

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

April 11, 2008

TO: Ernest Duran and BreeAnne Glasman

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #94, concerning tax credits or subsidies to companies that relocate jobs outside the U.S.

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 amendment appear to be:

1. To add a new section 22 to article X of the Colorado constitution to prohibit the state or any department or agency of the state from allowing any kind of tax credit, deduction, reduction, subsidy, or other form of tax forgiveness otherwise available under Colorado law to any business entity that has employees in Colorado and that relocates some or all of its business operations outside of the United States if the relocation results in a reduction in employment by the business entity in Colorado.
2. To require the Colorado general assembly to enact, amend, or repeal such laws as are

necessary to implement the new constitutional provision.

### **Comments and Questions**

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

#### **Technical questions:**

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

1. On line 13 in the amendment clause, "State" should not be capitalized.
2. On line 22, the comma after the word "States" is unnecessary.
3. Standard drafting practice is to show new language being added to the constitution, with the exception of the section number and headnote, in SMALL CAP TYPE. Would the proponents make this change?

#### **Substantive questions:**

1. Section 1 (5.5) of article V 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 would prohibit a business entity that has employees in Colorado, that relocates some or all of its business operations outside of the United States, and that reduces its Colorado employment as a result of the relocation (hereinafter referred to as a "disqualified business entity") from being allowed tax deductions. Would this prohibition prevent a disqualified business entity from claiming any deduction, including, for example, an income tax deduction for its ordinary business expenses, and thereby require the disqualified business entity to pay taxes on the gross income rather than on its "net income . . . derived from sources within Colorado" as specified in section 39-22-301 (1) (a), Colorado Revised Statutes? If ordinary business expenses deductions are prohibited, would a disqualified business entity also be prohibited from allowing its employees a pretax deduction for health care premiums, flex savings accounts, and other pretax expenses that are afforded to employees under the federal Internal Revenue Code? If these types of deductions are not prohibited, what types of deductions would be prohibited?
3. The proposed initiative would prohibit a disqualified business entity from being allowed tax reductions. Would this prohibition apply to an appeal of the amount of a disqualified business entity's state tax liability that results in a reduction in the amount of taxes owed? If not, what types of reductions would be prohibited?
4. The proposed initiative would prohibit a disqualified business entity from being allowed tax subsidies. What are "subsidies" and how are they different from the "credits", "deductions",

and "reductions" that the proposed initiative would also prohibit from being allowed to disqualified business entities? Do subsidies from "the state, its agencies, and its departments, including the department of revenue," include:

- a. General fund diversions or transfers (e.g., bioscience grants) for purposes of economic development?
  - b. Economic development grants, loans, or transfers?
  - c. Benefits from local government revolving fund and loan programs?
  - d. Local government pension benefits that the department of local affairs administers?
  - e. Other state-administered employment services?
5. What does the phrase "other form of tax forgiveness" include? Does it include:
- a. Sales tax exemptions such as the exemption from state sales and use tax for fuel and oil subject to the state gasoline and special fuel taxes allowed by section 39-26-715, Colorado Revised Statutes? If so, how would the state collect the sales tax from disqualified business entities?
  - b. Property tax exemptions such as the exemption from property tax for intangible personal property such as computer software allowed by section 39-3-118, Colorado Revised Statutes, and the exemption from property tax of the first two thousand five hundred dollars of actual value of personal property that would otherwise be listed on a single personal property tax schedule? If so, how would local governments that impose property tax collect the tax from disqualified business entities?
  - c. The filing by a disqualified business entity of extensions of time in which to file state income tax returns or other state tax returns?
  - d. Appeals of the amount of a disqualified business entity's state tax liability that result in a reduction in the amount of taxes owed?
6. What does it mean for a business entity to relocate "its business operations, in whole or in part, outside the United States"? Does relocation only apply to business activities currently being conducted in the United States? For example, if a business opens a new sales office in a foreign country in which it has not previously conducted business activities, would the opening of the new office represent such a relocation? What if the business transfers employees from a Colorado sales office to the new office? If an airline decides to add more flights to Asia but reduces flights to Mexico and Central America and, as a result, increases employment in Los Angeles but reduces employment in Colorado, does the airline become a disqualified business entity?
7. How direct would the relationship between a business entity's relocation of business

activities and the "layoff, discharge, termination, reduction from full-time to part-time status, or other reduction in employment of its employees in Colorado" have to be in order to make the business entity a disqualified business entity? For example, if a business entity that has a spork manufacturing plant in Colorado opens a new spork manufacturing plant in Mexico without immediately reducing employment in Colorado, but five years later reduces employment at the Colorado plant, would the business entity become a disqualified business entity?

8. How long would a disqualified business entity be prohibited from receiving the specified tax benefits? Once a business entity is disqualified, is it perpetually prohibited from receiving the listed benefits, or would there be circumstances in which the business entity could receive the benefits again?
9. Would the proposed initiative require the general assembly to enact implementing legislation or could the General Assembly determine that such legislation is not necessary? If implementing legislation is needed, which terms or phrases contained in or issues addressed by the proposed initiative are likely to require additional clarification?
10. Article 1, section 8, clause 3 of the United States constitution, more commonly known as the Commerce Clause, grants the federal government the "power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes," and Article VI, section 2 of the United States constitution, more commonly known as the Supremacy Clause, specifies that the United States constitution and federal laws are "the supreme law of the land . . . anything in the constitution or laws of any state to the contrary notwithstanding." Accordingly, the United States Supreme Court has stated that the Commerce Clause prohibits states from engaging in economic protectionism or isolationism and has held many state laws that discriminated against interstate or international commerce to be unconstitutional. Are the proponents concerned that the proposed initiative, which seems to require different and less favorable tax treatment of business entities that shift business activities from Colorado to foreign countries, might, if subjected to a legal challenge, be found to violate the Commerce Clause? If not, why not?
11. Article 1, section 10, clause 1 of the of the United States constitution prohibits any state from enacting any "law impairing the obligation of contracts." Similarly, article 2, section 11 of the Colorado constitution specifies that no "law impairing the obligation of contracts . . . shall be passed by the general assembly." It appears that the proposed initiative would apply to tax credits or other tax incentives offered to business entities under the "Urban and Rural Enterprise Zone Act," article 30 of title 39, Colorado Revised Statutes, and business incentive agreements under which a local government agrees to reduce the amount of taxes owed annually to the local government by a business entity in exchange for investment in a new business facility (see, e.g., section 31-15-903, Colorado Revised Statutes). If the proposed initiative does, in fact, apply to such credits, incentives, and agreements, are the proponents concerned that the proposed initiative or any implementing legislation enacted by the general assembly would impair the obligations of any contract between the state or any local government and any business entity and thereby violate article 1, section 10, clause 1 of the United States constitution and article 2, section 11 of the Colorado constitution? If not, why not?