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SUBJECT: OFM IMPLEMENTATION CRITERIA FOR INITIATIVE 960

I. Introduction

Initiative 960 (I-960) requires the Office of Financial Management (OFM) to prepare and report certain fiscal information for any bill that would impose or increase taxes or fees. In consultation with the Attorney General's Office, OFM has developed responses to recurring questions and more general guidance concerning how OFM will implement the initiative's requirements.¹ That information, as set forth below, will be used to identify bills to which I-960 applies and will guide OFM's implementation responsibilities regarding notification and cost projections. The guidance is not intended to determine any other matter to which I-960 relates or to provide comprehensive analysis of the initiative.

II. Relevant I-960 Provisions

In determining OFM's responsibilities in implementing I-960, there are three sections of the initiative for which interpretations and application guidance are needed. These sections include the following.

A. I-960, Section 2

I-960, Section 2 states in pertinent part:

(1) For any bill introduced in either the house of representatives or the senate that raises taxes as defined by RCW 43.135.035 or increase fees, the office of financial management must expeditiously determine its cost to the taxpayers in its first ten years of imposition, must promptly and without delay report the results of its analysis by public press release via email to each member of the house of representatives, each member of the senate, the news media, and the public, and must post and maintain these releases on its web site. Any ten-year cost projection must include a year-by-year breakdown. For any bill containing more than one revenue source, a ten-year

¹ The Attorney General's Office has reviewed and provided edits to this memorandum.

cost projection for each revenue source will be included along with the bill's total ten-year cost projection. ...

B. I-960, Section 5

I-960, Section 5 amends RCW 43.135.035 to define "raises taxes" as follows:

(6) For the purposes of this act, "raises taxes" means any action or combination of actions by the legislature that increases state tax revenue deposited in any fund, budget, or account, regardless of whether the revenues are deposited into the general fund.

C. I-960, Section 14

Finally, I-960, Section 14 amends RCW 43.135.055 to read as follows:

(1) No fee may be imposed or increased in any fiscal year (~~(by a percentage in excess of the fiscal growth factor for that fiscal year)~~) without prior legislative approval and must be subject to the accountability procedures required by section 2 of this act.

(2) This section does not apply to an assessment made by an agricultural commodity or board created by state statute or created under a marketing agreement or order under chapter 15.65 or 15.66 RCW, or to the forest products commission, if the assessment is approved by referendum in accordance with the provisions of the statutes creating the commission or board or chapter 15.65 or 15.66 RCW for approving such assessments.

III. Application, Interpretations, and General Guidance

A. Issues Dealing With Taxes

1. What is a tax?

Response. A tax is generally thought of as a required contribution to the support of government exacted by legislative authority, ordinarily without regard to receipt for particularized or special benefits. It is generally a collection of revenue for general governmental purposes, as opposed to a charge levied in return for a particular benefit or service.

2. Does I-960 apply to bills that affect local taxes?

Response. In most instances, I-960 does not apply to bills that affect only local taxes. However, if all or a portion of the local tax will be deposited in a state account or fund, then I-960 applies to the bill for that portion of the local tax that goes into the state account or fund.

3. What about a bill that has an estimated net revenue effect of zero? In other words, a single bill includes provisions that raise one tax and lower another with the net estimated effect of no revenue gain. Does I-960 apply to that bill?

Response. If the revenue from both the tax being raised and the tax being lowered is deposited into the same account or fund, then I-960 does not apply to that bill since the initiative defines “raises taxes” to mean actions by the legislature that increase state revenue deposited in any fund or account. By contrast, if the revenue from the tax being raised is deposited into a different fund or account than the tax that is being lowered, I-960 does apply to that portion of the bill that raises the tax. This is because revenues will be increased in the particular fund or account into which the increased taxes are deposited. In other words, you cannot net out actions on two taxes if the revenue does not go into the same account or fund. This revenue neutral cost assessment will be based on the best information available at the time the projection is made, and could change with updated or new information.

4. A bill changes the distribution of tax revenue after it goes into the state account or fund. For example, the bill changes how the revenues are ultimately spent, or carves out a portion of the existing revenue stream and diverts it into another account or fund. Does I-960 apply to this type of bill?

Response. No, I-960 does not apply to a bill that simply deals with how existing revenue is expended or into which account the revenue is deposited. I-960 does not deal with how tax revenues are ultimately distributed.

5. Based on the initiative’s definition of “raises taxes” as actions by the legislature that increase state tax revenue deposited in any fund or account, does I-960 apply to a bill that does the following:
 - a. Broadens a category of taxpayers or adds a new category of taxpayers to an existing tax? YES
 - b. Adds a new tax exemption? NO
 - c. Repeals an existing tax exemption? YES
 - d. Extends the date when an exemption goes into effect? YES
 - e. Delays the date on which a tax reduction will begin? YES
6. Does I-960 apply to a bill that either clarifies an ambiguity in current law without intent to change the substance of the law or changes the procedures for qualifying for a tax exemption?

Response. No, I-960 does not apply to a bill that resolves an ambiguity in existing law or adds additional procedural requirements to qualify for a tax exemption, such as requiring additional documentation or filing by a specific date, without actually narrowing the category of taxpayers entitled to the exemption.

B. Issues Dealing With Fees

1. What is a fee?

Response. A fee is a charge, fixed by law, for the benefit of a service or to cover the cost of a regulatory program or the costs of administering a program for which the fee payer benefits. For example, professional license fees, which cover the cost of administering and

regulating that category of professions, are fees. Other charges that are categorized as fees include tolls and tuition.

2. If a bill expands the category of persons who must be licensed and pay the licensing fee, does I-960 apply?

Response. Yes, I-960 applies. When a bill expands the category of persons required to be licensed, a new category of persons will be required to pay a licensing fee that was not previously required. This meets the definition of a bill that imposes a fee. For example, if current law requires dog or cat owners to obtain a pet license and pay a license fee and a bill is introduced to expand pet licenses to include owners of birds, this is a new category of persons required to obtain a license and pay the fee. I-960 applies to this bill.

3. What if the bill changes the eligibility requirements for a license and this change results in more persons being eligible for that license? Does I-960 apply to that bill?

Response. No, I-960 does not apply if the bill deals with eligibility to receive a license. Although more people may meet the eligibility requirements, the bill is not imposing a fee or increasing an existing fee. For example, if current law requires architects to have an MBA degree in order to obtain a license, for which a fee is required, and a bill is introduced to allow architects to obtain a license with only a BA degree, I-960 does not apply to this bill.

4. If a bill creates a new program and authorizes the agency that is responsible for the program to impose a fee for that program, does I-960 apply?

Response. Yes, I-960 applies to a bill that creates a new program and authorizes an agency to impose a fee for the program. This would be seen as a bill that imposes a new fee. In addition, because the legislature is authorizing the agency to impose a fee, this bill would also serve as legislative preapproval to the agency to set and impose the fee. In other words, the agency would not need to come back to the legislature after the fee is set in order to begin imposing it. However, if the bill authorizes an agency to set the fee, but requires legislative approval before the fee can actually be charged, as seen in some tolling bills, then I-960 does not apply.

5. If a bill authorizes an agency to set a fee, but the fee is collected by a third party, does I-960 apply?

Response. Who collects the fee and where the funds go are not the determinative factors in regard to whether I-960 applies. First you must determine whether the charge is a "fee" under the definition of a "fee." If it is a fee, and the agency sets the rate, then I-960 applies to the bill. However, some charges set by state agencies for services provided by third parties are not fees under I-960. For example, if a bill authorized the Department of Licensing (DOL) to require a promoter of a sporting event to pay a set fee to the event physician, that charge is not a fee under I-960.

C. Charges that are Neither a Tax nor a Fee

There are charges that do not fall within the definition of a tax or a fee. For bills that deal with those types of charges, I-960 does not apply.

1. Penalties and Fines. A penalty or fine is a monetary assessment for a violation of the civil or criminal law. Whether imposed by the courts, the legislature or an agency through legislative delegation, penalties and fines are not fees, and therefore, I-960 does not apply.
2. Intergovernmental Charges. Charges imposed by a state agency on other state agencies (for example, central service charges by OFM, Department of Personnel, or Department of General Administration) are not fees. This also applies to charges imposed by a state agency on local governments. I-960 does not apply to these intergovernmental charges.
3. Commercial Charges. Charges that are levied for a “commercial” rather than a governmental function or service are not fees. A proprietary transaction is a business-like or commercial venture rather than a governmental function. For example, the sale of alcoholic beverages is a business function, so the purchase price of the alcoholic beverage is not a fee. Another example is the university book store. The price of books represents a business transaction and is not a fee. This differs from tuition or laboratory fees, which are directly related to the governmental function of providing education. Therefore, I-960 does apply to tuition and laboratory fees but does not apply to bookstore sales.
4. Pension Contribution Rates. The contribution rates for both employers and employees to any of the state retirement systems are not fees, and therefore, I-960 does not apply.
5. Charges Based on Individual Determinations or Proceedings (Cost Recovery). In some cases, when a state agency recovers the cost of a service provided, the costs recovered are not fees. An example of costs in this category is when the Department of Ecology cleans up a contaminated site and recovers the costs from the responsible party or parties. Another example is when the Department of Social and Health Services recoups the cost of Medicaid services through the estate recovery process. These are individualized proceedings to recover actual costs, where no fee or rate is set. For these charges, I-960 does not apply. By contrast, if an agency charges a set rate that is not separately calculated for each proceeding, but is intended to cover the agency’s cost of the program for which the fee is charged, the charge is a “fee” under I-960.

In other words, actual cost recovery for specific situations, such as these two examples, does not fall under I-960, but a fee to support the general costs of a program or service does.

6. Workers Compensation Rates, Unemployment Insurance Rates, and Similar Insurance-Type State Program Charges. Although some of these programs involve charges defined as “taxes” for some purposes, the charges operate much like insurance premiums, in which the charges are periodically recalculated to reflect changes in the cost of operating the program and paying claims. Typically, an employer’s rates will go up or down based on past claims experience (either for the individual employer or for a group of similar employers). The purpose of these programs is not to provide general revenue for state activities, but to sustain self-supporting state-operated insurance programs. For purposes of I-960, these charges are not taxes or fees.
7. Health Care Insurance Programs. Programs to extend health care insurance to a greater number of citizens include costs payable by the participants. These costs include premiums,

deductibles, coinsurance charges, administrative charges and other cost-sharing items under a health insurance program. These costs are not fees, and therefore, I-960 does not apply.

D. Issues Dealing with the Ten-Year Cost Projection

1. If the total cost of the fee or tax cannot be determined, what should the cost projection reflect?

Response. If the total amount of revenues that the state will receive cannot be determined from applying reasonable assumptions to the bill, then the cost projection should include the cost to the individual tax or fee payer. For example, if the bill provides a fee for a new license and sets the fee, but the agency cannot determine how many people will apply for the license, the cost projection can show that if you apply for a license, it will cost \$X per license. Using this example, if the bill does not provide for automatic increases, then \$X would be the cost per license in each of the ten years.

2. A bill provides for a new license and fee, but the program does not begin until 2010. What time period should be reflected in the ten-year cost projection?

Response. Regardless of when the fee starts, the cost projection will begin with the year that the bill will be enacted and extend ten years out. For example, a bill enacted in this legislative session would begin the cost projection in 2008 and end in 2018. If the fee was not implemented until the third year, then the first two years of the cost projection will show a zero cost.

3. How do you determine the “revenue source” referred to in I-960, Section 2 for purposes of the cost projection?

Response. I-960 does not define “revenue source.” The revenue source should be derived by who is paying the fee or tax and for what purpose. The source is not derived from the account or fund into which the fee or tax is deposited. Agencies can group paying entities together as a single revenue source if there is a close subject matter or statutory connection among the entities paying the fee or tax or the purpose for which it is paid. For example, if the bill authorizes fee increases for all health profession licenses, agencies should not group all the licenses together as one source. Agencies could group all the licenses of professions that are regulated by the same board or commission under the same chapter of law. Another example is Gambling Commission licenses. The agency should not group together as one revenue source all gambling-related licenses. However, the agency could group together in a single revenue source all licenses that relate to bingo activity.

E. Administrative Issues Implementing the Notice Requirement

1. A bill subject to I-960 is scheduled for a hearing before a legislative committee. OFM issues the required notice. Before the hearing date, the hearing for this bill is cancelled. Does OFM need to issue a notice that the hearing is cancelled?

Response. No. The initiative requires notice only when a bill is scheduled for a public hearing. OFM is not required to provide notice if the hearing is cancelled.

2. A bill subject to I-960 is scheduled for a hearing before a legislative committee. OFM issued the appropriate notice. Sometime before the hearing, OFM learns the hearing for the I-960 bill has been rescheduled. Does OFM need to issue a notice for the new hearing date?

Response. Yes. The initiative requires notice when a bill is scheduled for a public hearing. It does not distinguish between original or rescheduled hearings.

3. A bill subject to I-960 is scheduled for a hearing but the ten-year cost projection has not been completed. Is OFM required to send the notice without the cost projection or should the notice wait until the cost projection is complete?

Response. Notice should be sent when OFM knows the hearing has been scheduled, whether or not the ten-year cost projection is complete. However, the notice requirement is not fully satisfied until the ten-year cost projection is completed and sent. So upon completion, another notice should be sent that includes the cost projection.

4. A bill subject to I-960 is scheduled for a hearing. The cost projection requires information from several agencies and not all agencies have submitted their information. Should a partial cost projection be included with the notice or should OFM wait until the cost projection is complete?

Response. The cost projection should be sent with the notice if the fiscal analysis is complete. A partial cost projection does not need to be sent. Consistent with I-960, these cost projections shall take priority over all other fiscal analyses.

F. Legislative Preapproval to Increase Fees.

Legislative approval is required prior to an agency increasing fees. This memo does not address how preapproval is obtained. However, once the legislature authorizes the agency to impose the fee, a question has been asked regarding whether the agency needs legislative approval in later years to raise the fee?

Response. It depends on the terms of the initial approval. Conceptually, the legislature can approve fee increases for more than one year. Whether the legislature has done so will depend on how the initial approval is given. If the approval is clear that it extends beyond the fiscal year or fiscal biennium, and either from the approval itself or the authorizing statute the parameters for future increases can be determined, then the approval may be a continuing approval to increase fees in future years.