

STATE OF COLORADO

Colorado General Assembly

Mike Mauer, Director
Legislative Council Staff

Colorado Legislative Council
029 State Capitol Building
Denver, Colorado 80203-1784
Telephone (303) 866-3521
Facsimile (303) 866-3855
TDD (303) 866-3472
E-Mail: lcs.ga@state.co.us



Dan L. Cartin, Director
Office of Legislative Legal Services

Office Of Legislative Legal Services
091 State Capitol Building
Denver, Colorado 80203-1782
Telephone (303) 866-2045
Facsimile (303) 866-4157
E-Mail: olls.ga@state.co.us

MEMORANDUM

April 3, 2013

TO: Ashley Brillante, Tom Stokes, and Mark Grueskin

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2013-2014 #13, concerning funding for public schools

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 2013-2014 #13 to #28. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiatives 2013-2014 #14 to 28, 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.

Purposes

The major purposes of the proposed amendment to the Colorado constitution and Colorado Revised Statutes appear to be:

1. To impose an income tax rate increase of seventy-two one-hundredths percent on federal taxable income of individuals, estates, and trusts, referred to in the proposed initiative as the income tax increment for public school funding (income tax increment).
2. To eliminate the requirement that the statewide base per pupil funding for public education from preschool through twelfth grade and total state funding for all categorical programs grow annually by at least the rate of inflation, as set by the general assembly.
3. Beginning July 1, 2014, to eliminate the requirement that all state revenues collected from a tax of one-third of one percent on federal taxable income of every individual, estate, trust, and corporation be deposited in the state education fund.
4. To require the state education fund to receive at least forty-three percent of sales, excise, and income tax revenue collected in the state general fund in a manner that equals such percentage in relation to the revenue generated by the tax rates in effect on December 31, 2012, net of any refunds required by section 20 (3) (c) of article X of the Colorado constitution.
5. When there is a change in the actual value of residential real property that would otherwise warrant a reduction in the ratio of valuation for assessment for residential real property, to require the general assembly, notwithstanding any other provision of law, to reduce the residential assessment rate that is applicable to public school funding annually until the rate that applies to public school funding is seven and nine-tenths percent, and to require the general assembly to maintain the rate at such percentage thereafter.
6. To create a state educational achievement fund (achievement fund) in the state treasury, and in connection to the fund to specify that:
 - a. The department of revenue is required to determine the amount of the income tax increment and that such amount shall be deposited in the achievement fund;
 - b. The moneys in the achievement fund shall be used for the education of students in preschool through the twelfth grade by implementing educational reforms and programmatic enhancements enacted by the general assembly;
 - c. The state auditor's office shall audit the achievement fund on an annual basis and that the audit shall be distributed to specified members of the general assembly and posted on specified web sites; and
 - d. Interest earned on moneys in the achievement fund shall remain in the fund and shall be used before the principal of the fund is used, and that moneys remaining in the fund at the end of any fiscal year shall remain in the fund;
7. To require revenues collected from the income tax increment to be used to supplement, not

supplant, revenues that were appropriated by the general assembly in the previous fiscal year for education from preschool through the twelfth grade.

8. To specify that all revenues attributable to the income tax increment or revenues otherwise addressed in the proposed initiative shall be collected and spent as voter-approved revenue changes without regard to any limitation on revenue, spending, or appropriations contained in section 20 of article X of the Colorado constitution (TABOR) or any other law; and to specify that spending such revenue consistent with the expressed intent of the voters at the 2013 statewide election does not require additional voter approval at any statewide or local election.

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. 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.

2. The amending clause for the constitutional provisions should read as follows:

In the constitution of the state of Colorado, section 17 of article IX, **amend** (1) and (4); and **add** (6), (7), (8), and (9) as follows:

[**Note to proponents:** The subsections mentioned in the above amending clause will need to change depending on what provisions are included in the particular initiative in which the amending clause occurs.]

3. The amending clause for the statutory provision should read as follows:

In Colorado Revised Statutes, 39-22-104, **amend** (1.7) as follows:

4.
 - a. 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. The same applies to paragraphs. For example in the new subsection (7), paragraph (a) should immediately follow the headnote on the same line.
 - b. Please include the section number and headnote, in bold, for the statutory section being amended. For example, "**39-22-104. Income tax imposed on individuals, estates, and trusts - single rate - definitions - repeal.**"
5. It is unnecessary to capitalize "section", "subsection", or "article" in the proposed initiative.

6. Numbers should be spelled out.
7. When referring to specific dates in text, it is standard drafting practice to set off the year with commas.
8. When referencing a subsection, paragraph, subparagraph, or sub-subparagraph, it is standard drafting practice to repeat the letter or number of the subsection, paragraph, subparagraph, or sub-subparagraph and to say where the provision is located. For example: "subsection (6) or (7) of this section" or "authorized in this subsection (1.7)".
9. It is standard drafting practice to write out fractional percentages as "one-tenth" or "one-hundredths". For example, "seventy-two one-hundredths percent".
10. It is standard drafting practice to refer to "this constitution" when making a cross-reference in a state constitutional provision to another state constitutional provision.

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. The proposed initiative includes exemptions from certain current state constitutional requirements, including the requirements of section 20 of article X of the Colorado constitution and the requirements of subsection (1) (b) of section 3 of article X of the Colorado constitution. How does the inclusion of these exemptions impact the single subject of the proposed initiative as you stated it in response to the question above?
3. What will be the effective date of the proposed initiative? Please consider using a standard effective date clause, with a headnote, in section 3 of the proposed initiative to conform to standard drafting procedure. For example, "**SECTION 3. Effective date.** This act takes effect _____ (*insert a fixed date*)".
4.
 - a. The provisions of the proposed initiative that are a statutory change may be amended by subsequent legislation enacted by the general assembly. Is this your intention?
 - b. The provisions of the proposed initiative that are a change to the Colorado constitution may only be amended by a subsequent amendment to the constitution. Is this your intention?
5. Standard drafting practice is to use the word "fund" to refer to an account into which "moneys" or "revenues" are placed. Therefore, the word "fund" or "funds" is not typically used to refer to the moneys or revenues themselves. Would the proponents consider using this phrasing where appropriate? For example, in paragraph (c) of subsection (7) of the proposed initiative, write "Moneys in the state educational achievement fund shall be

appropriated . . .".

6. Throughout the proposed initiative, you refer to "income tax increment for public school funding". Does this refer to the tax rate increase in section 39-22-104 (1.7) of the proposed initiative? Would you clarify what the phrase means when it is used in section 17 of article IX of the Colorado constitution (Amendment 23)?
7. In subsection (1) of the proposed initiative, you amend Amendment 23 to eliminate the requirement that the base per pupil funding amount and the funding for all categorical programs increase annually by at least the rate of inflation. Do you believe that there are other provisions in the proposed initiative that will require the general assembly to specifically increase the base per pupil funding amount and the categorical program funding amount each year? If so, what are they?
8. To the extent that any of the moneys used to fund the annual inflationary increase in the base per pupil funding amount and the categorical program funding amount have come from the general fund in the past, will the amendment to subsection (1) of Amendment 23 result in increased moneys in the general fund that the general assembly may use for any purpose? Is this your intent?
9. The proposed initiative amends subsection (4) of Amendment 23 to eliminate, as of July 1, 2014, the requirement that state revenues collected from a tax of one-third of one percent on federal taxable income of every individual, estate, trust, and corporation be deposited into the state education fund. This change raises the following questions:
 - a. Notwithstanding other provisions of this proposed initiative that require transfers from the general fund into the state education fund, does eliminating the currently required transfer of one-third of one percent on federal taxable income result in an increase in general fund revenues in an amount equal to one-third of one percent on federal taxable income of every individual, estate, trust, and corporation?
 - b. If the result of such elimination is that there is an increase in general fund moneys, notwithstanding any other provision of this section, would the general assembly be able to use this increase in revenue for any purpose? Is there any requirement that the money be used for education from preschool through the twelfth grade?
 - c. Is it your intent that the funding source for the state education fund be replaced by the transfer of certain moneys from the general fund as is required later in subsection (4) of Amendment 23?
10. The proposed initiative adds new language to section (4) of Amendment 23 specifying that the state education fund is required to receive, at a minimum, 43% of sales, excise, and income tax revenue collected in the general fund in a manner as to equal such percentage in relation to the revenue generated by the tax rates in effect on December 31, 2012. This provision raises the following questions:

- a. This language seems to require that for the 2014-15 fiscal year and each fiscal year thereafter, an amount equal to 43% of the sales, excise, and income tax revenue collected by the state for the applicable fiscal year will be transferred to the state education fund. However, if the sales, excise, or income tax rate for the applicable fiscal year is higher or lower than the rates that were in effect on December 31, 2012, then the 43% will be calculated using the 2012 rates. Is this your intent?
 - b. After the first year that the proposed initiative is in effect, is it your intent that the amount transferred to the state education fund pursuant to this section of the proposed initiative could be higher or lower than the amount transferred in the previous fiscal year if the state generates more or less revenue from sales, excise, and income tax than was generated in the previous fiscal year?
 - c. Is it your intent that the amount that is transferred to the state education fund pursuant to the proposed initiative will change solely based on the amount of revenue generated by the state from sales, excise, and income taxes and that the tax rates in effect in a particular fiscal year are irrelevant to the amount transferred, because the 43% will always be calculated using the tax rates in effect on December 31, 2012?
11. The proposed initiative adds additional new language to section (4) of Amendment 23 to specify that the calculation of the 43% of sales, excise, and income tax revenue shall be net of any refunds required by subsection (3) (c) of TABOR. This requirement raises the following questions:
 - a. Is it your intent that the calculation of 43% of sales, excise, and income tax in the general fund in a given year be calculated after any refunds required pursuant to subsection (3) (c) of TABOR are made?
 - b. Section (3) (c) of TABOR provides that if, after a voter-approved increase in revenue, the revenue or district spending exceeds the estimated amount that would be generated by such increase as included in the ballot title of the proposed revenue increase, then the district is required to refund the excess. What is your intent in referring to this section of TABOR? Are you anticipating that the income tax rate increase included later in the proposed initiative may require that excess revenue be refunded?
 - c. What would happen if the state is required to refund excess general fund revenue to the voters pursuant to section (7) of TABOR? Would the 43% be calculated before or after such refund is made?
12. The changes to section (4) of Amendment 23 that were discussed in the two previous questions raise the following additional general questions:
 - a. Can the general assembly choose to transfer more to the state education fund in any year than 43% of the sales, excise, and income tax revenue received by the general fund in that year?

- b. Is it your intent that the moneys transferred into the state education fund pursuant to the proposed initiative be used for the same purposes and be subject to the same use restrictions as the moneys currently transferred into the state education fund?
 - c. Is it your intent that after the proposed initiative takes effect, the costs associated with the financing of public schools from preschool through the twelfth grade will be paid primarily from the state education fund and the newly created state educational achievement fund, rather than from the general fund?
 - d. When will the transfer from the general fund to the state education fund be made? At the end of the applicable fiscal year? At close of books for the applicable fiscal year?
 - e. When the general assembly determines the amount of money available for financing public schools for a particular fiscal year, is it your intent that the general assembly will be working from a projection of what will be available in the state education fund for the applicable fiscal year, similar to the current process? Or, is it your intent that the money transferred into the state education fund for a particular fiscal year actually be used to finance public schools in the following fiscal year?
 - f. How is the amount to be transferred calculated? What specific taxes does it include or exclude? Does it include future taxes that are not currently being collected? Is the calculation based on actual revenues received? Estimates of revenues? Who makes the calculation?
 - g. If subsequent data shows that too much or too little revenue was received by the state education fund in a given year, can the amount be increased or decreased in a subsequent fiscal year?
 - h. What is meant by the phrase "collected in the general fund"? Is this limited to revenues that are originally deposited in the general fund? Would it apply to revenues that are collected in another fund or transferred to the general fund from another fund?
13. The proposed initiative adds a new subsection (6) to Amendment 23 concerning property tax for public school funding. This provision of the proposed initiative raises the following questions:
- a. In which property tax year does this provision take effect?
 - b. Does this provision create an exception to the requirements of section 3 of article X of the Colorado constitution, known as the "Gallagher amendment"?
 - c. This provision relates solely to property taxes dedicated to public school funding. What do you mean by "public school funding"? Local districts levy mills for several purposes, including bonded debt, total program funding, full-day kindergarten,

capital construction, and other authorized mill levy overrides pursuant to the school finance act. All of these are arguably for public school funding purposes. Do you intend to include these when you refer to "public school funding"? Some community colleges in the state are funded through a local mill levy, which arguably is public school funding. Is it your intent to include property taxes dedicated to community colleges in the proposed initiative? Would you clarify your intent?

- d. Before the 7.9% residential assessment rate is reached, if the residential assessment rate for all residential property is not required to decrease pursuant to current law, does the residential assessment rate for property taxes dedicated to public school funding decrease under the provisions of the proposed initiative? If so, by how much?
 - e. Once the residential assessment rate for all residential property reaches 7.9% of actual value, if the provisions of subsection (1) (b) of section (3) of article X of the Colorado constitution would otherwise require the rate to decrease further, is it your intent that the residential assessment rate for property taxes for public school funding would not decrease and would remain at 7.9%?
 - f. The current residential assessment rate is 7.96% of actual value. Is it your intent to allow a maximum decrease of .06% in the residential assessment rate for property taxes for public school funding only?
 - g. The proposed initiative states that the general assembly shall continue to reduce the residential assessment rate that is applicable to public school funding and shall continue to do so annually, until the rate is lowered to 7.9%. What do you mean by "and shall continue to do so annually"? Since property is reassessed every two years, the residential assessment rate would only change once every two years pursuant to current law. Do you intend to require the residential assessment rate for the purposes of public school funding to decrease every year until the rate is 7.9%?
14. Subsection (7) (a) of the proposed initiative creates the state educational achievement fund in Amendment 23, and subsection (7) (b) requires the department of revenue to annually determine the amount of the income tax increment, created later in the proposed initiative, that will be deposited into the fund. When in the state fiscal year do you anticipate that the department will make this determination and the transfer will occur? Because the tax increment is an income tax, will the first year in which the achievement fund receives moneys from the tax increment be the year after the first year in which the tax increment is imposed?
15. Subsection (7) (c) of the proposed initiative specifies the permissible uses for moneys in the achievement fund. Is it your intent that the general assembly appropriate moneys in the achievement fund only to implement statutory educational reforms and programmatic enhancements that benefit the education of students from kindergarten through the twelfth grade and participants in preschool programs? This requirement raises the following additional questions:

- a. What do you mean by "educational reforms and programmatic enhancements"? Can you provide a few examples of currently existing educational reforms or programmatic enhancements?
 - b. Can the general assembly appropriate the moneys in the achievement fund for its annual school finance obligations pursuant to the "School Finance Act of 1994" or any successor act or categorical program funding?
 - c. Would it be permissible for the general assembly to use the moneys in the achievement fund for an educational reform or programmatic enhancement that occurs in connection with its annual funding obligations? For example, could the general assembly use the moneys in the achievement fund to increase the funding for at-risk students through the "School Finance Act of 1994" or a successor act?
 - d. Can the general assembly use the moneys in the achievement fund for educational reforms and programmatic enhancements that were enacted prior to the effective date of the proposed initiative?
 - e. Does the general assembly have the authority to determine or define what qualifies as an educational reform or programmatic enhancement that benefits the education of students in kindergarten through the twelfth grade and participants in preschool programs?
16. What is the purpose of requiring interest to be used before principal is depleted in subsection (7) (e)? Do principal and interest need to be accounted for separately for any other purposes?
17. Subsection (8) of the proposed initiative specifies that new revenue for the income tax increment shall be used to supplement appropriations by the general assembly in the previous fiscal year for kindergarten through twelfth grade and preschool education and shall not be used to supplant such appropriations. This subsection raises the following questions:
- a. The general assembly currently makes appropriations from multiple sources for the financing of public schools from preschool through the twelfth grade, for example, from the general fund, the state education fund, and the state public school fund. Do you intend that the moneys in the achievement fund be used to supplement the funding from all of these sources?
 - b. What are the specific appropriations by the general assembly for kindergarten through twelfth grade and preschool education that you intend to supplement, rather than supplant, with the additional tax revenues collected?
 - c. Is it your intent that the amount appropriated by the general assembly for kindergarten through twelfth grade and preschool education would grow every fiscal year? What if the income tax increment does not generate as much revenue in one year as it did in the previous year? How could the moneys in the achievement fund be used to supplement if the revenues are not as great?

- d. Would you consider rephrasing this requirement to state that the moneys in the achievement fund, rather than the revenue collected from the income tax increment, shall be used to supplement rather than supplant?
18. Subsection (9) of the proposed initiative states that the revenues attributable to the income tax increment and revenues otherwise addressed in subsections (6) or (7) of the proposed measure are exempt from the requirements of TABOR. Is it your intent that any property taxes that are higher than they otherwise would have been due to the residential assessment rate remaining at 7.9% not be subject to the provisions of TABOR? Is there another TABOR issue that you intended to address regarding subsection (6) of the proposed initiative?
19. If the income tax rate increase in the proposed initiative generates more revenue than is anticipated and stated in the ballot question, is it your intent that subsection (9) of the proposed initiative would allow the state to keep and spend such additional revenue, rather than return it to the voters as required by TABOR?
20. Section 2 of the proposed initiative amends the Colorado Revised Statutes to create the income tax increment which is an increase in the income tax rate for individuals, estates, and trusts. This section raises the following questions:
- a. In which income tax year would the increased income tax rate take effect? Would you consider including the year in the proposed initiative?
 - b. With the addition of the income tax increment of .72%, is it your intent that the income tax rate on the federal taxable income of individuals, estates, and trusts be a total of 5.35%?
 - c. The proposed initiative does not increase the corporate income tax rate. Is it your intent to have a different tax rate for individuals and corporations?
 - d. Subsection (8) of TABOR requires all taxable net income to be taxed at one rate. If it is your intent that the income tax rate for individuals, estates, and trusts be different from the corporate income tax rate, do you think it is necessary to amend TABOR to allow the different rates? Would you consider including an exemption to the relevant TABOR requirement in the proposed initiative?