

# STATE OF COLORADO

## Colorado General Assembly

Mike Mauer, Director  
Legislative Council Staff

**Colorado Legislative Council**  
029 State Capitol Building  
Denver, Colorado 80203-1784  
Telephone (303) 866-3521  
Facsimile (303) 866-3855  
TDD (303) 866-3472  
E-Mail: lcs.ga@state.co.us



Dan L. Cartin, Director  
Office of Legislative Legal Services

**Office of Legislative Legal Services**  
091 State Capitol Building  
Denver, Colorado 80203-1782  
Telephone (303) 866-2045  
Facsimile (303) 866-4157  
E-Mail: ols.ga@state.co.us

### MEMORANDUM

March 5, 2014

**TO:** Vickie Armstrong and Bob Hagedorn

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**SUBJECT:** Proposed initiative measure 2013-2014 #80, concerning Proceeds from Video Lottery Terminals for K-12 Education

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 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.

This initiative was submitted with along with proposed initiative 2013-2014 #81.

### Purposes

The major purposes of the proposed amendment to the **Colorado constitution** appear to be:

1. To increase funding for K-12 education by creating a new revenue source from the use of video lottery terminals;

2. To permit the use of video lottery terminals at certain racetracks and at licensed limited gaming establishments in Black Hawk, Cripple Creek, and Central City; and
3. To distribute a portion of video lottery terminal proceeds to local governments hosting establishments operating video lottery terminals.

## **Technical Comments**

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the draft as suggested below.

1. The paragraph at the beginning of the draft that begins "An Initiative Proposal to Increase K-12 Education Funding ..." appears to be a title. The title board will set a title for the draft, so this language is unnecessary and should be deleted.
2. It is standard drafting practice to number, before the amending clause, each section, part, etc. that is being amended, added, or repealed with a section number (i.e., **SECTION 1.**, **SECTION 2.**).
3. It is standard drafting practice for the amending clause to follow the format specified in the initiative drafting guide and style sheet and in the Office of Legislative Legal Services Drafting Manual. For example:

**SECTION 1.** In the constitution of the state of Colorado, **add** section 17 to article XVIII as follows:

4. It is standard drafting practice to show the word "Section" and the language in the headnote in regular type rather than in small capitals. For example:

**Section 17. The K-12 education fund.**

5. Although the text of the draft should be in small capital letters, a large capital letter should be used to indicate capitalization where appropriate. The following should be large capitalized:
  - a. The first letter of the first word of each sentence;
  - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and

c. The first letter of proper names.

For example the first word in subsection (1), paragraphs (a) and (b) of subsection (7), and subparagraph (II) of paragraph (a) of subsection (8) should all be capitalized. The words "SECTION" and "ARTICLE" in paragraph (c) of subsection (8) should not be capitalized.

6. In subsection (1), if it is your intention to create a single fund called "K-12 education fund," it would be better to use the word "the" to precede the name of the fund, rather than "a" on the fifth line after "hereby established".
7. In subsection (1) and paragraph (e) of subsection (9), the initiative contains the phrase "including, but not limited to." It is standard drafting practice to not include the qualifier "but not limited to" because courts should construe the word "including" correctly without the qualifier.
8. It is standard drafting practice to insert one left tab at the beginning of the first line of each new section, subsection, paragraph, or subparagraph, including amending clauses and section headings. Smaller section divisions should not be further indented.
9. In subsections (2), (3), (4), (5), (7), (8), and (9), the paragraph letters should be in lower-case lettering, not small capitals.
10. When citing the Colorado Revised Statutes in the Colorado constitution, it is preferred that "Colorado Revised Statutes" be spelled out, rather than written as "C.R.S."
11. It is standard drafting practice to set off certain phrases such as introductory, parenthetical, or prepositional phrases with commas. For example, in paragraph (f) and subparagraph (II) of paragraph (g) of subsection (2), commas are preferred to parentheses. See the example in technical comment 12.
12. When providing examples, it is preferred to say "such as" or "including" rather than using abbreviations such as "i.e." or "e.g." For example:

(f) "NET VLT PROCEEDS" MEANS THE TOTAL AMOUNT  
OF CURRENCY AND CURRENCY EQUIVALENTS, SUCH AS ITEMS  
REDEEMABLE FOR CURRENCY, WAGERED IN ...
13. The preferred method for separating a series of at least three items in a list is to use a comma after the second to last item in the series. As such, there should be a comma after "operate" in paragraph (c) of subsection (3) and after "lease" in subsection (6).

14. When referring to a provision within the same section, it is standard drafting practice to start with the smallest subdivision and to name each subdivision within the cite. For example, in paragraph (a) of subsection (4), the cite would read: "... LISTED IN SUBPARAGRAPH (I) OF PARAGRAPH (d) OF SUBSECTION (2) OF THIS SECTION,..." Similar references occur in paragraph (b) of subsection (4), paragraph (c) of subsection (8), and paragraph (a) of subsection (9).
15. It is standard drafting practice when referencing statutory sections, to include the word "section" before the number. In subsection (6), the word "section" should be inserted before "24-35-204.5."
16. When a citation is within the same section or article of the Colorado constitution, it is not necessary to include the section or article number. Simply write "this section" or "this article."
  - a. In paragraph (c) of subsection (8), the reference to "ARTICLE XVIII, SECTION 2 OF THE STATE CONSTITUTION" should be changed to "SECTION 2 OF THIS ARTICLE."
  - b. Additionally, section numbers should not be in parentheses. In subsection (11), the citations that read "this section (17)" should be changed to "this section."
17. In paragraph (a) of subsection (9), parentheses should surround the subsection number, and the paragraph letters should be shown in lowercase type.
18. The word "shall" should be used to indicate that a person has a duty; it should not be used as a future tense verb. See section 2-4-401 (6.5) and (13.7), Colorado Revised Statutes, which define "must" and "shall." Simple present tense verbs should be used when possible. For instance:
  - a. In paragraph (b) of subsection (4), write "... additional terminals are not permitted ...."
  - b. In subsection (5):
    - i. In the introductory portion, write "... at exclusive locations is subject ...";
    - ii. In paragraph (a), write "... at each exclusive location is prohibited ...";

iii. In paragraph (c), write "... video lottery terminals is restricted ...."

c. In subsection (9):

i. In paragraph (a), write "... education fund consists of the moneys provided in ...";

ii. In paragraph (b), write "The state treasurer shall make the payment upon proper presentation ...";

iii. In paragraph (c), write "The per pupil amount is determined ..." and "The amount distributed to each school district and the state charter school institute is the ...";

iv. In paragraph (d), write "Money distributed ... under this subsection (9) are in addition ...;" "No school district or institute charter school is required ...;" and "... nor is any school district required ...";

v. In paragraph (e), write "Each school district ... charter school has the discretion ...."

d. In subsection (11), write "... the remainder of this section 17 remains unimpaired."

19. The word "shall" indicates that a person has a duty; an inanimate object cannot logically possess a duty. Therefore, in paragraph (d) of subsection (5), video lottery terminals cannot have a duty to accept a wager. Would you consider changing "shall" to "must" in this instance?

20. The word "shall" indicates that a person has a duty, while the word "must" indicates that a person is required to satisfy some condition in order for a consequence to apply. See section 2-4-401 (6.5) and (13.7), Colorado Revised Statutes, which define "must" and "shall." In the introductory portion of subsection (7), consider changing the word "shall" to "must" because subsection (7) requires an exclusive location to satisfy the initial one-time payment condition in order for the consequence of operating video lottery terminals to apply.

21. It is standard drafting practice to use the active voice, rather than the passive voice. In paragraph (f) of subsection (9) and in subsection (10), the actor should precede the action. For example:

(f) THE STATE AUDITOR SHALL AUDIT OR DIRECT AN AUDIT OF THE K-12 EDUCATION FUND AT LEAST ANNUALLY AND SHALL SUBMIT A REPORT ...

(10) THE STATE AND LOCAL GOVERNMENTS SHALL COLLECT, DISTRIBUTE, AND SPEND ALL TAX AND FEE REVENUES ATTRIBUTABLE ...

22. References to provisions in the Colorado constitution should begin with the section number, followed by the article number. In subsection (10), the reference should read: "section 20 of article X."
23. Throughout the draft, the word "such" is used to mean "the thing or person just mentioned." The word "such" means things or people that are similar to the one just mentioned." It is standard drafting practice to use a definite article: Use the word "the" instead of "such" when identifying a mentioned thing.

### **Substantive Comments and Questions**

The substance of the proposed initiative raises the following comments and questions:

1. The following questions concern the definitions to be added by subsection (2) of section 17 of the Colorado constitution:
  - a. In subparagraph (I) of paragraph (d), "exclusive location" is defined as a class B horse racetrack that has been continuously operating and licensed for the preceding five years. Does this mean that the racetrack must be licensed as a class B racetrack for the preceding five years, or may the racetrack be licensed as a class A racetrack for a portion of that five-year period?
  - b. The equal protection clause of the Fourteenth Amendment to the U.S. Constitution requires that state laws be rationally related to a legitimate government purpose. Courts will usually ask whether a rational basis exists for the way a class has been defined. In subparagraph (I) of paragraph (d) of subsection (2), what are the policy reasons for permitting only one racetrack per county to operate video lottery terminals? By what standard is one racetrack to be chosen to operate video lottery terminals over another racetrack in the same county?
  - c. In subparagraph (II) of paragraph (d), "exclusive locations" also includes "licensed limited gaming establishments in the city of

Blackhawk, Central City, and the city of Cripple Creek ...." Section 9 of Article XVIII of the Colorado constitution permits limited gaming in "the City of Central, the City of Black Hawk, and the City of Cripple Creek." Would you consider changing the definition in subparagraph (II) of paragraph (d) of subsection (2) to state "the City of Black Hawk, the City of Central, and the City of Cripple Creek . . ." in order to remain consistent with section 9 of article XVIII?

- d. If section 9 of article XVIII of the Colorado constitution is subsequently amended to permit licensed limited gaming in other jurisdictions, is it your intent to keep the operation of video lottery terminals limited to Blackhawk, Central City, and Cripple Creek?
  - e. The acronym "VLT" as used in the term "net VLT proceeds" is undefined. Would you consider specifying that VLT is an acronym for "video lottery terminal"?
  - f. By defining a "host community" as "the single local jurisdiction that issues the permits and approvals necessary for an exclusive location to operate video lottery terminals" do you require a city to explicitly authorize the use of video lottery terminals in an existing limited gaming establishment in order for that city to qualify for a distribution of net VLT proceeds? For example, if an existing limited gaming establishment in Black Hawk is authorized by the commission to operate video lottery terminals, would the City of Black Hawk have to issue an additional permit or approval in order to qualify for a distribution of net VLT proceeds?
2. Paragraph (a) of subsection (3) is ambiguous in that it is susceptible to multiple interpretations. Which, if any, of the following interpretations reflects the intent of paragraph (a):
- a. Does paragraph (a) require establishments to obtain a license from both the commission and the division? Current law provides the director of the state lottery division with licensing authority. Section 24-35-204 (3) (d) and (3) (e), Colorado Revised Statutes; see also section 24-35-206 (1), Colorado Revised Statutes. The commission, however, is explicitly denied licensing authority. Section 24-35-208 (1) (a), Colorado Revised Statutes.
  - b. An alternative interpretation is that paragraph (a) requires the commission and the division to permit the operation of video lottery terminals no later than November 1, 2014; and that paragraph (a) confers licensing authority on neither the commission nor the division.

3. In paragraph (c) of subsection (3), what is the reason for providing the "division and director" with authority to act? Section 24-35-204, Colorado Revised Statutes, confers a number of duties upon the director, to include licensing, administering the state lottery program, and supervising the state lottery. While section 24-35-203, Colorado Revised Statutes, mirrors the language of paragraph (d), section 24-35-203, Colorado Revised Statutes, describes the functions of the division but does not confer any duties or authority. Would you consider removing the reference to the division in paragraph (c) and confer authority upon the director alone? This comment also applies to paragraphs (a), (b), and (c) of subsection (4).
4. Given that parts of section 17 discuss licensing by the state lottery division, the phrase "subject to licensure" in paragraph (b) of subsection (5) could be interpreted to require the lottery division to license the sale of alcoholic beverages in exclusive locations. Currently, the state liquor control division and the local licensing authority are responsible for issuing a license that permits an establishment to sell alcoholic beverages. The Colorado liquor code contains licenses for limited gaming establishments and racetracks. Section 12-47-414, Colorado Revised Statutes (retail gaming tavern license); section 12-47-418, Colorado Revised Statutes (racetrack license). Do you intend the licensure in paragraph (b) to be conducted by the lottery commission, the liquor control division and local licensing authority, or some other entity? If you intend that exclusive locations are to be licensed according the Colorado liquor code, then would you consider mirroring the language in section 9(3)(e) of article XVIII of the Colorado constitution, which states "[l]imited gaming may occur in establishments licensed to sell alcoholic beverages"?
5. In subsection (7), The draft says "FOR THE PRIVILEGE OF OPERATING VIDEO LOTTERY TERMINALS, IN ADDITION TO ANY APPLICABLE LICENSE FEES, EACH LICENSED EXCLUSIVE LOCATION SHALL:" The following questions concern this clause:
  - a. The courts have not looked favorably on the distinction between a privilege and a right. See *Sherbert v. Verner*, 374 U.S. 398 (1963). It appears that the intention is to simply impose requirements, so the privilege language is unnecessary. Would the proponents consider deleting the word "privilege" and rewriting the introductory phrase?
  - b. Then follows a list of things a licensee is required to do. The term "shall" imposes a duty. If a person fails to obey the duty, a punishment is usually required. The draft should contain explicit consequences. Would the proponents consider adding consequences?



- c. If the consequence is merely that a person loses the ability to operate a VLT, the word “shall” may be replaced with the word “must” to make it clear that these are licensing conditions. See section 24-4-401, Colorado Revised Statutes. Nevertheless, it is a better practice to explicitly state the consequences of failing to meet the requirements. For example, if a person keeps money owed to the state, is the state authorized to merely revoke the license? Or may the state collect the money?
6. Paragraph (c) of subsection (8) includes a reference to the provisions of section 24-35-203, Colorado Revised Statutes, which defines the function of the state lottery division as "to establish, operate, and supervise the lottery authorized by section 2 of article XVIII of the Colorado constitution, as approved by the electors." What is the purpose of this reference in light of the fact that section 24-35-203, Colorado Revised Statutes, does not contain any discussion of the allotment or allocation of lottery moneys?
7. Paragraph (a) of subsection (9) states that "the state treasurer shall invest moneys in the fund, and any interest earned on such investments shall be deposited in the fund." Paragraph (b) requires the state treasurer to pay certain expenses incurred by the commission and by the division in implementing this section; while paragraph (c) requires the state treasurer to distribute the remaining balance to school districts and the charter school institute. Of the moneys deposited in the fund in a given year, how much should the treasurer invest, and how much should be kept for distribution?
8. Are the state treasurer and the state auditor authorized to receive moneys from the K-12 education fund to pay the expenses they incur in administering and in auditing the fund?
9. In paragraph (a) of subsection (9), the draft contains the clauses “THE STATE TREASURER SHALL INVEST MONEYS IN THE FUND, AND ANY INTEREST EARNED ON SUCH INVESTMENTS SHALL BE DEPOSITED IN THE FUND.” This leads to the following questions:
  - a. The state treasurer may invest the moneys so that they earn income rather than interest. Would the proponents consider adding “income” so that the sentence requires interest and income to be deposited in the fund?
  - b. The second clause, beginning with “and any interest,” does not follow the form used for the first clause. The first clause makes it clear that the state treasurer has the duty to invest the moneys. The second clause is ambiguous but appears to require the interest to be

deposited in the fund. If so, then it should be rewritten to make it clear who has the duty: "THE STATE TREASURER SHALL INVEST MONEYS IN THE FUND AND DEPOSIT ANY INTEREST OR INCOME EARNED ON THE INVESTMENTS IN THE FUND."

10. Paragraph (c) of subsection (9) of the draft directs the state treasurer to distribute moneys from the K-12 education fund to each school district and to the state charter school institute based on pupil enrollment. Under current law, the school districts and the institute report pupil enrollment to the department of education and the department distributes education funding to school districts and to the institute. Would the proponents consider directing the department of education, rather than the state treasurer, to distribute the moneys in the K-12 education fund? If the department of education distributes the moneys in the K-12 education fund, would the proponents consider authorizing the department to receive moneys from the fund to pay the administrative expenses it incurs in distributing the moneys in the fund?
11. The draft refers in several places to the "state charter school institute" and to the "institute." Is it the proponents' intent to refer to the state charter school institute created in section 22-30.5-503, Colorado Revised Statutes? If so, does this remove the General Assembly's authority to amend, replace, or repeal the institute in the future? If the General Assembly were to authorize another existing or newly created entity to approve a charter school or other type of public school, would the proponents intend for the proposed initiative to apply to the new entity? Would the proponents consider clarifying the reference to the state charter school institute in the draft?
12. Will the state treasurer distribute moneys from the K-12 education fund on an annual basis or at intervals throughout the year? Under current law, school districts and the state charter school institute receive distributions of the state share of total program funding on a monthly basis.
13. Paragraph (c) of subsection (9) directs the state treasurer to distribute the moneys in the K-12 education fund based on the pupil enrollment of each school district and the state charter school institute.
  - a. Students don't actually enroll in the state charter school institute; they enroll in individual institute charter schools. Would the proponents consider clarifying this in the draft?
  - b. What does the term "pupil enrollment" mean? Would the proponents consider defining this term in the draft?

- c. Under current law, each school district and each institute charter school certifies its pupil enrollment for an entire school year by counting the number of pupils in attendance on a particular day during the school year. How will the state treasurer determine pupil enrollment for purposes of paragraph (c) of subsection (9) of the draft?
  - d. If the state treasurer is expected to use the same pupil enrollment that applies for purposes of calculating total program funding under the "Public School Finance Act of 1994", article 54 of title 22, Colorado Revised Statutes, and the General Assembly changes the method of determining pupil enrollment for purposes of this Act or a successor act, would the new method also apply for purposes of distributing moneys in the K-12 education fund?
  - e. Under current law, the department of education distributes the state share of total program funding to school districts in July, August, September, October, and November based on the projected pupil enrollment for each school district and each institute charter school. After the department receives each school district's and institute charter school's actual pupil enrollment numbers in November, it recalculates the state share of total program funding for each school district and adjusts the remaining monthly distributions accordingly. Is it the proponents' intent that the state treasurer would distribute moneys under paragraph (c) of subsection (9) of the draft based on projections for the first half of the state fiscal year?
  - f. Does the General Assembly have authority to specify in statute the manner of determining pupil enrollment for purposes of distributing moneys in the K-12 Education Fund and to enact other statutes to implement the proposed initiative?
14. Paragraph (d) of subsection (9) of the draft states that the moneys distributed to school districts and the state charter school institute under subsection (9) of the draft are in addition to other moneys "appropriated for distribution to school districts or otherwise allocated to school districts."
- a. Are the moneys distributed pursuant to subsection (9) of the draft also in addition to other moneys appropriated for distribution or allocation to institute charter schools or to the state charter school institute?
  - b. Current law authorizes school districts to obtain moneys through mill levies in addition to the mills levied for the local share of total program funding and authorizes school districts and institute charter schools to obtain moneys for capital construction through bond initiatives. Are the

moneys distributed under subsection (9) of the draft in addition to any of these local revenues that a school district or an institute charter school may receive? Is it the proponents' intent that the moneys distributed pursuant to subsection (9) of the draft would have any effect on the limitations on a school district's ability to increase revenues through additional mill levies?

15. Paragraph (d) of subsection (9) of the draft states that a school district and an institute charter school are not required to use moneys distributed under subsection (9) of the draft "as a contribution to any funding formula contained in law nor shall any school district be required to offset distributions from the fund with local property tax revenue." What does the quoted language mean?
16. Current law includes a formula by which each school district that authorizes a charter school must distribute moneys to the charter school. Is a school district required to distribute any portion of the moneys received as a result of the distribution in subsection (9) of the draft to the charter schools authorized by the district? If so, what is the portion that a school district must distribute to its charter schools, and how is each charter school's share calculated?
17. Is a school district required to distribute any portion of the moneys received as a result of the distribution in subsection (9) directly to the schools of the district that are not charter schools?
18. Under paragraph (d) of subsection (9) of the draft, moneys are distributed to the state charter school institute. Is the institute required to distribute those moneys to the institute charter schools? If so, what portion must the institute distribute, and how is each institute charter school's share calculated?
19. Paragraph (e) of subsection (9) gives each school district and each institute charter school discretion to use the moneys received from the K-12 education fund to address "local needs to improve the education of children in Colorado public schools...." Is there any limitation on the manner in which or the purposes for which a school district or an institute charter school can use these moneys? Is it the proponents' intent that the General Assembly would enact implementing legislation to address a school district's or the institute charter school's use of the moneys distributed pursuant to subsection (9) of the draft?
20. Section 2 of article IX of the Colorado constitution requires the General Assembly to establish and maintain a thorough and uniform system of free

- public schools throughout the state. Is it the proponents' intent that the moneys distributed to school districts and the state charter school institute under the draft are part of the maintenance of the thorough and uniform system of free public schools throughout the state?
21. What, if any, is the relationship between the K-12 education fund and the state education fund created in section 17 of article IX of the Colorado constitution? Does the General Assembly have authority to appropriate moneys from or to the K-12 education fund?
  22. What does the term "all tax and fee revenues attributable to the operation of this section 17," as used in subsection (10), mean? For example does this include revenues on drinks and food purchased by video lottery terminal users, or is this limited only to the net VLT proceeds and initial one-time payments collected by the state treasurer according to subsections (7) and (8)? If the term is limited only to the net VLT proceeds and initial one-time payments collected by the state treasurer, would you consider changing this to "all tax and fee revenues derived from net VLT proceeds and initial one-time payments collected by the state treasurer"?