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COLORADO 2010 STATEWIDE BALLOT INITIATIVES AMENDMENT 60, AMENDMENT 61 AND PROPOSITION 101

The Colorado Secretary of State has certified three citizen-proposed initiatives, designated Amendment 60, Amendment 61 and Proposition 101 (the “Initiatives”), to be submitted to Colorado’s voters on November 2, 2010. Each of these Initiatives, if approved, will have a serious, and in concert may have a disastrous, fiscal impact on State and local government in Colorado and, in turn, the economy of the State.

Amendment 60 amends Article X, Section 20 of the State constitution, commonly known as the “Taxpayers Bill of Rights” (“TABOR”), and generally affects existing and future property taxes, related elections and the State public education funding mandate. Amendment 61 amends both Article XI of the State constitution and TABOR with respect to State and local indebtedness, capital infrastructure financing, cash flow financing and other forms of borrowing. Proposition 101 is an initiated State statute that dramatically reduces vehicle registration taxes, fees and charges, State income taxes and certain telecommunication charges. Most provisions of the Initiatives would take effect on January 1, 2011.

The proponents of the Initiatives allege that the Initiatives are simple and straightforward, but in fact many provisions of the Initiatives are broad, unclear and subject to a variety of interpretations. Therefore, it is likely that, if approved, judicial interpretation of these provisions will be required, which is likely to be an arduous and time consuming process. Certain provisions of the Initiatives may also require implementing legislation. Finally, certain provisions of the Initiatives, if approved, or the application of such provisions to particular fact situations, may be subject to legal challenges in State and federal courts. Consequently, it is not possible to predict with certainty the eventual interpretation or enforceability of the Initiatives or the ultimate impact of the Initiatives on the State and local governments in Colorado. Suffice it to say, however, that during this sorting out process, State and local government will be left in a protracted state of uncertainty as to exactly what the new laws are and how to comply with them.

The following is a brief summary of the Initiatives, including a discussion of certain issues presented by some of their provisions. The actual text of the ballot titles and text of the Initiatives appears at the end of the document. This document is not intended as legal advice or our opinion as to the ultimate interpretation of the Initiatives. For legal advice regarding the potential impact of the Initiatives on a particular governmental entity, fact situation or financing, please consult with your own attorney or contact one of the following Peck Shaffer attorneys.

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AMENDMENT 60
(Property Taxes)

Amendment 60 adds a new Section 10 to TABOR that affects existing and future property taxes in several ways.

- Permits electors to vote on property taxes where they own real property.

It is unclear whether this is intended to expand upon the definition of elector under current State law, which, among other things, requires electors to be Colorado residents and registered to vote.

- Requires all local governments to allow petitions to lower property taxes as voter-approved revenue changes.

This expands the initiative power, which currently is available only with respect to the enactment of State laws and constitutional amendments and municipal ordinances. Other than "Adapting State law," no procedures are specified, thus likely requiring implementing legislation.

- Requires property tax issues to be voted on only in November elections.

- Requires property tax issues to be submitted and voted on separately from related debt issues.

This is a change from current law that permits general obligation indebtedness and the related property tax necessary to pay such indebtedness to be voted as a single question. It is unclear how this provision will affect the continued viability of combined debt/tax increase questions approved prior to the effective date of the Amendment.

- Requires government-owned enterprises (such as public water, sewer and power utilities, golf courses, other recreational facilities, airports and hospitals) and authorities (such as state and local housing authorities, urban renewal authorities and water authorities) to pay property taxes on their assets. The local governments receiving these property taxes are required to reduce their tax rates to offset the additional revenue.

Enterprises are not defined for purposes of this provision; however, as this provision is an addition to TABOR, it arguably applies only to TABOR enterprises. In most cases this requirement will require these enterprises and authorities to increase user fees or other charges in order to generate the revenue necessary to pay such property taxes. The methodology for valuing and assessing these assets for property tax purposes is not specified in the Amendment.

- Prohibits enterprises and unelected boards from levying a mandatory fee or tax on property.

TABOR enterprises are not permitted to have taxing power. However, this provision may preclude the imposition of such things as capital improvement or other fees that are not based on the actual use or receipt of service. It also affects the ability of appointed boards, such as the governing boards of business improvement districts, urban renewal authorities, downtown development authorities and library districts, from imposing any mandatory fees.

- Requires all future property tax rate increases to expire within 10 years.

This would effectively limit the term of bonds and other types of financial obligations payable from property taxes to ten years, notwithstanding the maturity limitation on borrowings mandated by Amendment 61.

- Repeals prospectively all voter authorization since 1992 under TABOR to retain and spend excess property tax revenues (“de-Brucing”).

This may require affected local governments to recalculate their revenue and spending limits based on a 1992 base year.

- Deems future property tax de-Brucing authorization to be tax increases and requires such authorization to expire after four years.
- Provides that the extension of an expiring tax is a tax increase.
- Requires K-12 school districts to reduce their 2011 mill levies (except bond redemption levies) by 50% by 2020. The resulting reduction in local tax revenue is required to be replaced by the State.

This provision is estimated to shift approximately \$1.2 billion in public education funding from local property taxes to the State without providing the State with any additional source of revenue to fund this mandate.

- Repeals prospectively the following property tax increase, extension and abatement rates imposed after 1992: taxes that exceed State law; tax policies or limits “violated, changed or weakened” without voter approval; taxes exceeding the dollar amount first listed on a tax increase ballot title; and tax rates without voter approval after 1992.

This may be targeting such things as non-voted extensions of taxes, temporary tax reductions to pay TABOR refunds and tax abatement levies. It may impact voter-approved tax increases that permit the local government to retain the revenues of a property or sales tax imposed at a specified rate (e.g., xxx mills or xxx%) and over time have generated revenues in excess of the amount stated in the ballot question as the result of increases in assessed values or retail sales.

- Requires property tax bills to list only taxes and late charges.
- Requires the State to audit and enforce the provisions of the Amendment.
- Provides that this voter-approved revenue change supersedes conflicting laws, opinions and constitutional provisions, and is always to be strictly interpreted to favor taxpayers.
- Costs and attorney fees are always to be awarded to successful plaintiffs, but “districts” (as defined in TABOR) are to receive neither.

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AMENDMENT 61

(State and Local Government Financial Obligations)

Amendment 61 amends the State constitution to (i) prohibit the State and State level governmental entities from engaging in any form of borrowing, leasing or other financing transaction coming within a broad definition of “loan,” and (ii) impose new and stringent limitations on the ability of local governments to incur such obligations.

Amendments to Article XI of the State Constitution

Amendment 61 amends and/or repeals several provisions of Article XI of the State constitution affecting State and local government “debt.” *These amendments, except for the requirement that local indebtedness may not be repealed until fully paid or discharged, are not expected to affect obligations that are issued or incurred prior to the effective date of amendments.*

- The State is prohibited from contracting any debt by loan in any form.
- Political subdivisions of the State (*i.e.*, local governments) may contract debt by loan in any form only with voter approval.
- The ballot title seeking voter approval of local government indebtedness must specify the use of the funds, which may not be changed.

It is unclear what degree of specificity is required (e.g., water system improvements versus a specific project).

- Local government indebtedness may not be repealed until it is fully paid or discharged.
- No effective date is specified for these amendments.

Amendments to TABOR

Amendment 61 also adds a new Section 4(c) to TABOR that places the following limits on State and local government borrowing occurring after 2010.

- The provisions of Section 4(c) apply to “any loan, whether or not it lasts more than one year; may default; is subject to annual appropriation or discretion; is called a certificate of participation, lease-purchase, lease-back, emergency, contingency, property lien, special fund, dedicated revenue bond or any other name; or offers any other excuse, exception or form.”

This broad description of loan is apparently intended to cover any and all types of public finance transactions other than pay-as-you-go obligations, and could be interpreted to include such things as equipment leases, economic development agreements and the acceptance of grants or federal funds that could be subject to repayment.

- The State and its enterprises, authorities and other State political entities are prohibited from borrowing, directly or indirectly, money or other items of value for any reason or period of time.

This prohibition would apply to State departments and agencies such as the Colorado Department of Transportation and the Colorado Department of Higher Education (including its CollegeInvest division), as well as such entities as the Colorado Housing and Finance Authority, the Colorado Water Resources and Power Development Authority, the Colorado Educational and Cultural Facilities Authority and the Colorado Health Facilities Authority. It is unclear, however, if conduit obligations issued by these entities would be subject to the ban since they are payable by an entity other than the nominal State governmental issuer.

- Local districts, including enterprises, authorities and other political entities, are permitted to engage in borrowings only with November voter approval.

This provision expands the types of obligations that will require voter approval, including the obligations of TABOR enterprises such as public water, sewer and power utilities, golf courses, other recreational facilities, airports and hospitals, obligations of local governmental entities that are currently deemed not to be a “district” for purposes of TABOR such as local housing authorities and urban renewal authorities, obligations subject to annual appropriation and obligations that do not extend beyond the fiscal year in which incurred, among others. It is unclear if refundings are covered inasmuch as Section 4(b) of TABOR, which permits the refinancing of bonded debt at a lower interest rate without prior voter approval, was not amended.

- Borrowings are to be in the form of bonded debt.

It is unclear how this will affect traditional financing transactions such as equipment leases.

- Borrowings are limited to a maturity of ten years.

This is a change from existing law that permits maturities of up to 40 years, although 20 to 30 year maturities are more typical, and may increase borrowing costs depending upon market demand for short term obligations. Shorter maturities will also result in higher annual repayment costs as compared with longer maturities, much in the same way as monthly payments on a 15 year mortgage are higher than those on an equivalent 30 year mortgage. The requirement for shorter maturities does not permit the cost of a project with a longer useful life, such as a new school, to be amortized, or spread out, over the entire life of the facility and hence paid for both by current as well as future users of the facility. It instead places a greater repayment burden on current residents and taxpayers. This could result in the downsizing or cancellation of needed capital projects to avoid significant increases in the taxes or fees required to repay the financing obligations over a shorter amortization period.

- Borrowings may be prepaid without penalty.

If interpreted as meaning that borrowings must be prepayable at any time without penalty, this would eliminate the ability for obligations to have either call protection or redemption premiums, and may increase borrowing costs.

- No borrowing may continue past its original term.

It is unclear if this is meant to apply to provisions such as those that permit the continuing accrual of interest after maturity so long as the principal remains unpaid, and how this would apply to refundings that extend beyond the term of the original bonds.

- Requires that all current borrowing be repaid.

It is unclear what effect, if any, this requirement may have on outstanding obligations that are subject to annual appropriation as it would effect a change in the contract between the lessee and the lessor.

- Imposes a limit on total outstanding borrowing by local governments (excluding enterprises) of 10% of the assessed value of only taxable real property within the jurisdiction.

This is both a significant reduction of existing statutory debt limits, which apply only to certain general obligation indebtedness, and an expansion of the financial obligations that are subject to the limit, thus imposing an even further reduction in financing capability. This lower limit will also cause many local governments with outstanding obligations to already exceed the limit and preclude them from engaging in any type of capital infrastructure financing or other borrowing until the existing obligations are paid down.

- Except for borrowings by enterprises, after any borrowing is repaid, tax rates are required to be reduced by an amount equal to the planned average annual repayment of such borrowing, even if not paid from taxes. Such declines do not replace others required.

This provision requires a reduction in taxes even if the obligation is paid from non-tax sources such as parking revenue, special assessments and other general revenues. The types of taxes (property, sales and use, etc.) to be reduced are not specified, and therefore the local government arguably may elect which taxes to reduce. It is also unclear what is meant by the requirement that such declines do not replace others required. It may require a general tax reduction in addition to the expiration of any tax imposed and pledged specifically for the payment of the obligations, such as a bond redemption mill levy.

- Future borrowing is void if it violates the provisions of Section 4(c) of TABOR, which are to be strictly enforced.

- Conflicting laws, rulings and practices are repealed, overturned and superseded.

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PROPOSITION 101

(Vehicle Taxes, Fees and Charges; State Income Tax; and Telecommunication Charges)

Proposition 101 enacts a new Article 25 of Title 39 of the Colorado Revised Statutes that reduces the State income tax and vehicle and telecommunications taxes, fees and charges. Proposition 101 is an initiated statute rather than an amendment to the State constitution, and as such could ordinarily be amended by the State legislature. However, Proposition 101 states that it constitutes a voter-approved revenue change and a matter of statewide concern that overrides conflicting statutes and local laws, and is to be strictly enforced to reduce government revenue. Thus, a statewide vote could be required in order to amend the provisions of Proposition 101 in any way that would constitute a weakening of the limits on district revenue, spending or debt contained in TABOR.

Vehicle Taxes, Fees and Charges

- Decreases the State imposed specific ownership tax on vehicles in four equal annual steps to \$2 for new vehicles and \$1 for other vehicles.

The tax on vehicles other than those engaged in interstate commerce is collected annually by county treasurers in connection with the registration of vehicles and distributed to local governments within the county proportionally based on the amount of property taxes imposed by such entities. The tax on interstate commercial carriers is collected annually by the Colorado Department of Revenue and distributed to each county in the State according to the miles of State highways in the county. Proposition 101 would change the methodology by which the tax is calculated, from a formula based on the age and taxable value of the vehicle to a flat nominal dollar amount. This change is predicted to result in a reduction of approximately \$500 million annually to local governments.

- Terminates all State and local taxes on vehicle rentals and leases.
- Exempts the first \$10,000 of value of vehicle prices from all State and local taxes on vehicles, to be phased-in over four years.

This would include sales and use taxes imposed on vehicle sales.

- Provides that sale rebates are not taxable.
- Sets the total of all annual registration, license and title charges, combined, to \$10 per vehicle, and terminates all State and local government charges on vehicles and vehicle uses with the exception of the foregoing charges, and tax, fine, toll, parking, seizure, inspection and new plate charges.

This provision would dramatically reduce funds available for State and local highway construction and maintenance. It would also effectively eliminate the vehicle registration fee imposed pursuant to the "FASTER" (Funding Advancement for Surface Transportation & Economic Recovery) legislation passed by the State legislature in 2009 to fund transportation projects, including repairs to unsafe roads and bridges, throughout the State. The Colorado

Department of Transportation estimates that Proposition 101 would eliminate approximately 25% of its annual revenue. It is also estimated that the portion of the vehicle registration fees received by counties and municipalities for the funding of local highway projects will be reduced by approximately \$375 million annually.

- Provides that, except for fine, toll, parking, seizure, inspection and new plate charges, all added charges will be considered tax increases.

This would require a statewide vote to either impose or increase such charges.

State Income Tax

- Reduces the 2011 State income tax rate from 4.63% to 4.5%, with subsequent reductions to 3.5% in increments of 0.1% yearly in each of the first ten years that yearly income tax revenue net growth exceeds 6%.

This equates to an overall reduction of 25% in the State income tax, which has been estimated will result in a loss to the State treasury of more than \$1 billion (current dollar equivalent).

Telecommunication Charges

- Provides that, with the exception of Emergency 911 fees (which are capped at 2009 rates), no charge by, or aiding programs of, the State or local governments may be imposed with respect to telephone, pager, cable, television, radio, internet, computer, satellite or other telecommunication service customer accounts.

This could apply to such charges as utility occupation taxes, sales and use taxes on telecommunication services and possibly franchise fees, as well as the State's "high-cost support mechanism" fee, which subsidizes the provision of phone service in rural areas.

- Specifies that any such added charges will be considered tax increases.

This will require a statewide vote to either impose or increase such charges.

Enforcement

- Provides that this voter-approved revenue change is to be strictly enforced to reduce government revenue.
- Requires the State to audit yearly compliance with the provisions of this measure in order to reduce unfair, complex charges on common basic needs.
- Provides that only prevailing plaintiffs shall have their legal fees and court costs repaid.

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BALLOT TITLES AND TEXT OF THE AMENDMENTS/PROPOSITION

Ballot Title for Amendment 60

“Shall there be an amendment to the Colorado constitution concerning government charges on property, and, in connection therewith, allowing petitions in all districts for elections to lower property taxes; specifying requirements for property tax elections; requiring enterprises and authorities to pay property taxes but offsetting the revenues with lower tax rates; prohibiting enterprises and unelected boards from levying fees or taxes on property; setting expiration dates for certain tax rate and revenue increases; requiring school districts to reduce property tax rates and replacing the revenue with state aid; and eliminating property taxes that exceed the dollar amount included in an approved ballot question, that exceed state property tax laws, policies, and limits existing in 1992 that have been violated, changed, or weakened without state voter approval, or that were not approved by voters without certain ballot language?”

Text of Amendment 60

Be it Enacted by the People of the State of Colorado:

Article X, section 20, The Taxpayer’s Bill of Rights, is amended to add:

(10) Property taxes.

Starting in 2011:

(a) The state yearly shall audit and enforce, and any person may file suit to enforce, strictest compliance with all property tax requirements of this section. Successful plaintiffs shall always be awarded costs and attorney fees; districts shall receive neither. This voter-approved revenue change supersedes conflicting laws, opinions, and constitutional provisions, and shall always be strictly interpreted to favor taxpayers.

(b) Electors may vote on property taxes where they own real property. Adapting state law, all districts shall allow petitions to lower property taxes as voter-approved revenue changes. Property tax issues shall have November election notices and be separate from debt issues. Property tax bills shall list only property taxes and late charges. Enterprises and authorities shall pay property taxes; lower rates shall offset that revenue. Enterprises and unelected boards shall levy no mandatory fee or tax on property. Future property tax rate increases shall expire within ten years. Extending expiring property taxes is a tax increase. Prior actions to keep excess property tax revenue are expired; future actions are tax increases expiring within four years. Non-college school districts shall phase out equally by 2020 half their 2011 rate not paying debt; state aid shall replace that revenue yearly. Nothing here shall limit payment of bonded debt issued before 2011.

(c) These property tax increase, extension, and abatement rates after 1992 shall expire:

(i) Taxes exceeding state laws, tax policies, or limits violated, changed, or weakened without state voter approval. Those laws, policies, and limits, including debt limits, are restored.

(ii) Taxes exceeding the one annual fixed, final, numerical dollar amount first listed in their tax increase ballot title as stated in (3)(c).

(iii) Those rates without voter approval after 1992 of a ballot title as stated in (3)(c).

Ballot Title for Amendment 61

“Shall there be an amendment to the Colorado constitution concerning limitations on government borrowing, and, in connection therewith, prohibiting future borrowing in any form by state government; requiring voter approval of future borrowing by local governmental entities; limiting the form, term, and amount of total borrowing by each local governmental entity; directing all current borrowing to be paid; and reducing tax rates after certain borrowing is fully repaid?”

Text of Amendment 61

Be it Enacted by the People of the State of Colorado:

Section 1.

Article XI, section 3 is repealed and re-enacted to read, as stated in the original constitution: “The state shall not contract any debt by loan in any form.”

Sections 4, 5, 6(2), and 6(3) are repealed as obsolete and superseded.

Section 6(1) is repealed and re-enacted as section 6 to read: “Without voter approval, no political subdivision of the state shall contract any debt by loan in any form. The loan shall not be repaid until such indebtedness is fully paid or discharged. The ballot title shall specify the use of the funds, which shall not be changed.”

Section 2.

Article X, section 20 is amended to add:

(4)(c). After 2010, the following limits on borrowing shall exist:

(i) The state and all its enterprises, authorities, and other state political entities shall not borrow, directly or indirectly, money or other items of value for any reason or period of time. This ban covers any loan, whether or not it lasts more than one year; may default; is subject to annual appropriation or discretion; is called a certificate of participation, lease-purchase, lease-back, emergency, contingency, property lien, special fund, dedicated revenue bond, or any other name; or offers any other excuse, exception, or form.

(ii) Local districts, enterprises, authorities, and other political entities may borrow money or other items of value only after November voter approval. Loan coverage in (i) applies to loans in (ii). Future borrowing may be prepaid without penalty and shall be bonded debt repaid within ten years. A non-enterprise shall not borrow if the total principal of its direct and indirect current and proposed borrowing would exceed ten percent of assessed taxable value of real property in its jurisdiction.

(iii) No borrowing may continue past its original term. All current borrowing shall be paid. Except enterprise borrowing, after each borrowing is fully repaid, current tax rates shall decline as voter-approved revenue changes equal to its planned average annual repayment, even if not repaid by taxes. Such declines do not replace others required. Future borrowing is void if it violates this paragraph (c), which shall be strictly enforced. Conflicting laws, rulings, and practices are repealed, overturned, and superseded.

Ballot Title for Proposition 101

“Shall there be an amendment to the Colorado Revised Statutes concerning limits on government charges, and, in connection therewith, reducing vehicle ownership taxes over four years to nominal amounts; ending taxes on vehicle rentals and leases; phasing in over four years a \$10,000 vehicle sale price tax exemption: setting total yearly registration, license, and title charges at \$10 per vehicle; repealing other specific vehicle charges; lowering the state income tax rate to 4.5% and phasing in a further reduction in the rate to 3.5%; ending state and local taxes and charges, except 911 charges, on telecommunication service customer accounts; and stating that, with certain specified exceptions, any added charges on vehicles and telecommunication service customer accounts shall be tax increases?”

Text of Proposition 101

Be it Enacted by the People of the State of Colorado:

Title 39, article 25 of the Colorado Revised Statutes

Reducing government charges

(1) Enforcement. This voter-approved revenue change shall be strictly enforced to reduce government revenue. It is self-executing, severable, and a matter of statewide concern that overrides conflicting statutes and local laws. Prevailing plaintiffs only shall have their legal fees and court costs repaid. The state shall audit yearly compliance with this reform to reduce unfair, complex charges on common basic needs.

(2) Vehicle. Starting January 1, 2011:

(a) All annual specific ownership taxes shall decrease in four equal yearly steps to: New vehicles, \$2; and other vehicles, \$1. All state and local taxes shall cease on vehicle rentals and leases, and on \$10,000, reached in four equal yearly steps, of sale prices per vehicle. Sale rebates are not taxable.

(b) All registration, license, and title charges combined shall total \$10 yearly per vehicle. Except those charges, and tax, fine, toll, parking, seizure, inspection, and new plate charges, all state and local government charges on vehicles and vehicle uses shall cease. Except the last six specific charges, added charges shall be tax increases.

(3) Income. The 2011 income tax rate shall be 4.5%. Later rates shall decrease 0.1% yearly, until reaching 3.5%, in each of the first ten years that yearly income tax revenue net growth exceeds 6%.

(4) Telecommunication. Starting January 1, 2011, except Emergency 911 fees at 2009 rates, no charge by, or aiding programs of, the state or local governments shall apply to telephone, pager, cable, television, radio, Internet, computer, satellite, or other telecommunication service customer accounts. Added charges shall be tax increases.