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MEMORANDUM

April 3, 2012

TO: Earl Staelin and Robert Bows

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #94, concerning the establishment of banks owned by political subdivisions

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 to the Colorado constitution appear to be:

1. To make statements and findings about the Bank of North Dakota;
2. To allow municipalities, counties, home rule municipalities, home rule counties, cities and counties, and other political subdivisions to establish a bank;
3. To specify the membership for the board of directors for a bank established by each type of political subdivision;

4. To specify that banks created under the proposed initiative may lend money at interest to promote development and enterprise in the state, and to promote any purpose authorized by the laws governing the political subdivision creating the bank;
5. To specify that banks created under the proposed initiative have the same powers and authority of other banks chartered by the state except as limited by the legally established purposes of the government of the political subdivision;
6. To specify that revenue, income, and assets of these banks are not limited, and expenditures and management of the banks' revenue, income, and assets are not restricted, except upon sound financial and public policy considerations; and
7. To specify that the provisions of the proposed initiative are self-executing and severable and supersede any conflicting state constitutional, state statutory, charter, or other state or local provisions.

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.

WHEREAS Paragraphs

1. With regard to the "WHEREAS" paragraphs at the beginning of the proposed initiative, it is unclear whether they are part of the proposed initiative itself and are to be added to the Colorado constitution if the proposed initiative is enacted or are simply extra explanatory material. If the proponents intend the paragraphs to be added to the Colorado constitution as part of the initiative, you should add the paragraphs as a subsection to the new section 22, article X of the constitution. (See the example under "**Numbering of Constitution/Headnotes**" for adding the paragraphs as a "purpose and findings" subsection.)
2. If the proponents intend the "WHEREAS" paragraphs to be a part of the initiative, carefully check to ensure that spelling, grammatical, punctuation, and typographical errors are corrected.

Enacting Clause

Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the 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 directly above the text to be added to the Colorado constitution.

Section Number/Amending Clause

1. Section numbers being added to the constitution are typically numbered in sequence. Currently, the last section number under article X of the constitution is section 21. Therefore, the proponents should add the new section of the proposed initiative as section 22 rather than section 23.
2. It is standard drafting practice to include an amending clause telling the reader what is being added to or amended in the Colorado constitution. Instead of using the phrase "THEREFORE, be it enacted as Article X, Section 23 of the Colorado Constitution:", use "In the constitution of the state of Colorado, **add** section 22 to article X as follows:".

Format/Organization of Initiative

1. 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.
2. 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.

Numbering of Constitution/Headnotes

1. 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)". The proponents may want to consider breaking up the text of the proposed initiative into separate subsections, etc.
2. Each section in the Colorado constitution has a headnote. Headnotes should briefly describe the contents of the section, should follow the constitutional section number, should be in bold-faced type, should be in mixed-case letters, and should end with a period.
3. It is standard drafting practice for the first line of the constitutional text or the first line of a subsection to immediately follow the headnote on the same line instead of the first subsection appearing on a separate line from the headnote.
4. In addition, sometimes internal headnotes are used for reader-friendly purposes, similar to the headings in the current initiative. Internal headnotes should follow the subsection number or paragraph letter, as appropriate, should be bold-faced type, and should end with a period.

For example:

Section 22. Banks owned by political subdivisions - board of directors - capitalization. (1) Purpose and findings. (a) SINCE 1919, THE PEOPLE OF NORTH

DAKOTA HAVE OWNED AND BENEFITED FROM . . .

(b) THE BANK OF NORTH DAKOTA IS LIMITED IN ITS SCOPE . . .

(2) **Political subdivision banks established.** (a) ANY COUNTY, MUNICIPALITY, OR POLITICAL SUBDIVISION OF THE STATE MAY ENGAGE . . .

(3) **Governance of banks established by municipalities.** IN THE EVENT A STATUTORY MUNICIPALITY . . .

(4) **Governance of banks established by counties.** IN THE EVENT A STATUTORY COUNTY . . .

(5) **Governance of banks established by home rule municipalities.** IN THE EVENT A HOME RULE MUNICIPALITY . . .

Small Caps/Capitalization

1. It is standard drafting practice to use SMALL CAPITAL LETTERS (rather than ALL CAPS) to show the language being added to the Colorado constitution.
2. 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.
3. It is standard drafting practice to capitalize only proper names, such as the names of states. Therefore, it is unnecessary to capitalize words such as "people", "bank", "federal reserve system", "state", "mayor", "municipal attorney", etc.

Commas

1. 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, "apples, oranges and pears" should be "apples, oranges, and pears".
2. In the first paragraph after the "THEREFORE" clause, with regard to the fourth sentence ("The revenue, income, and assets of such a bank shall not be limited, nor shall expenditures and management of its revenue, income, and assets be restricted except upon sound financial and public policy considerations."): If the proponents mean that the revenue, income, and assets of the bank shall not be limited **except upon sound financial and public policy considerations**, nor that expenditures and management of its revenue, income, and assets be restricted **except upon sound financial and public policy considerations**, the proponents should place a comma before the "except" phrase. In other words, if the proponents intend that the "except" phrase applies only to the phrase that begins "nor", then leave the sentence written as is.

Active Voice/Verb Tense/Authority Verbs

Prior to the 2012 legislative session, the Office of Legislative Legal Services revised its drafting guidelines pertaining to verb tense, active voice, and authority verbs (e.g., shall, shall not, may). These guidelines emphasize writing in active voice, writing in the present tense (rather than future tense), and using authority verbs only to mandate, prohibit, permit, or impose conditions on a person or entity. Accordingly, the proponents may want to consider implementing the guidelines in the proposed initiative. Following are a few examples:

- a. Instead of writing "Any such bank shall have the same", write "Any such bank has the same".
- b. Instead of "assets of such a bank shall not be limited", "assets of such a bank are not limited".
- c. Instead of "shall consist of", "consists of".

Miscellaneous

1. It is standard drafting practice to use the word "that" instead of "which" when indicating a restrictive clause, meaning the word, clause, or phrase following the word "that" is necessary to the meaning of the sentence and is not simply additional or descriptive information. If "which" is used, it is preceded by a comma.
2. Except for dates, express numbers in words; for example, in the fourth WHEREAS clause, "\$325 million" should be written as "three hundred twenty-five million dollars" and in the sixth WHEREAS clause, "\$500 million" should be written as "five hundred million dollars" and "30%" should be written as "thirty percent".
3. In the last sentence of the paragraph following the "THEREFORE" clause, the proponents may want to add "state" before the word "charter".
4. "And/or" is ambiguous. Use the word "**or**" to connect two or more phrases, events, conditions, etc. when only one or more, but not all, need occur. Instead of using "and/or" in the last paragraph of the proposed initiative, use "or".
5. In the last paragraph of the proposed initiative, toward the end of the first sentence, insert the word "or" before the word "chartered".
6. You may wish to consider adding a definitions section to define certain terms such as "political subdivision", "bank", "financial institution", etc.

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. What sources did the proponents rely on for the factual statements in the "whereas" clauses of the proposed initiative? Several of the factual assertions appear to be inaccurate. For example, the Bank of North Dakota does not "administer bank charters and audits"; and the Bank of North Dakota is not prohibited by either the North Dakota Constitution or North Dakota statutes from competing with other financial institutions in the private sector. See www.banknd.nd.gov
4. The proposed initiative would authorize any "political subdivision" of the state to engage in or establish a bank. Some political subdivisions of the state, for example, special districts, are very small entities with few assets and little revenue. Do the proponents intend for these types of entities to be allowed to form banks?
5. Colorado law currently provides a system for the protection of deposits of public moneys in financial institutions. Eligible public depositories must meet minimum requirements of Colorado law and have a designation as a public depository from the Colorado banking board and the commissioner of financial services in order to receive deposits of public moneys. See §§ 11-10.5-101 through 11-10.5-112 and 11-47-101 through 11-47-120, C.R.S. Regarding this system:
 - a. What do the proponents intend with respect to Colorado's existing regulatory structure for public depositories if the proposed initiative is enacted by the people?
 - b. Can the system continue to exist in its current form, or would it be necessary for the General Assembly to change the system to account for governments depositing public money in their own banks?
6. The proposed initiative calls for a political subdivision bank to be capitalized in the same manner as a private bank including with public money of the subdivision. Current practice of these subdivisions generally requires the appropriation of the entire treasury of the subdivision to pay the expenses of its operation. How would surplus funds be available in the bank for lending for promoting development and enterprise in the state and to promote any purposes authorized by the laws governing the political subdivision?
7. Current Colorado law requires all financial institutions operating in the state to have federal deposit insurance coverage. This underpins Colorado's public deposit protection system, which requires collateralization of public deposits in addition to federal deposit insurance coverage to avoid losses in the event of insolvency of a financial institution. The Bank of North Dakota is not a member of the Federal Deposit Insurance Corporation (FDIC). The state of North Dakota guarantees the deposits in the Bank of North Dakota by the full faith and credit of the state of North Dakota. With respect to the protection of deposits in banks created by local governments under the proposed initiative:

- a. Do the proponents intend for banks created by Colorado local governments to be members of the FDIC?
 - b. If not, how, if at all, will local governments back up deposits in the banks they create?
 - c. The Bank of North Dakota predates the FDIC and has never chosen or been required to join the FDIC. Do the proponents know whether Colorado or federal financial institution regulators will allow the creation and operation of a bank that is not a member of the FDIC?
 - d. If the proponents intend for the full faith and credit of the state of Colorado or the political subdivision creating the bank to back up deposits in the bank, would the requirements of the Taxpayer's Bill of Rights (TABOR), Article X, § 20 of the Colorado constitution be an obstacle to this because the state and other units of government that are not enterprises do not have the ability to levy taxes without voter approval? Would a separate ballot initiative be required to amend or repeal TABOR to make this work?
8. Banking in the United States has generally, with certain exceptions for the operation of the First and Second Banks of the United States early in our history, the Federal Reserve System, and limited efforts by certain states to create their own banks in the early 19th Century, been conducted as a private business activity. Even when the Bank of North Dakota was created, the state of North Dakota acknowledged it was creating an entity that would be conducting a private activity. See www.banknd.nd.gov; G. Edward Griffin, *The Creature from Jekyll Island* (1998). In fact, at the same election where North Dakota voters approved creation of the bank, they also approved North Dakota entering into the grain storage/elevator business. The Colorado constitution contains a variety of provisions that prohibit Colorado and its local governments from operating or participating in private businesses. For example, Article XI of the Colorado constitution generally prohibits the state and local governments from lending or pledging their credit and owning private businesses. Article XI allows local governments to contract debt only after voter approval. Likewise, Article X prohibits the state and local governments from contracting multi-year debt without voter approval. Banks are essentially debtors to their creditor depositors. With respect to these issues:
- a. Would the proponents consider amending Article XI of the Colorado constitution to conform with the authority granted in the proposed initiative to local governments to create and operate banks?
 - b. Would the proponents consider amending Article X as necessary to permit the creation of multiple fiscal year obligations by banks created by local governments under this proposed initiative?
9. The Bank of North Dakota has no formal regulatory oversight of its activities other than informational audits provided to the North Dakota Financial Services Commissioner. Do the proponents intend for there to be any regulatory oversight over banks created under the

proposed initiative?

10. The proposed initiative would allow all political subdivisions in Colorado to create and operate a bank. Given that according to the Colorado Department of Local Affairs (See www.dola.colorado.gov) there are over 3,000 active subdivisions that would be eligible to form a bank in Colorado under the proposed initiative is it the proponents intent that:
 - a. The large number of potential government-backed banks would compete with each other for potential depositors?
 - b. The large number of government-backed banks would eventually form some type of alternative to the current private sector banking/financial services industry in Colorado?
 - c. The large number of potential banks that could emerge could affect the safety and soundness of public and private deposits in nongovernmental banks?
11. In the provisions of the proposed initiative dealing with governance of banks created by statutory municipalities and counties, there is reference to the municipal auditor and the county auditor serving on the board of directors. In Colorado, statutory cities and counties do not have official positions of municipal auditor and county auditor, nor is there a "chief county commissioner". Would the proponents consider changing these terms to require another appropriate city official and county official to serve on the board of directors of a bank created by either type of entity?