

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

March 25, 2014

**TO:** Earl Staelin and Robert Bows

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**SUBJECT:** Proposed initiative measure 2013-2014 #104, 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.

### Purposes

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

1. To establish a state-owned bank in the state of Colorado;
2. To set the purposes of a state-owned bank;

3. To create rules governing the election of the bank's board of directors and for governance and management of the state-owned bank; and
4. To establish an advisory board for the state-owned bank.

## 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.

1. It is standard drafting practice to number each section, part, etc. that is being amended or added with a section number (e.g., **SECTION 1.**, **SECTION 2.**) before the amending clause. For example:

**SECTION 1.** In the constitution of the state of Colorado, add section 22 to Article X as follows:

2. The initial line of each new paragraph should be indented. See technical comment 1 for an example.
3. Sometimes internal headnotes are used for reader-friendly purposes, similar to the headings in the proposed initiative. Internal headnotes should follow the subsection number or paragraph letter, as appropriate.

**Section 22. State-owned bank. (1) Statement of intent.** (a) THE STATE OF COLORADO . . .

4. When using the relative pronoun "who", the noun to which it refers must be a person or persons. If the referent is an institution, use the pronoun "that" instead. In subsection (1) (a) of the proposed amendment, a reference to "private banks" should use "that."
5. In section 22 (1) (b) of the proposed amendment, the word "current" that precedes "North Dakota" is unnecessary as the reference of a state implies the state as it exists unless specified to the contrary elsewhere.
6. Do the proponents intend to have the effective date listed in the first subsection be applied to the entire document? If so, it should be its own subsection at the end of the document. If different effective dates apply to different subsections, specify those at the end of each subsection.

7. It is standard drafting practice to name the provision containing definitions "Definitions" rather than "Term definitions." It is also standard drafting practice to begin the definitions provision with the language: "As used in this section:" See the example in technical comment 8.
8. It is standard drafting practice to place the paragraph that immediately follows the headnote on the same line (instead of the first paragraph appearing on the line after the headnote). For example, in subsection (3), the first term should appear on the same line as the headnote.

(3) **Definitions.** AS USED IN THIS SECTION:

(a) "SOUND BANKING PRACTICES" MEANS PRACTICES  
GENERALLY ...

9. It is standard drafting practice to list definitions in alphabetical order.
10. When a modifying phrase or clause appears in a sentence, it is presumed to modify the last antecedent before it. In paragraph (c) of subsection (3), the clause that begins "such as those enumerated . . ." is ostensibly describing the "public interest" named in the sentence's opening clause. Therefore, move the "such as . . ." clause immediately after the sentence's first clause.
11. The headnote following each section label might contain multiple items. In these instances, the different items should be separated by a hyphen with a space on either side. Additionally, only the first letter of the first word in the headnote is capitalized. The proposed amendment contains a number of headnotes like this. For example:

(4) **Establishment of state-owned bank.**

(5) **Governance of state bank – elected officials.**

12. When a series contains an item that itself contains commas (when a list is used as an item within a larger list, for example), use semi-colons to separate the larger series and commas in the internal item. In these instances, a colon should precede the primary list, and the first letter of the list should be capitalized. (For example, "Each person is required to: A; B, C, or D; and E.") The second sentence in subsection (4) contains such a series.
13. The word "shall" indicates that a person has a duty; while the word "must" should be used to indicate that a person is required to satisfy some condition in order for a consequence to apply. See section 2-4-401 (6.5) and (13.7), Colorado Revised Statutes, which define "must" and "shall."

- a. The word "shall" should not be used as a future-tense form of "to be." Simple present tense verbs should be used when possible. So, for example:
    - i. In subsection (4), the sentence beginning "The bank shall have all the powers ..." should read, "The bank has all the powers ...."
    - ii. In subsection (4), the sentence beginning "This shall include ..." should read "This includes ...."
    - iii. In subsection (4), the sentence beginning "The debts and obligations ..." contains the clause "... which shall not be required ...." This clause should read "... which is not required ..."
    - iv. In subsection (4), the sentence beginning "The revenue and income of the bank shall not be limited, nor shall expenditures ... be restricted ..." should read "The revenue and income of the bank is not limited, nor are expenditures ... restricted ...."
  - b. The word "shall" should be used to indicate that a person has a duty; an inanimate object cannot logically possess a duty. For example, in subsection (4), the sentence "The debts and obligations of the bank are backed by the full faith and credit of the state of Colorado that shall serve as self-insurance for the bank ..." appears to impose a duty upon the "full faith and credit of the state of Colorado." The "full faith and credit of the state of Colorado" cannot logically possess a duty. Therefore, this sentence should read "The debts and obligations of the bank are backed by the full faith and credit of the state of Colorado that serves as self-insurance for the bank ...."
  - c. Paragraph (d) of subsection (5) appears to require candidates to satisfy the condition of registering with the secretary of state's office in order for the consequence of being included on the ballot to apply. The word "must" should be used to indicate that a person is required to satisfy some condition in order for a consequence to apply. Would the proponents consider using the word "must" so that the sentence begins "To be included on the ballot, candidates must register ..."?
14. It is standard drafting practice to use the word "that" instead of "which" when indicating a restrictive (essential) clause. In other words, when the word, clause, or phrase following the word "that" is necessary to the meaning of the sentence, use "that." If the text is simply additional or descriptive information, use "which" and place a comma before it. In

- subsection (4), the sentence that begins "The debts and obligations of the bank are backed ..." contains such an error. The clause "... the state of Colorado that shall serve ...." should be replaced with "the state of Colorado, which serves as self-insurance ...."
15. It is standard drafting practice when referring to "this" subsection, paragraph, subparagraph, or sub-subparagraph to include the number or letter of the provision. So, in the last sentence of subsection (4), write "ALL PROVISIONS OF THIS SUBSECTION (4) ...." Similar changes are needed throughout the proposed initiative.
  16. A list held together with the conjunction "and" is different than a list that uses "or." Using "and" indicates that the items in the list work as a unit. "Or" suggests that they remain independent of one another. In subsection (4), the sentence beginning "The revenue and income of the bank ..." contains a list using "and" ("revenue, income, and assets"). To show that the management of each of those things should not be restricted on its own right (rather than as a result of its relationship to the group), use "or."
  17. Similar to comment 15, the word "all" suggests the group as a whole instead of individual members. In paragraph (b) of subsection (5), the language "... include candidates for all five districts, ..." and "... all terms for all districts ...." In conjunction with the drafting guideline that singular nouns be used whenever possible, write "... include a candidate for each of the five districts ..." and "... the term for each district."
  18. Attempt to use straightforward, modern language. In paragraph (b) of subsection (5) of the proposed amendment, use "the" instead of "said."
  19. Begin paragraphs (c) and (d) of subsection (5) with the singular "A candidate ..." and "To be included on the ballot, a candidate ..." instead of a plural subject. Use singular nouns wherever possible throughout the proposed amendment.
  20. It is standard drafting practice to make short, readable sentences wherever possible. To that end, paragraph (e) in subsection (5) could be split into two sentences, which would also prevent an antecedent issue with the word "which." Consider ending the sentence after "... the most votes." Begin the next sentence "The run-off election must be held ...."
  21. Only proper nouns receive capital letters. The term "board of directors" should always appear in lowercase letters.

22. Use active voice instead of passive voice, wherever possible. For example, in the first sentence in subsection (6) (a), consider adding a period after "... education, labor, and employment" and beginning the next sentence "The governor shall appoint the board members for staggered terms ..." to avoid using the passive "to be appointed by." In the last sentence in that same paragraph (a), consider using the language "various groups within each area of interest can nominate members of the board of advisors" to avoid the use of "shall be nominated." That change would also remove an incorrect instance of the word "shall."

### **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 sources did the proponents rely on for the factual statements in subsection (1) of the proposed initiative?
3. Paragraph (a) of subsection (3) purports to define "sound banking practices" as those "generally followed by public non-profit banks, such as the Bank of North Dakota, ... , as opposed to the speculative and fraudulent practices of private for-profit banks, ...."
  - a. Are there other public non-profit banks from which the determination of what practices are "generally" followed might be derived? If so, what are they, and would you consider mentioning them in the text of the initiative?
  - b. What specific banking practices are included within this definition? Is any practice that is or may be adopted by the Bank of North Dakota, now or in the future, automatically appropriate for Colorado's state-owned bank? If not, what other examples might Colorado follow, or what standards should guide its practices?
  - c. Other than the reference to practices followed by public non-profit banks, the definition is stated in the negative, that is, it lists a number of current examples of things that "sound banking practices" do not include. Does this leave the door open to future practices that

someone might consider "speculative and fraudulent" but that have not yet been tried?

- d. Would the charging of interest above current market rates constitute a "speculative and fraudulent" practice? Would the charging of a late payment penalty on a loan, or a transaction fee for withdrawals through an ATM, be "speculative and fraudulent"? How does this definition resolve those questions?
4. In paragraph (c) of subsection (3), what is the definition of "public interest"?
  5. The term "*any limitations imposed by any* state constitutional, state statutory, state chartered, or other state or local provisions" (subsection (3) (d); emphasis added) does not appear in the measure. The emphasized clause could be removed, however, leaving the remainder of the phrase, which is used in subsection (4). Would you consider changing the definition accordingly? What is meant by the term "state chartered"? Is this meant to refer to state bank charters issued under section 11-102-104 (5.5) (a), Colorado Revised Statutes?
  6. The definition in (3) (d) contains a clause (" ... the sole purpose of which ...") that appears more appropriate as part of the "statement of intent" in subsection (1). Would you consider moving this language from the definition section to the "statement of intent" portion of the measure?
  7. 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* sections 11-10.5-101 through 11-10.5-112 and 11-47-101 through 11-47-120, Colorado Revised Statutes. 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? Would the state-owned bank created by the proposed measure have to follow the laws protecting public deposits?
    - 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 the operation of a bank owned by the state?

8. 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. With respect to the protection of deposits in the state-owned bank created under the proposed initiative:
  - a. How will the "full faith and credit of the state of Colorado" back up deposits in the state-owned bank? Should there be a limit on how much money is available to cover losses on any given account? For example, the FDIC currently limits coverage to \$250,000 per account.
  - b. 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 state-owned bank that is not a member of the FDIC?
  - c. Will the requirements of the Taxpayer's Bill of Rights (TABOR), article X, section 20 of the Colorado constitution, be an obstacle to the full faith and credit of the state of Colorado backing the deposits of the state-owned bank because the state is not an enterprise and does not have the ability to levy taxes without voter approval? Do the proponents intend for the definition of "any limitations imposed by any state constitutional, state statutory, state chartered, or other state or local provisions" definition in paragraph (d) of subsection (3) of the proposed measure to resolve any conflicts with TABOR?
9. 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](http://www.banknd.nd.gov); G. Edward Griffin, *The Creature from Jekyll Island: A Second Look at the Federal Reserve* (Amer. Media, 3<sup>rd</sup> edition, May 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 of the state to own and operate a bank, as granted in the proposed initiative?
  - b. Would the proponents consider amending article X as necessary to permit the creation of multiple fiscal year obligations by the state-owned bank created under this proposed initiative?
10. 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 the state-owned bank created under the proposed initiative?
11. Subsection (4) states that the bank may lend money "at interest or at no interest."
- a. Do you intend to place any limits on the interest rate that the bank may charge? If so, would the limits vary depending on who the recipient of the loan is? And by what standard, if any, would the limits be set – for example, would the existing state usury laws apply?
  - b. Do you intend to place any limits on who may receive a loan from the bank?
12. In paragraph (a) of subsection (5), is it your intent that the districts set by the state legislature will remain in place in perpetuity? Does the legislature have any authority to modify the boundaries of these districts through a redistricting process?
13. Under current Colorado law, statewide general elections are held on the first Tuesday in November in even-numbered years. Odd-year elections are only allowed if the matter on the ballot concerns a state matter arising under section 20 of article X of the Colorado constitution. Current law does not permit the election of candidates at odd-year statewide general elections. See section 20 of article X of the Colorado constitution, part 2 of article 4 of title 1, Colorado Revised Statutes, and section 1-41-102,

- Colorado Revised Statutes. Is it the proponents' intent to circumvent these provisions with regard to the election of directors in odd-year elections?
14. Paragraph (b) of subsection (5) is confusing in its references to "said two districts" and "said three districts." It appears that the intent is to stagger the members' terms. This intent could be more clearly expressed by following the example used in paragraph (a) of subsection (6) of the proposed initiative. *See also* section 10-22-105 (1) (b), Colorado Revised Statutes, ("[o]f the members first appointed ... four of the governor's appointees shall serve for a term of two years and the remaining governor's appointee and other initial appointees shall serve for a term of four years. Thereafter, the terms of the members shall be for four years").
  15. Subsection (5) does not state that candidates for the board of directors are nonpartisan, or that political parties may not endorse candidates for these positions. Do you intend to allow these elections to be partisan?
  16. Is it your intent in paragraph (g) of subsection (5) that the board of directors of the bank will have less than two months to establish the bank following their election?
  17. Under subsection (6) (a), what constitutes "advisory input" from the board of advisors? How do the proponents intend the board of advisors to work in conjunction with the board of directors? What level of control or authority would the advisors hold over the directors and the operations or management of the bank?
  18. Paragraph (c) of subsection (6) contains the clause: "[T]he management and Employees of the bank shall be hired according to the standards of the state personnel system, which [*sic*] shall endeavor to hire the best qualified persons ...."
    - a. When a modifying phrase or clause appears in a sentence, it is presumed to modify the last antecedent before it. *See* technical comment 10 above. Therefore, it appears that the clause "which shall endeavor to hire the best qualified persons" modifies either "the state personnel system" or "standards of the state personnel system." This creates an impossibility, because the state personnel system and its standards are both inanimate; neither can "endeavor" to do anything.
    - b. Do the proponents wish to convey a duty upon someone to "endeavor to hire the best qualified persons"? Would you consider

rewording paragraph (c) so that it is clear who will have a duty to hire qualified persons?

- c. Is the reference to the "state personnel system" intended to refer to the system established under section 13 of article XII of the Colorado constitution? If so, would the proponents consider including a cross reference to the constitutional provision or including "state personnel system" in the definitions subsection and defining the term by referencing the system established in the constitutional provision?

19. Subsection (7) states that the rules and regulations of the bank are to be drafted by the managers of the bank and approved by its board of directors, "subject to consideration of recommendations by the advisory board."

- a. Is it your intent that the general assembly have no say in the rules and regulations of the bank? If so, how does this procedure differ from the operation of banks that support a "small group of financiers," as stated in subsection (3) (a)?
- b. If the board (or 3 of the 5 members of the board, constituting a controlling group) were to act in a way that violated the principles stated in this initiative, how do you anticipate the situation should be addressed? Do you wish to give citizens standing to enforce those principles through a private lawsuit in court? Would the general assembly have the authority to establish a recall procedure or other means of relief legislatively?
- c. Would the adoption of rules be subject to the "State Administrative Procedure Act," article 4 of title 24, Colorado Revised Statutes?
- d. Do the proponents intend for the general assembly to have any control or veto power over these rules? If not, how would you address the contention that the delegation of authority to this small group of individuals, in derogation of the general assembly's plenary authority over taxing, spending, and appropriations under article V of the Colorado constitution, conflicts with article V or with the due process principles discussed in *Cottrell v. Denver*, 636 P.2d 703, 709 (Colo. 1981)?

20. Under subsection (8), regarding capitalization of the state bank:

- a. Who determines the amount of "taxes and other revenues and funds of the state" that are needed to capitalize the state bank?

- b. Section 33 of article V of the Colorado constitution specifies that "No moneys in the state treasury shall be disbursed therefrom except upon appropriations made by law ...." Do the proponents intend that the general assembly would appropriate state moneys to capitalize the state bank?
  - c. What "other funds" are "collected currently for the state" by other banks, and how are they "collected"? Do you intend for the state bank to take over the "collection" of these funds, and if so, when?
  - d. Regarding the second sentence, which begins "Specifically allocated funds ...," do the proponents intend that all assets of the state that are held by or invested by private financial institutions be transferred to the state bank? Is this feasible within 10 working days after the bank starts operating?
  - e. In the first sentence, reference is made to "funds generated by bonds," suggesting that the state bank is authorized to issue bonds. Is that the intent? If so, the proponents may want to include an affirmative statement to that effect.
  - f. Is the state bank a "district" under TABOR and thereby subject to the spending limits specified in section 7 of TABOR? If the state bank is intended to be excluded from TABOR, does it satisfy the definition of "enterprise" under section 2 (d) of TABOR?
21. The proposed initiative does not give anyone authority to acquire property for the bank. Who will be responsible for acquiring land, physical structures, and furnishings for the bank? Is the bank's primary office required to be in Colorado?