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MEMORANDUM

February 15, 2011

TO: Carol Hedges and Marijo Rymer

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #13, concerning a fair income tax system

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.

This initiative was submitted with a series of initiatives including proposed initiatives 2011-2012 #13 to #18. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiatives 2011-2012 #14 to #18, except as necessary to fully understand the issues raised by the 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 appear to be:

1. On and after January 1, 2012, to impose a graduated state income tax on federal taxable income on individuals, estates, and trusts as specified in a schedule of rates;
2. To require the adjustment of the income brackets in the specified schedule of rates each income tax year by the percentage change in Colorado personal income;
3. On and after January 1, 2012, to raise the flat rate tax on each domestic and foreign C corporation to seven percent of Colorado net income;
4. To specify that revenues raised by the income tax imposed by the proposed initiative constitute a voter-approved revenue change and may be collected, kept, and spent without regard to other limits in the constitution or other law and to specify the manner in which such revenue may be spent;
5. To specify that revenues raised by the income tax imposed by the proposed initiative be spent only for paying the costs of education, higher education, health care, and public safety;
6. To specify that at least 90% of the revenues raised by the taxes imposed as a result of the proposed initiative be spent on services for Colorado residents and not administrative costs;
7. To require the general assembly to establish a citizen's oversight committee to assure that such revenues are spent in accordance with the constitution;
8. To require the director of research of the legislative council to prepare an annual report concerning the amount of revenue raised and spent as a result of the proposed initiative; and
9. To specify that the provisions of the proposed initiative supercede conflicting provisions of the Colorado constitution and to require the general assembly to adopt implementing legislation, as needed.

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. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, this phrase should be added to the beginning of the proposed initiative.

2. For the proposed initiative, the amending clause should read: "Article X of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:".
3. It is standard drafting practice to insert a left tab at the beginning of the first line of each new section, subsection, paragraph, or subparagraph, including amending clauses and section headings. It is also standard practice to bold the section number and headnote.
4. It is standard drafting practice for the first subsection to immediately follow the headnote on the same line instead of the first subsection appearing on a separate line from the headnote. For example:

Section 22. A fair income tax system. (1) THE PEOPLE OF COLORADO FIND THAT IN ORDER TO MAKE COLORADO TAXES FAIRER . . .
5. Constitutional provisions are usually divided into component parts using the following structure: Subsection, or, for example, "(1)", followed by paragraphs, or, for example, "(a)" followed by subparagraphs, or, for example, "(I)", ending with sub-subparagraphs, or, for example, "(A)". In the proposed initiative, consider adding "(a)" after "(2)" and then making the unlabeled paragraph following "(II)" into "(b)".
6. It is standard drafting practice to use SMALL CAPITAL letters rather than ALL CAPS to show the language being added to the Colorado constitution.

Note that although the text of the proposed initiative should be in small capital letters, a large capital letter should be used 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. However, it is unnecessary to capitalize "general assembly" in the proposed initiative. For example: COLORADO
7. Commas need to be used in a series before the conjunction.
 8. Numbers should be spelled out, with the exception of citations and charts that refer to dollar amounts or percentages. For example: "in accordance with section 1-2-701 (2) shall be punished by a fine not to exceed **five hundred dollars.**"

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. You specify that the income tax changes commencing on or after January 1, 2012, but what

- will be the effective date of the proposed initiative?
3. Is the proposed initiative intended to be revenue neutral or increase/decrease revenue to the state?
 4. The following questions relate to the election at which the proposed initiative is to be submitted to the voters:
 - a. At which election do the proponents anticipate that the secretary of state will place this initiative on the ballot?
 - b. Section 1-41-102, Colorado Revised Statutes, specifies that initiatives that "concern state matters arising under section 20 of article X of the state constitution" may be submitted at an odd-year statewide election. Does the proposed initiative concern a state matter arising under section 20 of article X of the Colorado constitution?
 - c. By superceding or effectively repealing the requirement in section 20 (8) (a) that all income shall be taxed at one rate, does this mean that the measure also concerns matters that do not arise under section 20 of article X? Would this cause the measure to be placed on the 2012 general election ballot?
 5. The proposed initiative is a major shift in taxation policy that would likely need changes in the Colorado revised statutes. How does that timing work with respect to this being on the ballot in November 2011? Consider the fact that the votes are not certified by the secretary of state until the end of December or early January.
 6. As a change to the Colorado constitution, the proposed initiative may only be amended by a subsequent amendment to the constitution. All amendments to the constitution require voter approval. Is this your intention?
 7. Why not specify the rates in the Colorado revised statutes rather than clogging up the constitution with information that will be difficult to change in the future?
 8. The following questions relate to your choice of placement for the constitutional amendment in your proposed initiative:
 - a. Why do you create a new constitutional section in title X when you could amend section 17, which is specifically related to income tax and allows for a graduated income tax?
 - b. Why do you not amend section 20 (8) (a) of article X of the constitution to remove the requirement that all taxable net income is taxed at one rate?
 9. Does the proposed initiative limit the ability of the general assembly to pass an emergency income tax pursuant to section 20 (6) of article X of the Colorado constitution?
 10. The following questions relate to the language in the proposed initiative that the "revenues raised by the taxes imposed pursuant [to] this section shall constitute a voter approved revenue change and may be collected, kept and spent notwithstanding any other limits in the constitution or other law."
 - a. What do you mean by this?

- b. Do you mean, in effect, all income tax revenues collected by the state? Only the net increase in revenues collected as a result of the adoption of the proposed initiative?
 - c. If the revenues are granted or otherwise transferred by the state to another governmental entity subject to section 20 of article X, would revenues be counted for purposes of determining the other entity's fiscal year spending?
 - d. How do you intend the voter-approved revenue raised by this measure to interact with the TABOR limit and the Referendum C Cap? Do you intend that the voter-approved revenue raised by this measure augment or be contained within revenue currently retained as a result of Referendum C?
11. For purposes of the requirements of subsection (2) of the proposed initiative, what entity do you intend would calculate the amount of revenue raised by this measure?
12. The following questions relate to the part of the proposed initiative that specifies that the revenues raised by the taxes imposed are to be spent only for paying the costs of education, higher education, health care and public safety. Currently individual income taxes make up approximately fifty-nine percent of the state's general fund revenues and the share of general fund revenue attributable to corporate income taxes is approximately six percent.
- a. Are you requiring those tax revenues, now in the form of a graduated individual income tax and an increase in corporate tax, to be kept outside of the general fund and earmarked for only the purposes you describe?
 - b. Do you see it as a problem that those purposes are specified in the constitution and could foreseeably tie the hands of future general assemblies? For example, what if several of the state's bridges collapse and the department of transportation needs an immediate infusion of general fund revenue, what do you suggest?
 - c. What exactly do you mean by those particular purposes? For example, do you mean only the finance portion of K-12 education or do you mean to include specific program expenditures? Does public safety include corrections? What about human services?
 - d. Given the unpredictable nature of income tax revenues, do you anticipate any difficulties for the state adopting a budget each year subject to this restriction when it does not know what income tax revenues will be?
13. Does the proposed initiative in any way impact the requirement that a percentage of income tax be deposited in the state education fund pursuant to section 17 (4) of article IX of the Colorado constitution?
14. The following questions relate to the requirement of the proposed initiative that 90% of the revenues be spent for services:
- a. What do you mean when it says "at least 90% of the revenues raised shall be spent on services for Colorado residents and not administrative costs"?
 - b. Does this mean that the remaining 10% is to be used for administrative costs?
 - c. What do you mean by "administrative costs"?
 - d. How would this be tracked and measured?
 - e. How do you define "services"?
 - f. What do you mean by "Colorado residents"?

15. The following questions relate to the creation of a "citizen's oversight committee":
 - a. What role will the citizen's oversight committee have?
 - b. How many citizens are required to be on the committee?
 - c. What sort of background must the committee members have?
 - d. What about political party considerations?
 - e. Who will provide staff assistance to the committee?
 - f. Will the committee members be paid for their work on the committee? If so, how much?
 - g. What does the committee do if it finds that the "such revenues" have not been "spent in accordance with this section"? What kind of a vote is required to have such a finding? What authority does the committee have?
 - h. Should the oversight committee be able to take public testimony?
 - i. Could the formation of the committee by the general assembly be considered an unlawful delegation of legislative powers?
 - j. How will the expenses of the committee be funded?

16. The following questions relate to the "legislative report":
 - a. Should the report be approved by the general assembly?
 - b. May a designee of the "director of research of the legislative council" help create the report?
 - c. Are you looking for a total revenue received amount or one broken down by corporate and individual income tax revenues?
 - d. Should you allow the legislative council to collaborate with the department of revenue, office of state planning and budgeting, and the joint budget committee for purposes of preparing the report?
 - e. What do you mean with "may be amended thereafter as necessary"? This is an annual report because it is required after a fiscal year in which the state receives revenues. What kind of amendments are you envisioning?

17. The chart in the proposed initiative specifies "federal taxable income as modified in subsections (3) and (4) of this section". What does this refer to? Subsection (3) of the proposed initiative sets forth the rate chart and subsection (4) of the proposed initiative specifies the new rate for C corporations. How are those modifications?

18. The following questions relate to the schedule of tax rates:
 - a. Does a joint federal return include married filing jointly returns? Does it include any other returns?
 - b. Does a head of household federal return include any returns other than Colorado head of household returns?
 - c. Does the schedule for all other individuals, estates, and trusts include returns for those married filing separately? What Colorado returns, in particular, do you envision this schedule applying to?

19. The following questions relate to the requirement that the income brackets in the schedule are to be adjusted each year:
 - a. Such annual updates will likely affect revenues, perhaps even resulting in an increase.

- What effect does section 20 of article X of the constitution have with respect to those changes?
- b. Would the change be considered a tax rate increase requiring voter approval to change?
 - c. Who makes the adjustments? The general assembly? The department of revenue? Must the changes be made in the constitution, the revised statutes, or rule?
 - d. Why is Colorado personal income used as the adjustment factor instead of other factors such as inflation?
 - e. What is meant by "any successor index?"
 - f. Is it your intention that income brackets be increased or decreased depending on an increase or decrease in personal income?
 - g. Should the change in personal income be calculated as the most recent two calendar years for which data is available?
 - h. Personal income data is revised periodically. Should the adjustments to the brackets be revised as well? If so, how often?
20. Is it your intention that the single rate individual income tax specified in section 39-22-104, C.R.S. be superseded by this new graduated income tax rate?
 21. The following questions relate to the proposed initiative's change with respect to the flat rate used to calculate the income tax of C Corporations:
 - a. Section 39-22-301 (1) (d) (I) (I), C.R.S. specifies the current flat income tax rate for C Corporations. Is it your intention that the single rate tax of 4.63% be superseded by this new rate?
 - b. Section 39-22-301 (1) (d) (II), C.R.S., defines "income from sources within Colorado". Is it your intention to supersede the corporate taxation sections in the revised statutes completely or is this proposed initiative only affecting the rate?
 - c. If it is only affecting the rate, have you considered just amending section 39-22-301, C.R.S.?
 22. Section 39-22-104, C.R.S., specifies that the federal taxable income be modified (increased or decreased) as specified in that statute. Is it your intention that those modifications be eliminated?
 23. Does this proposed initiative have any effect on any income tax credits specified in article 22 of title 39, C.R.S.?
 24. Would the general assembly be prohibited from enacting exemptions, credits, grants, or any other form of relief that in some way mitigates or eliminates the effect of the proposed measure on taxpayers?
 25. Except as specifically stated, does the proposed initiative otherwise modify the administration of the income tax by the department of revenue?
 26. You specify that the provisions of the proposed initiative supersedes conflicting provisions of the constitution, what about conflicting provisions of the revised statutes?

27. What are the consequences for failing to comply with the provisions of the proposed initiative? Do you intend for anyone in particular to have or not have standing to enforce its provisions? Would the state be subject to paying any amounts if it is found to be in violation?