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MEMORANDUM

February 28, 2006

TO: Jon Caldara and Beth Skinner

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2005-2006 #88, concerning the Rebate of Money Above Referendum C Estimates

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, which amends the Colorado constitution by the addition of a new article XXIX, appear to be:

1. To limit the amount of state revenues in excess of the limitation on the state fiscal year spending that the state is permitted to keep for the state fiscal years 2005-06 through 2009-10;
2. To refund to taxpayers any revenues collected by the state above this limitation in order to offset high home energy costs; and

3. To establish the method for the refunds.

Comments and Questions

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

Technical comments:

The following comments are technical changes that we would recommend you make in order to conform the proposed initiative to standard drafting practices.

1. There is an extraneous hyphen at the very beginning of the proposed initiative.
2. Only the phrase, "BY THE ADDITION OF A NEW ARTICLE" in the enacting clause needs to be in capital letters. The remainder of the phrase can be in regular type.
3. The article number can be removed from the enacting clause.
4. The following comments relate to the headnote, which reads: "**SECTION 1. HOME ENERGY ADJUSTMENT TAX-REBATE (H.E.A.T.)**":
 - a. Only the first letter of the first word of the headnote should be capitalized. The remainder of the headnote can be in regular type.
 - b. The term "**tax-rebate**" does not need to be hyphenated. This phrase is also used in subsection (3) of the proposed initiative.
 - c. It is not standard drafting practice to include an acronym in the section headnote. There is also an acronym used in subsection (3) of the proposed initiative.
5. It is standard drafting practice to use small capital letters to show the language being added to the Colorado constitution. For example, the first sentence would begin "EXCESS TAXPAYER SURPLUS SHALL ...".
6. The following are standard drafting practices related to a definition: The defined term is preceded by the phrase, "As used in this section, unless the context otherwise requires,"; the defined term is set off in quotation marks; and the term "means" is used instead of the phrase "shall be defined as". Accordingly, the definition in subsection (1) would properly read as follows: "(1) As used in this section, unless the context otherwise requires, 'excess taxpayer surplus' means all revenues...".
7. Considering that there may be other "referendum C's" in the future, it might be more clear if you identified the election in which referendum C was held, instead of identifying the election in the context of the ballot information booklet.

8. It would be more precise to fully identify the "ballot information booklet" as the "2005 state ballot information booklet".
9. Is it correct to assume that when you refer to "ballot information booklet prepared by the staff of legislative council of the general assembly" you are referring to the one that was approved by the legislative council of the general assembly, which is a legislative committee? If so, you may want to make this fact clear.
10. The following comments relate to paragraphs (A) to (E) of subsection (1) of the proposed initiative:
 - a. The paragraph letters (a) to (e) should be in lowercase type.
 - b. Numbers should be written out. For example, 570 would be "five hundred seventy".
 - c. It might be more clear if you wrote out the phrase "fiscal year", as you did in the introductory portion to subsection (1), instead of using "FY".
 - d. Paragraphs (A) through (C) should end in a semicolon, and paragraph (D) should end as follows: "2008-09; and".
 - e. It appears that the numbers in paragraphs (A) and (D) do not match the numbers from the 2005 state ballot information booklet prepared by the legislative council. In figure 3, which appears on page 7 of the booklet, the estimate for FY2005-06 was \$577 million and the estimate for FY2008-09 was \$822 million.
11. Subsection (2) of the proposed initiative begins "All excess taxpayer surplus". The term "all" appears to be redundant because the definition for "excess taxpayer surplus" already appears to include all revenues.
12. "Residential" is misspelled in subsection (3) of the proposed initiative.
13. It is not necessary to include "the" in the fund name in subsection (5) of the proposed initiative.
14. Subsection (5) of the proposed initiative includes the phrase, "excess taxpayer surplus revenues". The term "revenues" appears to be redundant because the definition for "excess taxpayer surplus" already appears to refer to revenues.

Substantive comments and questions:

1. It appears that one of the purposes of the proposed initiative is to limit the amount of state revenues in excess of the limitation on state fiscal year spending set forth in section 20 of article X of the Colorado constitution (TABOR) that the state is authorized to retain and spend as a result of the passage of referendum C at the November 2005 statewide election. As referendum C was a statute that was referred to and approved by the voters in accordance

with the voter approval requirements set forth in subsection (7) of TABOR, this purpose could be accomplished with a statutory change instead of a constitutional change. Have the proponents considering amending the Colorado Revised Statutes rather than creating an amendment to the Colorado constitution?

2. The following questions and comments refer to subsection (1) of the proposed initiative:
 - a. In light of the fact that state fiscal year spending includes state revenues that are derived from sources other than taxes, such as fines and fees, is the term "excess taxpayer surplus" a misnomer?
 - b. If the proposed initiative is approved by the voters, the state will be required to refund "excess taxpayer surplus" and the state will not actually retain any revenues above the amounts that were forecasted by the staff of the legislative council. Accordingly, does it make sense to define "excess taxpayer surplus" as revenues "retained by the state of Colorado pursuant to voter approval of referendum C...?"
 - c. What does the term "revenues" include? Would it include any revenues "retained by the state of Colorado" that are not included in "fiscal year spending", as such term is defined in paragraph (e) of subsection (2) of TABOR?
 - d. Does the phrase "revenues retained by the state" mean state revenues that are above the state fiscal year spending limit set forth in subsection (7) of TABOR that the state is authorized to retain and spend pursuant to the passage of referendum C at the November 2005 statewide election?
 - e. It appears that the last state fiscal year in which there may be "excess taxpayer surplus" is the 2009-10 state fiscal year. Is this your intention?
3. The following questions and comments relate to subsection (2) of the proposed initiative:
 - a. In order to avoid any misunderstanding of your intention, would the proponents consider adding the phrase "Except as otherwise provided in subsection (4) of this section," to the beginning of subsection (2)?
 - b. Is it your intent that subsection (2) establishes a limit on the amount of state revenues in excess of the state limit on state fiscal year spending that the state is authorized to retain in a given year?
 - c. Does subsection (2) affect the state's ability to spend any revenues that are not included in the definition of "fiscal year spending" set forth in TABOR? For example, would the proposed initiative affect the amount of federal funds that the state receives?
 - d. If taxpayers approved a measure in 2008 that created a new tax that is collected during the 2008-09 state fiscal year, how would it affect the amount of the "excess

taxpayer surplus"? Would your response change if the measure included language that tax revenues from the new tax are to be excluded from the definition of "fiscal year spending" under TABOR? Could the measure exclude the new tax revenue from excess taxpayer surplus?

- e. Will this section in any way preclude the general assembly from refunding state revenues that are in excess of limitation on the state fiscal year spending set forth in TABOR that are not "excess taxpayer surplus"?
 - f. Subsection (7) of TABOR requires state revenues not excluded from fiscal year spending in excess of the limitation on state fiscal year spending to be refunded in the next fiscal year "unless voters approve a revenue change as an offset". The requirement that "excess taxpayer surplus" be refunded appears to supersede this provision in TABOR. Is this your intention?
 - g. What is the connection between "excess taxpayer surplus" and "high home energy costs"?
 - h. Does a person have to pay an energy bill to qualify for the refund?
4. The following questions and comments relate to subsection (3) of the proposed initiative:
- a. How will the refund work? Please describe.
 - b. Is "total excess taxpayer surplus amount" the same as "excess taxpayer surplus"? Does "total excess taxpayer surplus amount" include interest earned in the "the excess taxpayer surplus fund" or any moneys that remained in the fund because the exception in subsection (4) of the proposed initiative applies?
 - c. The phrases "each year", "that same year", and "that October" are used in subsection (3). Are these phrases all referring to the calendar year that begins during the state fiscal year for which there is "excess taxpayer surplus" or some other year? In light of the fact that "excess taxpayer surplus" is based on a state fiscal year, it might be helpful to clarify what year or month you are referring to in subsection (3).
 - d. The following questions and comments refer to the phrase "number of exemptions claimed on all full-year residential Colorado individual tax returns filed in that same year as represented on federal tax returns":
 - i. What does the phrase mean?
 - ii. If the exemptions are claimed on the federal tax return, what does the reference to "Colorado individual tax returns" add to this phrase?
 - iii. Does the phrase "tax returns" mean "income tax returns"? You may want to clarify this point.

- iv. What tax year will be used to calculate the number of exemptions for a given calendar year? For example, if there were "excess taxpayer surplus" for the 2006-07 year, would the number of exemptions be based on those claimed in 2006 for the 2005 tax year, or would some other year be used?
- v. If the number of exemptions is based on the those claimed by April 15 during the state fiscal year in which there is "excess taxpayer surplus", the total number would likely understate the actual total number of exemptions because some taxpayers receive filing extensions. How would the state account for extensions in filing income taxes as it relates to calculating the average rebate?
- vi. Does the state have access to the number of exemptions claimed on a federal return? If not, how will the state calculate the refund amount?
- e. What is a "household" as used in the proposed initiative? Can there be more than one return filed per household -- for example, married filed separately or unrelated renters who file separate returns?
- f. What does the phrase "head of household" mean?
- g. If the phrase "head of household" has the same meaning as the term is used in the federal internal revenue code,¹ it appears that the class of taxpayers who receive a check is narrower than the class of taxpayers used to calculate the amount of the refund. Was this your intention?
- h. The proposed initiative requires the state to issue checks to taxpayers in October, which is different from how refunds under TABOR are currently done by the Colorado department of revenue. Is there a reason that the rebate checks should not

¹ 26 U.S.C. 2 (b) Definition of head of household. (1) In general. For purposes of this subtitle [26 USCS 1 et seq.], an individual shall be considered a head of a household if, and only if, such individual is not married at the close of his taxable year, is not a surviving spouse (as defined in subsection (a)), and either--

(A) maintains as his home a household which constitutes for more than one-half of such taxable year the principal place of abode, as a member of such household, of--

(i) a qualifying child of the individual (as defined in section 152(c) [26 USCS § 152(c)], determined without regard to section 152(e) [26 USCS § 152(e)]), but not if such child--

(I) is married at the close of the taxpayer's taxable year, and

(II) is not a dependent of such individual by reason of section 152(b)(2) or 152(b)(3) [26 USCS § 152(b)(2) or 152(b)(3)], or both, or

(ii) any other person who is a dependent of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such person under section 151 [26 USCS § 151], or

(B) maintains a household which constitutes for such taxable year the principal place of abode of the father or mother of the taxpayer, if the taxpayer is entitled to a deduction for the taxable year for such father or mother under section 151 [26 USCS § 151].

For purposes of this paragraph, an individual shall be considered as maintaining a household only if over half of the cost of maintaining the household during the taxable year is furnished by such individual.

coincide with typical income tax return filings, similar to the current practice with sales tax refunds under TABOR?

- i. Does a person need to pay state taxes in order to be eligible to receive the refund or must a person simply file a return?
- j. The following questions and comments relate to the language that is required to be printed on each check:
 - i. In this phrase you use the term "rebate", but elsewhere in the proposed initiative, you refer to a "refund". Why the discrepancy?
 - ii. As the state does not receive any money for home energy costs, is the term "rebate" accurate?
 - iii. As the refund is actually based on the total amount of state fiscal year spending, which is not limited to tax revenue, is it accurate to say that the rebate is "based upon last year's Colorado excess tax revenue"?
 - iv. In light of the fact that the refund may include more than one year's "excess taxpayer surplus" pursuant to subsection (4) of the proposed initiative, is it accurate to describe it as being "based on last year's Colorado excess tax revenue"?
 - v. Distributing checks to taxpayers is an expensive method of refunding revenues. How will the state pay for this distribution?
 - vi. Does the requirement that a check contain certain information preclude the state from paying through a direct deposit?
- k. Does a person have to be directly responsible for the heating bill to qualify for a refund? If not, would you consider making that clear in the language?
- l. Would a refund be due for the following individuals?
 - i. An elderly individual living in group quarters, who is not responsible for paying the heating bill on his or her domicile?
 - ii. A twenty-five year old living in his or her parents' home but claiming himself or herself as an exemption on his or her own tax return?
 - iii. A college student for whom his or her parents claim an exemption but who attends school out of state?
5. If there is no refund because subsection (4) of the proposed initiative applies, will the "excess taxpayer surplus" be required to remain in the "the excess taxpayer surplus fund" until the

moneys are refunded?

6. The following questions and comments relate to subsection (5) of the proposed initiative:
 - a. The "excess taxpayer surplus" for what state fiscal year is required to be deposited in the newly created fund prior to "June 1 of each year"?
 - b. If the excess is to be deposited into the newly created fund on June 1 of the current state fiscal year -- for example excess taxpayer surplus for 2005-06 needs to be deposited by June 1, 2006 -- how will the state know the amount that needs to be deposited, as the state fiscal year ends on June 30 and the state does not certify the amount of money that has been collected until well into the following fiscal year? Should the state deposit money based on an estimate of how much excess taxpayer surplus there will be? Would there be any adjustments made based on the difference between the estimate and the actual figures?
 - c. Is there anything that prohibits the general assembly from borrowing moneys from the newly created fund, so long as it repays the money before the refund is due to be paid?
 - d. Can the state use any of the moneys in the newly created fund to pay for the administration costs related to refund?
7. The following questions and comments relate to subsection (6) of the proposed initiative:
 - a. What does the phrase "subsequent October" mean? Please give examples.
 - b. If subsequent October means the October immediately following a completed state fiscal year, it appears the refund for the 2005-06 state fiscal year would be required to be made prior to the effective date of the proposed initiative. It should also be noted that it would likewise be impossible to deposit moneys in the excess taxpayer surplus fund prior to June 1, 2006, if that fund does not exist until December 31, 2006. Would you consider changing the language of the proposed initiative to avoid these issues?
8. As it appears that the 2009-10 state fiscal year is the last year in which there may be "excess taxpayer surplus", would you consider putting a clause into the language to repeal the measure after the last refund occurs?
9. Is it your intention that the refund increase or hold harmless a taxpayer's federal income tax liability?