

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: Anna Haynes and James Garcia
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: January 22, 2020
SUBJECT: Proposed initiative measure 2019-2020 #224, concerning the creation of a nicotine products tax

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 ##224 to 241. 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 ##225 to 241, 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:

1. To increase the cigarette tax to six cents per cigarette;
2. To allow the cigarette tax to be adjusted for inflation;
3. To remove the discount on the sale of cigarette stamps;
4. To increase the tobacco products tax to forty-two percent of the manufacturer's list price;
5. To remove the tobacco products distributor tax reduction;
6. To create a tax on the sale, use, consumption, handling, or distribution of all nicotine products in Colorado that equals the total sales tax levied on tobacco products;
7. To require that, if a distributor of nicotine products fails to pay the nicotine products tax, then any person or entity in possession of the nicotine products is liable for the tax;
8. To require distributors of nicotine products to obtain a license and file quarterly returns;
9. To create the preschool programs cash fund for expanding the number of children in preschool and to require the general assembly to enact legislation for the administration of the cash fund;
10. To allow the programs funded by the tobacco education programs fund to also apply to nicotine products;
11. To create a tobacco products inventory tax;
12. To create a presumption that all charges included on an invoice of a tobacco product manufacturer or supplies are for the sale of tobacco products;
13. To define "delivery sale" for purposes of the cigarette tax; and
14. To distribute the additional total revenue collected from the increased cigarette and tobacco products tax and the new nicotine products tax to the preschool programs cash fund, the tobacco tax cash fund, and the tobacco education programs fund.

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. 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.
3. How will the price of the required cigarette stamps in section 39-28-104, C.R.S., be determined?
4. If a licensed cigarette wholesaler is delinquent in paying for cigarette stamps, does the penalty imposed under section 39-28-108 (2), C.R.S., still apply?
5. Are cigarette wholesalers compensated in any way for the collection and remittance of the cigarette tax?
6. How shall the funds distributed under sections 3 and 9 of the initiative be distributed to the preschool programs cash fund, the tobacco tax cash fund, and the tobacco education programs fund? Is it in accordance with the requirements of proposed section 24-22-118?
7. It is not clear what tax increases you are referring to when you refer to "the tax increase set forth in this measure" in sections 3 and 9 of the initiative and proposed section 39-28.6-109.

- a. Does this include the tax increases on cigarettes, tobacco products, and nicotine products?
 - b. Section 12 of the initiative allocates "the total revenue from the taxes on cigarettes, tobacco products, and nicotine products as described in" these sections. Does this allocation apply to revenue from the taxes levied at rates of six cents per cigarette and 42 percent of the manufacturer's list price of tobacco products, or to something else?
8. What is the significance of the language "this tax shall be collected by the department" at the end of the introductory portion of section 39-28.5-102 (1), C.R.S., in section 4 of the initiative?
 9. If a tobacco products distributor is delinquent in remitting the tobacco products tax, does the penalty imposed under section 39-28.5-110 (2)(b), C.R.S., still apply? If so, is there no longer an exception for "unusual circumstances shown to the satisfaction of the executive director of the department [of revenue]". See section 38-28.5-106, C.R.S.
 10. Are tobacco products distributors compensated in any way for the collection and remittance of the tobacco products tax?
 11. Proposed section 39-28.6-101 (1)(c) states has there been a "significant increase in the use of electronic cigarettes". Over what period of time has there been a "significant increase in the use of electronic cigarettes"?
 12. Is it "only now becoming known" that electronic cigarettes can contain the substances listed in proposed section 39-28.6-101 (1)(d)?
 13. Proposed section 39-28.6-101 (2) states that a tax will be created for nicotine products "so that they are taxed in the same manner as tobacco products." What does it mean that nicotine products will be taxed "in the same manner as tobacco products"?
 14. What comprises "the total state tax on tobacco products" referred to in proposed section 39-28.6-103?
 15. When is the nicotine products tax in proposed section 39-28.6-103 imposed and collected by the department of revenue?
 16. Is it correct that, in order to have nicotine product distributors who meet the requirements of proposed section 39-28.6-105, if the measure is approved by the voters in the November 2020 election, proposed section 39-28.6-105 only allows approximately one and a half months for the department of revenue to

- create a nicotine products distributor license and for distributors to apply for and receive such a license?
17. If a nicotine product distributor obtains a license under proposed section 39-28.6-105 on or before June 29, 2021, is that license only valid until June 30, 2021?
 18. If a hearing is held and a nicotine product distributor's license is either suspended or revoked under proposed section 39-28.6-105, may the department not issue a license to the same person within two years of the date of the hearing or the date of the suspension or revocation?
 19. Do the distributor's records of purchasers required under proposed section 39-28.5-106 (2) only refer to purchasers of nicotine products?
 20. May a retailer of nicotine products destroy the documents referenced in proposed section 39-28.6-106 (4)(a) after a certain amount of time?
 21. Proposed section 39-28.6-106 (4)(b) requires the general assembly to appropriate money for the department of revenue to enforce proposed section 39-28.6-106 (4)(a). Is there a similar appropriation requirement for the department of revenue to enforce proposed sections 39-28.5-106 (1) through (3)?
 22. Section 39-28-107 (1)(b), C.R.S., creates the tobacco tax enforcement cash fund and lists the sources of money that is deposited in the fund and how the money in the fund may be spent. Should this section be amended to reflect that money deposited in the tobacco tax enforcement cash fund may come from proposed section 39-28.6-107 (4) and that the fund may be used to finance the enforcement of the nicotine products tax?
 23. Other than via the mechanisms in proposed section 39-28.6-107 (4), C.R.S., does the measure cause additional deposits to the tobacco tax enforcement cash fund that may be appropriated for the enforcement purposes in proposed section 39-28.6-106?
 24. Are nicotine product distributors compensated in any way for the collection and remittance of the nicotine products tax?
 25. Will proposed section 39-28.6-107 (4) be enforced by the department of revenue for nicotine products the same way that section 39-28.5-106 (4), C.R.S., is enforced by the department of revenue for tobacco products?
 26. Are the funds collected under proposed section 39-28.6-107 (4)(b) distributed differently than those collected under proposed section 39-28.6-107 (4)(a)?

27. Does proposed section 39-28.6-108 apply when a distributor ships or transports nicotine products outside of the state to a consumer?
28. What is being referred to as "subsection (1)(a) of this section" in proposed section 39-28.6-109?
29. How is the revenue collected under the nicotine products tax distributed? Does that amount include license fees?
30. Does the measure require that moneys collected as a result of penalties imposed pursuant to proposed section 39-28.6-111, C.R.S., be credited to any particular fund?
31. Does the amendment to section 24-22-117 (2)(c)(I), C.R.S., require that 16 percent of the amounts specified in proposed section 24-22-118 (1) be transferred to the tobacco education programs fund?
32. What components make up the total revenue from nicotine products referenced in the introductory portion of proposed section 24-22-118 (1)?
33. Proposed section 24-22-118 (1)(a) and (b) detail the money the state treasurer shall transfer from the general fund as dollar amounts rather than percentages of the total revenue from the taxes on cigarettes, tobacco products, and nicotine products. What happens if the total revenue from the taxes on cigarettes, tobacco products, and nicotine products drops below the total of these dollar amounts?
34. Does the distribution of funds outlined in proposed section 24-22-118 (1) and (2) align with the distribution of funds in sections 39-28-110, C.R.S., 39-28.5-108, C.R.S., and proposed section 39-28.6-109?
35. Is the 73% referred to in proposed section 24-22-118 (1)(b) equal to 73% of 15 million dollars? Likewise is the 27% equal to 27% of 15 million dollars?
36. Why is the 27% that is distributed to the general fund in proposed sections 24-22-118 (1)(b) and 24-22-118 (2)(b) transferred out of the general fund and then transferred back to the general fund?
37. Should the funds deposited in the general fund under proposed section 24-22-118 (1)(b) be included in the definition of "gross state cigarette tax" for purposes of section 39-22-623 (1)(a)(II)(A), C.R.S.?
38. What taxes are being referred to in proposed section 24-22-118 (1)(b) and 24-22-118 (2)(b) as "such voter-approved tax increases"?

39. What happens if the costs of the department of revenue collecting the nicotine products tax exceed the one percent limit in proposed section 24-22-118 (1)(c)? Does the department not get any funds or do they get the full "one percent of the additional cigarette, tobacco, and nicotine taxes approved by voters at the 2020 election"?
40. For the purposes of proposed section 24-22-118 (1)(c), what comprises the "the additional cigarette, tobacco, and nicotine taxes approved by voters at the 2020 election"?
41. Is the 73% referred to in proposed section 24-22-118 (2)(b) equal to 73% of 7.5 million dollars? Likewise is the 27% referring to 27% of 7.5 million dollars?
42. Section 24-22-118 (2) does not appear to allocate tax revenue collected between January 1, 2021, and June 30, 2021, in excess of 22.5 million dollars. Is this the proponents' intent?
43. If the amount of tax revenue generated under the measure is less than the transfer amounts in subsections (1) and (2) of proposed section 24-22-118, does the initiative require the state treasurer to transfer these amounts from general fund revenue collected from other sources?
44. If the initiative does not require transfers of general fund revenue collected from other sources, and the amount of tax revenue generated under the measure is less than the total amount required to be transferred to the tobacco education programs fund and the tobacco tax cash fund, the initiative appears to require that the transfer to the tobacco education programs fund occur in full before any money is transferred to the tobacco tax cash fund. Is this the proponents' intent?
45. What happens to the money in preschool programs cash fund before the legislation required by proposed section 24-22-118 (3)(b) is enacted?
46. What does "foster" mean in the context of proposed section 24-22-118 (3)(d)?
47. Is "preschool" defined for the purposes of proposed section 24-22-118 (3)(c)? Are "programmatically administration" and "mixed delivery goals" defined for purposes of proposed section 24-22-118 (3)(d)(I)? Is "mixed delivery preschool" defined for purposes of proposed section 24-22-118 (3)(e)?
48. What "quality and program standards" must school-based and community-based programs meet under proposed section 24-22-118 (3)(d)(I)?

49. Are the "students in the final year before kindergarten" referenced in proposed section 24-22-118 (3)(e)(V) the same as the children in the last year of preschool before kindergarten referenced in proposed section 24-22-118 (3)(c)?
50. Will the results of the annual financial audit required under proposed section 24-22-118 (4) be made available to the public?
51. What transfer of funds is referred to in proposed section 25-3.5-810?
52. Are the "tax stamps...affixed to a tobacco product package" referred to in proposed section 39-28.5-113 the same as the cigarette stamps required under 39-28-104, C.R.S.?
53. Is it correct that, under proposed section 39-28.5-113, in the case of a person who possess packages of cigarettes that do not have the stamp required by section 39-28-104, C.R.S., before January 1, 2021, that the person must pay to the department the total of the new price of the stamp less the old price of the stamp and not only the new price of the stamp?
54. What base is used to compute the interest required by the penultimate sentence of proposed section 39-28.5-113? Does the interest compound?
55. Under proposed section 39-28.5-113, may a taxpayer reduce his or her tax payments by one percent when the taxpayer submits his or her taxes within twenty days of the tax rate increase? Or must the taxpayer wait for the department of revenue to refund him or her one percent of the total tax paid? If it is the second option, may the department of revenue decline to refund the taxpayer?
56. Does proposed section 39-28.5-113 allow payments received by the department within 20 days of the tax rate increase to be reduced by one percent of what they otherwise would be, such that the amount paid need not exceed 99 percent of the amount that would otherwise be owed?
57. At the time of payment, a taxpayer may not be certain of the date at which his or her payment will be received by the department. Will a taxpayer be able to make a payment of 99 percent of taxes that would otherwise be owed if the taxpayer believes that his or her payment will be received by the department within 20 days of the tax rate increase?
58. The second to last sentence in proposed section 39-28.5-113 requires "tax payments" to pay interest. Was that the proponents' intent?
59. Does proposed section 39-28.5-114 only apply to manufacturers and suppliers of tobacco products?

60. Does the restriction on manufacturer's list price in proposed section 39-28.5-114 (2) differ from the restriction in the definition of manufacturer's list price in section 39-28.5-101 (3), C.R.S.?
61. Article X, section 20 (3)(c) of the Colorado constitution requires that the title of a ballot measure that enacts a phased in tax include the final, full fiscal year dollar increase. Given that proposed section 39-21-123 (1), C.R.S., increases the cigarette excise tax rate in perpetuity, in what fiscal year is the tax rate fully phased in?
62. In proposed section 39-21-123, what comprises "revenues from the tax increases and new tax on cigarettes, tobacco products, and nicotine products that were approved by the voters at the November 2020 general election"?
63. The definition of fiscal year spending in article X, section 20 (2)(e), of the Colorado constitution is "all district expenditures and reserve increases except, as to both, those for refunds made in the current or next fiscal year or those from gifts, federal funds, collections for another government, pension contributions by employees and pension fund earnings, reserve transfers or expenditures, damage awards, or property sales."
- a. The proposed initiative does not amend the constitution; however, proposed section 39-21-123 (2) declares that revenues from the tax increases and new taxes shall be excluded from fiscal year spending. Do these revenues satisfy one of the listed exceptions in the constitutional definition of fiscal year spending?
 - b. Is it the proponents' intent that the initiative create an exclusion from fiscal year spending rather than a voter-approved revenue change adjusting the state fiscal year spending limit and excess state revenues cap?
64. The exclusion from fiscal year spending applies to revenues from the tax increases "approved by voters at the November, 2020 general election". Does the exclusion apply to revenues generated from future inflation adjustments to the cigarette tax rate?
65. The proposed initiative creates an exclusion from the "spending limits upon state government and all local governments receiving such revenues." May voters in a state election create an exclusion from the constitutional spending limits imposed on local governments?
66. Proposed section 39-21-123 (3), C.R.S., requires that revenues from the tax increases and new taxes "be used to supplement revenues that are appropriated

by the General Assembly as of January 1, 2021, and shall not be used to supplant these appropriated revenues."

- a. This provision appears to attempt to require that the General Assembly continue to appropriate revenue from the tobacco education programs fund, the tobacco tax cash fund, and the general fund at the level authorized as of January 1, 2021, while additionally appropriating revenue generated through the tax increases and new tax in the proposed initiative. Is this what the proponents intend?
 - b. Appropriations of revenue credited to the tobacco tax cash fund and the tobacco education programs fund are usually governed by revenue received from the constitutional cigarette and tobacco product taxes enacted pursuant to Amendment 35. Under the December 2019 Legislative Council Staff forecast, revenue to these funds is expected to continue to decrease consistent with declines in cigarette consumption. Does the proposed initiative require that the General Assembly transfer moneys into these cash funds so that appropriations may remain at their present levels?
 - c. Appropriations from the general fund are at the discretion of the General Assembly and largely depend on economic conditions. In future years when the economy performs poorly, general fund revenue may not be sufficient to allow appropriations at current levels. What would the general assembly do in such years?
67. Proposed section 39-21-123 (4), C.R.S., requires the use of the "consumer price index for Denver-Boulder, all items, all urban consumers, or its successor index." Would the proponents consider replacing this index with the consumer price index for Denver-Aurora-Lakewood, which has been in use since January 2018?
68. Does the definition of "delivery sale", in proposed section 39-28-110 (1.5), and the corresponding modifications to the definitions of "sale" and "wholesaler", apply to tobacco and nicotine products or does it only apply to cigarettes?

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. 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.
2. 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.
3. The proposed initiative has section numbers 1 through 5, but then jumps to section 9 and continues from there. Please consider renumbering the sections for accuracy. Additionally, though not required, it may assist the reader for the C.R.S. sections to be in numerical order.
4. There appear to be digits placed randomly throughout the proposed initiative. Please check the language and delete. For example:
 - a. In section 39-28-104, a "3" appears before "39-28-108," which is not part of existing language.
 - b. In proposed section 39-28.6-106 (4)(b), a "2" appears before the (b).
 - c. In proposed section 39-28.6-110, "26" appears before the C.R.S. number.
 - d. In proposed section 25-3.5-810, "4" appears before "24-22-118 (3)(c)(I)". Additionally, there is no subsection 24-22-118 (3)(c)(I) in the initiative, do the proponents mean to direct the citation elsewhere?
5. The amending clause in section 10 of the proposed initiative adds section "39-28.5-108.5" but is actually adding a new article 28.6 to title 39. Please correct the amending clause as follows: "In Colorado Revised Statutes, **add** article 28.6 to title 39 as follows".
6. Proposed section 39-28.6-102 (4)(b) does not seem to follow the correct format to link it to the introductory portion. Please rephrase for clarity. For example: "TOBACCO PRODUCTS AS DEFINED IN SECTION 39-28.5-101 (5); OR".

7. In proposed section 39-28.5-113, please correct the phrase "...equal to the price of *a* new tax *stamps* minus the prior price..." to be either singular or plural.
8. Section 17 of the proposed initiative adds a new section 39-21-124, but the headnote is labeled as 39-2-123. Please correct.
9. For clarity, please include an internal citation for the preschool programs cash fund mentioned in proposed section 24-22-118 (1)(c), as follows: "[T]HE REMAINDER TO THE PRESCHOOL PROGRAMS CASH FUND *CREATED IN SUBSECTION (3)(C) OF THIS SECTION*[...]".
10. In section 24-22-118 (2)(b), standard drafting practice is to write the specified dollar amount as "seven million five hundred thousand dollars". Also, it is standard practice to write all numerals out, for example "one dollar and twenty cents" rather than "\$1.20".
11. In proposed section 39-28.5-113, the proponents refer to "this chapter". As there are no chapters in statute, do you mean to say "this article"?