repayment is to the taxpayers, in what manner is the repayment to be made? Do the proponents intend the repayment to operate as a refund of excess revenue and to be distributed to taxpayers in the manner specified in statute, i.e., through the various refund mechanisms enacted by the General Assembly? If, in any year in which the repayment is made, the state is required to refund revenues collected in the prior year, would the moneys required to be repaid be added to the moneys required to be refunded, and the total amount be refunded under the current refunding mechanisms in state statute? Could the amounts be added together so as to satisfy a monetary threshold that triggers a mechanism that refunds excess revenues to certain taxpayers?
- b. Would the state be allowed to make the repayment of borrowed moneys over a period of several fiscal years? Can the repayment take place over numerous fiscal years even if there is a sufficient balance in the rainy day fund to make the repayment in one fiscal year? Is the state required to deplete the rainy day fund to make the repayment?

8. With regard to subsection (7) of the proposed initiative:

- a. What is meant by the phrase "the TABOR inflation rate"? Is the "TABOR inflation rate" intended to mean the inflation rate as defined in section 20 (2) (f) of article X of the Colorado constitution, i.e., the percentage change in the United States Bureau of Labor Statistics Consumer Price Index for Denver-Boulder, all items, all urban consumers? Would the proponents consider clarifying the meaning of "TABOR inflation rate"?
- b. Surplus revenues used to balance the budget will carry an interest rate annually adjusted to the TABOR inflation rate. What inflation rate will be used to calculate the interest due on the outstanding surplus revenue? Is it the prior fiscal year's inflation rate or the current fiscal year estimate? Does the repayment specified in subsection (6) include the interest costs specified in subsection (7), or are they separate amounts to be paid? Would the proponents precisely explain how interest expenses would be determined?
- c. Do the proponents intend the state to repay borrowed surplus revenues with interest? Would the proponents consider stating that intent more clearly?
- d. Do the proponents intend the interest rate to apply annually to any borrowed surplus revenues that have not been repaid?



- e. Do the proponents intend the interest rate to be equal to the inflation rate?
9. With regard to subsection (8) of the proposed initiative:
- a. What is meant by the term "TABOR revenues"? Do the proponents intend "TABOR revenues" to refer to all revenues included in "fiscal year spending", as defined in section 20 (2) (e) of article X of the Colorado constitution? If so, would the proponents consider defining the term as such or using the terminology used in section 20 (2) (a) of article X of the Colorado constitution to make the intent of the phrase clear?
  - b. What is meant by the term "TABOR revenue limit"? Do the proponents intend "TABOR revenue limit" to refer to the state fiscal year spending limit set forth in section 20 (7) (a) of article X of the Colorado constitution? If so, would the proponents consider stating the intent more clearly?
  - c. Under the current provisions of section 20 of article X of the Colorado constitution, the state fiscal year spending limit is calculated based on the prior year's limit or the prior year's revenues, whichever is less. Accordingly, when revenues drop or do not grow by an amount equal to inflation and population growth over the prior year's limit, the next year's allowable limit is "ratcheted down" to the lower amount of actual revenues. Under current law and the circumstance described above, when would "TABOR revenues reach the TABOR revenue limit" if the new limit is based on the prior year's revenues, not the prior year's limit? Would the proponents please explain how this provision is intended to operate?
  - d. If the repayment of borrowed surplus is suspended, is the requirement triggered again when revenues reach the specified level?
10. With regard to subsection (9) of the proposed initiative:
- a. What is meant by the "statutory spending limit"? Are the proponents referring to the statutory limitation on the annual growth in general fund appropriations specified in section 24-75-201.1 (1) (a) (II), C.R.S.? Section 24-75-201.1 (1) (a) (II), C.R.S., specifies that the total state general fund appropriations are limited each fiscal year to the lesser of five percent of Colorado personal income or six percent over the prior year's total state general fund appropriations for the prior fiscal year. Do the proponents intend the provisions of subsection (9) to alter this limitation on general fund appropriations?
  - b. The inflation rate for the prior calendar year is usually announced by the federal government in February. If the inflation rate for the 2005 calendar year is 6.5%, as announced in February 2006, in what fiscal year would the statutory spending limit be modified? Do the proponents intend that the general fund appropriations limit would be

modified in fiscal year 2005-06, which would only have four remaining months, or would the limit be modified in fiscal year 2006-07?

- c. What is meant by the "TABOR revenue limit" as used in subsection (9)? Do the proponents intend the statutory general fund appropriations limit to be modified to be equal to the total amount of allowable revenues under section 20 (7) (a) of article X of the Colorado constitution, or do the proponents intend the growth in general fund appropriations to equal the allowable percentage change in state fiscal year spending, i.e., an amount equal to inflation plus the percentage change in state population? Would the proponents consider clarifying the intent of this provision?

11. With regard to subsection (10) of the proposed initiative:

- a. How does subsection (10), which appears to preclude the use of moneys in the rainy day fund until fiscal year 2007-08, operate in conjunction with subsection (5), which appears to allow the use of surplus moneys that are deposited into the rainy day fund to balance the state budget? Is subsection (5) an exception to the limitation in subsection (10)? Would the proponents consider clarifying how these two provisions are intended to operate?
- b. If the General Assembly accesses moneys in the rainy day fund, is there any limitation on how those moneys can be used? Can the General Assembly appropriate the moneys in the rainy day fund for any purpose?
- c. What is meant by the phrase "to bring TABOR revenues up to the TABOR revenue limit"? Do the proponents intend this language to operate as a limit on the amount of moneys in the rainy day fund that can be accessed by the General Assembly? In other words, if the "TABOR revenue limit" is \$10 billion, and "TABOR revenues" are \$9.5 billion, would the General Assembly only be able to access \$500 million from the rainy day fund?
- d. If rainy day funds are accessed, is there any requirement that the moneys expended from the fund be replaced or repaid? Is there any limit, other than as described above, on the amount of moneys that may be expended from the rainy day fund?

12. With regard to subsection (11) of the proposed initiative:

- a. What is meant by "additional funds"? Does this mean the General Assembly can appropriate moneys from any other fund, including the general fund or a cash fund, to the rainy day fund?
- b. Does the cap specified in subsection (12) limit the amount of "additional funds" that may be appropriated to the rainy day fund?

13. With regard to subsection (12) of the proposed initiative:

- a. When is the determination made regarding the balance in the rainy day fund and whether the moneys in the fund exceed the 15% cap? Is the determination to be made on an annual basis or more frequently?
  - b. What is the "permanent school fund"? Do the proponents intend excess moneys to be transferred to the "public school fund" created in section 3 of article IX of the Colorado constitution?
  - c. How would the "flow" of moneys in the rainy day fund to the permanent school fund happen? Would the state treasurer be required to periodically transfer moneys over the 15% cap into the permanent school fund? How often would the transfer occur?
14. With regard to subsection (13) of the proposed initiative:
- a. In the first sentence, the term "resources" is used, and later in the same sentence, the term "funds" is used. In this sentence, do "resources" and "funds" have the same meaning? If so, would the proponents consider using the term "moneys" or other consistent terminology to avoid confusion?
  - b. Does the phrase "coming out" of the rainy day fund mean moneys that are expended or appropriated from the fund? Would the proponents consider rephrasing this sentence to more clearly state the meaning?
  - c. What is meant by the phrase "will cause a readjustment in the TABOR base"? What is the "TABOR base"? How is it currently calculated and how does this provision readjust the calculation of the TABOR base?
  - d. This provision appears to require moneys expended from the rainy day fund for purposes of "budget stabilization" to be "counted as TABOR revenue". Are moneys that are deposited into the rainy day fund counted as TABOR revenue? If so, would this provision require the moneys in the rainy day fund to be counted twice as TABOR revenue?
  - e. What is meant by "budget stabilization"? Do the proponents intend moneys expended from the fund to "balance the budget in FY 2005-06 and FY 2006-07", as allowed in subsection (5), to constitute "budget stabilization"? Do the proponents intend moneys accessed from the rainy day fund "whenever TABOR revenues fall below the TABOR revenue limit", as allowed by subsection (10), to constitute "budget stabilization"? Would the proponents consider defining the term "budget stabilization" to make the meaning of this provision clearer?
  - f. The second sentence appears to exempt moneys that are transferred from the rainy day fund to the permanent school fund from the TABOR limit. Would the moneys, when

expended from the permanent school fund, also be exempt from the TABOR limit? Would the proponents consider clarifying their intent?

15. With regard to subsection (14) of the proposed initiative:
  - a. What is the intent of the phrase "Cash funds may be utilized for budget stabilization only via the Colorado rainy day fund"? What is "budget stabilization"? How are cash funds used "via" the rainy day fund? Would the proponents please explain the meaning of this provision?
  - b. If cash funds are "borrowed", when does the repayment have to occur? Can it occur over a period of fiscal years? Does it have to occur in the fiscal year after the funds are borrowed? Who determines when and how the repayment occurs? Does this provision apply only to cash funds borrowed after the proposed initiative becomes effective?
  - c. Does the state treasurer only determine the amount of interest, or does the treasurer also determine the repayment method? Is this an unlawful delegation of a legislative function?