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Colorado General Assembly

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MEMORANDUM

January 7, 2008

TO: Sue Radford and Tim Hillman

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #56, concerning the imposition of carbon fee with offsetting rebates and tax reductions

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.

An earlier version of this initiative was the subject of a memorandum dated November 30, 2007. Proposal 2007-2008 #52 was discussed at a hearing on December 3, 2007. To the extent possible, 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 reduce carbon dioxide emissions in the state by taxing each metric ton of such emissions; and

2. To require the revenue from the charge to be used to reduce other state taxes and to provide rebates to the taxpayers and citizens of the state.

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. The first three paragraphs on page 1 are not in a subsection.

2. Component parts of sections do not follow standard outline form and can only be broken down into lesser subdivisions (that is, subsections can be divided into paragraphs, paragraphs into subparagraphs, and subparagraphs into sub-subparagraphs) in two ways. The first and more common method is to denote those lesser subdivisions by listing them according to similar subject matter following the introductory portion to that section division, which ends with a colon. For example:

   "(1) This subsection (1) can be broken into three lesser section divisions respectively:
   (a) Paragraphs;
   (b) Subparagraphs; and
   (c) Sub-subparagraphs."

   The other method is to group similar thoughts under a larger section division. For example:

   "(1) (a) This subsection (1) is divided into paragraphs.
   (b) This subsection (1) contains three paragraphs, (a), (b), and (c).
   (c) This paragraph (c) and paragraphs (a) and (b) all pertain to the same subject."

3. 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 "THE PURPOSE OF THIS SECTION . . ."

4. In the first sentence, "specifying" would be the form of "specifies" that parallels the verb "implementing" and would fit with the rest of the sentence.

5. Rather than generally describing the sections of the constitution that are expressly superceded, it might be clearer if you specifically identified the sections in question.

6. As there is only one definition in the proposed initiative, the definition may be in one paragraph, as follows: "(3) As used in this section, unless the context otherwise requires, "fossil fuel" shall mean. . .".

7. The use of present tense verbs is preferred in standard drafting. In the definition of "fossil fuel", you should use the term "is not created by human activity" rather than "was not created . . .".

8. The definition might be easier to understand if the items included within the definition of fossil fuels are mentioned in a separate sentence beyond the definition. For example, "Fossil fuels" include, but are not limited to, coal, petroleum....".

9. Commas are generally used after the last word before the conjunction in a series. For example, "extraction, processing, and use of fossil fuels."

10. "Fiscal year" should be stated essentially as follows: "State fiscal year 2008-09".

11. Dollar amounts should be written out. For example, $125.03 would be written "one hundred twenty-five dollars and three cents".

12. In subsection (3) of the proposed initiative, the phrase "and to fund income tax credits for ". . . per capita," seems incomplete. Per capita what? Rebates?

13. In subparagraph (II) of paragraph (b) of subsection (3) of the proposed initiative, "one tenth" should be hyphenated.

14. In subparagraph (IV) of paragraph (c) of subsection (3) of the proposed initiative, the phrase "credit for all persons domiciled in Colorado at the time distribution is made" seems to be missing a limiting adjective before "distribution."

15. The "state treasurer" should be referred to as such.

16. The first word after a colon should be capitalized.

17. For ease of comprehension, the formulas in the proposed initiative, which now read, ". . . the quantity:", should instead read, ". . . the following quantity:".

<u>Substantive comments and questions</u>

1. The following questions and comments relate to the first paragraph of the proposed initiative:
    a. Is the tax in paragraph (a) of subsection (2) of the proposed initiative "consumption-based"?
    b. Aside from 2020 and 2050, during which emissions targets must be met, is the tax rate simply left to the discretion of the Governor?
    c. Insofar as some of the tax revenue is kept by the state in lieu of collecting other taxes, is all of the tax revenue "distributed"?

2. The following questions and comments relate to the second paragraph of the proposed initiative:
    a. What sections of the Colorado constitution "divert all taxes on transportation fuel"?
    b. What sections of the Colorado constitution "place limits or totals on revenue or

spending"?

c. What does "statewide votes" mean? Are you referring to the provision that requires "voter approval in advance for" certain tax changes?

d. Insofar as you use the phrase "change to tax rates", are you trying to limit which provisions are superceded? For example, are you referring only to the requirement for voter approval in advance for "tax rate increases"?

e. What does "place ... totals on revenue or spending" mean? What provisions place totals on revenue or spending?

f. How does the proposed initiative contradict the sections that are identified as being superceded?

g. Are you aware of any other provisions that may be superceded?

h. Though the proposed initiative may supercede existing provisions, the provisions of the proposed initiative may nonetheless be superceded by a subsequent constitutional amendment.

i. If the sections that are generally listed as being superceded include other provisions that do not contradict the proposed initiative, are they still effective?

3. The following questions and comments relate to the definition:

a. Does the phrase "obtained by extraction from the earth" describe a specific type or way that the substance is removed from the earth?

b. The definition seems to include two parts: (1) It creates requirements to meet the definition, which are that the substance is fifty percent carbon and removed from the earth; (2) It gives examples of fossil fuels. However, do all of the examples meet the requirements of the definition? For example, is a petroleum product or derivative necessarily removed from the earth? Would it make sense to add the reference to products and derivatives to the first part of the definition, instead of just as an example?

The following questions and comments relate to subsection (1) of the proposed initiative:

4. Is the assumption behind subsection (1) and the carbon tax in general that creating and increasing the carbon tax will cause a change in statewide carbon emissions?

5. Are emission[1] targets set for calendar years or fiscal years? Insofar as the proposed initiative appears to refer to both calendar and fiscal years, the proponents might consider specifying what type of year is being referred to.

6. Does the proposed initiative expressly require the carbon tax to be levied in any years other than years that are included in the target emission years?

7. If the target year is a calendar year, should the carbon tax change on a calendar year basis as opposed to a fiscal year basis?

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[1] As used in this memorandum, "emissions" is a shorthand for "carbon dioxide emissions."

8. What does paragraph (a) of subsection (1) of the proposed initiative mean?

9. With respect to the term "previous level":
   a. To what does the term previous level refer?
   b. Based on subparagraph (II) of paragraph (a) of subsection (1) of the proposed initiative, it appears that it may include the amount from some prior year. Must it always be based on a year? Why do the initial targets use different base years?
   c. Is the level always limited to a single year, or could it be more than one year?
   d. Is it limited to years prior the enactment of the proposed initiative? For example, in twenty years, could the general assembly specify 85% of the emissions from 2015?

10. Does "emissions from fossil fuels" mean the emissions from the use or extraction of fossil fuels or both?

11. Is there any requirement that a target be specified by statute for years after 2050? If a target is not set beyond 2050, what would happen to the tax?

12. What is the difference between target years and interim years if both can be changed by statute?

13. With respect to the carbon emissions in 1990 and 2005:
   a. Do we know what the 1990 and 2005 statewide levels of emitted carbon dioxide were?
   b. Who is responsible for estimating those levels?
   c. If they are known amounts, why not place those amounts in the constitution as a target as opposed to using a percentage reduction from a previous level?
   d. Who is responsible for estimating those levels? Could the general assembly pass legislation that sets the amount of the emissions from 1990 and 2005?

14. The following questions relate to the authority of the governor to set the carbon tax rate:
   a. If the emissions target only needs to be reached in the target years, could the governor not set a tax for nontarget years?
   b. Can the governor set different rates for different taxpayers?
   c. Can the governor establish exemptions or credits related to the tax?
   d. Is the governor free to reject any data or calculations that are included in the report prepared pursuant to paragraph (c) of subsection (1) of the proposed initiative?
   e. Does the governor have the authority to modify the carbon tax rate for the 2009-10 fiscal year?

15. How does the governor "announce" the tax rate?

16. The following questions and comments relate to the second sentence of paragraph (b) of subsection (1) of the proposed initiative:
   a. Is this intended to exempt the carbon tax from the provisions of section 20 (4) (a) of article X of the Colorado constitution (TABOR)? If so, the proponents might

consider specifically referencing the other provision or using the language from that provision. (See subsection (4) (a) of TABOR, "districts must have voter approval in advance for. . .")

b. TABOR would not require voter approval for a decrease in a tax rate, so does "changes" really mean "increases"?

c. The language is limited to changes in the tax rate. Is it possible that prior voter approval may nonetheless be required for a change to the carbon tax because of a provision in subsection (4) (a) of TABOR that pertains to tax changes other than just increases in the rate?

17. Subparagraph (II) of paragraph (c) of subsection (1) of the proposed initiative limits "annual changes." Are these changes from one fiscal year to the next? Does this language limit both increases and decreases?

18. Paragraph (c) of subsection (1) of the proposed initiative requires the governor to prepare a report that includes data and calculations used to arrive at the carbon tax rate, but is there a provision in the proposed initiative that actually requires the governor to use any data or calculations in arriving at the carbon tax rate? If so, where?

19. Does successor organization refer to both the "American Agricultural Economics Association" and the "American Economic Association"?

20. In what field must the principal author of the report be employed?

21. Will the author be reimbursed for writing the report? If so, by whom?

22. What happens if the Governor cannot find a person with the specified qualifications to prepare the report?

23. While anonymous comments to the required report posted on the internet shall not be posted, what if the commenter fails to include his or her occupation or employer? Furthermore, what if the commenter lives in an unincorporated area within Colorado? How should a commenter's identity be verified?

24. The report would not need to include a listing of the carbon tax rate information related to carbon dioxide emissions that directly result from mining or other activities, correct?

25. In subparagraph (V) of paragraph (c) of subsection (1), is carbon dioxide always produced through burning? Is it your intent that "consumption" is equivalent to "burning"?

The following questions and comments relate to subsection (2) of the proposed initiative:

26. With respect to the tax on the release of carbon dioxide that is directly contained in a geologic deposit:

a. How will the party responsible for the release know how much carbon dioxide is released?

b. Who is the "party responsible"? Is it the company that actual severs the geologic deposit? Would it include an interest owner?

27. Does the fact that the governor has authority to designate the appropriate agency to enforce paragraph (a) of subsection (2) of the proposed initiative limit the authority of the general assembly to pass laws implementing the provisions of the proposed initiative? For example, could the general assembly pass a law that establishes guidelines for the method the appointed agency should use in calculating the amount of the emissions?

28. How will the amount of emissions be estimated when released from a geologic deposit?

29. To the extent that the tax is collected on each kilowatt hour delivered to electric power users in Colorado:
    a. Is this limited to power produced in Colorado?
    b. If not, does this mean that the state is collecting tax on emissions that are outside of Colorado?
    c. Pursuant to subsection (1) of the proposed initiative, the tax rate is set at a level that causes annual statewide emissions of carbon dioxide to meet the emissions target. How does collecting a tax on emissions outside of the state help the state meet the emissions target?

30. Who is a "fossil fuel supplier"?

31. Who are "receivers" as used in paragraph (c) of this subsection (2)?

32. Please explain how the exemption in subparagraph (I) of paragraph (c) works:
    a. Are those fossil fuels taxed when they are mined or created?
    b. Are they exempt when they are burned in the process of generating electricity?
    c. Is the tax related to the burning of these fossil fuels paid by electric power users pursuant to the provisions of paragraph (b) of subsection (2) of the proposed initiative?

33. The following questions and comments relate to subparagraph (II) of paragraph (c) of subsection (2) of the proposed initiative:
    a. What is a "fossil fuel handler"?
    b. The last group that is subject to the tax in subparagraph (II) are "parties using fossil fuels for uses that do not create carbon dioxide." If the use doesn't create carbon dioxide, then won't the party have no taxable emissions?
    c. How will this group of taxpayers referenced in subparagraph (II) calculate their emissions?

34. The following questions and comments relate to paragraph (d) of subsection (2) of the proposed initiative:
    a. What is the purpose of paragraph (d)?

b. How are fossil fuels used in these various types of building systems?
c. Is it a different type of carbon tax or simply a different way of collecting the carbon tax created in other paragraphs of subsection (2)?
d. For example, to the extent that the lighting system uses electricity, isn't the power user, who may be the tenant, required to pay the tax pursuant to paragraph (b) of this subsection (2)? Is this a double-tax or an exception to the rule as to who has to pay the tax?
e. How will the amount of the carbon emissions from a building be known?
f. If the tenants in an apartment building all have separate utility bills and meters, how will the utility company know how much the building owner should pay?
g. As written, it appears that if a single-family home was leased, the lessor would be responsible for the carbon tax associated with the home. Is that your intention?

35. The following questions and comments relate to paragraph (e) of subsection (2) of the proposed initiative:
    a. Does paragraph (e) supercede section 18 of article X of the Colorado constitution?
    b. That provision states that any excise tax on gasoline "shall, except costs of administration, be used exclusively for the construction, maintenance, and supervision of the public highways of this state." Is that what you mean by "transportation funding?"
    c. Does this provision prohibit money from the fund from being sent to the highway users tax fund (HUTF), created in section 43-4-201, Colorado Revised Statutes? If so, insofar as a portion of the sales and use tax revenue goes to the HUTF, and the moneys in the Colorado clean energy tax shift fund are supposed to back fill lost sales and use tax revenue, this will mean that the HUTF will have less revenue. Is this your intention?

The following questions and comments relate to subsection (3) of the proposed initiative:

36. To the extent that the moneys in the Colorado clean energy tax shift fund are excluded from revenue or spending limits or totals:
    a. What are the revenue or spending limits or totals?
    b. If the moneys in the Colorado clean energy tax shift fund are exempt from the TABOR spending limit and those dollars are used in part to backfill sales and income tax revenue that would otherwise be included in the state general fund and elsewhere, won't this have the effect of reducing the TABOR spending limit and, consequently, reducing the fiscal year spending limit in future years? (Though by virtue of Ref. C, the state may not be required to refund some or all of the money in excess of the limit.)
    c. To the extent that the tax is discontinued in future years and the income tax and sales tax revenues go back up, how will these reduced spending and revenue limits impact the state's ability to use the revenue it receives?

37. The following questions relate to paragraph (a) of subsection (3) of the proposed initiative:
    a. How will the state treasurer know how much will be needed for administrative

expenses related to the proposed initiative?

b. Is the general assembly or the governor to be responsible for telling the state treasurer how much will be needed? If not, then doesn't this discretion implicitly give the state treasurer control on how the proposed initiative is administered? To the extent that this provision seems to empower the state treasurer to decide how much to spend on administrative expenses, this is a departure from the normal budgeting process that involves both the general assembly and governor.

c. Is the money spent on administrative expenses to be appropriated by the general assembly? To the extent that the moneys are transferred to other funds for administrative expenses, will such moneys be appropriated by the general assembly?

d. How did you arrive at a figure of three million dollars for administrative expenses? What happens if the state needs more than three million dollars for administrative expenses related to the proposed initiative?

38. If the money is transferred to the state general fund, will the dollars be included within the limit on general fund appropriations?

39. If the state uses two million dollars to administer the tax in the first year, this will establish a new base for the administrative expenses in the future, correct?

40. What are the "constraints placed on increases of the general fund?"

41. Does subparagraph (III) of paragraph (a) of subsection (3) of the proposed initiative prohibit the state from using moneys from other sources to pay for the administration of the carbon tax? If so, would the state be excused from collecting the tax?

42. How will the state pay for expenses that are incurred prior to the collection of the tax? On one hand the proposed initiative requires that certain administration occur by April 1, 2009, but it only allows the expenses to be paid from the tax that is collected after July 1, 2009.

43. Is the "discounted rate" used in paragraph (b) of subsection (3) of the proposed initiative, the state sales and use tax, the amount of which is reduced by the proposed initiative? It might be helpful to define "discounted sales and use tax rate"?

44. The formula in subparagraph (II) of paragraph (b) of subsection (3) of the proposed initiative does not appear to reduce the sales tax rate to a level sufficient to fully reduce revenue by the amount available for the reduction in the sales and use taxes. Is this your intent?

45. How will the state treasurer know how much to transfer? Will it be distributed to all of the same funds that currently receive sales and use tax revenue? How often will such transfers take place?

46. Is subparagraph (III) of paragraph (b) of subsection (3) of the proposed initiative an exception to the voter approval provisions in TABOR?

47. What happens if the anticipated revenue available to fund the sales and use tax discount is less than actual revenues received from the carbon tax?

48. In subparagraph (IV) of paragraph (b) of subsection (3) of the proposed initiative, to which "revenue and spending limits constraining sales and use tax revenue" are the proponents referring?

49. The following questions and comments relate to the introductory portion of paragraph (c) of subsection (3) of the proposed initiative:
    a. Is the carbon tax revenue literally returned to taxpayers, or does it just reduce the amount income tax liability?
    b. How will the state treasurer know how much to transfer?
    c. Are income tax credits refundable? Would you consider clarifying whether they are refundable?
    d. Are moneys used to fund the sales and use tax discount and administrative expenses the only uses of the carbon tax revenue that are permissible in the same year that the revenue is received?
    e. For revenue received during the fiscal year 2009-10, would the credits be available for the 2010 tax year, for which taxes are due in 2011?
    f. When will the state treasurer make transfers to cover the lost revenue? Will the treasurer simply transfer all of the remaining revenue from the prior fiscal year to the state general fund?
    g. What are the "revenue or spending limits or totals"?
    h. If all of the money transferred from the Colorado clean energy tax shift fund is excluded from any revenue or spending limits, won't this reduce those revenue limits by the amount transferred? If so, what will happen if the tax is discontinued?

50. The following questions and comments relate to subparagraph (I) of paragraph (c) of subsection (3) of the proposed initiative:
    a. How do you anticipate the adjustments working?
    b. Will the state have to estimate the number of people who will be claiming the credit? What happens if there is an error in the estimate?
    c. Should the state use the "anticipated expense of funding the earned income tax credit at twenty percent of the federal level", which is mentioned in subparagraph (I) of paragraph (b) of subsection (3) of the proposed initiative, for determining the amount available for the credit?
    d. To the extent that this anticipated amount is used for purposes of determining the remaining income tax credits, wouldn't an error in the anticipated amount mean that the state may not have sufficient revenue to reimburse itself for all of the lost revenues from the income tax credits? Is the state supposed to avoid this by reducing the amount of the earned income tax credit?
    e. When would the general assembly be making adjustments to the amount of the earned income tax credit? Would it be during the regular legislative session during the calendar year prior the year in which the credit is allowable? If so, it would be prior to the end of the fiscal year, so the general assembly would not know the actual

amount of the carbon tax revenues.

f. If the federal credit is discontinued, the state is permitted to continue the earned income tax credit, but only as described in this subparagraph (I)? The general assembly would not be required to continue the credit, correct? If so, would the amount of the sales tax discount and other income tax credits be increased?

51. How will the governor announce the percentages of the credits as required in subparagraphs (II) to (IV) of paragraph (c) of subsection (3) of the proposed initiative?

52. The following questions and comments relate to subparagraph (II) of paragraph (c) of subsection (3) of the proposed initiative:
    a. Which year is the "previous year"? Is it the year prior to the September 15 that the governor announces the percentage or is it the year prior to the year in which the rebate is made? What would an example be for the first year that the rebate is made.
    b. Is this an income tax credit?
    c. What happens if the amount of the business personal property tax rebate exceeds the tax liability?
    d. Does the state know how much business personal property tax is paid in the state?
    e. Does "paid in the state" mean paid to local governments in the state?

53. The following questions and comments relate to subparagraph (III) of paragraph (c) of subsection (3) of the proposed initiative:
    a. Is this an income tax credit?
    b. Which year is the "previous year"?
    c. What are "payroll taxes"? Paid by whom?
    d. Who claims the credit, the employee on whose behalf the payment was made or the employer who makes the payment?
    e. "Total statewide payroll taxes" include payroll taxes paid by the individual or an employer to the federal government. Would the state know the amount of payroll taxes paid to the federal government in time for the Governor to announce the rebate percentage by September 15?
    f. Could the state require a taxpayer to include the amount of the employer payments on an individual's return? Could the state require the employer to file something indicating how much the employer paid?
    g. Why may this credit exceed one hundred percent, but the business personal property tax credit may not?

54. The following questions and comments relate to subparagraph (IV) of paragraph (c) of subsection (3) of the proposed initiative:
    a. What does "domiciled in Colorado at the time distribution is made" mean? Is it just the state population? Would you considering defining it?
    b. For the revenue received during the 2009-10 fiscal year, would this credit be taken on the income tax return for the 2010 tax year, which tax is paid in 2011? If not, please describe your intention for the timing of the credit.