HB 20-1420

Legislative Council Staff
Nonpartisan Services for Colorado's Legislature

FISCAL NOTE

Drafting Number:	LLS 20-1268	**Date:**	June 9, 2020
Prime Sponsors:	Rep. Sirota; Gray Sen. Moreno; Hansen	**Bill Status:**	House Finance
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Bill Topic: **ADJUST TAX EXPENDITURES FOR STATE EDUCATION FUND**

Summary of Fiscal Impact:

- ☒ State Revenue
- ☒ State Expenditure
- ☒ State Transfer
- ☐ TABOR Refund
- ☐ Local Government
- ☐ Statutory Public Entity

The bill makes various changes to state income, sales and use, and insurance premium tax expenditures. It increases state revenue, on net, beginning in FY 2020-21 and requires transfers from the General Fund to the State Education Fund for FY 2021-22 through FY 2024-25. It also requires ongoing expenditures for administration.

Appropriation Summary: For FY 2020-21, the bill requires an appropriation of $4,777,659 to the Department of Revenue.

Fiscal Note Status: This fiscal note is preliminary and reflects the introduced bill. While all agencies were canvassed for this fiscal note, additional time may be required to obtain information from agencies and to further review information previously submitted. The fiscal note will be updated if new or additional information becomes available.

Table 1
State Fiscal Impacts Under HB 20-1420

		FY 2020-21	FY 2021-22	FY 2022-23	FY 2023-24
Revenue	General Fund	$248 million	$408 million	$369 million	$350 million
	Total	**$248 million**	**$408 million**	**$369 million**	**$350 million**
Expenditures	General Fund	$4.8 million	$3.7 million	$3.7 million	$3.7 million
	Total	**$4.8 million**	**$3.7 million**	**$3.7 million**	**$3.7 million**
	Total FTE	42.5 FTE	45.7 FTE	45.7 FTE	45.7 FTE
Transfers	General Fund	-	($150 million)	($200 million)	($200 million)
	SEF*	-	$150 million	$200 million	$200 million
	Total	-	**$0**	**$0**	**$0**
TABOR Refund		-	-	-	-

**State Education Fund.*

Summary of Legislation

The bill makes changes to state income, sales and use, and insurance premium tax expenditures, discussed below, and requires transfers from the General Fund to the State Education Fund (SEF). Transfer amounts are:

- on July 1, 2021, $150 million;
- on July 1, 2022, $200 million;
- on July 1, 2023, $200 million; and
- on July 1, 2024, $200 million.

Income taxes — CARES provisions. For tax year 2020, the bill requires additions to the taxable income of pass-through businesses and C corporations. For the purposes of computing state taxable income, these additions effectively reverse certain expanded income tax deductions allowed under the federal Coronavirus Aid, Relief, and Economic Security Act (CARES Act). These are as follows:

- pass-through businesses that claim an expanded federal net operating loss (NOL) deduction are required to add to their taxable income an amount equal to the portion of the deduction that is attributable to Section 2303 of the CARES Act;
- pass-through business owners that claim an excess business loss deduction are required to add to their taxable income an amount equal to the portion of the deduction that exceeded the limitation in the Tax Cuts and Jobs Act of 2017 (TCJA), as allowed by Section 2304 of the CARES Act;
- pass-through business owners and C corporations that claim a business interest income deduction are required to add to their taxable income an amount equal to the portion of the deduction that exceeded the limitation in the TCJA, as allowed by Section 2306 of the CARES Act.

The bill also requires that NOL deductions for 2018 and later tax years remain limited by provisions in the TCJA that had been relaxed in the CARES Act. More information on the relevant provisions of the CARES Act and subsequent Department of Revenue (DOR) rulemaking related thereto can be found in the Background section of this fiscal note.

Income taxes — NOL limitation. For 2021 and future tax years, the bill limits C corporation NOL deductions to $400,000 annually. C corporations for which this provision limits the deduction amount are able to carry forward the amount not allowed to be deducted with 3.25 percent annual interest to apply as an NOL deduction in a later year.

Income taxes — qualified business income. For 2021 and future tax years, the bill requires pass-through business owners who claim a federal qualified business income deduction, as allowed under the TCJA, to add back the amount of the deduction for the purposes of computing their state taxable income, if their adjusted gross income (AGI) exceeds $75,000 (for single filers) or $150,000 (for married taxpayers filing jointly).

Income taxes — net capital gains deduction. The bill repeals the current law state income tax deduction for qualified net capital gains effective at the end of tax year 2020.

Income taxes — earned income tax credit. Under current law, the Colorado earned income tax credit (EITC) is allowed to taxpayers who are allowed the federal EITC, and is equal to 10 percent of the federal EITC. Beginning in tax year 2020, the bill extends the state EITC to taxpayers who would otherwise qualify for the federal EITC but who are disqualified from doing so because they, their spouse, or one or their dependents does not have a valid social security number.

Beginning in tax year 2023, the bill increases the state EITC to 20 percent of the federal EITC.

Sales and use taxes — energy for industrial use. Under current state law, the sale or use of electricity, coal, gas, fuel oil, steam, coke, or nuclear fuel for industrial use is exempt from the state sales and use tax. Effective for filing periods on and after August 1, 2020, the bill repeals this exemption. Beginning on that date, taxpayers who use energy for industrial purposes are allowed to claim a sales and use tax refund of up to $1,000 per filing period. Certain purposes are exempt from the $1,000 refund limit, including energy used for agriculture and street or railroad transportation services, diesel fuel purchased for off-road use, and fuel used to generate electricity.

The bill requires that repeal of the exemption shall not affect the sales and use tax base of counties, statutory municipalities, and special districts that use the state sales and use tax base.

Insurance premium taxes — regional home office provision. Under current state law, insurance premiums are taxed at a rate of 2 percent, except that insurance policies underwritten by insurance companies with a regional home office in Colorado are taxed at a rate of 1 percent. Effective March 1, 2021, the bill repeals this provision, effectively taxing these policies at the 2 percent rate.

Insurance premium taxes — deposit-type contracts provision. Under current state law, insurance policies issued in connection with an annuity plan are exempt from the insurance premium tax. Effective March 1, 2021, the bill excludes deposit-type contracts that do not incorporate mortality or morbidity risks from the annuity plan exemption, such that the insurance premium tax will be assessed on these contracts. The bill provides a list of examples of deposit-type contracts for which the annuity exemption will no longer apply, including guaranteed investment or interest certificates, supplementary contracts without life contingencies, annuities certain, premium funds or other deposit funds, dividend accumulations, coupon accumulations, lottery payouts, or structured settlements.

Background

Taxable income. Colorado taxable income is equal to federal taxable income as modified in state law. Changes to federal taxable income by default change Colorado taxable income, unless state law or rule exists to preclude or alter the change.

CARES Act. The federal CARES Act became law on March 27, 2020. Among other provisions, the CARES Act made the following tax policy changes that are addressed in this bill:

- Section 2303 of the CARES Act allows NOLs arising in 2018 through 2020 to be carried back for up to five preceding tax years. Under preexisting federal law enacted in the TCJA, NOLs arising in 2018 and later years were restricted such that they could limit pre-NOL taxable income by up to 80 percent, rather than by up to 100 percent for NOLs arising in 2017 and earlier years. Section 2303 of the CARES Act delays implementation of the 80 percent limitation until 2021, allowing NOLs that arise in tax years 2018 through 2020 to be applied to reduce taxable income by up to 100 percent in those years. Finally, Section 2303 changes the base amount from which 80 percent is calculated, by allowing NOLs to reduce taxable income calculated before a taxpayer's NOL, qualified business income, and foreign-derived income deductions by up to 80 percent.

- Beginning in 2018, preexisting federal law enacted in the TCJA limited the amount by which deductions of pass-through business losses could reduce a taxpayer's non-business income, with the business loss exceeding the limit declared an excess business loss to be applied as an NOL deduction in a later tax year. Section 2304 of the CARES Act delays the TCJA excess business loss limitation until 2021, allowing deductions of unlimited business losses for tax years 2018 through 2020.

- Beginning in 2018, preexisting federal law enacted in the TCJA limited deductible business interest income to 30 percent, rather than the 50 percent limit that had applied for 2017 and earlier years. Section 2306 of the CARES Act delays the 30 percent limitation until 2021, allowing a 50 percent deduction for tax years 2018 through 2020.

The CARES Act provisions together reduce federal taxable income for tax years 2018 through 2020, allowing taxpayers who have already filed returns for 2018 and 2019 to file amended returns and claim income tax refunds for these years. For 2021 and future tax years, Section 2303 of the CARES Act reduces federal taxable income for taxpayers who are able to claim a larger NOL deduction as a result of modifications to the 80 percent limitation.

DOR emergency rules. On June 2, 2020, DOR adopted two emergency rules that together define "internal revenue code", for the purpose of determining federal taxable income, which is used to determine Colorado taxable income. Under the emergency rules, "internal revenue code" is defined to exclude federal statutory changes enacted after the end of a tax year. Pursuant to this change, DOR is expected to disallow amended returns filed to reduce taxable income for tax years 2018 and 2019 under the CARES Act. Accordingly, under current law and rule, the above provisions of the CARES Act are not expected to decrease state revenue for tax years 2018 or 2019.

Qualified business income deduction. The TCJA allows a federal income tax deduction for qualified business income for tax years 2018 through 2025. Taxpayers who earn income from ownership of some sole proprietorships, partnerships, limited liability corporations treated as sole proprietorships or partnerships for tax purposes, and S corporations ("pass-through businesses") are able to deduct 20 percent of such income when calculating their federal taxable income. For taxpayers whose income exceeds an inflation-adjusted threshold in federal law, additional limitations apply concerning the nature of the business and the amount it pays in wages. For tax year 2020, the threshold is $163,300 for single filers or $326,600 for joint filers.

Capital gains deduction. Current state law allows some taxpayers who record federally taxable capital gains on real or tangible personal property acquired after May 9, 1994, and owned for at least five uninterrupted years prior to its sale, to deduct the gain from their Colorado taxable income. For a gain on real property to qualify, the property must have been acquired before June 4, 2009.

Federal and state earned income tax credits. The federal EITC is available for taxpayers with earned income, such as income from wages or salaries, disability benefits received prior to the minimum retirement age, and some business income, whose earned income and AGI both fall below thresholds set in federal law. Thresholds depend on a taxpayer's filing status and number of qualifying children. For example, for 2020, a taxpayer filing singly or as a head of household is able to claim the credit if their income falls below $15,820 with no children, $41,756 with one child, $47,440 with two children, or $50,954 with three or more children. Benefits likewise depend on a taxpayer's AGI, filing status, and number of qualifying children. For 2020, the maximum credit amount ranges from $538 for taxpayers with no children to $6,660 for taxpayers with three or more children. A taxpayer and the spouse and/or dependents listed on their tax return must have a valid social security number in order to claim the federal EITC.

Under current law, Colorado taxpayers are able to claim a refundable state EITC equal to 10 percent of their federal EITC. A Colorado taxpayer must qualify for the federal EITC in order to claim the state EITC, meaning that they must also have a valid social security number.

Insurance premium tax. The insurance premium tax is paid by insurance companies and surplus line brokers, the latter of which offer policies on behalf of insurance companies not licensed in Colorado. The tax is assessed on policy premiums at a rate of 1 percent for insurance companies with a regional home office in Colorado, 2 percent for other licensed insurance companies, and 3 percent for surplus line brokers. Revenue is credited to the General Fund, except for portions diverted to the Division of Insurance Tax Fund, the Wildfire Emergency Response and Wildfire Preparedness Funds, and the state reinsurance program.

Assumptions

Current law. This fiscal note presents the fiscal impact of the bill relative to current law. For the purposes of this fiscal note, current law includes the emergency rules adopted by DOR governing the state's administration of expanded federal income tax deductions in the CARES Act. To the extent that the bill changes statute to match DOR's administration of the CARES Act, it is treated as a codification of current practice with no new discrete fiscal impact.

Economic forecast. All revenue estimates assume future economic activity consistent with the May 2020 Legislative Council Staff forecast update.

State Revenue

The bill is expected to increase General Fund revenue by $248 million in FY 2020-21, $408 million in FY 2021-22, $369 million in FY 2022-23, and $350 million in FY 2023-24. Revenue impacts are presented in Table 2 and discussed below. The bill increases revenue from the income, sales and use, and insurance premium taxes, all of which are subject to TABOR.

Revenue impacts for years beyond FY 2023-24 are not estimated but are expected to be similar, except that the bill's requirement that taxpayers add back their federal qualified business income deduction will not increase revenue beyond tax year 2025, when the qualified business income deduction expires under current federal law. For FY 2026-27 and later years, the bill is estimated to increase state revenue by approximately $230 million per year.

Table 2
Revenue Under HB 20-1420*

	FY 2020-21**	FY 2021-22	FY 2022-23	FY 2023-24
Income Tax Provisions				
CARES Section 2303	$5 million	***	***	***
CARES Section 2304	$73 million	$18 million	$0	$0
CARES Section 2306	$2 million	$5 million	$0	$0
Limit on C Corp NOLs	$62 million	$129 million	$138 million	$147 million
Qualified Business Income	$43 million	$95 million	$110 million	$120 million
Capital Gains Deduction	$8 million	$17 million	$20 million	$21 million
EITC - Expanded Eligibility	($15 million)	($10 million)	($15 million)	($20 million)
EITC - Additional Credit	-	-	($44 million)	($89 million)
Sales and Use Tax Provisions				
Industrial Energy Exemption	$52 million	$59 million	$61 million	$63 million
Industrial Energy Refund	($20 million)	($23 million)	($24 million)	($25 million)
Insurance Premium Provisions				
Home Office Rate Reduction	$30 million	$93 million	$99 million	$106 million
Deposit-Type Contracts	$8 million	$26 million	$26 million	$26 million
Total	**$248 million**	**$408 million**	**$369 million**	**$350 million**

* *Totals may not sum due to rounding.*
** *Values shown for FY 2020-21 include impacts that may arise in FY 2019-20 on an accrual accounting basis depending on executive branch accrual accounting. Any FY 2019-20 impacts are assumed to affect the beginning General Fund balance for FY 2020-21.*
*** *Indeterminate revenue increase, see discussion below.*

Income taxes — CARES provisions. Table 2 presents expected revenue increases from provisions in the bill that reverse revenue decreases that would otherwise be expected for tax year 2020 under the CARES Act. Relative to the estimates shown in Table 2, the May 2020 LCS forecast assumed larger decreases especially in relation to CARES Section 2303, concerning NOLs, and CARES Section 2306, concerning business interest income deductions. However, because the revenue decreases expected under these sections of the CARES Act were mostly attributable to retroactive modifications to taxable income for 2018 and 2019, they are assumed to be reversed pursuant to DOR emergency rules adopted on June 2, 2020, and are mostly excluded from this fiscal note.

For tax year 2021 and subsequent years, the bill increases state revenue because it reverses a provision in CARES Section 2303 that had relaxed the limitation on NOL deductions. Specifically, the CARES Act allows taxpayers to use an NOL carried forward from an earlier tax year to reduce taxable income by up to 80 percent of taxable income calculated before application of the NOL deduction, the qualified business income deduction, and the foreign-derived income deduction. This bill reverses the exclusion of the latter two deductions from this calculation, allowing taxpayers to reduce taxable income only by up to 80 percent of taxable income calculated before application of the NOL deduction. For taxpayers who take the qualified business income deduction and/or the foreign-derived income deduction, and who carry forward sufficiently large NOLs to reduce taxable income by more than 80 percent, the provision in this bill will increase revenue. Data and information are not currently available to calculate this impact, as the qualified business income deduction was first allowed in 2018 and no taxpayer-level information concerning the deduction has yet been shared by the federal government with the state government. The provision is assessed as causing an indeterminate ongoing revenue increase relative to what would otherwise have been expected under the CARES Act and may be updated as additional information becomes available.

Income taxes — modifications to other deductions. Table 2 presents the revenue increases expected to result from three modifications to current income tax deductions for tax year 2021 and subsequent years. The revenue increases for FY 2020-21 represent half-year impacts for tax year 2021 on an accrual accounting basis. These provisions are discussed below.

- The bill limits the NOL deduction for C corporations to $400,000 per taxpayer per year. Estimates are based on state data for actual deductions claimed for tax year 2017.
- The bill requires taxpayers who take the federal qualified business income deduction to add back the amount of their federal deduction on their state tax return if their adjusted gross income exceeds $75,000 (for single filers) or $150,000 (for joint filers). Estimates are based on limited national level data for actual deductions claimed for tax year 2018. This provision has a state revenue impact through tax year 2025 only, after which the federal deduction is scheduled to expire.
- The bill repeals the state income tax deduction for qualifying capital gains. Estimates are based on state data for actual deductions claimed for tax years 2017 and 2018.

Income taxes — earned income tax credit. Table 2 presents revenue reductions expected to result from extending the state EITC to taxpayers without valid social security numbers beginning in tax year 2020 and from increasing the state EITC to 20 percent of the federal EITC beginning in tax year 2023. Estimates are based on state data for actual credits allowed for tax year 2017, as well as for state income tax filers using an individual taxpayer identification number (ITIN) in lieu of a social security number with incomes in the EITC eligibility range.

Extending the EITC to taxpayers without valid social security numbers will result in a half-year impact in the current FY 2019-20 for tax year 2020 on an accrual accounting basis. This half-year impact is expected to affect the beginning General Fund balance for FY 2020-21 and is included with the FY 2020-21 estimate in Table 2. Beginning in FY 2022-23, the impact of expanding the EITC to 20 percent of the federal EITC for filers without valid social security numbers is presented on the line labeled "Expanded Eligibility" in Table 2, and is not double counted on the line labeled "Additional Credit." The additional credit will cause a half-year revenue impact in FY 2022-23 for tax year 2023 on an accrual accounting basis. The first full-year impact will occur in FY 2023-24.

Sales and use taxes. The bill increases state revenue by repealing the state sales and use tax exemption for industrial energy use. Estimates for the revenue increase are based on state sales and use tax returns for businesses classified as electric power generation, transmission, and distribution or national gas distribution that claimed wholesale sales exemptions in calendar year 2019, and for restaurants that directly claimed sales and use tax exemptions for industrial energy use in 2019 as allowed under current state law. The estimate for FY 2020-21 reflects an impact for 11 months because the provision takes effect on August 1, 2020.

The bill also decreases revenue by allowing taxpayer claims for refunds of up to $1,000 per filing period in state sales and use taxes paid on energy for industrial use. The revenue decrease resulting from refunds will necessarily be less than the revenue increase resulting from repeal of the exemption. It is assumed that taxpayers for whom refunds are limited in the bill will receive refunds for about one-third of sales and use taxes paid in the aggregate. In practice, most taxpayers will be eligible to receive refunds of the entire amount of tax paid, while taxpayers who spend more than $413,793 per year on energy for industrial use will receive refunds of less than the amount of tax paid.

Insurance premium taxes. The bill increases state revenue by eliminating the rate reduction for insurance policies offered by companies with a regional home office in Colorado and by excluding deposit-type contracts from the types of annuities exempted from the insurance premium tax. The estimates in Table 2 reflect a four-month impact for FY 2020-21 because these provisions take effect on March 1, 2021. Estimates for both provisions are based on insurance policies underwritten and premium taxes paid in calendar year 2018.

State Transfers

The bill requires transfers from the General Fund to the SEF of $150 million for FY 2021-22 and $200 million for each of FY 2022-23 through FY 2024-25.

State Expenditures

The bill is expected to increase General Fund expenditures by $4.8 million and 42.5 FTE in FY 2020-21, and by $3.7 million and 45.7 FTE in FY 2021-22 and subsequent years. Expenditures are summarized in Table 3 and described below.

Table 3
Expenditures Under HB 20-1420

	FY 2020-21	FY 2021-22
Department of Revenue		
Personal Services	$2,403,800	$2,613,430
Operating Expenses	$62,370	$61,695
Capital Outlay Costs	$285,200	-
Computer Programming	$1,069,600	-
Computer and User Acceptance Testing	$52,262	$647
New Tax Form	$1,200	-
Data Reporting	-	$4,608
Centrally Appropriated Costs	$903,227	$973,828
Total Cost	**$4,777,659**	**$3,654,208**
Total FTE	**42.5 FTE**	**45.7 FTE**

State Education Fund. Revenue transferred to the SEF is assumed to be available for expenditure pursuant to future school finance acts. These expenditures are not identified in this fiscal note.

Department of Revenue. Expenditures for the department are expected to total $4.8 million in FY 2020-21 and $3.7 million in FY 2021-22 and subsequent years. Most expenditures are attributable to the addition of 42.5 FTE in FY 2020-21 and 45.7 FTE in FY 2021-22 and subsequent years, including expenditures for personal services, operating expenses, capital outlay costs, and centrally appropriated costs.

DOR workload is expected to increase to process:

- refunds of sales and use tax paid on energy used for industrial purposes, requiring 31.6 FTE in FY 2020-21;
- additional EITC claims by taxpayers without valid social security numbers, requiring 6.2 FTE in FY 2020-21; and
- state income tax additions for federal qualified business income deductions, requiring 4.7 FTE in FY 2020-21.

In particular, expenditures for the sales and use tax refund provision are preliminary and subject to change as more information becomes available. The department currently processes all sales and use tax refund claims manually. Initial review requires at least one hour, with additional review required in over 40 percent of cases due to the amount of the refund claimed or the nature of the case. Processing 132,000 refunds manually, or 12 refunds per year for an estimated 11,000 taxpayers, would require between 140 FTE and 150 FTE. This fiscal note assumes that DOR will expend up to $1 million to contract for the programming of sales and use tax refund automation for this provision in its GenTax software system. Automating the filing of claims is assumed to speed initial reviews and reduce time required for additional reviews at a lower cost than manual review.

Workload expected for DOR to process EITC claims and state income tax additions for federal qualified business income deductions is consistent with implementation of current law tax expenditures with similar caseload to that expected under the bill.

Other costs for the department are related to programming the department's GenTax software system and Sales and Use Tax System, performed by software vendors under existing contracts; software and related user acceptance testing, performed by the department's Taxpayer Service Division and Systems Support Office; a new tax form, to be created in the Department of Personnel and Administration using reappropriated DOR funds; and, beginning in FY 2021-22, data reporting in the department's Office of Research and Analysis.

Department of Regulatory Agencies. For FY 2020-21 only, the bill will increase DORA workload to update the department's computer system to accommodate changes to the insurance premium tax. This workload increase can be accomplished within existing appropriations.

Centrally appropriated costs. Pursuant to fiscal note and Joint Budget Committee policy, centrally appropriated costs for bills involving more than 20 FTE are appropriated in the bill, rather than through the annual budget process. These costs, which include employee insurance, supplemental employee retirement payments, and leased space for the DOR, are estimated to be $903,227 in FY 2020-21 and $973,828 in FY 2021-22. These costs are itemized in Table 4.

Table 4
Centrally Appropriated Costs Under HB 20-1420

	FY 2020-21	FY 2021-22
Department of Revenue		
Health, Life, and Dental Insurance	$405,134	$435,639
Short-Term Disability Insurance	$3,637	$3,954
Supplemental PERA Disbursements	$213,956	$232,615
Leased Space	$280,500	$301,620
Centrally Appropriated Costs	**$903,227**	**$973,828**

TABOR refunds. The bill increases state revenue subject to TABOR as noted in the State Revenue section of this fiscal note. The May 2020 LCS forecast anticipates that state revenue subject to TABOR will remain below the TABOR limit through at least FY 2021-22. For FY 2022-23 and future years, and the bill may increase required refunds to taxpayers, which are paid from the General Fund.

Local Government

The bill has no fiscal impact for local governments, other than to the extent to which revenue transferred to the SEF is later allocated to school districts. The bill requires that eliminating the state sales and use tax exemption for energy used for industrial purposes does not correspondingly eliminate this exemption in counties, statutory municipalities, or special districts that use the state sales and use tax base.

Effective Date

The bill takes effect upon signature of the Governor, or upon becoming law without his signature, except that the provision repealing the reduced insurance premium tax rate for insurance companies with regional home offices in Colorado takes effect March 1, 2021.

State Appropriations

For FY 2020-21, the bill requires a General Fund appropriation of $4,777,659 to the Department of Revenue, with an allocation of 42.5 FTE. From this amount, $1,200 should be reappropriated to the Department of Personnel and Administration.

State and Local Government Contacts

Education	Information Technology	Law
Personnel	Regulatory Agencies	Revenue