

STATE OF COLORADO

Colorado General Assembly

Natalie Mullis, Director
Legislative Council Staff

Colorado Legislative Council
200 East Colfax Avenue Suite 029
Denver, Colorado 80203-1716
Telephone 303-866-3521
Facsimile 303-866-3855
Email: lcs.ga@state.co.us



Sharon L. Eubanks, Director
Office of Legislative Legal Services

Office of Legislative Legal Services
200 East Colfax Avenue Suite 091
Denver, Colorado 80203-1716
Telephone 303-866-2045
Facsimile 303-866-4157
Email: olls.ga@state.co.us

MEMORANDUM

TO: Suzanne Taheri and Michael Fields

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: March 9, 2021

SUBJECT: Proposed initiative measure 2021-2022 #19 concerning Requirements for Spending Custodial Money

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 directors of 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 to the **Colorado constitution and Colorado Revised Statutes** appear to be:

1. To transfer authority over custodial funds from the executive branch to the Colorado General Assembly;

2. To require that all money in the state treasury and custodial funds be appropriated;
3. To require all custodial funds the state receives to be deposited into a single account and to be annually appropriated therefrom as specified by law on an equitable basis; and
4. To allow the state to retain and spend custodial funds and any interest and income earned on custodial funds as a voter-approved revenue change to the constitutional limit on state fiscal year spending.

Substantive Comments and Questions

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

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?

Questions and comments 2 through 23 relate to section 1 of the proposed initiative.

2. What is the intended effect of the change in section 1 of the proposed initiative?
3. If the proposed initiative is approved by voters, would the General Assembly be able to exercise control over custodial moneys in the same manner as it does over state money that is currently subject to article V, section 33 of the Colorado Constitution? (Article V, section 33 of the Colorado Constitution will be referred to as "section 33" for the remainder of this memorandum.)
4. Is it your intent to amend section 33 to effectively override the Colorado Supreme Court's decisions regarding the governor's control over "custodial funds"? See *In re Interrogatories Submitted on House Bill 04-1098*, 88 P.3d 1196 (Colo. 2004).
5. The case law on this point typically refers to "custodial funds," and not "custodial moneys." Are they the same thing? To the extent you are trying to use a term that has a legal meaning in the common law, you might consider using "custodial funds."
6. Is the definition of "custodial moneys" the same as the definition of "custodial money" in section 3 of the initiative?
7. Do custodial moneys include:

- a. Gifts, grants, or donations;
 - b. Federal funds; or
 - c. Money the state receives under a consent decree for a particular purpose or a damage award?
- 8. Are there any other types of money that the state receives that you specifically intend to be covered by section 33 as amended by the initiative?
- 9. The current language in section 33 refers to money "in the state treasury" and the constitutional restriction is on money "disbursed therefrom." The new language inserted into the section does not identify where custodial moneys are located and the phrase "in the state treasury" does not apply to it. So how does the phrase "disbursed therefrom" apply now? Does this insertion work grammatically?
- 10. With this change in the proposed initiative, is there any money that the state receives that is not subject to the requirement in section 33 that money shall not be disbursed without an appropriation?
- 11. Will the new requirement apply to any custodial moneys, such as federal funds or gifts, grants, or donations, that the state receives prior to the time proposed initiative takes effect?
- 12. Section 3 of the initiative takes effect on July 1, 2022. When does section 1 of the proposed initiative take effect?
- 13. If the proposed initiative is approved by voters and takes effect in the middle of a fiscal year, state agencies will no longer be able to spend any custodial moneys they have until such time that the General Assembly appropriates such money. So, for example, the Department of Health Care Policy and Financing would not be able to use available federal funds to make provider reimbursements until the General Assembly appropriates the money. This may lead to a disruption of services or federal payments.
- 14. If gifts, grants, and donations are included in "custodial moneys," the initiative appears to prohibit state agencies or enterprises that receive gifts, grants, or donations from spending them until the General Assembly appropriates the money. Is this the proponents' intent?
- 15. Will the General Assembly have more, less, or the same power to exert control over the custodial moneys, as the governor currently has over custodial moneys? Stated differently, are you trying to change how the state uses

custodial moneys, or are you only trying to change who decides how the state uses custodial moneys?

16. Does the requirement that moneys "shall be substantiated by vouchers signed and approved in the manner prescribed by law" in section 33 apply to custodial moneys?
17. The money and property that the state receives through the "Revised Uniform Unclaimed Property Act", article 13 of title 38, C.R.S., are described as custodial funds in sections 38-13-801 and 38-13-801.5, C.R.S. Do you intend for that property to be subject to section 33?
18. There are number of sections that, contrary to section 33 as amended in the proposed initiative, currently specify that certain custodial funds are not subject to appropriation—for example, section 12-220-310 (1)(e), C.R.S. Do you intend for the General Assembly to amend those provisions if the proposed initiative is approved by voters?
19. What is the effect of striking "or otherwise authorized by law"?
20. An example of an expenditure that is otherwise authorized by law is section 39-3-207 (4)(a)(I), C.R.S., under which the State Treasurer is authorized to issue warrants to county treasurers to backfill for lost revenue for the senior homestead exemption. Is it your intent that the General Assembly would now have to appropriate this money to the Department of Treasury to allow the State Treasurer to issue the warrants?
21. Section 43-1-219, C.R.S., creates the state highway fund in the state treasury and makes all moneys paid into the fund "immediately available, without further appropriation" to the Transportation Commission. Would the amended version of section 33 require that the General Assembly appropriate money for highway projects rather than delegating this authority, by law, to a commission?
22. Could the General Assembly continuously appropriate any money that currently is "otherwise authorized by law"?
23. If section 1 of the proposed initiative takes effect prior to July 1, 2022, is there any limitation on where the custodial moneys are deposited?
24. Proposed section 24-31-108 (5) requires money received by the attorney general to be deposited in a separate account. Proposed section 24-75-201 (3) requires all custodial funds to be deposited into the custodial fund transparency account.

Is the attorney general's money not subject to the requirements of section 24-75-201 (3)?

The remaining questions and comments relate to section 3 of the proposed initiative.

25. Section 24-75-201 (3), C.R.S., currently includes three paragraphs, (3)(a) through (3)(c). Are these paragraphs being repealed, or are paragraphs (3)(d) through (3)(g) being appended to the existing subsection?
26. Is the definition of "custodial money" in section 3 intended to be the definition for "custodial moneys" as used in the section 1 of the proposed initiative?
27. Does the General Assembly have the authority to modify the definition? For example, could the General Assembly enact a law to amend the definition to exclude gifts, grants, and donations from the definition of "custodial money," and if it did, would those be excluded from the requirement in section 1 of the proposed initiative?
28. Currently, section 24-75-201 (3)(a), C.R.S., states that "[c]ustodial moneys do not include moneys granted by the federal government to the state for the support of general or essential state government services of the type for which expenditures are made in the most recently approved annual general appropriation act[...]" Does this exception apply to the definition of "custodial money" in proposed subsection (3)(d)?
29. Section 24-75-201 (3)(c), C.R.S., states that "all federal moneys described in paragraph (a) of this subsection (3) shall be credited and paid to the general fund unless otherwise provided by law[...]" How does this requirement interact with proposed subsection (3)(e), if at all?
30. Subsection (3)(e) reads "Custodial fund transparency account created." Is this a headnote for the subsection? If so, it should be in bold and not in small caps.
31. The proposed initiative creates an account, instead of a cash fund, which is typically the device used by the General Assembly to segregate money that will be appropriated for a particular purpose. Is an account the same thing as a cash fund? If so, you might consider using the same terminology to avoid any confusion.
32. The state currently receives federal funds and gifts, grants, and donations for hundreds of purposes, and all of these would have to be deposited into the account. Is that correct?

33. To the extent that the state is required to use each of these separate sources of custodial money "to carry out the particular purpose for which the money has been provided," it seems necessary that the each be kept separate within the account. Therefore, it seems likely that the account will have hundreds of subaccounts within the account. Will the complicated nature of the account itself belie your goal of transparency as expressed in the account's name?
34. Under section 24-36-114 (1), all interest derived from the deposit and investment of state money is credited to the general fund unless otherwise expressly provided by law. To the extent that custodial money will be appropriated, it may constitute state money. As such, the interest and income earned on the money in the custodial fund transparency account would appear to be required to be deposited in the general fund. Is that your intent?
35. Is proposed subsection (3)(e)(II) consistent with definition of "custodial money" in proposed subsection (3)(d)? Isn't the state required to use the money consistent with the donor's intent only?
36. Is the General Assembly required to enact a law to specify how each source of custodial money may be used? If so, could the General Assembly deviate from the donor or grantor's intent?
37. Subsection (3)(d)(II) appears to require the General Assembly to appropriate money on an equitable basis. An appropriation is spending authority for a state department or agency. How can an appropriation be made on an equitable basis?
38. What does it mean that the appropriations must be for the "benefit of the state"? Does it have any legal effect on how the General Assembly appropriates this money?
39. It is unclear how the General Assembly is supposed to appropriate money in a single public hearing. In addition, this requirement would be inconsistent with the requirement that appropriations be made by law as required in section 1 of the proposed initiative, as under other provisions of the state constitution, laws must be passed by bills and bills must be approved by a majority of members of each legislative chamber.
40. Do you intend for subsection (3)(e)(III) to require some type of public comment that is different from the current public participation in the legislative process? If so, you may want to explain that process.

41. The new subsection (3)(f) uses the phrase "custodial funds," which is different from the defined term in subsection (3)(a) of section 3 and section 1 of the proposed initiative. Is this intentional? Does it have a different meaning?
42. Will subjecting custodial funds to the requirement that they be appropriated change whether those funds are fiscal year spending under article X, section 20 of the Colorado Constitution?
43. Is it your intent that subsection (3)(f) allow the state to retain and spend a certain type of custodial funds that the state currently receives, any custodial funds that somehow become state fiscal year spending as a result of the change in section 33, or both?
44. Can you provide an example of custodial funds that the state would not be allowed to retain and spend if not for the voter-approved revenue change in subsection (3)(f)?
45. The new subsection (3)(f) describes custodial funds as being "authorized by the voters at the statewide election in the November 2021."
 - a. It is unnecessary to modify November with "the."
 - b. By approving the proposed initiative, are voters authorizing the state to collect custodial funds or are they changing how the state spends those custodial funds?
46. "Earnings and revenue" are included in the voter-approved revenue change. That phrase is not used in current law. What does that term mean? Is it similar to "interest and income derived from the deposit and investment of [the] money," which is a commonly used phrase?
47. If the custodial funds and earnings and revenue are retained as a voter-approved revenue change, aren't they part of the fiscal year spending limit, which is based on the prior year's limit adjusted inflation and population changes and "adjusted for revenue changes approved by voters after 1991"? Can this money be included in the limit and at the same time "exempt from" the same limit?
48. Are custodial funds currently subject to any other limits in the state constitution or any other law?
49. The definition of "fiscal year spending" in article X, section 20 (2)(e) of the Colorado Constitution excludes "gifts, federal funds, . . . damage awards." Section 24-77-102 (17)(b)(II), (17)(b)(III), and (17)(b)(VII), C.R.S., exclude the

"interest earned on each of those types of money." If these types of revenue are currently excluded from fiscal year spending, then does the state need voter approval to retain and spend as a voter-approved revenue change under article X, section 20 (7) of the Colorado Constitution?

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 proposed initiative as suggested below.

1. Each section in the Colorado Revised Statutes and the Colorado Constitution has a headnote. Headnotes briefly describe the content of the section. A headnote should be added to each section of the proposed initiative and be in bold-face type. For example:

Section 33. Disbursement of public money.

24-31-108. Receipt of money - subject to appropriation - exception for custodial money - legal services cash fund - creation - definition.

2. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty."
3. Section 3 of the proposed initiative adds a definition to this section. It is standard drafting practice to add "**- definition**" to the headnote.
4. In section 3 of the proposed initiative, the (d), (e), (f), and (g) preceding each new paragraph, as well as the letters in the internal reference to (3)(d) to (3)(f), should be lowercase and not small caps.
5. Additionally, the internal reference to "subsection 3(d)..." in section 3 of the proposed initiative should be rewritten as "subsection (3)(d)..."
6. In section 3 of the proposed initiative, the word "moneys" in (3)(e)(III) should be initial capped since it is the start of a new subsection.