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MEMORANDUM

July 19, 2013

TO: Robert Bows and Jason Bosch

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2013-2014 #45, 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 make statements about the benefits of state-owned banks;
2. To require the state of Colorado to establish and operate a state-owned 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 or at no 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;
6. To specify that the debts and obligations of the bank are backed by the full faith and credit of the state of Colorado;
7. 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
8. 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 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. Under subsection (3) ("**Term definitions.**"), paragraph (d) refers to the "sole purpose" of the proposed initiative "as stated in [sub]section (4) of the amendment," with a quoted passage. Since the quoted passage appears immediately below this reference, would it be preferable simply to cross-reference "the purpose (or purposes) stated in subsection (4) of this section" and omit the quoted passage?
2. Internal cross-references such as the one on lines 5 and 6 of subsection (8) ("as noted in section (3) of this amendment, ... ") should be to a "subsection" rather than to a "section," as the proposed initiative itself is a "section" (i.e., section 22 of article X). Similarly, the references to "this amendment" should be changed to "this section."

Substantive Comments and Questions

1. Article V, section 1 (5.5) 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 paragraph (b) of subsection (1) of the proposed initiative?

3. Paragraph (a) of subsection (3) ("**Term definitions.**") defines "sound banking practices" to exclude "the speculative and fraudulent practices of private for-profit banks."
 - a. Are there objective standards for determining what practices are "speculative" or "fraudulent"? For example, would an investment in soybean futures be considered "speculative," such that the state bank could not legally invest in soybean futures? If so, would the same standard apply to a loan to a soybean farmer for seed and fertilizer? Similarly, by "fraudulent," do you mean to refer only to practices for which a person or institution could be convicted of a crime or held liable for damages in a civil action? If so, "fraudulent" does not seem to add much to the analysis since private banks are rarely indicted for criminal fraud.
 - b. Could this phrase ("the speculative and fraudulent practices of private for-profit banks") be interpreted to include *any* practice engaged in by a private bank, and, if so, could the exception swallow the rule?
4. Subsection (4) says that the state bank is "not required" to join the Federal Deposit Insurance Corporation (FDIC). Could the state bank join the FDIC if it chose to do so?
5. Subsection (4) also provides that the debts and obligations of the state bank are "backed by the full faith and credit of the state of Colorado"
 - a. What is the intended effect of this provision?
 - b. Does this provision give the state bank an advantage in competition with private banks? Does it provide any incentives for state bank managers to take unnecessary risks with state funds?
6. Subsection (5) requires that an election be held in an odd-numbered year to elect the board of directors. Is the election intended to be combined with the regular general election in November or is it to be held at another time? Are subsequent elections of board members intended to occur in November at the regular general election?
7. Paragraph (d) of subsection (5) requires the secretary of state to provide an automated online process for the candidates for the board of directors to list their qualifications. Is the general assembly required to appropriate moneys to pay for the development of the process, as part of the required funding of "elections" in paragraph (f) of subsection (5)?
8. Paragraph (e) of subsection (5) states that "the Secretary of State shall hold a run-off election" Would it be more appropriate to direct the secretary of state to set an election, but have the election actually conducted by designated election officials?
9. Are the candidates for the board of directors required to have any special experience or expertise in banking or finance? If so, who will establish the experience requirements?
10. 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?
 - 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 state depositing public money in its own bank?
 - c. Other than FDIC insurance and the Public Deposit Protection Act, article 10.5 of title 11, Colorado Revised Statutes, what protections would exist for deposits of public moneys in the Colorado state bank?
11. 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 Colorado's state bank other than the annual independent audit required under subsection (6) (b)?
12. Subsection (7) of the proposed initiative calls for the top five operating officials of the bank to draft rules and regulations for the bank, subject to "consideration of recommendations by the advisory board" and "approval of the board of directors."
- a. To what extent would the top five operating officials be required to consider the advisory board's recommendations, and what if the board of directors withheld its approval? Do you wish to add any sort of tiebreaker mechanism or standards for judicial review in case these entities could not agree on the rules?
 - b. 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)?
13. Subsection (8) of the proposed initiative calls for the state bank to be capitalized using "any proceeds from taxes and other revenues and funds of the state, including other funds such as may be collected currently for the state by other banks, that are not otherwise obligated,"
- a. Which of the state funds that are collected currently for the state by other banks are "otherwise obligated"? Do you wish to include standards and perhaps a timeline for determining how and when these obligations no longer exist, and when the state bank should receive these funds?

- b. Current practice in Colorado requires the appropriation of the entire state treasury to pay the expenses of operating state government, and article X, section 16 of the Colorado constitution prohibits deficit spending. Therefore, how would surplus funds be available in the bank for lending for the purposes listed in subsection (4) of the measure?
14. Subsection (8) provides that the capitalization of the state bank "*may* include any proceeds from taxes and other revenues and funds of the state, ... *if deemed necessary by the board of directors ...* ." (Emphasis added.) Does this give the state, or the board of directors of the state bank, the discretion to allow some or all state funds to be deposited in private financial institutions rather than in the state bank?
 15. Banking in the United States has generally been conducted as a private business activity.¹ 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. In fact, at the same election in which 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 the state from operating or participating in private businesses. Specifically, article X prohibits the state and local governments from contracting multi-year debt without voter approval. In view of the fact that banks are essentially debtors to their creditor depositors, would the proponents consider amending article X as necessary to permit the creation of multiple fiscal year obligations by the state bank under this proposed initiative?
 16. 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?
 17. The proposal states that its provisions are "self-executing," but there is no regulatory or enforcement responsibility assigned to anyone other than the state bank's managers and board of directors.
 - a. Subsection (8) of the proposed initiative requires that other banks transfer any state moneys that they hold to the state bank within 10 working days after the state bank begins operation. If they fail to do so, who would enforce this requirement and how?
 - b. Subsection (4) of the proposal says that the state bank's expenditures and management are not restricted "except upon sound financial and public policy considerations." How is this standard to be interpreted and enforced? Could a person sue in court to challenge a decision of the bank's managers as being contrary to a "sound" financial or public policy consideration? If so, would any Colorado taxpayer have standing to enforce this requirement? Could the general assembly enact a statute

¹Exceptions include 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.

embodying the financial and public policy considerations by which the bank's managers should abide?

- c. Would the state treasurer retain any discretion on what type of investment priorities to pursue when investing state funds? Or would such decisions be turned over to the state bank after it receives deposits of state funds?

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