

Legislative Constituent Services Stipend and Reimbursement

Prepared for the Legislative Council

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This document summarizes the identified issues with the Constituent Services Stipend and Reimbursement passed by the 2015 Legislature and disbursed for the first time in July of 2017. This document was presented to the State Administration and Veteran's Affairs Interim Committee in January of 2018 and has been revised and includes comments from the committee members and the Commissioner of Political Practices.

Identified Issues and Options

- 1) **Issues are different for the primary stipend and secondary reimbursement amount.** The secondary amount has not raised any concerns to date as it is used in the same manner as other reimbursements and the amount is taxed only when required by law. The primary stipend was treated as a taxable fringe benefit so the legislator received the full amount upfront, taxed at the fringe benefit rate, and not subject to submitting expense information. Legislators were encouraged to keep appropriate records and return any unexpended funds at the end of their term. The confusion is particularly over the return of excess funds as that is traditionally part of an accountable plan, yet, the stipend was treated as a nonaccountable plan subject to withholding. The reasoning for the return of the funds and for the maintenance of an expenditure log is not because of the IRS regulations, it is to ensure that the funds are used for "constituent services" as required by statute, and to maintain records in the event of a public records request.
 - Accountable plan – not considered income to the employee for federal income tax purposes – excluded from gross income, not reported as wages or compensation and exempt from withholding.
 - a. A business connection – paid or incurred by employee in connection with performance of services as an employee (per diem, meals, mileage).
 - b. Substantiation – must furnish adequate substantiation of reimbursed expenses to employer.
 - c. Return of excess amounts – employee-by-employee basis. – if the legislator fails to return excess amounts or if amount is in excess of substantiated expenses the stipend would be treated as a nonaccountable plan.
 - Nonaccountable plan – considered income to the employee and subject to withholding. May be considered deductible by the employee subject to limitation (and changes in federal law).
 - a. It is considered nonaccountable based on the fact that legislators would not be required to detail amount of business use and the amount of total use for IT property for tax purposes.

Options:

1. Make the entire amount a reimbursement system, i.e. only appropriate items are taxed upon submission for reimbursement, requires statutory change to 5-2-204, MCA. (Note: see SAVA comments.)
2. In order to include use of information technology (IT), return to a reimbursement system for IT or place IT under a separate account like the secondary amount for reimbursement (requires statutory change to 5-2-204, MCA). Reimbursement would remove the concern regarding detailed business use and enable the primary stipend to be under an accountable plan and therefore not considered income and not subject to taxation (with caveats on returning excess funds and required substantiation – see #4). However, not everyone is eligible for the secondary amount so that would require statutory changes.
3. (Status Quo) Declare a nonaccountable plan, continue to withhold taxation and legislators would not be required to detail amount of business use for tax purposes. However, to fulfill records requests regarding the expenditure of these funds, legislators should maintain a log of expenditures and the constituent services rendered. (Changes to federal law removed the miscellaneous expenses deduction.)

- a. Note: If no changes are made, Legislative Services should clarify that excess funds not used during the interim for one who resigns or is not reelected do not need to be returned **for tax purposes** as the amount was already taxed. The reasoning for the return of the funds and for the maintenance of an expenditure log is not because of the IRS regulations, it is to ensure that the funds are used for “constituent services” as required by statute, and to maintain records in the event of a public records request.
 4. Declare an accountable plan so that the stipend is not considered income or subject to withholding. The major drawbacks include that excess funds would have to be returned at the end of the interim/term according to federal tax law, and that for any amount used for property, such as a computer or other electronic device (information technology or IT), the legislator must substantiate the amount of related business use. (Statute could be clearer that, as a citizen legislator, use of the computer is considered constituent services).
 5. Administer the stipend in a manner that provides a legislator the information in advance and have the legislator make the decision whether they want the stipend, and if they want it, to declare whether they want it in an accountable plan or a nonaccountable plan subject to all respective federal and state requirements.
 6. Remove the constituent services primary stipend and use those funds to raise legislator salaries.
- 2) **Name of the account in statute.** Section 5-2-204 named the legislative stipend “Constituent services stipend and reimbursement.” This may result in confusion with the constituent services account from remaining campaign funds in 13-37-402, MCA. Ideas are: legislative district services stipend and reimbursement, citizen services stipend and reimbursement.
- 3) **Miscellaneous issues (need to analyze if statutory change is necessary).**
- Three legislators returned their stipend check and we reversed the taxes. In order to avoid this in the future, we will offer that option to refuse the stipend prior to sending the checks to legislators.
 - Some legislators want the option at the front end whether the stipend should be taxed or not.
 - How to handle resignations and appointments in the interim was not contemplated in the statute. Staff attorneys have recommended that a legislator who resigns that has not expended their stipend upon resignation should return the unused funds. The new legislator who has been appointed to date has received the constituent services amount, but an alternative would be to prorate it for the portion of the interim that has already elapsed.
- 4) **Interaction with accounts in Title 13, MCA.** Section 13-37-402 (3): A person (who establishes a constituent services account) may not establish any account related to the public official's office other than a constituent services account. This subsection does not prohibit a person from establishing a campaign account. **Option:** If the stipend is retained and if a statutory change is made, a separate account should be allowed specifically for this purpose.
- This statute has potential ramifications for someone who created a separate account rather than depositing their stipend in their regular bank account. This statute should be clarified with either an exception to this statute for the legislative constituent services account or more emphasis placed on this in the administering of this account. If the law is changed to allow a separate account, in order to comply with the ethics laws in Title 2, chapter 2, part 1, legislators could make a simple declaration filed with LSD that the funds were for constituent services and none of the funds were for personal gain or benefit. There may need to be a provision capping an amount for IT and exempting purchase of IT as citizen legislators may use the items for personal use and the depreciation/obsolescence of IT is so rapid (2-2-121, MCA, and prohibition on use of public equipment for personal use does not apply to legislators). Legislative Council could require reporting on expenses every 6 months for public records and transparency purposes.

- Combining the two accounts may seem like an option, however, once a campaign account is opened, the funds in the Title 13 (surplus campaign funds) constituent services account may not be used. Also, the holder of a constituent services account must close the account within 120 days after the account holder leaves public office and disposal of these funds may not be appropriate for the legislator stipend as they are taxpayer funds.
- Acceptable disposal of funds includes:
 - a. return the funds to the contributors, so long as the refund to contributors will not violate the personal benefit or campaign contribution provisions of 13-37-240 and 13-37-402, MCA, ARM 44.11.703, or the rules in this chapter;
 - b. donate the funds and personal or real property to any organization or entity, so long as the use of the funds and personal or real property will not violate the personal benefit or campaign contribution provisions of 13-37-240 and 13-37-402, MCA, ARM 44.11.703, or the rules in this chapter;
 - c. an elected official other than an eligible elected official may transfer the funds to an account to serve a public purpose related to the officeholder's public duties, so long as the funds will not result in personal benefit or a contribution to a campaign;
 - d. an eligible elected official may transfer the funds to a constituent services account provided for in Title 13, chapter 37, part 4, MCA, and the rules in this chapter;
 - e. an eligible elected official may retain the personal or real property of the campaign to serve constituents as provided in Title 13, chapter 37, part 4, MCA, and the rules in this chapter.
- A candidate or an eligible elected official shall not contribute surplus campaign funds to a political committee. However, nothing prohibits the contribution of surplus campaign funds to a political party or a political party committee, so long as the funds are not earmarked for a specific campaign.
- ARM 44.11.706 states: Constituent services account funds may not be contributed to another ballot issue or candidate campaign, including the eligible elected official's own future campaign.

SAVA/COPP Comments

This information was presented on January 18, 2018, at a meeting of the State Administration and Veterans' Affairs Interim Committee. Comments include:

- Allowing legislators to take responsibility for their own taxes instead of letting legislative services control it (this relates to the differences between an accountable plan and a non-accountable plan). There is confusion since it's taxed as an income against the legislators as individuals, but is used for constituent services.
- The law establishing this should be repealed.
- The bill was meant as a reimbursement, and legislators shouldn't get anything unless they submit an expense for it. This solves the taxation issue and also resolves the issue that the amount would not be considered income and would not affect the limits on earnings regarding Social Security. Renaming the account to a "legislative service account" would be clearer that it could be used for educational purposes and for attending other hearings in Helena.
- Clarification was needed on the financial accounts, uses of the primary and secondary stipends and mileage rates.
- Whether there could be one account for all of the money.
- The Commissioner of Political Practices recommended a name change and a statutory change in 13-37-402, MCA, to allow a separate account specifically for this purpose. He also recommended that the account continue to be administered by the Legislative Services Division and that some form of reporting be required on the use of the funds. He raised the concern regarding the legislators who resign mid-interim.

**Excerpt from “Guidance on the Legislative Stipend and Reimbursement for Constituent Services.”
Memo dated October 6, 2017.**

Types of Inquiries re: Constituent Services Stipend

1. **Tax Ramifications--why is the tax so high?** *Legislative Services Division, in consultation with the Legislative Council, chose the single payment at the flat rate as the midpoint and the most efficient to administer. IRS: The employer may elect to treat taxable fringe benefits as paid in a pay period, or on a quarterly, semiannual, or annual basis, but no less frequently than annually. IRS Ann. 85-113. The employer may elect to add taxable fringe benefits to employee regular wages and withhold on the total, or may withhold on the benefit at the supplemental wage flat rate of 25%. Reg. ' 31.3402(g)-1; Reg. ' 31.3501(a)-1T.*
2. **Record Keeping--should I keep a record of what the primary stipend is spent on?** *Yes, the expense log form that was supplied to you was intended for that use and has spaces for you to indicate destination, name of person, organization, and description of event. A draft form for your use is provided on the legislative website. You must document how you spend the primary stipend funds (\$3,000).*
3. **Is the Legislative Services Division able to retain copies of records for the purpose of information requests?** *Yes, Legislative Services is willing to keep your forms on file for information requests and to assist you.*
4. **Can I invest a portion of my constituent services into a deferred comp account?** *No, use of funds for that purpose would treat them as personal funds for the individual’s benefit and would not directly relate to constituent services.*
5. **How does this stipend differentiate from my campaign finance account?** *These funds are intended strictly for constituent and related services and, because it is public money, may not be spent for campaign purposes. These funds should also be kept separate from any constituent services accounts created from leftover campaign funds as that account is not permitted to have additional deposits made.*
6. **Can we put this payment into our campaign finance account?** *Do not deposit these funds into a campaign account. They should be kept and accounted for separately.*
7. **Existing Legislators who are also state employees--can they receive their constituent services check separate from their regular biweekly paycheck?** *This is considered taxable income and the state requires these payments to go through payroll.*
8. **How to decline/repay stipend when a legislator does not wish to be paid?** *In the future, Legislative Services will provide that information in the letter that will be sent to all legislators prior to the payment being made and provide a contact or form so that a legislator may decline the payment. Three legislators returned their stipends in 2017.*
9. **What can the funds be used for?** *Please see description of Legislative Stipend and Reimbursement for Constituent Services (5-2-204, MCA) above or access the brochure on the website.*
10. **If we do not spend all the funds during the biennium, do we have to repay the remainder?** *If you do not spend or encumber the funds by the end of your term and you are not reelected, you must remit the balance back to Legislative Services where it will revert to the general fund. Your term does not end until December 31, 2018, or, for some senators, December 31, 2020. Also, if you leave or resign your office before the end of your term, you must remit the balance to Legislative Services. **The reasoning for the return of the funds and for the maintenance of an expenditure log is not because of the IRS regulations, it is to ensure that the funds are used for “constituent services” as required by statute, and to maintain records in the event of a public records request.***

Attachments: Brochure, History of Legislator Salary and Session Per Diem Rates

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