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Colorado General Assembly

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MEMORANDUM

To: Suzanne Taheri and Michael Fields

From: Legislative Council Staff and Office of Legislative Legal Services

Date: June 4, 2025

Subject: Proposed initiative measure 2025-2026 #90, concerning Voter Approval of New Fees and Fee Increases

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 and questions 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 and questions intended to aid designated representatives, and the proponents they represent, in determining the language of their proposal and to avail the public of the contents of the proposal. Our first objective is to be sure we understand your intended purposes of the proposal. We hope that the comments and questions in this memorandum provide a basis for discussion and understanding of the proposal. Discussion between designated representatives or their legal representatives and employees of the Colorado Legislative Council and the Office of Legislative Legal Services is encouraged during review and comment meetings, but comments or discussion from anyone else is not permitted.

Purposes

Purposes for Proposed Initiative 2025-2026 #90

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

1. To require advance voter approval for a fee authorized by state law that is imposed or increased on or after January 1, 2027, and that is projected to generate over \$100 million in revenue in its first five fiscal years, which includes revenue from multiple fees that are collected to fund similar purposes and that have been created within the same year or the preceding five years, except for fees charged by institutions of higher education;
2. To require the ballot title for the imposition or increase of such a fee to begin with specified language; and
3. To create definitions of “new tax” and “new fee” that apply to the Taxpayer’s Bill of Rights (TABOR).

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. Article V, section 1 (4)(a) of the Colorado Constitution requires that when the majority of voters approve an initiative, the initiative is effective on and after the date of the official declaration of the vote and proclamation of the governor.

Because the proposed initiative does not contain an effective date, this would be the default effective date. Does this default effective date satisfy your intent? If not, the designated representatives should include the desired effective date that is not earlier than the default effective date to comply with this constitutional requirement within section 2 of the proposed initiative.

3. The following questions relate to the definition of a “new tax” in proposed subsection (2)(h) of the proposed initiative:
 - a. The Taxpayer’s Bill of Rights does not currently define “new tax,” but requires advance voter approval for “any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district” in subsection (4)(a). Do you intend the proposed definition of “new tax” to apply to this existing advance voter approval requirement?
 - b. The definition of “new tax” in proposed subsection (2)(h) is “a tax not previously assessed, an assessment incorrectly categorized as a fee, the removal of a tax exemption, a change in tax classification, or a new interpretation of statute that creates an additional tax burden.”
 - i. What is “a tax not previously assessed”? If, for example, a tax was created with voter approval in 2025 and was subsequently repealed in 2029, would an identical tax created and assessed in 2031 be “a tax not previously assessed”?
 - ii. For “an assessment incorrectly categorized as a fee”:
 1. Does this include assessments that are not taxes, for instance: fines, special assessments, or other non-tax and non-fee charges?
 2. Who determines if an assessment has been incorrectly categorized as a fee?
 3. When is the advance voter approval that is required by TABOR’s existing subsection (4)(a) for any “new tax” triggered in the case of “an assessment incorrectly categorized as a fee”?
 4. What are the legal consequences to a TABOR district that imposes “an assessment incorrectly categorized as a fee” without advance voter approval? Can the legal consequences be avoided if voter approval is obtained after a determination is made that an assessment has been “incorrectly categorized as a fee”?
 - iii. What is “the removal of a tax exemption”?

1. Does “tax exemption” include deductions, such as subtractions from taxable income, or only exemptions?
2. If, for example, a bill creates a temporary exemption from personal property taxes that at the time of enactment is scheduled to last for property tax years 2025 through 2030, is the expiration of the exemption the “removal of a tax exemption”? If so, when is the advance voter approval that is required by TABOR’s existing subsection (4)(a) for any “new tax” triggered?
3. Does a reduction in the amount of a tax exemption allowed, but not a complete elimination of the tax exemption, fall under this category?
4. What are the legal consequences to a TABOR district that removes a tax exemption without advance voter approval? Can the legal consequences be avoided if voter approval is obtained after a tax exemption that was scheduled, before the effective date of the proposed initiative, to expire?

iv. What is a “change in tax classification”?

1. Does this apply to changes in law that redefine or modify tax classifications?
2. Does this apply to a law that creates a new tax classification?
3. Is the advance voter approval that is required by TABOR’s existing subsection (4)(a) for any “new tax” triggered by a law that changes a tax classification even if that change does not increase the relevant district’s tax revenue?

v. What is “a new interpretation of statute that creates an additional tax burden”?

1. What qualifies as “an additional tax burden”?
 - a. Is this calculated for an individual, a discrete class, a district, or on another level?

- b. Does this provision apply to a new interpretation of statute that results in a greater tax burden on some individuals within a district but a lesser tax burden on others?
2. Which of the following entities' interpretations of statute can be a "new interpretation of statute":
 - a. The General Assembly?
 - b. The Governor?
 - c. The Department of Revenue or other executive branch agencies?
 - d. A court?
3. Do the proponents' intend that a "new interpretation" of a constitutional provision, such as TABOR, "that creates an additional tax burden" be a "new tax"? If so, consider adding language specifying that to the definition of "new tax" in the proposed initiative.
4. When is the advance voter approval that is required by TABOR's existing subsection (4)(a) for any "new tax" triggered?
 - a. Is this requirement triggered when the General Assembly enacts legislation that would clarify or modify the interpretation of a statute (i.e., would the General Assembly be required to refer such a statute to the voters?), after a final judgment, after all appeals have been exhausted, or at a different time?
 - b. How is a district notified that a qualifying "new interpretation of statute" exists such that it can seek voter approval?
 - c. What specifically would a district need to ask its voters to approve in relation to a qualifying "new interpretation of statute"?

5. If a bill that creates a tax exemption is later declared to be unconstitutional by a court in the state of Colorado, would the court's decision be "a new interpretation of statute that creates an additional tax burden"? If so, what happens as a result of the court's decision—is voter approval required to return to the status quo prior to enactment of the unconstitutional exemption?
4. The following questions relate to the definition of a "fee" in proposed subsection (2)(d.5) of the proposed initiative:
 - a. What is a "voluntarily incurred" charge?
 - b. What is a "governmental charge"? Does this apply to charges imposed by enterprises, which are government-owned businesses?
 - c. Who determines what approximates a payer's "fair" share of the costs incurred in providing a specific benefit?
 - d. What is included in the term "specific benefit conferred on the payer"?
 - i. Must the specific benefit be directly received and used by the payer?
 - ii. Must the payer choose to avail themselves of the specific benefit?
 - iii. Must the specific benefit be made available only to persons that pay the fee?
 - e. What is included in the "costs incurred by the government in providing said specific benefit"?
5. The following comments and questions relate to the voter approval requirement in proposed subsection (4.5) of the proposed initiative:
 - a. It appears that the proposed initiative intends to require advance voter approval for a fee that is projected to generate over \$100 million in revenue in its first five fiscal years. This requirement also appears to apply to fees with actual revenue collected over \$100 million.
 - i. What does the actual collection of revenue over \$100 million trigger?
 1. If the actual collection of revenue over \$100 million triggers voter approval to continue collecting the fee,

what happens between the time of reaching the \$100 million revenue threshold and the statewide election to approve the fee?

2. Alternatively, does collection of more than \$100 million in fee revenue trigger a refund of the excess? If so, how would the refund be administered?
 - ii. How does the first five fiscal years calculation apply to an increase of a fee?
 1. If, for example, a fee is created and receives voter approval because it is projected to collect over \$100 million in its first five fiscal years, would a subsequent increase in that fee require additional voter approval?
 2. Assume a fee is created that is not presented to the voters for approval because it is not projected to collect over \$100 million in its first five fiscal years, and it does not collect over \$100 million in its first five fiscal years. If the fee is subsequently increased such that it would collect an amount in excess of \$100 million in a later five-fiscal-year period, does that increase require voter approval?
 - b. What constitutes “similar purposes” for purposes of the fee revenue aggregation requirement in proposed subsection (4.5)(b)?
 - i. Who determines whether fees are “collected to fund similar purposes”?
 - ii. What is a “legislative year”? Would fees created or increased by legislation enacted during a regular session of the General Assembly and fees created or increased by legislation enacted during a special session of the General Assembly that occurs during the same calendar year be created or increased “in the same legislative year”?
 - iii. Are fees that are automatically increased—for instance, those indexed to inflation or that contain a time frame, schedule, adjustment, or mathematical formula with predetermined objective components for increasing the fee—covered by the fee increase aggregation provision?

- iv. If, for example, a fee was set at a maximum of \$20 and was temporarily decreased to \$15 for one fiscal year, would increasing the fee back to the \$20 maximum in the next fiscal year be covered by the fee increase aggregation provision?
- c. What happens if the fees collected exceed the estimated full dollar collection amount that was included in the required ballot title language and approved by the voters?

6. The following comments and questions relate to Section 2 of the proposed initiative, which contains the applicability clause:

- a. Section 2 states that “This definition applies to fees enacted or increased on or after the effective date of this act.” Is this clause intended to specify the applicability of both definitions created by the proposed initiative or only the definition of “fee”?
- b. Assuming that “this definition” refers to the definition for “fee” included in proposed subsection (2)(d.5), what is intended by including this applicability clause? For context, the term “fee” is not used in the existing language of TABOR and only appears in proposed subsection (4.5).
- c. It appears that the definition of “fee” in proposed subsection (2)(d.5) could apply to fees created or increased between the effective date of the initiative and January 1, 2027, but the voter approval requirement in proposed subsection (4.5) would not apply until after January 1, 2027. Is this correct?

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 hearing only if the designated representatives so request. You will have the opportunity to ask questions about these comments at the review and comment hearing. Please consider revising the proposed initiative as follows:

1. You’ve correctly used “(2)(h)” in the amending clause of section 1. Please note the incorrect capitalization of (H) to begin the corresponding subsection.
2. The bolded headnote of section 20 should use title case capitalization.

3. There should be a comma and a space after “(2)(h)” in the amending clause of section 1.
4. In the definition of “New tax” in subsection (2)(h), “tax” should not be capitalized.
5. The bolded headnote for subsection (4.5), “**Voter approval of fees.**” should be lowercase and not in small capital letters.
6. Because section 2 does not contain an effective date, the headnote can be “**Applicability.**” instead of “**Effective date - applicability.**”
7. Because section 2 only contains one sentence, it does not need a subsection number and the (2) can be removed.