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Bill Ritter Jr.
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August 16, 2007

The Honorable President Joan FitzGerald
The Honorable Speaker Andrew Romanoff
State Capitol Building
Denver, CO 80203

Dear Madam President and Mr. Speaker:

On May 2, 2007, the Governor vetoed seven headnotes and eighty-one footnotes in Senate Bill 07-239 (the "FY 2007-08 Long Bill"). On the final day of the legislative session, both chambers of the General Assembly overrode each of these vetoes. The veto override, however, did not resolve issues related to the legal effect of these headnotes and footnotes. The purpose of this letter is to clarify the directives that the Governor is giving to the executive branch with respect to each of the headnotes and footnotes addressed in the Governor's veto letter.

As a threshold matter, it is important to distinguish between "binding" and "nonbinding" footnotes, as that distinction is drawn in headnote 21. In that headnote, the General Assembly noted that purposes, conditions, and limitations contained in the footnotes were intended to be binding, while requests or expressions of intent contained in footnotes were intended to be nonbinding. While this distinction is not always easy to draw, it appears that of the eighty-one vetoed footnotes, only two were styled as binding footnotes. (Footnote 114, p. 206; Footnote 122a, p. 245.) The remaining seventy-nine vetoed footnotes were nonbinding requests or expressions of the General Assembly's intent. Notwithstanding the nonbinding nature of the vast majority of the vetoed footnotes, we believe it is important to communicate to the General Assembly which of the footnotes, if binding, would encroach upon executive authority and which of the footnotes the Governor is directing the executive departments to follow and which ones he is directing not be followed.

In the Governor's veto letter, he communicated his position that each of the headnotes and footnotes vetoed violated Article III and Article V of the Colorado Constitution. Article III provides separation of powers between the executive and legislative branches. While the legislative branch has the authority to appropriate state funds, the executive branch has the inherent responsibility and authority to administer state funds. Therefore, the legislature may not attach conditions in the Long Bill that intrude into the administration of state government. *Colorado General Assembly v. Owens*, 136 P.3d 262 (Colo. 2006); *Anderson v. Lamm*, 579 P.2d 620 (Colo. 1978); *Colorado General Assembly v. Lamm*, 704 P.2d 1371 (Colo. 1985) (hereinafter *Lamm II*). Some of the headnotes and footnotes vetoed went beyond appropriating funds and infringed on the executive authority in violation of the Colorado Constitution, and are, therefore, void. Indeed, less than a year ago the

Colorado Supreme Court recognized the invalidity of such headnotes, holding that “the legislature ‘may not attach conditions to a general appropriation bill which purport to reserve to the legislature powers of close supervision that are essentially executive in character.’” *Owens*, 136 P.3d at 266 (quoting *Anderson*, 579 P.2d at 624). Similarly, Article V, section 32 of the Colorado Constitution prohibits the legislature from including substantive legislation in the Long Bill. *Owens*, 136 P.3d at 266; *Anderson*, 579 P.2d at 624; *Lamm II*, 704 P.2d at 1382. As the Governor stated in his veto letter, the executive department cannot abide by legislative directives that are in violation of the Colorado Constitution.

Since the veto override, the administration has carefully analyzed each of the headnotes and footnotes identified in the Governor’s veto message to determine which of those directives could reasonably be complied with given the available resources and departmental priorities. To the extent that a headnote or footnote can be adhered to without adversely impacting the operation of the executive branch or the delivery of government services, the Governor is directing departments to comply. There are, however, two headnotes and fifteen footnotes that cannot reasonably be fully complied with for specific reasons; therefore, the Governor is directing executive departments not to comply or only to partially comply with those specific headnotes and footnotes. His directives and rationale with respect to those headnotes and footnotes are set forth below.

HEADNOTE AND FOOTNOTE DIRECTIVES

Headnote 3, pages 2-3: This headnote defines FTE and, in conjunction with certain footnotes, places FTE limits on certain executive departments. Just last year the Colorado Supreme Court unambiguously held that an identical headnote contained in the 2002-03 Long Bill was unconstitutional because “a limit on the number of FTEs constitutes interference with the inherent prerogatives of the executive branch.” *Owens*, 136 P.3d at 269 (citing *Anderson*, 579 P.2d at 626 (holding that placing “specific staffing and resource allocation decisions” in a general appropriations bill is unconstitutional)). Based upon the holding in *Owens*, it is beyond question that this headnote is constitutionally void. Therefore, the Governor is directing the departments not to comply with this headnote.

Headnote 21, page 7: This headnote distinguishes between footnotes that are intended to be binding and those that are not. Specifically, this headnote provides that the footnotes that set forth conditions or limitations are “intended to be binding portions of the items of appropriation to which they relate,” while nonbinding footnotes include those phrased as “requests on the part of the general assembly for particular administrative action in connection with items of appropriation.” Based upon this distinction, it appears all but two footnotes that the Governor vetoed are nonbinding, as those footnotes were phrased as requests or expressions of intent. However, there remains one “binding” footnote – footnote 122a – that the Governor is directing a department not to fully comply with. Therefore, the Governor is also directing the departments not to comply with this headnote to the extent it purports to make any vetoed footnote binding.

Footnote 8a, page 32: This footnote requests that the Department of Corrections require private prison providers to break-out their operating expenses and capital construction costs in the invoices that they submit to the Department, and then that the Department submit a report to the Joint Budget Committee by November 1, 2007, summarizing that information for each of the private prison

providers. Because the private prison providers are private contractors, neither the Department of Corrections nor the State have control over the availability of the requested financial information, let alone the timing with which these contractors provide information that may be requested. Because the Department does not control this information, it cannot assure full compliance with this footnote. The Governor is, however, directing the department to comply with this footnote to the extent that the information is available from the private prison providers.

Footnote 19, pages 50-51: This footnote requests that the Office of State Planning and Budgeting (OSPB) prepare a detailed report “concerning the common policy for provider rates,” and provide this report to the Joint Budget Committee by October 1, 2007. The October 1st deadline imposed by this footnote is unmanageable given the resources available to prepare the report. The Governor is instead directing OSPB to provide the requested report by November 1, 2007.

Footnote 23, pages 65-66: This footnote requests that the Department of Health Care Policy and Financing prepare a detailed report “regarding the amount spent on pharmaceuticals by each managed care organization (MCO) that contracts with the Department in the Medicaid program,” and provide this report to the Joint Budget Committee by November 1, 2007. Because the MCOs are private entities, neither the Department of Health Care Policy and Financing nor the State have control over the availability of the requested information, let alone the timing with which these MCOs provide information that may be requested. Because the Department does not control this information, it cannot assure full compliance with this footnote. The Governor is, however, directing the department to request this information from the MCOs and to comply with this footnote to the extent that the information is available from the MCOs.

Footnotes 38, 40, and 41, page 78: These footnotes request that the Department of Higher Education prepare reports evaluating the financial aid program, documenting the base level of financial aid at each institution, and analyzing the impact of need-based financial aid on recruitment, retention, and academic performance of underserved students. The footnotes request that the Department provide these reports to the Joint Budget Committee and/or the House and Senate Education Committees by November 1, 2007. However, the data for the most recent fiscal year is not available to the Department in time to meet the November 1st reporting date; instead, January of the following year is the earliest deadline feasible for the Department to provide accurate reports based upon the most current data. Therefore, the Governor is directing the Departments to provide the requested reports by January 2, 2008.

Footnote 39, page 78: This footnote requests that the Department of Higher Education submit a report to the Joint Budget Committee “comparing the retention rates of students receiving Governor’s Opportunity Scholarships with retention rates for low-income students receiving other types of financial aid packages.” Because the Governor’s Opportunity Scholarship Program is being eliminated, the Governor is directing the Department not to comply with this footnote.

Footnote 67, page 108: This footnote states that “[i]t is the intent of the General Assembly that no more than 7.5 percent of total expenditures in this line item be for administrative expenses,” and requests that the Department of Human Services “include information in its budget request demonstrating compliance with this intent.” The Governor is not directing the Department to comply with the limitation set forth in this footnote; however, the Governor is directing the

Department to submit a report detailing the percentage spent on administrative expenses by September 1, 2008.

Footnote 74, page 110: This footnote requests that the Division of Vocational Rehabilitation in the Department of Human Services “conduct a study to determine how to increase employment outcomes for people with developmental disabilities,” and that the Department submit a report to the Joint Budget Committee by October 1, 2007, “setting forth options and recommendations, including implementation strategies, for increasing integrated employment outcomes for people with developmental disabilities.” Due to the cost and lack of funding to complete the requested study and report, the Governor is directing the Department and Division not to comply with this footnote.

Footnote 77, pages 110-111: This footnote requests that the Department of Human Services “periodically survey all individuals on the comprehensive services waiting list to determine when each individual will need comprehensive services,” and that the Department complete the next survey no later than June 2007, and report the results in the submission of its FY 2008-09 budget request to the Joint Budget Committee. The deadlines imposed by this footnote are unmanageable given the resources available to conduct the survey and prepare the report. The Governor is instead directing the Department to complete a survey and provide the report by January 15, 2008, subject to the approval by the JBC of funding needed to complete the survey.

Footnote 78, page 111: This footnote requests that the Department of Human Services provide a detailed report to the Joint Budget Committee by November 1, 2007, “concerning the distribution of resources among the 20 Community Centered Boards throughout the state.” This footnote further provides that “until this report has been submitted to and considered by the Joint Budget Committee, it is the intent of the General Assembly that no resources be redistributed among CCBs through attrition or any other mechanism.” The Governor is directing the Department not to comply with this footnote. The Department cannot complete a timely and meaningful report due to resource limitations. Additionally, such a report would be based on the current developmental disability system, which is changing as a result of the Centers for Medicare and Medicaid Services (CMS) requirements. The Governor recognizes that this is an issue and believes this report would be more useful after the transition of at least the comprehensive waiver in the spring of 2008. Finally, this footnote that does not allow for redistribution of developmental disabilities resources until the report is completed because it conflicts with federal waiver requirements as well as current practice.

Footnote 79, page 111: This footnote requests that the Department of Human Services provide a report to the Joint Budget Committee, by November 1, 2007, “concerning recommendations for a five-year plan that addresses the elimination of all waiting lists for services for individuals with developmental disabilities.” The November 1, 2007, deadline imposed by this footnote is unmanageable given the resources available to prepare the plan. Furthermore, the scope and timeline of the plan must be set by the department. Therefore, the Governor is directing the Department to develop its plan and provide the requested report to the Joint Budget Committee by January 2, 2008.

Footnote 103a, page 165: This footnote states that it is the intent of the General Assembly that, of the 4.0 new FTE approved for FY 2007-08 for the Oil and Gas Conservation Commission, “1.0 FTE be located in Rifle for enforcement purposes.” The Governor is directing the Department of Natural Resources not to comply with this footnote. The Department is complying with the intent of the footnote, but it must be allowed the flexibility to use resources as determined to be most appropriate.

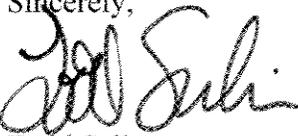
Footnote 108a, page 205: This footnote states that it is the intent of the General Assembly that at least \$380,000 of the appropriation for air quality monitoring “be used for the collection and evaluation of air quality data on the Western Slope of Colorado.” The Governor is directing the Department of Public Health and Environment not to comply with this footnote. The Department is complying with the intent of the footnote, but it must be allowed the flexibility to use its resources as determined to be most appropriate.

Footnote 122a, page 245: This footnote mandates that the Department of Transportation “develop rules to allow hybrid vehicles to drive in High Occupancy Vehicle lanes” within 120 days of the Long Bill becoming law. This is the only footnote discussed in this letter that can be characterized as “mandatory” under headnote 21. As such, this footnote is clearly substantive legislation that cannot constitutionally be included in the Long Bill. *See* Colo. Const. art. V, § 32. The substantive nature of this footnote is best illustrated by the fact that there is already a statute that governs this subject matter. *See* Colo. Rev. Stat. § 42-4-1012(2.5). Because of this constitutional infirmity, the Governor is directing the Department not to comply with this footnote; he is, however, directing the Department to continue to comply with existing statutes on this subject, including section 42-4-1012(2.5). The Governor supports the increased use of hybrid vehicles and is further directing the Department to attempt to promulgate proposed rules by March 1, 2008, pursuant to the statutory authority granted in C.R.S. § 42-4-1012(2.5).

CONCLUSION

I hope that this letter provides further clarity with respect to the direction that the Governor is giving to each of the executive departments regarding the requests expressed in the headnotes and footnotes contained in the FY 2007-08 Long Bill. The veto override created an opportunity for the executive and legislative branches of Colorado government to explore how best to proceed with respect to headnotes and footnotes in future Long Bills. I am particularly interested in discussing with you the option of codifying the headnote language to the extent such codification would be appropriate. It is my sincere hope and belief that in the ensuing months our two branches of government can continue to work together to find an accommodation to this issue, one that resolves this long-standing dispute in a manner that respects and honors the powers and limitations vested in our respective branches of government.

Sincerely,



Todd Saliman

Director, Office of State Planning and Budgeting

cc: Governor Bill Ritter, Jr.
Senator Peter Groff
Senator Ken Gordon
Representative Alice Madden
Senator Andy McElhany
Representative Mike May
Senator Abel Tapia
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