

# STATE OF COLORADO

## Colorado General Assembly

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## MEMORANDUM

**TO:** Jon Caldara and Monica Vondruska

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

**DATE:** April 1, 2020

**SUBJECT:** Proposed initiative measure 2019-2020 #315, concerning Tobacco Tax Revenue for New State Preschool Program

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.

An earlier version of this proposed initiative, proposed initiative 2019-2020 #293, was the subject of a memorandum dated March 6, 2020. Proposed initiative 2019-2020 #293 was discussed at a public meeting on March 9, 2020. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meeting, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

## **Purposes**

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

1. To require the General Assembly to enact legislation to enable a state department to create and administer a new Colorado preschool program, which supplements any existing program and funding;
2. To require the creation of a preschool cash fund;
3. To modify the current constitutional distribution of revenue from the constitutional tax on cigarettes and tobacco products (Amendment 35) by:
  - a. Requiring \$100 million to be appropriated to the preschool cash fund, if there is sufficient revenue;
  - b. If there is any money left after the \$100 million appropriation and the existing 16% allocation for school and community based and statewide programs, requiring the General Assembly to reallocate the remainder of the Amendment 35 revenue consistent with the existing requirements and the proposed initiative;
4. To require 76.5% of the money the state receives under the Master Settlement Agreement to be deposited in the preschool cash fund;
5. To prohibit a local government that bans tobacco and nicotine products from receiving a portion of income tax collections, which for purposes of the state budget are referred to as the cigarette rebates, and to instead require this money to be deposited in the preschool cash fund;
6. To require sales and use tax receipts that are attributable to sales of tobacco and nicotine products to be deposited in the preschool cash fund, instead of the general fund;
7. To require 15% of the statutory tax on cigarettes and tobacco products to be deposited in the preschool cash fund, instead of the general fund; and
8. To create a new tax on the sales of tobacco-derived nicotine vapor products and require the tax revenue to be deposited in the preschool cash fund.

## **Substantive Comments and Questions**

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

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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. Proposed article X, section 22 (4) states that "the sum of one hundred million dollars . . . must be credited to the preschool cash fund." If there is insufficient revenue to credit that amount to the fund, then should all of the Amendment 35 revenue after the specified 16% allocation be credited to the fund?
3. If there is Amendment 35 revenue remaining after the specified uses in the proposed section 22, the General Assembly is required to "enact legislation to reallocate the percentages set forth in section 21 of this article X for the purposes set forth therein and in this section 22."
  - a. Can the General Assembly allocate money for any of the purposes in article X, section 21 (5) of the Colorado Constitution? If not, which ones have been eliminated by the proposed section 22?
  - b. Have any of the purposes in article X, section 21 (5) of the Colorado Constitution been amended by the proposed section 22? If so, which ones and how have they been amended?
  - c. What are the purposes in the proposed section 22?
4. The new preschool program and its funding "must supplement and not supplant any existing programs and funding relating to preschool education."
  - a. What does this mean?
  - b. What are the "existing programs . . . relating to preschool education"?
  - c. "Existing" as of what date?
  - d. If the General Assembly appropriated \$40 million dollars to fund the "existing programs," then is it required to annually appropriate that amount forevermore?
  - e. Does this provision require the continuation of programs that could potentially become unnecessary after the implementation of the new preschool program?
  - f. Can the existing programs be modified to be like the new preschool program?

- g. What happens if the combination of the funding for the new preschool program and the existing funding exceeds the need in the state?
- 5. Proposed section 39-26-123 (1)(c) creates a definition for "tobacco and nicotine products" that specifies that it includes cigarettes and does not include accessories. Does it also include tobacco products and nicotine products, which are not mentioned?
- 6. The existing language in sections 39-28-110 (1) and 39-28.5-108 (1), C.R.S., is for the most part the same. The amendments in sections 5 and 6 of the proposed initiative, however, make different amendments that appear to do the same thing—credit 15% of the tax revenue in the preschool cash fund. Is there a reason for this difference?
- 7. Article X, section 21 (7) of the Colorado Constitution permits the General Assembly to use Amendment 35 revenue for "any health related purpose and to serve populations enrolled in the children's basic health plan and the Colorado medical assistance program" if there is a declaration of a state fiscal emergency, and this overrides the specific allocation in the section. It is unclear how this fiscal emergency exception will apply if the proposed initiative is approved by voters. Does it still apply? Does it apply to revenue allocated under Amendment 35, revenue allocated under the proposed initiative, both, or neither?

*The remaining questions and comments relate to section 7 of the proposed initiative:*

- 8. Section 7 defines "tobacco-derived nicotine vapor product":
  - a. What is included in the definition?
  - b. Does it include e-juice, a vape pen, or both?
  - c. Is all nicotine in vaping products derived from tobacco? Is a product made from synthetic nicotine excluded from the definition?
  - d. This definition only applies to the vaping. Is it your intent that, if there is a new method of ingesting nicotine, then it is excluded from the definition and the new tax does not apply?
- 9. The sales tax in article 26 of title 39 of the Colorado Revised Statutes applies to "retail sales," but the tax in proposed section 39-28.6-103 applies to "sales," which based on proposed section 39-28.6-102, is defined in section 39-26-102 (10), C.R.S. Accordingly, it appears that this tax applies to both retail sales and wholesales. Is that your intent?

10. If you do intend to create a tax that applies to both wholesale and retail sales, then it appears that the tax may be levied multiple times on the same tobacco-derived nicotine product.
11. Alternatively, do you intend to create an additional sales tax?
12. Who owes the tax, the seller or the buyer? If it is the buyer, is the seller collecting the tax paid by the buyer on behalf of the state?
13. Proposed section 39-28.6-104 uses the term "vapor products," which is different than the defined term in the new article. Was that intentional?
14. In addition to a current sales tax license, what type of licensing do you anticipate the General Assembly will need to create?
15. A statute is not binding on the General Assembly. As the proposed initiative includes both constitutional and statutory provisions, if you really want to limit the plenary power of the General Assembly, then you should include any requirements for the General Assembly in the constitutional amendments.
16. Based on the distribution required by proposed section 39-28.6-106 (1), do you expect that retailers will have to separately account for sales of tobacco-derived nicotine vapor products and submit the revenue to the Department of Revenue separately from the current sales and use tax collections?
17. This article does not create an additional use tax on tobacco-derived nicotine vapor products. Was that intentional?

## 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 constitutional and statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, "In Colorado Revised Statutes, 39-28-110, **amend** (1) as follows:".
2. It is standard drafting practice to include the headnote for all constitutional and statutory sections being amended, repealed, or added.

3. 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

For this reason, we recommend renumbering (5)(I) through (5)(V) in section 1 of the proposed initiative as (5)(a) through (5)(e).

4. 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."
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.
6. In section 1 of the proposed initiative, we recommend moving the quotation mark to between the words "federal" and "Food," so it would read "the federal "Food, Drug, and Cosmetic Act" . . . ".

7. In section 2 of the proposed initiative, since only subsection (1)(a)(II)(A) is being amended, it is unnecessary to show (1)(a)(I).