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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 #95, concerning the establishment of a state-owned bank

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.

This initiative was submitted with proposed initiative 2011-2012 #94. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiative 2011-2012 #94, except as necessary to fully understand the issues raised by proposed initiative 2011-2012 #95. Comments and questions addressed in the other memorandum may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum. Only new comments and questions are included in this memorandum.

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 require the state of Colorado to establish and operate a bank;
3. To specify the membership, appointment, and duties of a board of directors, an advisory board, and a president for the state bank;
4. To authorize the bank to lend money at interest to promote development, commerce, industry, and agriculture in the state, to promote home ownership, maintenance and construction of needed infrastructure, education, public health, safety, and other purposes for the general welfare;
5. To specify that the bank has all the powers and authority of other banks chartered by the state of Colorado, except taking deposits of individual citizens, corporations, and other legal entities;
6. To specify that the revenue and income of the bank are not limited and its expenditures and management of its 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 conflicting state constitutional, state statutory, charter, or other state or local provisions.

Technical Comments

The technical comments and questions set forth in the review and comment memorandum on proposed initiative 2011-2012 #94 are applicable to proposed initiative 2011-2012 #95 and, as such, will not be repeated. However, the following new technical comments and questions have arisen:

1. In the first paragraph after the "THEREFORE" clause, with regard to the second sentence "The bank is authorized to lend money at interest **to promote** development, commerce, industry, and agriculture in the state, **to promote** home ownership, maintenance and construction of needed infrastructure, education, public health, safety, and other purposes for the general welfare of its citizens.": [emphasis added]
 - a. If it is the proponents' intent that the bank is authorized to lend money at interest to promote development, commerce, etc., **and** to promote home ownership, maintenance and construction of needed infrastructure, etc., then the comma before the second "to promote" should be changed to an "and";

- b. The proponents may want to add the word "public" before the word "safety".
- 2. In the first paragraph after the "THEREFORE" clause, with regard to the third sentence, the comma before the "except that" phrase should be a semicolon.
- 3. In the second paragraph after the "THEREFORE" clause, with regard to the first sentence, consider changing "should represent" to "that represent".
- 4. In the third paragraph following the "THEREFORE" clause, "Board of the Bank" should refer to the "board of directors of the bank" for the proper name of the entity.

Substantive Comments and Questions

The substantive comments and questions set forth in the review and comment memorandum on proposed initiative 2011-2012 #94 are applicable to proposed initiative 2011-2012 #95 and, as such, will not be repeated, and are incorporated by reference into this memorandum. In addition, the following new substantive comments and questions have arisen:

- 1. The "whereas" clauses of the proposed initiative refer repeatedly to the Bank of North Dakota. However, the proposed initiative would prohibit the state bank created in Colorado from receiving deposits from individual citizens, corporations, and other legal entities. Do the proponents realize that this is contrary to the practices of the Bank of North Dakota, which does receive deposits from individuals and businesses? See www.banknd.nd.gov
- 2. The proposed initiative authorizes capitalization of the state bank from tax and other revenues and funds of the state not otherwise specifically allocated. What do the proponents intend by the terms "not otherwise specifically allocated"? The practice in Colorado has been to establish numerous specific funds for various forms of state revenue, for example, the division of registrations cash fund. Tax and fee revenue flows directly into many of these "cash" funds. Could the term "not otherwise specifically allocated" be construed to prevent money that currently flows into "cash" funds of the state from being deposited in the bank?
- 3. The proposed initiative calls for the state bank to be capitalized with the state treasury. Current practice in Colorado requires the appropriation of the entire state treasury to pay the expenses of operating state government. How would surplus funds be available in the bank for lending for economic development, commerce, industry, and agriculture, home ownership, maintenance and construction of needed infrastructure, education, public health, safety, and other purposes for the general welfare of the citizens?
- 4. Since the proposed initiative leaves in place Colorado's existing public deposit protection system, do the proponents intend to require all state revenue to be deposited in the state bank, or would the state continue to be able to use eligible public depositories? If so, who would decide what public money to deposit into the state bank and what to deposit into other eligible public depositories?

5. In the section of the proposed initiative dealing with governance of the state bank, the proposed initiative specifies no terms of office for the members of the board of directors who are not state officials. The same is true of the advisory board. The proponents should consider changes to the language to specify the terms of office of these persons. Also, what do the proponents intend for the length of the terms?
6. The language of the proposed initiative says that the management of the bank will be hired according to the standards of the state civil service system. Do the proponents intend for employees of the bank to be state employees and part of the state personnel system? If so, will the bank's employees be entitled to the same rights as other state employees with respect to hiring and other terms and conditions of employment? If the proponents intend for the bank's employees to be subject to control by the bank's board of directors and management, the proponents should make appropriate changes to the wording of the proposed initiative to reflect this.
7. The proposed initiative calls for the top five officials of the bank to draft rules and regulations for the bank. The rules would be subject to approval of the advisory board, the board of the bank, the General Assembly, and the Governor. Do the proponents intend for the General Assembly to approve these rules in a bill or a resolution? What would happen if the General Assembly refused to approve the rules? What if the Governor vetoed the legislation approving the rules, and the General Assembly failed to override the Governor's veto? Do the proponents intend that the bank would be able to begin to function notwithstanding what the General Assembly and the Governor were to do with respect to the rules and regulations? If so, the proponents should clarify this in the proposed initiative.
8. The proposed initiative is silent with respect to regulation of the state bank. The Bank of North Dakota is not regulated directly by financial regulators in the state of North Dakota or by federal bank officials. Do the proponents also intend that the state bank in Colorado not be regulated as other financial services providers?
9. The proposed initiative is silent as to whether the state bank would become a member of the Federal Deposit Insurance Corporation (FDIC) or whether deposits would be backed by the full faith and credit of the state of Colorado. Deposits in the Bank of North Dakota are backed by the full faith and credit of the state of North Dakota, with no federal deposit insurance. What is the proponents intent with respect to the protection of deposits in the state bank? Would the bank become a member of the FDIC? Would the bank be able to operate without FDIC insurance? The proponents should make changes to the wording to indicate whether debts and obligations of the bank would or would not be backed by the full faith and credit of the state of Colorado.
10. If the proponents intend for the full faith and credit of the state of Colorado 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 cannot levy taxes without voter approval? Would a separate ballot initiative be required to amend or repeal TABOR to make this work?