

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

May 2, 2007

TO: Arthur Guerrero and Marvin Meyers

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #25, concerning operation and distribution of money from Colorado lottery.

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 purpose of the proposed amendment appears to be to amend sections 3 and 5 of article XXVII of the Colorado constitution and to add a new section 6.5 to article XXVII of the Colorado constitution:

1. To create the lottery operating concession board (board) as an independent and temporary board within the government of the state, specify the composition of the board, and identify the conflict of interest restrictions that apply to board members;
2. To authorize the board to enter into a lottery operating concession contract on behalf of the state at any time subsequent to January 1, 2008, and no later than December 31, 2010;

3. To define a lottery operating concession contract as a contract entered into by the board on behalf of the state under which the state obligates itself to a multiple-year financial obligation through the grant of a concession to a qualified private vendor that gives the vendor the right and obligation to operate all lottery programs, receive all gross revenues of lottery programs, and pay all lottery operating expenses, including all prizes, and the right to keep all baseline net proceeds and a specified share of the incremental net proceeds for a period of up to seventy-five years in exchange for a lump-sum payment and the retention by the state of a specified share of the incremental net proceeds; except that a lottery operating concession contract may include a further multiple-year financial obligation in the form of an agreement by the state and the vendor to jointly grant a third party the right to receive baseline net proceeds in exchange for valuable consideration;
4. To define the terms "baseline net proceeds," "incremental net proceeds," "qualified private vendor," and "video lottery terminal";
5. To require the board to select a qualified private vendor for a lottery operating concession contract through a competitive bidding process, but to exempt the bidding process from state procurement laws and allow the board to select a responsible bidder other than the bidder whose bid provides the most facially favorable financial terms to the state if the board believes, based on the qualifications, historical performance, or bid submissions of all qualified private vendors submitting bids, that selection of a different qualified private vendor will best serve the public interest;
6. To create the lottery trust fund and require all moneys received by the state under the terms of a lottery operating concession contract to be credited to the lottery trust fund;
7. To specify the manner in which all moneys credited to the lottery trust fund are to be invested therein or distributed therefrom and to specifically require that:
 - a. The entire lump-sum payment received by the state under the terms of a lottery operating concession contract initially be credited to the lottery trust fund;
 - b. The first one billion seven hundred million dollars of the lump-sum payment remain in the lottery trust fund;
 - c. The lesser of either the entire remainder of the lump-sum payment or the next sixty million dollars of the lump-sum payment be transferred and credited to the Colorado state veterans trust fund;
 - d. Sixty-five percent of all remaining moneys from the lump-sum payment be transferred and credited to the great outdoors Colorado trust fund for use for the exclusive purpose of making competitive grants to local governments and nonprofit land conservation organizations for specified land acquisition and stewardship purposes and that such moneys be exempted from existing constitutional provisions

requiring substantial equality of expenditures of great outdoors Colorado trust fund moneys among four specified purposes and diversion of great outdoors Colorado trust fund moneys in excess of a certain amount to the state general fund;

- e. Thirty-five percent of all remaining moneys from the lump-sum payment be transferred and credited to a trust to be created by the general assembly for the provision to public and private institutions of higher education located in Colorado of funding for need based and merit based scholarships;
- f. The interest and gains generated by the lottery trust fund, subject to such annual limitation as may be adopted by the general assembly, and the state share of the ongoing incremental net proceeds of all lottery programs received by the state under the terms of a lottery operating concession contract be continually appropriated and distributed in a manner consistent with the prudent management of a trust no less frequently than quarterly as follows:
 - i. Forty-two percent to the conservation trust fund for distribution to municipalities and counties and other eligible entities for parks, recreation, and open space purposes;
 - ii. Forty-two percent to the great outdoors Colorado trust fund to be distributed substantially equally among four specified purposes in accordance with a specified existing constitutional provision and to be exempted from an existing constitutional provision requiring diversion of great outdoors Colorado trust fund moneys in excess of a certain amount to the state general fund;
 - iii. Ten percent to the division of parks and outdoor recreation for acquisition, development, improvement, administration, and maintenance of new and existing state parks, recreation areas, and recreational trails;
 - iv. Three percent to the state education fund; and
 - v. Three percent to the state school fund as a contingency reserve;
- 8. To specify that execution of a lottery operating concession contract does not transfer ownership of any lottery program from the state to a qualified private vendor or any other person or limit or impair the ability of the state to regulate and ensure the integrity of lottery programs as specified by law;
- 9. To allow a qualified private vendor operating lottery programs to operate any type of constitutionally or statutorily approved lottery game except for a game that uses a video lottery terminal;
- 10. To generally prohibit the state from operating any lottery program during the term of a lottery

operating concession contract, but to allow the state to terminate or suspend the contract and resume operation of lottery programs if the qualified private vendor fails to operate lottery programs in accordance with operating requirements specified in the contract or otherwise substantially breaches the contract;

11. To specify that state employees whose positions relate to the operation or supervision of lottery programs and may be affected by the execution of a lottery operating concession contract and who are classified employees in the state personnel system retain all rights to the personnel system and retirement benefits pursuant to Colorado law, require that any transfers and or abolishment of positions in the state personnel system be made and processed in accordance with state personnel system laws and regulations, and clarify that the proposed initiative does not authorize or require the relocation of the home office, physical facilities, or employees of the Colorado lottery from their present geographic location; and
12. To exempt all moneys received by the state or any other district by operation of the proposed initiative from fiscal year spending limits specified in the Taxpayer's Bill of Rights or any other law.

Comments and Questions

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

Technical comments and questions:

1. In section 6.5 (1) (c) of the proposed initiative, the term "multiple-year financial obligation" appears once with a hyphen and once without one, which seems inconsistent.
2. On the third-to-last line of section 6.5 (4) (a) (II) (A) of the proposed initiative, the "(A)" should be changed to an "(a)".
3. Should "fund" be inserted after "trust" in the first line of section 6.5 (4) (a) (II) (B) of the proposed initiative?
4. On the first line of section 6.5 (8) of the proposed initiative, after "IN", insert "THIS".
5. On the second line of section 6.5 (9) of the proposed initiative, striking "THAT TERM IS" would improve clarity and conform to customary drafting practices.

Substantive questions:

1. The Colorado constitution requires each initiative to have a single subject. What is the single subject of the proposed initiative?

2. Do the proponents believe that the proposed initiative concerns matters arising under section 20 of article X of the Colorado constitution (Taxpayer's Bill of Rights) and can therefore be submitted to a statewide vote at an odd-year election? Why or why not?
3. Has any other state entered into a contract like a lottery operating concession contract or otherwise sold a lottery operating concession to a private party?
4. With respect to the definition of "lottery operating concession contract" set forth in section 6.5 (1) (c) of the proposed initiative:
 - a. Is a "multiple-year financial obligation" a "multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever" for purposes of the "required elections" provision in section (4) (b) of section 20 of article X of the Colorado constitution? If not, what is it?
 - b. Section 6.5 (1) (c) of the proposed initiative specifies that a "lottery operating concession contract" gives a qualified private vendor the right to keep a "specified share of the incremental net proceeds" and allows the state to receive a "specified" share, but does not specify the size of the respective shares. It thus appears that the allocation of incremental net proceeds between the state and a qualified private vendor would be established under the terms of a lottery operating concession contract. Assuming this is the case, will the board and a contracting qualified private vendor have absolute discretion to determine the sizes of the state and vendor shares of incremental net proceeds or are there any restrictions on that discretion? If this is not the case, how will the sizes of the state and vendor shares of incremental net proceeds be determined?
 - c. There is a seventy-five year limit on the term of a lottery operating concession contract, which raises the following questions:
 - i. What will happen to the lottery after the contract ends?
 - ii. Upon the expiration of a lottery operating concession contract, would the state have the option of entering into another lottery operating concession contract with a qualified private vendor for another period of up to seventy-five years? If so could another lottery operating concession board be appointed to enter into a new contract?
 - d. What is the purpose of the provision that allows the state and the vendor to grant a third party the right to receive baseline net proceeds in exchange for valuable consideration?
5. With respect to section 6.5 (2) of the proposed initiative, which establishes the board:
 - a. An appointment to a board is typically made by a single appointing authority such as

the governor or the president of the senate. Why have the proponents chosen to have one member of the board jointly appointed by the president and minority leader of the senate and one member of the board jointly appointed by the speaker and minority leader of the house of representatives?

- b. Why have the proponents chosen to require specific qualifications for the member of the board to be appointed by the governor, who must be "an employee or representative of an organization that provides scholarships for low-income children," but not for the members appointed by the leaders of the general assembly?
 - c. Why is the board to be dissolved one year after the effective date of a lottery operating concession contract? If the board does not enter into a lottery operating concession contract within the three-year window specified in section 6.5 (3) of the proposed initiative, what happens to it?
6. With respect to section 6.5 (3) of the proposed initiative:
- a. Why is the authority of the board to enter into a lottery operating concession contract been limited to the specified three-year period?
 - b. Why does the Colorado lottery commission have the ultimate responsibility for soliciting bids for a lottery operating concession contract from qualified private vendors while the board has ultimate responsibility for selecting the qualified private vendor?
 - c. Why is the process for selecting a private vendor exempt from the procurement laws of the state? Since the bidding process must nonetheless be "competitive", what specific procurement laws, if any, are being avoided?
 - d. Why is the board granted discretion to select as a qualified vendor a bidder other than the bidder providing the most facially favorable financial terms to the state if another bidder would best serve the public interest? What do the phrases "most facially favorable financial terms" and "best serve the public interest" mean?
 - e. How much revenue is a lottery operating concession contract expected to generate as a lump-sum payment to the state?
 - f. How much revenue is the state expected to receive annually as incremental net proceeds under the terms of a lottery operating concession contract?
7. With respect to section 6.5 (4) of the proposed initiative:
- a. Does the requirement in paragraph (a) that the first one billion seven hundred million dollars of the lump sum payment be credited to the newly created lottery trust fund mean that a lottery operating concession contract must guarantee at least a one billion

seven hundred million dollar lump-sum payment? If not, and if such a contract doesn't yield at least a one billion seven hundred million dollar lump-sum payment, what happens?

- b. Subparagraph (a) (I) does not specify the purposes for which moneys from a lump-sum payment received by the state under the terms of a lottery operating concession contract and credited to the Colorado state veterans trust fund must be used. For what purposes may such moneys be used?
 - c. Why are moneys credited to the great outdoors Colorado trust fund pursuant to sub-subparagraph (a) (II) (A) exempted from the "substantial equality restriction" of section 5 (1) (a) of article XXVII of the Colorado constitution and the limitations of section 3 (1) (b) (III) of article XXVII of the Colorado constitution? What is the "substantial equality restriction"?
 - d. Does the provision of funding to private institutions of higher education for need and merit based scholarships required by sub-subparagraph (a) (II) (A) in any way conflict with section 7 of article IX of the Colorado constitution, which states as follows:

Section 7. Aid to private schools, churches, sectarian purpose, forbidden. Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.
 - e. What does it mean to distribute interest and gains generated by the lottery trust fund and the state share of incremental net proceeds received under the terms of a lottery operating concession contract "in a manner consistent with the prudent management of a trust fund" as required by subparagraph (a) (I)? Does this requirement place specific identifiable limitations on the manner in which such moneys are distributed?
 - f. Sub-subparagraph (b) (I) (E) does not specify the purposes for which moneys credited to the state public school fund as a contingency reserve must be used. For what purposes may such moneys be used?
8. Section 6.5 (5) of the proposed initiative authorizes the state treasurer to invest moneys in the lottery trust fund in any investment in which the public employees' retirement association (PERA) board of trustees may invest PERA funds. How much does this provision restrict

the treasurer in investing such moneys? Does it prevent the state treasurer from investing such moneys in any investment in which state moneys generally may be invested or allow the state treasurer to invest such moneys in any investment in which other state moneys generally may not be invested?

9. With respect to section 6.5 (6) of the proposed initiative:
 - a. What is the proponents' intent in requiring the retention by the state of ownership of all lottery programs under a lottery operating concession contract and of the authority to regulate and ensure the integrity of lottery programs?
 - b. How, if at all, will the retention by the state of ownership of all lottery programs under a lottery operating concession contract and of the authority to regulate and ensure the integrity of lottery programs affect the value or marketability of a lottery operating concession contract?
 - c. Will the retention by the state of ownership of all lottery programs under a lottery operating concession contract subject the state to legal or financial liability if a qualified private vendor operating lottery programs mismanages those programs or engages in illegal or unethical behavior?
 - d. Why is operation by a qualified private vendor of any lottery game that involves a video lottery terminal prohibited?
 - d. Why is the state prohibited from operating any lottery games during the term of a lottery operating concession contract?
 - e. Who determines whether or not a qualified private vendor has substantially breached a lottery operating concession contract, and what constitutes a substantial breach?
10. With respect to section 6.5 (7) of the proposed initiative:
 - a. Are there any state lottery employees who are not classified employees in the state personnel system, and, if so, would this provision affect them at all?
 - b. What protection for state lottery employees does this provision, in conjunction with the state personnel system laws and regulations that it references, provide?
11. Does section 6.5 (8) of the proposed initiative prohibit the relocation of the current home office, physical facilities, or employees of the Colorado lottery or merely clarify that the proposed initiative itself does not require or alone provide sufficient authorization for such relocation?
12. Section 6.5 (9) of the proposed initiative seems somewhat unclear, which raises the following questions:

- a. Is the purpose of section 6.5 (9) to exclude all net proceeds of a lottery operating concession contract from all constitutional and statutory spending limits imposed on the state or any district and, if not, what is the purpose of section 6.5 (9)?
- b. Does "district" have the same meaning for purposes of this provision as it does in section 20 of article X of the Colorado constitution?
- c. Is the statutory limitation on state general fund appropriations a "spending limit" for purposes of section 6.5 (9)?