

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

TO: Michael Fields and Lindsey Singer

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: February 18, 2020

SUBJECT: Proposed initiative measure 2019-2020 #273, concerning voter approval of enterprises

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.

This initiative was submitted with a series of initiatives including proposed initiatives 2019-2020 ##273 to 275. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiatives 2019-2020 ##274 and 275, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in those other memoranda may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum.

Purposes

The major purposes of the proposed amendment to the Colorado Revised Statutes appear to be to require:

1. Voter approval for enterprises with a projected collection of more than fifty million dollars in their first five fiscal years;
2. That the calculation of the projected collection of an enterprise include the fees collected by any enterprises that serve primarily the same purpose; and
3. The ballot title for a question about the approval of an enterprise to state "Shall an enterprise be created to collect fees totaling (full dollar collection for first five fiscal year) in its first five years?"

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?
2. What will be the effective date of the proposed initiative?
3. Does the voter approval requirement in the proposed initiative apply to enterprises created pursuant to legislation that takes effect before the effective date of the proposed initiative, if the enterprise is scheduled to begin operations after the effective date of the proposed initiative?
4. Would the voter approval requirement apply to an initiated measure that would create an enterprise?
5. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the legislative council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
 - a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
 - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?

- c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at BallotImpactEstimates.ga@state.co.us.
6. What is the proponents' intent in including the "find and declare" language in the introductory portion of the proposed initiative? A legislative declaration typically expressed the goal or intent of legislation, but does not have the force and effect of law. Is it the proponents' intent that the provisions following the introductory portion be mandatory and have the force and effect of law?
 7. As a statutory change, the proposed initiative may be amended by subsequent legislation enacted by the General Assembly. Is this your intention?
 8. Is it your intent that this statute constitute a "limit on district revenue, spending, and debt" that may be weakened only by future voter approval under section 20 (1) of article X (TABOR)?
 9. The measure states that "Any enterprise[...] must be approved at an election," and then provides the ballot language "SHALL AN ENTERPRISE BE CREATED[...]." Is it correct to interpret this provision as requiring an election only in instances when an enterprise is being created?
 10. State accountants have distinguished between qualification of an existing state program as an enterprise, which triggers corresponding adjustment to the fiscal year spending limit and excess state revenues cap under section 24-77-103 (1)(b) and section 24-77-103.6 (6)(b), Colorado Revised Statutes, respectively, and creation of a new state enterprise, which does not trigger such adjustments. Would both qualification and creation of an enterprise require approval at an election under this measure?
 11. Some state programs authorized to operate as enterprises occasionally lose their enterprise status if their revenue from state and local governments combined exceeds 10 percent for a given fiscal year. Under current law and practice, such a program may requalify as an enterprise in a subsequent fiscal year when revenue from these sources next falls below 10 percent. Would such requalification require approval at an election under this measure?
 12. What is meant by the term "projected collection"? Does this only include the amount of fees collected by an enterprise? What about revenue from the federal

government, or from state and local government grants and revenue bonds?
Who makes the projection?

13. Most enterprise fees are set in rule or determined by an enterprise board. In light of this, how is revenue to be projected? Must a projection assume future decisions to be made by the board?
14. In an instance where an enterprise is expected to collect revenue from fees and other non-fee sources, should the number in the ballot title be the amount of projected fees or the total amount of projected revenue?
15. In an instance where an enterprise is expected to collect revenue exclusively from non-fee sources, should the number in the ballot title be zero?
16. Fiscal notes prepared for the General Assembly usually estimate fiscal impacts for the current fiscal year, if any are expected, and for the next two fiscal years. Estimates beyond the second fiscal year are not usually presented because uncertainty of projections compounds over time. Is it your intent that fiscal notes for legislation to create an enterprise include projections of enterprise revenue over the first five fiscal years for which the enterprise will operate?
17. May an enterprise continue to operate without approval at an election if it was projected to collect less than \$50,000,000 in its first five years, but actually collected more than \$50,000,000 during that time period?
18. TABOR does not require new enterprises to be approved at an election. Does the proposed initiative conflict with or constrict TABOR?
19. Section 24-77-101, Colorado Revised Statutes, states that "Nothing contained in this article shall be construed to apply to or impose, by implication or otherwise, any limitation, restriction, or prohibition upon or expansion of any local government fiscal policies." With that in mind, what effect will the proposed statutory language have on enterprises created by local governments, including home rule municipalities? Does this conflict with the home rule powers provided to cities pursuant to article XX of the Colorado Constitution?
20. What does it mean that an enterprise "must be approved at an election *pursuant to Colo. Const. Art. X, Section 20(3)*" (emphasis added)?
21. Subsection (3)(b)(ii) of TABOR requires that notices mailed to voters in advance of an election include "[f]or proposed district tax or bonded debt increases, the estimated actual total of district fiscal year spending for the current year and each of the past four years, and the overall percentage and dollar

- change." Is it your intent that a similar requirement apply in the case of an election to approve creation of a new enterprise?
22. Subsection (3)(b)(iii) of TABOR requires that notices mailed to voters in advance of an election include "[f]or the first full fiscal year of each proposed district tax increase, district estimates of the maximum dollar amount of each increase and of district fiscal year spending without the increase." Is it your intent that a similar requirement apply in the case of an election to approve creation of a new enterprise?
23. Unless voters later approve retention of the excess, subsection (3)(c) of TABOR requires that "if a tax increase or fiscal year spending exceeds any estimate in (b)(iii) for the same fiscal year, the tax increase is thereafter reduced up to 100% in proportion to the combined dollar excess, and the combined excess revenue refunded in the next fiscal year." Is it your intent that this refund requirement apply if estimates of enterprise revenue and/or fiscal year spending are exceeded?
24. What happens if the effective date of a statute creating an enterprise falls before an election date and the voters cannot be asked about a new enterprise until after the enterprise is already in existence?
25. What, if anything, must be in the ballot title for approving an enterprise besides the provided language?
26. What happens if an enterprise is not "approved at an election"?
27. Does the language, "regardless of the date of creation", mean that enterprises created before the effective date of this proposed initiative "must be approved at an election"? If so, when must this occur?
28. Over what time period will fees collected for enterprises "serving primarily the same purpose" be aggregated? Will it be for the entire life of the enterprise?
29. What does it mean for enterprises to serve "primarily the same purpose" and who will make that determination?
30. The Colorado community college system is part of a collection of state higher education enterprises. Would creation of a new community college in the Colorado community college system require voter approval under the proposed initiative if the new community college were projected to collect more than \$50,000,000 over its first five years?

31. Would creation of a new community college in the Colorado community college system require voter approval under the proposed initiative if the new community college were projected to collect less than \$50,000,000 over its first five years, since the entire community college system would be expected to collect more than \$50,000,000 over the five-year period following the new college's creation?
32. The Colorado Lottery is an enterprise that generates revenue exclusively from lottery ticket sales and interest earnings. Would creation of an enterprise projected to collect more than \$50,000,000, entirely from non-fee sources, require approval at an election?
33. Suppose an enterprise is created without voter approval and is expected to collect fees totaling \$30 million over its first five years. Two years later, the General Assembly considers legislation that would create a second enterprise serving primarily the same purpose, which is also expected to collect fees totaling \$30 million over its first five years. This subsequent legislation would cause the combined revenue from the two enterprises to exceed \$50 million over the first five years of the second enterprise, and would thus seem to trigger a voter approval requirement. Is this a correct interpretation of the proposed legislation?
34. Suppose the second enterprise in the previous question were created six years later, rather than two years later. The legislation to create the second enterprise would still cause the combined revenue from the two enterprises to exceed \$50 million over the first five years of the second enterprise, and would thus seem to trigger a voter approval requirement despite the second enterprise being created six years after the first enterprise. Is this a correct interpretation of the proposed legislation?
35. Suppose an enterprise is created without voter approval and is expected to collect fees totaling \$30 million over its first five years. Subsequently, the General Assembly considers legislation that would authorize the enterprise to double its fees. This subsequent legislation would not create an enterprise, and would thus seem not to trigger a voter approval requirement. Is this a correct interpretation of the proposed initiative?

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. The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

X-X-XXXX. Headnote. (1) Subsection.

(a) Paragraph

(I) Subparagraph

(A) Sub-subparagraph

(B) Sub-subparagraph

(II) Subparagraph

(b) Paragraph

(2) Subsection

(3) Subsection

2. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to and stricken type, which appears as ~~stricken type~~, to show language being removed from the Colorado constitution or the Colorado Revised Statutes.
3. 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."
4. It is standard drafting practice to capitalize only proper nouns. The following words do not need to be capitalized: "People", "State", and "Enterprise".
5. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter 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.