

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

March 15, 2006

TO: Barry Poulson and Christine Burt

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2005-2006 #93, concerning the PERA Reform Initiative

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 initiative were the subject of a memorandum dated February 10, 2006. Proposal 2005-2006 #81 was discussed at a hearing on February 13, 2006. The comments and questions raised in this memorandum will be limited so as not to duplicate comments and questions that were addressed at the earlier hearing unless it is necessary to fully address the issues in the revised measure. However, the comments and questions that have not been addressed by changes in the proposal continue to be relevant and are hereby incorporated by reference in this memorandum.

### Purposes

The major purposes of the proposed amendment appear to be:

1. To include amounts deducted from pay for a cafeteria plan or transportation costs in the definition of salary for purposes of the statutory provisions governing the public employees' retirement association (PERA);
2. To specify that PERA shall be subject to administrative direction by the governor's office of budget and management;
3. To specify that the general assembly shall appropriate funding for the administrative oversight of PERA;
4. To abolish the existing PERA board of trustees on January 1, 2007, and terminate the terms of its members serving immediately prior to the date;
5. To create a new PERA board of trustees in the governor's office of budget and management that shall consist of nine trustees as follows:
  - a. The state auditor and the state treasurer;
  - b. Three trustees appointed by the governor. With respect to the governor's three appointees:
    - i. They shall be professionally credentialed or have recognized competence in investment management, finance, banking, economics, accounting, pension administration, or actuarial analysis.
    - ii. They shall not hold another state office or position and shall not be members or beneficiaries of the association.
    - iii. One trustee shall be a member of the Colorado society of actuaries, one trustee shall be a member of the society of certified public accountants who is an expert in pensions, and one shall be a member of the Colorado bar association who is an expert in the federal "Employee Retirement Income Security Act of 1974", as amended. The Colorado society of actuaries, the society of certified public accountants, and the Colorado bar association shall each submit a list of recommended people from their respective organizations to serve on the board. In appointing the trustees from the Colorado society of actuaries, the society of certified public accountants, and the Colorado bar association, the governor shall appoint a person from the recommendations of each respective organization;
  - c. Two trustees shall be members or retirees of the defined benefit plan managed by the board and shall be elected by members of the association; and
  - d. Two trustees shall be members or retirees of the defined contribution plan managed by the board and shall be elected by members of the association.

6. To specify certain requirements regarding the staggering of the terms of the appointed and elected members of the PERA board of trustees, the removal of trustees for cause, the filling of vacancies on the board, the existence of a quorum for the transaction of business, and the compensation and reimbursement of expenses for trustees;
7. To specify that the PERA board of trustees shall provide annual training to trustees on pension management and investment;
8. To require the PERA board of trustees to submit an initial report to the general assembly within one hundred twenty days of the start of the first term of the board with a preliminary assessment of PERA's financial status, including the defined benefit plan, and preliminary recommendations for improving PERA's financial stability;
9. To require the PERA board of trustees to contract with a private auditor to conduct an independent financial and performance audit every two years for all transactions and accounts kept by or for PERA, to be staggered with the audit conducted by the state auditor;
10. To require the PERA board of trustees to determine the appropriate investment objectives for the defined benefit plan and, after reviewing recommendations from two financial institutions, adopt investment policies for each of the funds entrusted to the board;
11. To reduce the maximum amortization period that is deemed actuarially sound for the defined benefit plan trust funds from forty to thirty years and to specify that an actuarial necessity shall exist when the defined benefit plan is not actuarially sound;
12. In the event of an actuarial necessity, to authorize the general assembly to modify the member and employer contributions and the benefits allowed to members of the defined benefit plan, so long as the benefits of members who are eligible for a service retirement benefit or a reduced service retirement are not modified;
13. To prohibit the attorney general from delegating his or her responsibilities as legal advisor to the PERA board to any legal advisor or in-house counsel hired by the association;
14. To require the association to hire legal advisors to serve as in-house counsel for the association's staff;
15. To repeal the authority for a member that has forfeited service credit to re-purchase the service credit upon resumption of membership with PERA;
16. To repeal the provision that allows members in the defined benefit plan to purchase service credit for service credit forfeited with a refund;
17. To increase the number of years of service credit required for full retirement benefits for any person who became a member before January 1, 2007, but who is less than forty years of age on January 1, 2007, and whose benefits have not vested on or before such date;

18. To require the general assembly, before increasing benefits for the defined benefit plan, to conduct an actuarial study to ensure that the increases in benefits would not cause the actuarial value of assets of the association to decline below ninety percent of the actuarial accrued liabilities of the association;
19. To eliminate PERA's existing defined contribution plan and create a new defined contribution plan on January 1, 2007;
20. To specify that all members of the existing defined contribution plan shall become members of the newly established defined contribution plan;
21. To require employees hired on or after January 1, 2007, to become members of the new defined contribution plan;
22. To allow eligible members of the defined benefit plan to elect to become members of the new defined contribution plan;
23. To require each member of the new defined contribution plan to contribute an amount equal to two percent less than the employer contribution rates specified for the defined benefit plan;
24. Beginning January 1, 2007, to increase contributions by employees in the defined benefit plan by one-half of one percent of the employee's salary annually until the amount of the employee contribution is equal to the amount of the employer contribution;
25. To authorize members in the defined contribution plan to make additional contributions to the member's individual account, and to specify the methods of transmitting and crediting contributions to a member's individual account for those enrolled in the defined contribution plan.
26. To require an employer of a member of the defined contribution plan to contribute the following percentages of the member's salary to the member's individual account:
  - a. 8% for members of the state, school, and local government divisions;
  - b. 10% for members who are state troopers; and
  - c. 11% for members of the judicial division;
27. To require the difference between the employer contribution rates specified in statute and the contribution rate paid by the employer into the defined contribution plan be directed to pay off unfunded liabilities in the association's defined benefit plan;
28. To state that if the administration of the defined contribution plan creates savings, any savings will be directed toward paying the unfunded liability in the defined benefit plan;
29. To reduce the employer contribution rate to the new defined contribution plan to a rate two

percent less than the division membership employer rate for the defined benefit plan and cap employer contributions at that rate when the new pension plan has eliminated unfunded liabilities and is fully funded so as to meet the federal guidelines for state pension plans of funding one hundred percent of liabilities over a thirty-year period;

30. To limit annual additions to each member's individual account in the defined contribution plan to the amount permitted under federal law;
31. To allow a member of the defined contribution plan to elect to have all or part of an eligible direct rollover distribution paid directly into the member's individual account;
32. To provide that members in the defined contribution plan shall be immediately and fully vested in their own contributions as well as the employer contributions to the plan, together with accumulated gains or losses;
33. To allow each member of the defined contribution plan to exercise control of the investment of the member's account;
34. To require the PERA board of trustees to select at least five investment alternatives for members, to allow members to change investments regularly, to provide members with information describing investment alternatives, and to designate, subject to certain conditions, the companies from which investment products shall be purchased;
35. To specify that PERA and the employer shall not be responsible or liable for financial losses experienced by members of the defined contribution plan;
36. To specify that members of the defined contribution plan may participate in PERA's optional life insurance, long-term care insurance, voluntary investment program, and health care program;
37. To specify that the PERA board of trustees shall determine distribution options by which a member of the defined contribution plan may elect to receive the distribution of his or her individual account;
38. To require the PERA board of trustees to provide members with quarterly reports regarding the members' accounts and administrative fees charged to members;
39. To authorize members of PERA's defined benefit plan to make an irrevocable election to participate in the defined contribution plan in lieu of the defined benefit plan, subject to certain eligibility requirements;
40. To provide for the transfer to the defined contribution plan of the member's individual account and the matching employer contributions to which the member would be entitled at the time of the transfer;
41. To specify the requirements for the transfer, including a requirement that the PERA board

- of trustees inform the member of the effect of moving to the defined contribution plan; and
42. To make conforming amendments to certain statutory definitions and other provisions in accordance with the proposed statutory changes.

### **Comments and Questions**

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

#### **Technical questions:**

1. Given that the current version of the proposed initiative amends subsections (29) and (42) of section 24-51-101, C.R.S., would the proponents consider adding references to these subsections in the amending clause of section 1 of the proposed initiative?
2. To conform to standard drafting practices, would the proponents consider initial capitalizing the first letter of each sentence, as illustrated by the following example:  
  
"(1) THIS SUBSECTION IS REPEALED...."?
3. The proposed initiative includes formatting marks and notations in the left and right margins. Assuming these are not to be included in the text of the measure, would the proponents consider deleting them?
4. To conform to standard drafting practices, would the proponents consider showing all existing statutory language as stricken rather than simply deleting the language, and inserting any new language after the stricken language? For example, the second sentence of subsection 24-51-201 (1), C.R.S., as amended in section 2 of the proposed initiative, would appear as follows:  
  

~~Notwithstanding~~ IN ADDITION TO the applicability of sections 2-3-103, 24-4-103, 24-6-202, and 24-6-402, C.R.S., as provided for in this article, the association shall ~~not~~ be subject to administrative direction by ~~any department, commission, board, bureau, or agency of the state~~ THE GOVERNOR'S OFFICE OF BUDGET AND MANAGEMENT.
5. To conform with standard drafting practices, in amending section 24-51-201, C.R.S., in section 2 of the proposed initiative, would the proponents consider changing the proposed subsections (1) and (2) into paragraphs (1) (a) and (1) (b), showing the language in the new paragraph (1) (b) in ALL CAPITAL LETTERS and changing the proposed subsection (3) back to subsection (2) as it appears in the existing statutes?
6. Section 24-51-203.5 (3), C.R.S., of the proposed initiative refers to trustees appointed by the governor pursuant to paragraphs (a) to (b), even though the governor only appoints trustees

pursuant to paragraph (b). Would the proponents consider eliminating the reference to paragraph (a)?

7. Would the proponents consider correcting the misspelling of the word "elected" in section 24-51-203.5 (2) (d), C.R.S.?
8. In section 12 of the measure, would the proponents consider showing all of the language of this section in strike type or, in the alternative, using the following amending clause and not showing any part of the section heading or other language from the section:

**SECTION 9. Repeal.** 24-51-503, Colorado Revised Statutes, is repealed.

9. Would the proponents consider specifying whether they intended the proposed section 24-51-1603 (2), C.R.S., to read "employee contributions" given that the section governs employer contributions?
10. In order to conform to standard drafting practices, would the proponents consider the following language to replace section 19 of the proposed initiative:

**SECTION 19. Repeal.** Part 15 of article 51 of title 24, Colorado Revised Statutes, is repealed, effective January 1, 2007.

11. Would the proponents consider moving the beginning of section 20, which appears on the bottom of page 12 of the proposed initiative, to its own separate line below the last line of section 19?

Substantive questions:

1. The proposed initiative amends the definition of "member" in section 24-51-101, C.R.S., to include employees governed by section 24-52-201, C.R.S., which is a legislative declaration to the public officials' and employee's defined contribution plan. Assuming the proponents intend to include members of this plan, would the proponents consider changing the reference to "part 2 of article 52 of this title"?
2. Can the proponents please explain why the new initiative #93 implements the changes to PERA beginning in 2007 rather than in 2008 as in proposed initiative #81? If the governor signs the proclamation in late December or early January making the proposed measure law, have the proponents considered whether this provides adequate time to implement the proposed changes?
3. Can the proponents please explain why the definition of "Salary" in proposed section 25-51-101 (42) (a) (II), C.R.S., includes amounts deducted from pay for a cafeteria plan and for transportation costs when the existing definition of salary in section 25-51-101 (42) (a) (I), C.R.S., does not? What would be the effect of this change on the fiscal condition of the PERA trust funds and the benefits provided by PERA?

4. Would the proponents explain why the new proposed initiative places the administration of PERA in the governor's office of budget and management under section 24-51-201, C.R.S., rather than the state treasurer's office as proposed in initiative #81? Is it the proponents' intent to create a new office of budget and management in the governor's office? The office of state planning and budgeting (OSPB) currently exists in the governor's office. Would the proponents consider changing references in the measure to OSPB, or its successor office, rather than the governor's office of budget and management?
5. Proposed section 24-51-201 (2), C.R.S., states that funding for the administrative oversight of PERA shall be appropriated by the general assembly. What specific costs of administration would be funded? Would the proponents consider specifying the funding source for the administration of PERA? Would the funding be provided each year by the general fund? Do the proponents have an estimate of the annual costs of the administration of PERA under the proposed initiative?
6. Currently, the administration of PERA is funded by a portion of employer contributions and its investment earnings. If the proposed initiative proposes another funding source for PERA administration, can the proponents please explain the reason for the different funding source?
7. Can the proponents please explain the purposes of changing the composition of the PERA board as outlined in proposed section 24-51-203.5 (1), C.R.S.?
8. Typically, four-year terms would be staggered by making some of the initial appointments for two-year terms so that approximately one-half of the board would turn over every other year. The proposed measure makes some of the initial terms three years, which would result in approximately one-half of the board changing each third and fourth year. Would the proponents consider making some of the initial terms for two years rather than three years so that they are staggered more evenly?
9. The proposed initiative appears to specify that the benefits allowed to members who are eligible for a service retirement benefit or a reduced service retirement benefit under the defined benefit plan cannot be modified during an actuarial necessity. Can the proponents please explain the purpose of this change from the original proposed initiative #81?
10. Can the proponents explain the purpose for requiring separate legal advisors for the PERA board and for the PERA staff under section 24-51-216, C.R.S.? Does this restrict the ability of the attorney general to delegate his or her responsibilities to another attorney within the office of the attorney general? Does it require the association to hire separate attorneys to represent the association's staff? Are the interests of the association and the staff distinct, and would it create a conflict of interest for an attorney to represent both?
11. Does the proposed initiative repeal the existing statutory authority for a member who resumes membership in PERA to purchase forfeited service credit? Why have the proponents included this provision?



12. Can the proponents explain the purpose of proposed section 24-51-602 (1) (a.7), C.R.S., regarding service retirement eligibility? What do the proponents intend by referring to members whose benefits have not vested? Does this refer to members who are not entitled to any employer contributions upon leaving PERA? Does this refer to members who are not eligible for full or reduced retirement benefits? Does it have some other meaning?
13. Section 24-51-1001 (1), C.R.S., of the proposed measure, which governs benefit increases, references an exception in section 24-51-1002 (3), C.R.S., which does not exist. Did the proponents intend to refer to new section 24-51-1009, C.R.S., which places new conditions on benefit increases?
14. Can the proponents specify which statutory section(s) are being referred to in the provision in proposed section 24-51-1602 (1) (a), C.R.S., that states: "EACH PAYROLL PERIOD,...LESS THAN THE CONTRIBUTION RATE AS DEFINED FOR THE SEVERAL DIVISIONS IN **24-51-40**."? Did the proponents intend to refer to section 24-51-401, C.R.S., which specifies contribution rates for PERA?
15. Can the proponents explain how the employer and employee contribution rates were derived in proposed sections 24-51-1602 and 24-51-1603, C.R.S.? Is there any research or studies that show that these amounts will provide sufficient funds for retiree benefits?
16. Can the proponents explain why the rates for state troopers and for the judicial division are higher than for the state, school and local government divisions?
17. Can the proponents explain why the new proposed section 24-51-1606 (1), C.R.S., in initiative #93 allows members to be fully vested in their own and employer contributions immediately, whereas initiative #81 provided for a phase-in for employer contributions?
18. What is the proponents' intent in using the phrase "directed to repay unfunded liabilities in the association's defined benefit plan" in proposed section 24-51-1603 (3), C.R.S.? Are the moneys to be transferred to the trust funds of the defined benefit plan? If so, how and when would the transfers be made, and to which funds?
19. Section 1 (4) of article V of the Colorado constitution provides that an initiated measure shall take effect "from and after the date of the official declaration of the vote thereon by proclamation of the governor, but not later than thirty days after the vote has been canvassed.". Section 24 of the proposed initiative appears to provide that the measure shall take effect January 1, 2007, upon voter approval and certification by the secretary of state. What is the intent of this provision of the proposed initiative? Does it conflict with the constitutional provision?