MONTANA LEGISLATIVE BRANCH

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TO: Fiscal Note Workgroup Members

FROM: Jon Moe, Fiscal Specialist
Legislative Fiscal Division

RE: Fiscal Notes Study – Background Information

The information contained in this document was originally prepared as a response to a legislative request. The purpose of this document is to attempt to address the following questions:

- Are there enhancements that can be implemented in the short-term that might improve the fiscal note process?
  - What other information do we feel should be reflected in the current fiscal note format?
  - What role could the LFD play in monitoring or reviewing fiscal notes?

- What changes to the fiscal note process might be considered by the legislature as a long-term solution to concerns? (There should be a formal process to identify what concerns legislators have.)
  - Should the fiscal note function be located in the Legislative Branch?

For any discussion concerning quality of fiscal notes, quality should be defined. A quality fiscal note would be one that is complete, accurate, informative, and without bias (or even an appearance of bias).

Fiscal notes are an important part of the legislative process. They provide an "educated" estimate of what increases or decreases in expenditures or revenue can be expected by enactment of a specific legislative proposal. To this purpose, they must be generated in a very short turnaround time. Most are prepared in concert with the legislative process (shortly following introduction of the bill). Introduction of legislative proposals, for the most part, is confined to the early part of the session, so the initial preparation of a high volume of fiscal notes is similarly compacted into a relatively short time frame. This time frame, unfortunately, parallels the budget deliberation process (by subcommittees), as well as the activities of other legislative committees and their staff.

POTENTIAL ENHANCEMENTS IN THE SHORT-TERM

What other information do we feel should be reflected in the current fiscal note format?

Answering this question should follow a formal process to document feedback from legislators and other interested parties. However, based upon a review of fiscal notes prepared by several states, some suggestions on substance or cosmetic changes that might occur in fiscal notes are as follows:

- A description of what the bill does (generally);
- A description of what in the bill causes fiscal impact;
- A list of the agencies contacted so that the reader can see who was not contacted;
- A section showing in some general way how the legislation impacts individuals and businesses;
- The identification of specific state funds that are impacted, and in some instances specific federal funds;
- The identification of the type of revenue affected by the bill (e.g., individual income tax, hunting fees, etc.)
- A printed "date prepared"...currently, the only date appears with the signatures of the sponsor and the OBPP director and these do not appear on the copy available on the Internet.

If there is a desire to make the fiscal notes shorter, not listing the assumptions is a possibility. Colorado has done this but still addresses some of the assumptions in their narrative describing the fiscal impact. Work papers include assumptions in addition to other information that would be available for examination. Listing the assumptions, however, gives the sponsor and others the ability to understand the data used to calculate the impact and to challenge seemingly faulty assumptions. Also, the Montana fiscal note does not currently include a narrative description of the fiscal impact.

Enhancements to the fiscal note format should attempt to make the document easier to read and understand, as well as increase the confidence in the data provided.

What role could the LFD play in monitoring or reviewing fiscal notes?

This question is a subset of the bigger question of the role of the LFD in the context of services provided to the legislature.

In the *IDEAL* world, the LFD staff would promptly receive each fiscal note for legislation affecting their assigned agencies. The staff probably should be aware of all legislation that might affect his or her agency (from a fiscal and/or policy perspective). The staff would review the fiscal note to ensure that all impact was identified and to verify that the facts and assumptions used are appropriate to the legislative proposal. The staff should also make sure that all agencies affected by the bill had an opportunity to provide input.

In the *REAL* world, LFD analysts do track fiscal notes to a limited degree, although they concentrate on bills that impact the budget of assigned agencies. But time is the enemy, including the turnaround time for fiscal notes and the time individual analysts have to review fiscal notes. Most of the time needed to review the fiscal notes coincides with the time required to prepare for subcommittee meetings. LFD staff simply does not have the time to perform a thorough review of each fiscal note. Currently, they may upon request of a legislator take the time to review a specific fiscal note but it is not routinely done.

Given the time restraints, what could the role of the LFD staff be?

First, there is the need for a way to be alerted to the legislation/fiscal notes that affect their agencies. During the 2005 session, about 1,441 bills/resolutions were considered. About 773 of those had at least one fiscal note prepared. Armed with a list of bills that affect the assigned agencies, an analyst might have the ability to perform <u>at least a cursory review as time allows</u> (but probably only on key bills).

Currently, one LFD staff member maintains a fiscal note database for a different purpose, related to the preparation of the *General Fund Status Sheet* that is published regularly throughout the session. This database might be suitable for identifying fiscal notes for individual analysts. This staff member, in some instances, seeks feedback from other staff members on fiscal impacts in order to verify that the impact reported seems reasonable. In addition, this staff member questions and verifies many aspects of fiscal notes with the Office of Budget and Program Planning. He also ensures that for legislation with no fiscal note, but that should have one, that leadership is alerted so that a fiscal note can be requested. Similarly, he identifies where an amendment to a bill might require that a fiscal note be revised. Again, the purpose for this monitoring process is to ensure complete and accurate information for the *General Fund Status Sheet*.

In addition, analysts have the ability to query the legislatures LAWS system for bills that might impact their agencies. They can do this primarily by subject matter although this does not guarantee a complete list.

Second, the LFD staff should ideally be a resource for the legislator that needs assistance in understanding, or verifying certain aspects of, the fiscal note. Examples of the latter are validating assumptions or ensuring that the fiscal note does not miss a major impact.

In the absence of additional staff and to avoid adding significant compensatory time accumulations, it would seem that this is the most that existing LFD staff might be able to do. The hiring of one or more additional staff for session work would expand the LFD's ability to review fiscal notes, but finding someone with the right expertise and skills set might be problematic and having a space for them to work may also be an issue.

POTENTIAL ENHANCEMENTS IN THE LONG-TERM?

SHOULD THE FISCAL NOTE FUNCTION BE LOCATED IN THE LEGISLATIVE BRANCH?

Currently, the fiscal notes are the responsibility of the budget director (Attachment A is statutory authority). Section 5-4-203, MCA, provides that "the budget director in cooperation with the state or local agencies or officials or organizations representing local agencies or officials affected by the bill, is responsible for the preparation of the fiscal note." It appears that approximately 50% of the states have placed the fiscal note function with the Legislative Branch. I have identified the states that have the fiscal note function located in the legislative branch and can possibly explore more of those. I worked in Colorado for both the executive budget office and the legislative service agency in the budget analyst and fiscal analyst roles. I prepared hundreds of fiscal notes in both venues. Attachment B is a description of the Colorado shift of responsibility. It is helpful to understand what occurred in another state that shifted responsibility for the fiscal note function from an executive budget office to a legislative agency.

In Montana, the Office of Budget and Program Planning (OBPP) performs this function currently. The way the function is designed places much of the burden of preparation of the notes on the agencies. The agency prepares the fiscal note in a word processing template provided by OBPP in a form that may very well be the final version. The agency submits the note to OBPP. An OBPP budget analyst reviews the note and makes any corrections or changes that might be needed. If there is more than one agency impacted, the analyst will combine the notes into one. In at least one past session, OBPP has added temporary help (one person during the busiest time) to review/analyze fiscal notes, taking some of the load from the budget analysts who are at the same time monitoring the budget process on behalf of the Governor. The temporary person for the 1999 session was a retired individual who had considerable fiscal experience in Montana State government.

Is it feasible to transfer the fiscal note function to the Legislative Branch, and what would be gained? The Montana Legislature considered about 1,441 bills and resolutions during the 2005 session. Fiscal notes were prepared for about 773 of those. If the fiscal note function were located in the Legislative Branch, a dedicated staff would be needed for each regular session, from December to April. To assign it to existing staff would further dilute the ability of that staff to perform their existing duties and it would very much limit their ability to do a quality fiscal note analysis. It would be an impossible situation without more staff. Existing legislative staff are at their absolute busiest at the same time that fiscal note preparation must occur. It is the nature of the legislative process. For legislative staff to perform this function effectively, there would need to be a dedicated 5 or 6 fiscal analysts for 4 to 5 months every other year (although the workload would begin to diminish in late February). Without staff dedicated to this function only, there would continue to be a significant dependence on the agencies to perform the analysis and prepare the fiscal note. Even with staff resources to perform the fiscal note analysis, there would be dependence on the agencies for the data because of the required turnaround and the need for agency specific data. Utilizing these fiscal note analysts for the other 19-20 months of the biennium would be another issue. Hiring temporary help for those few months would

seemingly limit the expertise available for effective fiscal analysis unless experienced individuals are found available.

Conclusion

Indeed, there are several options that might be considered regarding fiscal notes. The interim study group offers the opportunity for the legislature to review options and hopefully reach some consensus on changes that will benefit the process. Staff has, with approval of Legislative Council and Legislative Finance Committee leadership, surveyed legislators on the content and process for fiscal notes, and to document concerns.

There is some advantage to the idea of moving the fiscal note process to the Legislative Branch, primarily that of having an office compiling the fiscal notes that has no stake in the outcome. It hopefully would minimize the appearance of bias in the process. However, this is tempered by the continued need to obtain input from the executive agencies, which in Colorado seems to raise the concern by legislators that "departments are controlling the process." Further, such a move would have a cost (potentially $600,000 per biennium) as there would be a need for additional staff, equipment, and office space.

I have one more point to add. Several years ago, I ran into something called "Chisholm's Law." I don't remember the source but it stuck with me, probably because at the time I was preparing fiscal notes. It states: ***"No matter what you do, somebody won't like it."*** In preparation of fiscal notes, this couldn't be truer, and it does not matter which agency is doing it. So, in the end, would the fiscal note process be better or would there still be plenty of concerns by legislators?

Statutes Concerning Fiscal Notes Attachment A

AUTHORITY FOR FISCAL NOTES

5-4-201. Requirement of fiscal notes with committee reports. All bills reported out of a committee of the legislature having an effect on the revenues, expenditures, or fiscal liability of the state or of a county or municipality, except appropriation measures carrying specific dollar amounts, shall include a fiscal note incorporating an estimate of such effect. Fiscal notes shall be requested by the presiding officer of either house, who shall determine the need for the note at the time of introduction.

5-4-202. Requests for notes by committee, house, or sponsor. A fiscal note also may be requested on a bill, as the joint rules of the senate and the house of representatives may allow, by:
(1) a committee considering the bill;
(2) a majority of the members of the house in which the bill is to be considered, at the time of second reading; or
(3) the sponsor, through the presiding officer.

5-4-203. Budget director to prepare note. The budget director, in cooperation with the state or local agencies or officials or organizations representing local agencies or officials affected by the bill, is responsible for the preparation of the fiscal note and shall return same within 6 days. The director may request additional time to complete a note, which extension must be submitted to the presiding officer or committee requesting the note for approval.

5-4-204. Submission of fiscal note -- sponsor's fiscal note -- distribution to legislators. (1) A completed fiscal note shall be submitted by the budget director to the presiding officer who requested it. Upon receipt of the completed fiscal note, the presiding officer shall notify the sponsor of the bill for which the fiscal note was prepared that the fiscal note has been completed and is available for review. Within 24 hours following notification, the sponsor must:

(a) notify the presiding officer that he concurs with the completed fiscal note;

(b) request additional time, not to exceed 24 hours, to consult with the budget director on the fiscal note; or

(c) elect to prepare a sponsor's fiscal note as provided in subsection (4).

(2) (a) If the sponsor concurs with the completed fiscal note prepared by the budget director or elects to prepare a sponsor's fiscal note, the presiding officer shall refer the completed fiscal note prepared by the budget director to the committee considering the bill. If the bill is printed, the note shall be reproduced and placed on the members' desks.

(b) If the sponsor requests additional time to consult with the budget director, the presiding officer shall notify the sponsor and the budget director of the time, not to extend beyond the time limitation specified in subsection (1)(b), by which:

(i) the budget director shall submit a revised completed fiscal note to the presiding officer;

(ii) the sponsor shall notify the presiding officer that he concurs with the original completed fiscal note; or

(iii) the sponsor shall elect to prepare a sponsor's fiscal note as provided in subsection (4).

(3) At the time specified as provided in subsection (2)(b), the presiding officer shall refer the original or, if revised, the revised fiscal note to the committee considering the bill. If the bill is printed, the note shall be reproduced and placed on the members' desks.
(4) (a) If a sponsor elects to prepare a sponsor's fiscal note, he shall prepare the fiscal note as provided in 5-4-205 and return the completed sponsor's fiscal note to the presiding officer within 4 days of his election to prepare a sponsor's fiscal note.
(b) The presiding officer may grant additional time to the sponsor to prepare the sponsor's fiscal note.
(c) Upon receipt of the completed sponsor's fiscal note, the presiding officer shall refer it to the committee hearing the bill. If the bill is printed, the note must be identified as a sponsor's fiscal note, reproduced, and placed on the members' desks.

5-4-205. Contents of notes. Fiscal notes shall, where possible, show in dollar amounts the estimated increase or decrease in revenues or expenditures, costs which may be absorbed without additional funds, and long-range financial implications. No comment or opinion relative to merits of the bill shall be included; however, technical or mechanical defects may be noted.

5-4-206. Background information to legislators on request. The budget director shall make available on request to any member of the legislature all background information used in developing a fiscal note.

5-4-207. Repealed. Sec. 2, Ch. 274, L. 1993.

5-4-208 and 5-4-209 reserved.

5-4-210. Estimate of fiscal impact on local government required. (1) A bill that, if enacted, may require a local government unit to perform an activity or provide a service or facility that requires a direct expenditure of additional funds without a specific means to finance the activity, service, or facility in violation of 1-2-112 or 1-2-113 must be accompanied, at the time that the bill is presented for introduction to the chief clerk of the house of representatives or the secretary of the senate, by an estimate of all direct and indirect fiscal impacts on a local government unit. The estimate of fiscal impacts must be prepared by the budget director in cooperation with a local government unit affected by the bill. The budget director has 10 days to prepare the estimate.
(2) The estimate must show in dollar amounts the increase in expenditures that may be required by the bill. Comment or opinion relative to the merits of the bill may not be included in the estimate. However, technical or mechanical defects may be noted. Upon completion of the estimate, the budget director shall submit the estimate to the requestor of the bill.

REGARDING REVENUE ESTIMATES

5-5-227. Revenue and transportation interim committee -- powers and duties -- revenue estimating and use of estimates. (1) The revenue and transportation interim committee has administrative rule review, draft legislation review, program evaluation, and monitoring functions for the department of revenue and the department of transportation and the entities attached to the departments for administrative purposes.

(2) The committee must have prepared by December 1 for introduction during each regular session of the legislature in which a revenue bill is under consideration an estimate of the amount of revenue projected to be available for legislative appropriation.
(3) The committee's estimate, as introduced in the legislature, constitutes the legislature's current revenue estimate until amended or until final adoption of the estimate by both houses. It is intended that the legislature's estimates and the assumptions underlying the estimates will be used by all agencies with responsibilities for estimating revenue or costs, including the preparation of fiscal notes.
(4) The legislative services division shall provide staff assistance to the committee. The committee may request the assistance of the staffs of the office of the legislative fiscal analyst, the legislative auditor, the department of revenue, and any other agency that has information regarding any of the tax or revenue bases of the state.

REGARDING DEDICATED REVENUE PROVISIONS

17-1-506. Review of legislation. The office of budget and program planning shall, consistent with the review provisions in 17-1-505, review each piece of legislation that proposes to dedicate revenue. The office shall submit its findings concerning the dedication of revenue on the fiscal notes accompanying that legislation.

REGARDING STATUTORY APPROPRIATIONS

17-1-508. Review of statutory appropriations. (1) Each biennium, the office of budget and program planning shall, in development of the executive budget, review and identify instances in which statutory appropriations in current law do not appear consistent with the guidelines set forth in subsection (2).
(2) The review of statutory appropriations must determine whether a statutory appropriation meets the requirements of 17-7-502. A statutory appropriation from a continuing and reliable source of revenue may not be used to fund administrative costs. In reviewing and establishing statutory appropriations, the legislature shall consider the following guidelines. A statutory appropriation may be considered appropriate if:

(a) the fund or use requires an appropriation;
(b) the money is not from a continuing, reliable, and estimable source;
(c) the use of the appropriation or the expenditure occurrence is not predictable and reliable;
(d) the authority does not exist elsewhere;
(e) an alternative appropriation method is not available, practical, or effective;
(f) other than for emergency purposes, it does not appropriate money from the state general fund;
(g) the money is dedicated for a specific use;
(h) the legislature wishes the activity to be funded on a continual basis; and
(i) when feasible, an expenditure cap and sunset date are included.

(3) The office of budget and program planning shall prepare a fiscal note for each piece of legislation that proposes to create or amend a statutory appropriation. It shall, consistent with the guidelines in this section, review each of these pieces of legislation. Its findings concerning the statutory appropriation must be contained in the fiscal note accompanying that legislation.

Case Study – Fiscal Note Preparation in Colorado Attachment B

DECISION TO SHIFT FUNCTION

During the 1988 session, when the legislature decided to look for alternatives to the budget office fiscal note model, they first went to the Joint Budget Committee (JBC) staff to see if the JBC staff would take on the function. The staff director's immediate reaction was not only no, but heck no. Legislative leadership then turned to the Legislative Council staff and that staff accepted the task. It wasn't until then, that the Joint Budget Committee (JBC) staff, Colorado's counterpart to Montana's LFD, indicated that if the function were moved to the Legislative Branch, then it should be located with the JBC staff. The director of the JBC staff at that time told me that the rationale was that his staff would be better equipped to know what the departments currently do and how any new legislation would impact them. He also thought it would be more efficient to have his staff perform the function since they already dealt with the departments, had more program knowledge, etc. He indicates that the decision to move the function to the Council was more a "political" decision, that the leadership at the time believed that if this function was moved to the JBC staff, it would give too much "power" to the JBC (the JBC is a 6-member committee out of a 100-member legislature). He speculated they thought that not only would the JBC be making decisions over ongoing appropriations but also new legislation. Today, in rare instances, the JBC can be asked to prepare a separate analysis of a bill's fiscal impact, through a formal process set up for that purpose.

The director of the Legislative Council said he could do it with 5 fiscal analysts and an administrative support position (3 analysts have been added to the process since 1993 but in the current year there are only 2 additional analysts because of budget reductions). In reality, the requirement for Colorado would be 9.0 FTE for 6 months but in order to have the resources and expertise when they need it, the positions need to be in place year around. These analysts have various assignments during the interim and contribute a great deal to the research and operational needs of the Legislative Council. In my tenure, for example, I recall working on studies of the various taxes and in one interim, staffed a joint interim Judiciary Committee as it developed legislation related to the death penalty that had been invalidated by the courts just prior to that interim.

The manager of the present fiscal note staff and process believes that the right decision was made at the time for some of the following reasons:

- The Council staff is closer to the committees...since we staff the committees, we are better able to work with staff and chairs on the calendaring of bills;
- They are better able to get an early start on the process in November and December when traditionally the JBC is busy with departmental budgets;
- The Legislative Council staff is viewed as being more "open" to input from departments and others on the potential fiscal impact;
- Not all bills go to the appropriations committees staffed by the JBC staff. Many bills have local government and not state government impact, or no impact at all. Analysis on these does not depend on state government budget experience, rather a broader perspective of government and the working relationships with the locals;

- The Legislative Council's fiscal note staff has developed a real expertise in tax law and forecasting for property taxes, cash funds, general fund revenues, prison population, school enrollment, etc. That places them in a better position when it comes to these issues; and they have more resources in our office to draw upon (as is explained in the next section).

STRUCTURE OF THE WORK UNIT

Colorado shifted the fiscal note function from the executive budget office to the Legislative Council office beginning with the 1989 session (Colorado has annual sessions). The Legislative Council is the Colorado counterpart of the Legislative Services Division in Montana. As stated above, initially 5.0 FTE fiscal analysts staffed this office plus 1.0 FTE administrative support. These were new positions. Subsequent to the 1992 session, the number of analysts grew to 8, although they are currently getting by with 7 because of budget reductions. They prepare about 771 initial fiscal notes per year (2004), one for every legislative proposal (bills and resolutions). In addition, they prepare revised fiscal notes when amendments to the bills warrant a change in the note. Many reflect "no fiscal impact," but every bill is analyzed. Of the 8 analysts, one oversees the function and reviews each note. The remaining 7 analysts each prepare fiscal notes during a session. The fiscal note preparation can begin as early as November when new legislation is being drafted. The workload is intense from mid-December through February when it begins to taper off. New bills and amendments can continue to the end of the session. As the fiscal note workload drops and through the interim (May through November), these analysts get involved with the other projects, such as researching tax policy, corrections costs, and health care budget issues, usually depending on the analysts' areas of expertise.

Since the fiscal note staff works very closely with their own economists, they have recently drawn upon the economists' willingness to write a number of notes. During this past session, 3 economists were available to them. Two of the analysts wrote approximately 25-30 notes, and the third economist wrote around 40. The fiscal note manager stated that "2 of the 3 economists I actually hired and were fiscal analysts for several years prior to moving to the economics section. In the past, we have also utilized the policy/research committee staff to write notes. This was more of a pilot-project and had mixed results. The bottom line is that the more we do, the more that is expected of us and the need for more analysts."

FISCAL NOTE PROCESS

When the function transferred from the executive budget office to the Legislative Council office, the process did not change significantly. The legislative analysts review assigned bills, determine which agencies might be affected, send copies of those bills to the agencies for their assessment, receive and analyze the agency work papers, and prepare the formal fiscal note. Generally, this is the same process that was in place in the executive budget office except that it was not a staff that was dedicated to fiscal notes only. The budget office was monitoring the budget deliberations at the same time, among other duties. The legislative analysts, on the other hand, are dedicated to the fiscal note process for the entire session, beginning a month or more prior to the session.

For the Colorado fiscal note work unit, fiscal notes are the top priority (actually their only priority for those few months). Because this staff is dedicated to the process, there is most likely

a better product. However, this difference is tempered by the fact that with the short turnaround times of fiscal notes, there is still a high dependence on the affected agencies' data and analysis. The time limitation for the large number of fiscal notes makes thorough fiscal analysis very difficult. However, the increase in staff resources in this unit probably has mitigated that problem to some degree.

It is important to note that the fiscal note function has been in the Colorado Legislative Council office for 16 annual sessions and two of the five original analysts are still there. At least two individuals that were hired subsequent to 1992 were from the JBC staff. Therefore, I think the knowledge base is at least equal to that of the JBC staff. During the first year or two, the new analysts' detailed knowledge of agency programs may have been an issue although the training of these analysts included agency visits and otherwise getting familiar with the assigned subject matter. Since the 1989 session, the fiscal note analysts have been very involved in interim activities such as tax policy analysis, corrections issues, etc., from which considerable policy and program knowledge is gained.

The manager of the Colorado fiscal note unit indicates that there is another change that has improved their fiscal notes. They consider communication with the sponsor to be key and have implemented a protocol that encourages one-on-one discussions with the sponsor when possible. This allows the analyst to better understand the bill and to help the sponsor see in advance why, for example, some unforeseen impact occurs or how a bill might be flawed. Such communication may be easier for legislative staff because of the relationships that develop through a variety of contacts regarding other issues.

The fiscal note manager also says, "This past session, we saw a growing distrust of the executive departments by legislative members and the games that they perceived were being played. This actually became a black mark on our process. Some members believe that the departments are controlling the process and they want to know what we are going to do about it. Another area of contention (which is related to the fact that we have no money for new programs), is the belief that we are "killing good bills" with our fiscal notes. We are now being blamed for just about everything. On one hand, they praise the staff for their integrity and unbiased opinions, while blasting us for killing their ideas. Sound a little familiar? It is, just a little worse now with term limits and budget deficits."

Improvement to fiscal notes has occurred in Colorado because there is a work unit that is dedicated to the function, not so much because of where the function is located. However, intuitively, it seems that placing the function in the Legislative Branch should give the members of the legislature more comfort because their own staff would be compiling the fiscal notes. In addition, it is important (and necessary) to include the departments in the process to ensure that no impacts are missed. It would seem that there is more risk in <u>not</u> surveying agencies for their input. It is a key element of the process. Legislators and staff simply need to understand the potential for the agencies (state or local) to manipulate information to satisfy a predetermined agenda, and the need to examine the assumptions that led to the conclusion of fiscal impact.