

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

April 2, 2014

**TO:** Vickie Armstrong

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

**SUBJECT:** Proposed initiative measure 2013-2014 #134, concerning Proceeds from Video Lottery Terminals for K-12 Education

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 along with proposed initiative 2013-2014 #135. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memorandum for proposed initiative 2013-2014 #135, except as necessary to fully understand the issues raised by the revised 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.

An earlier version of this proposed initiative, proposed initiative 2013-2014 #80, was the subject of a memorandum dated March 5, 2014. Proposed initiative

2013-2014 #80 was discussed at a public meeting on March 7, 2014. The comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, 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 amendment to the [**Colorado constitution / Colorado Revised Statutes - select one**] appear to be:

1. To establish the K-12 education fund for the purpose of providing additional revenue to address local educational needs;
2. To expand limited gaming, by the use of video lottery terminals, to exclusive locations in the counties of Arapahoe, Mesa, and Pueblo; and
3. To deposit the additional revenues generated by the expansion of limited gaming in the K-12 education fund.

## 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 section in the Colorado constitution has a headnote. Headnotes briefly describe the content of the section. The headnote for the section might list multiple items to alert the reader about all subjects in the section. In these instances, the different items should be separated by a dash with a space on either side. The headnote for proposed section 17 should also include information about the expansion of limited gaming and rule-making power being delegated to the Colorado limited gaming control commission. For example: "**Section 17. K-12 education fund – limited gaming – video lottery terminals – rules.**"
2. Use active voice instead of passive voice, wherever possible. Active voice establishes who performs an action and eliminates confusion. For example, in the original sentence below, no person was identified as performing the action specified:

- a. In paragraph (a) of subsection (2), the second sentence is in passive voice. To change it to active voice, write "*The state treasurer shall credit all interest and income derived from the deposit and investment of moneys in the K-12 education fund to the K-12 education fund.*"
3. It is standard drafting practice to hyphenate phrasal adjectives (two or more words that function as a unit and express a single thought). In subsection (2) (b), the words "per pupil" function as a single unit modifying the words "basis" and "amount", so the phrases should be written as "per-pupil basis" and "per-pupil amount."
4. It is considered a better practice for statutory or constitutional language to be in the present tense. Although a provision is in the future when it is being considered for passage, it is applied in the present tense. Avoiding the future tense avoids the implication that the statute contemplates a timing element. In subsection (4), would the proponents consider replacing the phrase "will be" with "are" or rewriting the sentence to the active voice?
5. Paragraph (a) of subsection (6) lists several requirements for certain rules. The requirements are imposed using "shall." This word should not be used unless the word can logically be replaced with the phrase "has a duty to" or "have a duty to." This means that subparagraph (I) should be understood "The rules of the commission have a duty to maximize the net VLT proceeds...." Violation of a duty usually imposes legal consequences such as fines or damages. The rules cannot suffer these consequences. So this use of the word "shall" creates ambiguities about the legal consequences of a compliance failure and ambiguities about which actors are affected by the failure. For example, does a failure to comply mean that the rules are void? Would the proponents consider changing the word "shall" to the word "must" and specifying the legal consequences of the rules not meeting these requirements?
6. Avoid the use of "may not" to prohibit because it could be interpreted to refer to an improbable or unnecessary action rather than a prohibited one. Instead, use "shall not" to prohibit or deny authority or to impose an affirmative duty not to act with regard to a person. In paragraph (c) of subsection (7), write "The commission and director shall not ...."

## **Substantive Comments and Questions**

The substance of the proposed initiative raises the following comments and questions:

1. Paragraph (d) of subsection (2) requires the school district and the state charter school institute to use money from the K-12 fund “to improve the education of the children in Colorado public schools by....” What if they use the money for other purposes? Would they have to suffer any consequences?
2. Paragraph (e) of subsection (2) requires an annual audit of the K-12 fund. The average cost for a performance audit is about \$175,000. Currently, it takes about ten months to complete a performance audit. That leaves two months between audits. Typically, it takes longer than two months to implement the audit recommendations from the last audit. Given the time needed to change rules and statutes, an agency can take up to a year to implement the audit recommendations. Also, the changes need to be implemented for some time before they generate enough data to make a meaningful comparison. If an audit is specified in statute, the standard practice is for the audit cycle to be on a five-year cycle. Another option is to allow the office of state auditor to determine the frequency based on the office’s assessment of risk. Would the proponents consider changing the audit cycle to five years or as determined by the office of state auditor?
3. Subsection (4) allows host communities to charge impact fees to exclusive locations after negotiations between the host community and the exclusive location. When negotiating impact fees, what level of participation is required on behalf of the exclusive location for the impact fees to be considered "established through negotiations?" Is it your intent that the host community must provide exclusive locations a threshold level of participation in the establishment of the impact fees?