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MEMORANDUM

December 21, 2011

TO: Jason Clark and John Miller

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #50, concerning limitations on the size of certain banking institutions

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment appear to be to amend the Colorado constitution to:

1. Limit the size of any bank, savings institution, or bank controlled by a holding company not regulated or supervised by the state banking commission to five percent of the total deposits originated within Colorado, as determined upon the public reports most recently filed with the appropriate federal regulatory agency; and
2. Exempt state-chartered commercial banks, industrial banks, trust companies, state-regulated

money transmitters and state-chartered or -supervised credit unions, savings and loans, and savings banks from the five percent limit.

Technical Comments:

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

Format/Organization of Initiative

1. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, this phrase should be added to the beginning of the proposed initiative.
2. The proponents have not indicated where in the Colorado constitution the new language is to be added. For example, the proponents could add this language as a new section 16 of article XV of the Colorado constitution. In order to indicate where in the Colorado constitution this proposed language will be added, please see the amending clause instructions in comment number 6 of this section of the memorandum.
3. The provisions of the proposed initiative should appear in the following order: The enacting clause, followed by the amending clause indicating what change is being made to the Colorado constitution, followed by the text of the initiative, followed by the effective date of the initiative.
4. The phrase "Shall there be an amendment to the Colorado Constitution" at the beginning of the proposed language is unnecessary. Under section 1 (5) of article V of the Colorado constitution, the proponent of an initiative is directed to submit the text of a proposed constitutional amendment or initiated law for review and comment, so phrasing the text as a question is unnecessary. Also, adding an amending clause to the beginning of the proposed initiative will have the same effect as the "Shall there be an amendment to the Colorado Constitution" phrase. The first sentence could be rewritten to read:

"The size of any bank, savings institution, or bank controlled by a holding company not regulated or supervised by the state of Colorado banking commission is limited to 5% of the total...".
5. It is standard drafting practice to insert a left tab at the beginning of the first line of each new section, subsection, paragraph, or subparagraph, including amending clauses and section headings. It is also standard practice to bold the section number. For example:

SECTION 1. In the constitution of the state of Colorado, **add** section 16 to article XV as follows:

Section 16. Banking limits. THE SIZE OF ANY BANK, SAVINGS INSTITUTION, OR BANK CONTROLLED BY A HOLDING COMPANY NOT REGULATED OR SUPERVISED BY THE STATE OF COLORADO BANKING COMMISSION IS LIMITED TO 5% OF THE TOTAL....

Amending Clauses

6. It is standard drafting practice to include an amending clause telling the reader what is being added to or amended in the Colorado constitution. Each constitutional section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, "In the constitution of the state of Colorado, **add** section ___ to article XV as follows:".

Numbering of Statutes and Constitution

7. Constitutional provisions are usually divided into component parts using the following structure: Subsection, for example, "(1)"; followed by paragraphs, for example, "(a)"; followed by subparagraphs, for example, "(I)"; ending with sub-subparagraphs, for example, "(A)". For example:

Section 9. Limited gaming permitted. (7) Local elections to revise limits applicable to gaming - statewide elections to increase gaming taxes.

(a) Through local elections, the voters of the cities of Central, Black Hawk, and Cripple Creek are authorized to revise limits on gaming that apply to licensees operating in their city's gaming district to extend:

- (I) Hours of limited gaming operation;
- (II) Approved games to include roulette or craps, or both; and
- (III) Single bets up to one hundred dollars.

(b) Limited gaming tax revenues attributable to the operation of this subsection (7) shall be deposited in the limited gaming fund. The commission shall annually determine the amount of such revenues generated in each city.

(c) From gaming tax revenues attributable to the operation of this subsection (7), the treasurer shall pay:

(I) Those ongoing expenses of the commission and other state agencies that are related to the administration of this subsection (7);

(II) Annual adjustments, in connection with distributions to limited gaming fund recipients listed in subsection (5)(b)(II) of this section, to reflect the lesser of six percent of, or the actual percentage of, annual growth in gaming tax revenues attributable to this subsection (7); and

(III) Of the remaining gaming tax revenues, distributions in the following proportions:

(A) Seventy-eight percent to the state's public community colleges, junior colleges, and local district colleges to supplement existing state funding for student financial aid programs and classroom instruction programs; provided that such revenue shall be distributed to institutions that were operating on and after January 1, 2008, in proportion to their respective full-time equivalent student enrollments in the previous fiscal year;

(B) Ten percent to the governing bodies of the cities of Central, Black Hawk, and

Cripple Creek to address local gaming impacts; provided that such revenue shall be distributed based on the proportion of gaming tax revenues, attributable to the operation of this subsection (7), that are paid by licensees operating in each city; and

(C) Twelve percent to the governing bodies of Gilpin and Teller Counties to address local gaming impacts; provided that such revenue shall be distributed based on the proportion of gaming tax revenues, attributable to the operation of this subsection (7), that are paid by licensees operating in each county.

8. Constitutional provisions are divided into subsections, paragraphs, subparagraphs, and sub-subparagraphs for ease of reading. The proponents may want to consider breaking up the text of the proposed initiative into separate subsections, etc. For example:

Section 16. Banking limits. (1) THE SIZE OF ANY BANK, SAVINGS INSTITUTION, OR BANK CONTROLLED BY A HOLDING COMPANY NOT REGULATED OR SUPERVISED BY THE STATE OF COLORADO BANKING COMMISSION IS LIMITED TO 5% OF THE TOTAL....

(2) THE FOLLOWING ARE EXEMPT FROM SUBSECTION (1) OF THIS SECTION:

(a) STATE-CHARTERED COMMERCIAL BANKS, INDUSTRIAL BANKS, AND TRUST COMPANIES;

(b) STATE-REGULATED MONEY TRANSMITTERS; AND

(c) STATE-CHARTERED OR STATE-SUPERVISED CREDIT UNIONS, SAVINGS AND LOANS, AND SAVINGS BANKS.

Strikes/Small Caps/Capitalization

9. In the proposed initiative, the words "Constitution", "Banking Commission", "Credit Unions", "Savings and Loans", and "Savings Banks" should not be capitalized.
10. When amending a section of the Colorado constitution, use strike type to delete language and small caps to show new language. Current law cannot be deleted without showing it as such in strike type. Also, the current language should be in mixed-case letters, while the language being added should be the only language shown in small caps. Stricken text should precede new text where such changes appear together. For example:

Section 9. Vacancies - how filled. EXCEPT AS OTHERWISE SPECIFIED IN THIS SECTION, in case of a vacancy occurring in the office of county commissioner a vacancy committee of the same political party as the vacating commissioner constituted as provided by law shall, by a majority vote, fill the vacancy by appointment within ~~ten~~ TWENTY days after occurrence of the vacancy. If the vacancy committee fails to fill the vacancy within ~~ten~~ TWENTY days after occurrence of the vacancy, the governor shall fill the ~~same~~ VACANCY by appointment within ~~fifteen~~ THIRTY days after occurrence of the vacancy. The person appointed to fill a vacancy in the office of county commissioner shall be a member of the same political party, if any, as the vacating commissioner. In case of a vacancy in any other county office, or in any precinct office, the board of county commissioners shall fill the same by appointment. Any person appointed pursuant to this section shall hold the office ~~until the next general election~~ FOR TWO YEARS, or until the vacancy is filled by election according to law.

11. It is standard drafting practice to use small capital letters (rather than all caps) to show the language being added to the Colorado constitution. For example:

THIS IS SMALL CAPS vs. THIS IS ALL CAPS

Note that although the text of the proposed initiative should be in small capital letters, a large capital letter should be used to indicate capitalization where appropriate. The following should be large capitalized:

- a. The first letter of the first word of each sentence;
- b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
- c. The first letter of proper names.

Headnotes

12. Each section in the Colorado constitution has a headnote. Headnotes should briefly describe the contents of the section, should follow the section number, should be in bold-faced type, and should be in mixed-case letters. A headnote should precede each new section in the proposed initiative.

Commas

13. In the first sentence of the proposed initiative, it is not necessary to use the word "or" in between each bank, savings institution, etc., nor it is necessary to repeat the word "any" before the phrase "...banks controlled by a holding...", as the term "any" already appears before the sequence. Instead, the sentence could read "...any bank, savings institution, or bank controlled by..."
14. In the second sentence, it appears that "state-chartered" is not modifying "state-regulated money transmitters", and that "state-chartered" is modifying "commercial banks", "industrial banks", and "trust companies". If so, the sentence should be rewritten as "State-chartered commercial banks, industrial banks, **and** trust companies and state-regulated money transmitters are exempt."
15. The preferred method for separating a series in a list is to include a comma after the second to last item in the series. For example, instead of "apples, oranges and pears" use "apples, oranges, and pears". In the language of the proposed initiative, the phrase "...any bank or savings institution or any bank controlled by..." could be reformatted to say "...any bank, savings institution, or bank controlled by..."

Definitions

16. There are several terms in the proposed initiative that may need to be defined to make it more

clear to which institutions the proponents are referring to. The terms that may need defined are "bank", "savings institution", "holding company not regulated or supervised by the state of Colorado Banking Commission", "state-chartered commercial banks", "industrial banks", "trust companies", "state-regulated money transmitters", "state-chartered or -supervised credit union", "state-chartered or -supervised savings and loans", and "state-chartered or -supervised savings banks". For example, in section 11-53-102 of the Colorado Revised Statutes, the term "financial institution" is defined as "a bank, savings institution, or trust company organized under, or supervised pursuant to, the laws of the United States or of any state."

17. The following is the standard drafting language used for creating a definition: "As used in this [section][subsection][paragraph], unless the context otherwise requires, '[term]' means (the definition for the term)...." Here is an example of the definitions section of section 20 of article X of the Colorado constitution:

(2) **Term definitions.** Within this section:

(a) "Ballot issue" means a non-recall petition or referred measure in an election.

(b) "District" means the state or any local government, excluding enterprises.

(c) "Emergency" excludes economic conditions, revenue shortfalls, or district salary or fringe benefit increases.

(d) "Enterprise" means a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined.

(e) "Fiscal year spending" means all district expenditures and reserve increases except, as to both, those for refunds made in the current or next fiscal year or those from gifts, federal funds, collections for another government, pension contributions by employees and pension fund earnings, reserve transfers or expenditures, damage awards, or property sales.

(f) "Inflation" means the percentage change in the United States Bureau of Labor Statistics Consumer Price Index for Denver-Boulder, all items, all urban consumers, or its successor index.

(g) "Local growth" for a non-school district means a net percentage change in actual value of all real property in a district from construction of taxable real property improvements, minus destruction of similar improvements, and additions to, minus deletions from, taxable real property. For a school district, it means the percentage change in its student enrollment.

18. Definitions should be in alphabetical order.
19. It is standard drafting practice to use the terms that have been defined for a particular article, without having to refer to full names repeatedly.

Miscellaneous

20. Use the singular form whenever possible.

21. Numbers should be spelled out. For example, in the text of the proposed initiative, "5%" should be "five percent".

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Section 1 (5.5) of article V of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. What will be the effective date of the proposed initiative?
3. Financial institutions covered by the proposed initiative operate as private businesses. The property rights of the owners of financial institutions, like all property rights, are entitled to state and federal constitutional protection. If the size limitation imposed by the proposed initiative were to be found to impair the property rights of the owners of financial institutions, it is possible that a court may require compensation to be paid to owners whose property rights are diminished. Have the proponents considered this possibility? Where would the money come from if the state of Colorado were required to pay owners of financial institutions whose property rights may be "taken" by the operation of the proposed initiative?
4. As pointed out in the technical comments section, the proposed initiative contains no definitions of terms. For example, what do the proponents intend for the terms "bank", "savings institution", and "bank controlled by a holding company not regulated or supervised by the state of Colorado Banking Commission" to mean?
5. The proposed initiative refers to the Colorado banking commission, which is an institution that does not exist. State-chartered banks, industrial banks, and trust companies in the state of Colorado are regulated by the division of banking within the department of regulatory agencies. State-chartered credit unions and savings and loan associations are regulated by the division of financial services within the department of regulatory agencies. Nationally chartered banks, credit unions, and savings and loan associations are regulated by the federal government. In addition, all financial institutions operating in Colorado are required to have federal deposit insurance and, therefore, are also regulated by either the federal deposit insurance corporation or the national credit union administration.
6. The proposed initiative refers to public reports most recently filed with the "appropriate federal regulatory agency". To which specific federal regulatory agency are the proponents referring? Which specific reports are intended to be used?
7. The proposed initiative will require a calculation to be made to determine "5% of the total deposits originated within Colorado". How exactly will this calculation be made and by whom? Who do the proponents intend to enforce the size limitation imposed by the proposed initiative?

8. When and at what intervals would the five percent limitation number be calculated?
9. The proposed initiative would limit the size of banks or savings institutions not chartered by the state of Colorado to five percent of the total deposits originated within Colorado. Presumably, the five percent limitation would change depending upon how and when it is calculated. Do the proponents intend for this limitation to change depending upon when the five percent figure is calculated? Which report(s) are used for the basis of the calculation? Or, is the assumption of the changing nature of the size of the five percent limitation erroneous?
10. Article I §8 (3) of the United States constitution specifically authorizes the federal government to regulate interstate commerce. This is commonly known as the Commerce Clause of the United States constitution. Consistent with the Commerce Clause, Congress has established a system of banking regulations in which financial institutions may be chartered by the federal government and operate in multiple states. Additionally, Congress has authorized states to charter financial institutions that usually operate in the state where chartered. Financial institutions can choose to be chartered nationally or in an individual state. Article VI (2) of the United States constitution makes federal laws enacted in pursuance of constitutional authority the "supreme law of the land". Therefore, arguably, a Colorado law like the proposed initiative could be found to violate federal law by infringing on the authority of the federal government to regulate nationally chartered banks. How do the proponents respond to this problem?
11. The language of the proposed initiative purports to try to regulate the size of financial institutions that may be beyond the legal regulatory authority of the state of Colorado because they are governed by federal law, but then proceeds to exempt state-chartered and state-regulated financial institutions over which the state of Colorado has regulatory control. How do the proponents respond to this inconsistency and what is the reason for it?