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MEMORANDUM

April 5, 2011

TO: Senator Rollie Heath and Richard Valenty

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #25, concerning an increase in state 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.

Earlier versions of this proposed initiative, proposed initiative 2011-2012 #19 and proposed initiative 2011-2012 #22, were the subject of memoranda dated March 11, 2011, and March 23, 2011, respectively. Proposed initiative 2011-2012 #19 was discussed at a public meeting on March 14, 2011, and proposed initiative 2011-2012 #22 was discussed at a public meeting on March 25, 2011. The comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meetings, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed initiative appear to be:

1. For income tax years beginning on or after January 1, 2012, but prior to January 1, 2017, to impose a five percent tax on the federal taxable income, as adjusted pursuant to Colorado law, of every individual, estate, and trust.
2. For income tax years beginning on or after January 1, 2012, but prior to January 1, 2017, to impose a five percent tax on the Colorado net income of each domestic C corporation and foreign C corporation.
3. Beginning January 1, 2012, and ending December 31, 2016, to impose a three percent sales tax on all taxable sales of commodities and services in the state and a three percent use tax on the taxable storage, use, or consumption of tangible personal property purchased at retail in the state.
4. To state that the additional revenue raised by the tax increases referenced above shall constitute a voter-approved revenue change and may be collected, kept, and spent notwithstanding any other limits in the Colorado constitution or other law.
5. To state that the additional revenue raised by the tax increases referenced above shall be spent only for the costs of public education from preschool through the twelfth grade and public postsecondary education.
6. To state that the additional revenue raised by the tax increases referenced above shall be allocated in addition to, and not as a substitute for, moneys otherwise appropriated by the general assembly, which shall be in an amount not less than the amount appropriated for fiscal year 2011-12 for the costs of public education from preschool through the twelfth grade and public postsecondary education.

Technical Comments

The technical comments and questions set forth in the review and comment memorandum on proposed initiative 2011-2012 #19 are applicable to proposed initiative 2011-2012 #25 and, as such, will not be repeated. However, the following new technical comments and questions have arisen:

1. It is standard drafting practice to include a space between the subsection number, paragraph letter, or other subdivision in the citation of a cross-reference within the Colorado Revised Statutes as well as in an amending clause. For example, in section 1 of the proposed initiative, write "39-22-301 (1) (d) (I) (J)" rather than "39-22-301(1)(d)(I)(J)".
2. It is standard drafting practice to keep hyphenated statutory references and words on one line, whether the reference is in statutory language or an amending clause. In section 1 of the measure, there is a statutory citation that is split between two lines. The amending clause in section 2 also contains a reference that is split between two lines. Finally, in the amending clause for section 3, the word "SUB-SUBPARAGRAPH" should be on a single line.

3. The term "voter approved", as used in section 1 of the proposed initiative, should be hyphenated and written as "voter-approved".
4. When referring to the Colorado constitution in statute, it is standard drafting practice to refer to it as the "state constitution". Please consider adjusting the reference to the Colorado constitution in section 1 of the proposed initiative accordingly.
5. It is standard drafting practice to use the term "postsecondary" rather than "post-secondary".
6. In section 2 of the proposed initiative, the headnote for section 39-22-104, Colorado Revised Statutes, appears to be missing some language that currently exists in statute. Please consider rewriting the headnote as follows:

"39-22-104. Income tax imposed on individuals, estates, and trusts - single rate - definitions - repeal. (1.9) SUBJECT TO . . ."

7. The amending clause for section 2 of the proposed initiative should include a comma after the word "SUBSECTION". Similarly, the amending clause for section 3 should include a comma after the word "Statutes" and a comma after the word "SUB-SUBPARAGRAPH".
8. It is standard drafting practice to only capitalize the first word in a headnote, unless the headnote contains proper nouns or other terms that are normally capitalized. In the headnotes for sections 39-22-301 and 39-26-106, Colorado Revised Statutes, respectively, the words "tax imposed" and "sales tax" should not be capitalized.

Substantive Comments and Questions

The substantive comments and questions set forth in the review and comment memorandum on proposed initiatives 2011-2012 #19 and 2011-2012 #22 are applicable to proposed initiative 2011-2012 #25 and, as such, will not be repeated. However, the following new substantive questions have arisen:

1. The review and comment memo for proposed initiative 2011-2012 #19 raised a question regarding whether it was your intent to create a maintenance of effort requirement by requiring that the allocation of the additional revenue raised by the tax increases in the measure be "in addition to and not a substitute for funds otherwise appropriated by the general assembly" for "education, including higher education". At the review and comment hearing for proposed initiative 2011-2012 #19, you indicated that this was not the intent of the measure.

Proposed initiative 2011-2012 #25 includes the same language stating that the allocation of moneys from the additional revenue raised by the tax increases be "in addition to and not a substitute for moneys otherwise appropriated by the general assembly". However, the language in proposed initiative 2011-2012 #25 continues to state "which shall be in an amount not less than the amount appropriated for fiscal year 2011-12, for the costs of public

education from preschool through twelfth grade and public post-secondary education".

This language appears to require the general assembly to appropriate in the 2012-13 fiscal year through the 2016-17 fiscal year at least the amounts appropriated in the 2011-12 fiscal year for public education from preschool through the twelfth grade and for public postsecondary education before any of the additional tax revenue collected as a result of the measure may be appropriated for such purposes. Is this your intent?

This kind of requirement is commonly referred to as a maintenance of effort requirement. Has your intent regarding the creation of a maintenance of effort requirement in proposed initiative 2011-2012 #25 changed from your stated intent during the review and comment hearing for proposed initiative 2011-2012 #19?

2. This question concerns the use of the word "allocated" in the phrase "the allocation of moneys required by this section be in addition to and not a substitute for moneys otherwise appropriated by the general assembly . . .". The measure states that "[a]ll revenues raised by the increases in taxes imposed pursuant to this measure . . . shall be appropriated . . . only for the costs of public education from preschool through twelfth grade and public post-secondary education.". The measure does not use the word "allocated" prior to the phrase quoted above. In addition, the general assembly does not have an official method of allocating moneys, but instead appropriates moneys to carry out its intent in funding state programs and services. Would you consider changing the word "allocated" to "appropriated" to be more consistent with the language earlier in the measure and to make it clear that your intent is for the general assembly to appropriate the moneys for the purposes specified in the measure?
3. Why have you chosen to state that "the people intend" that the appropriation of moneys be in addition to and not a substitute for other moneys appropriated for public education from preschool through the twelfth grade and public postsecondary education, rather than stating a requirement that the moneys be appropriated in such manner? A statement of intent in statute does not necessarily bind the actions of the general assembly. Would there be less room for the general assembly to use the moneys for other purposes if the language stated a mandatory use for the moneys? For example, "The general assembly shall appropriate the moneys from revenues raised by the increase in taxes imposed pursuant to this measure . . . in addition to, and not as a substitute for, moneys otherwise appropriated by the general assembly . . ."?
4. The language requiring that the allocation of moneys be "in addition to and not a substitute for moneys otherwise appropriated by the general assembly" does not clearly specify the purposes for which the moneys "otherwise appropriated" were appropriated. Would you consider clarifying this language to make it clear that you mean moneys otherwise appropriated for public education from preschool through the twelfth grade and public postsecondary education? For example, the language could read:

"The general assembly shall appropriate the moneys from revenues raised by the increase in taxes imposed pursuant to this measure . . . in addition to, and not as a substitute for, moneys otherwise appropriated by the general assembly for public

education from preschool through the twelfth grade and for public postsecondary education, the amount of which appropriation shall not be less than the amount appropriated for such purposes for the 2011-12 state fiscal year."

5. What would the consequence be if the state failed to meet the maintenance of effort requirement for a given fiscal year? Could revenues raised by the tax increase contained in the proposed initiative be spent in a subsequent fiscal year?
6. Does the establishment of a maintenance of effort requirement fit within the single subject of the proposed initiative?
7. The review and comment memo for proposed initiative 2011-2012 #19 raised questions about whether you would consider making two conforming amendments to avoid statutory inconsistencies. One suggested conforming amendment was in connection with the language in section 3 of the measure, and the other was in connection with the language in section 5 of the measure. It appears that you have made the recommended conforming change in section 3 but not in section 5. Is there a reason why you made one conforming amendment but not the other?
8. In addition to the conforming amendment discussed in question #7 above, other conforming amendments may be necessary. For example, sections 39-22-104 (1.7), 39-22-601 (10), 39-22-627 (1) (a), (1) (b), (2), (3), and (6), 39-26-105 (1) (a), and 39-26-112, Colorado Revised Statutes, contain references to either the current income tax rate of 4.63% or the current sales tax rate of 2.9%. For consistency among the different provisions, would you consider adding conforming amendments to the proposed initiative to reflect the changes made to the tax rates by the proposed initiative? Alternatively, is it your intent that the general assembly will enact legislation making the necessary conforming amendments if the proposed initiative is approved by the voters?