

STATE OF COLORADO

Colorado General Assembly

Mike Mauer, Director
Legislative Council Staff

Colorado Legislative Council
200 East Colfax Avenue Suite 029
Denver, Colorado 80203-1716
Telephone 303-866-3521
Facsimile 303-866-3855
TDD 303-866-3472



Dan L. Cartin, Director
Office of Legislative Legal Services

Office of Legislative Legal Services
200 East Colfax Avenue Suite 091
Denver, Colorado 80203-1716
Telephone 303-866-2045
Facsimile 303-866-4157
Email: olls.ga@state.co.us

MEMORANDUM

TO: Earl Staelin and David Runco

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: April 4, 2016

SUBJECT: Proposed initiative measure 2015-2016 #127, 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 directors of 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.

Earlier versions of this proposed initiative, proposed initiatives 2011-2012 #94 and #95, 2013-2014 #7, and 2013-2014 #104, were the subject of memoranda dated April 3, 2012, March 15, 2013, and March 25, 2014, which were discussed at public meetings on April 6, 2012, March 19, 2013, and March 27, 2014, respectively. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meetings, except as necessary to fully understand the issues raised by the revised proposed initiative.

However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

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 state the purpose of the state-owned bank;
3. To establish the state-owned bank as an enterprise under section 20 of article X of the state constitution;
4. To make the effective date of the proposed initiative January 1, 2017;
5. To make legislative declarations with respect to the reasons for creating a state bank and the benefits of a state bank;
6. With respect to the operation of a state bank, to define the terms “sound banking practices,” “sound financial and public policy considerations,” and “state personnel system;”
7. To allow the state-owned bank to accept deposits of any business lawfully operating under the constitution and laws of the state of Colorado, but which does not have a bank or financial institution in the state of Colorado in which the business may lawfully deposit money;
8. To establish an elected board of directors of the state-owned bank;
9. To establish an appointed advisory board to give input to the board of directors on the direction of the state-owned bank;
10. To provide for the appointment of a president of the bank by the board of directors and for the hiring of management and employees of the bank according to the standards of the state personnel system;
11. To charge the top operating officials of the bank with the task of drafting rules and regulations of the bank with advice from the advisory board and approval of the board of directors;
12. To require the general assembly to appropriate funds within three months after the effective date of the proposed initiative to enable the bank to purchase or

lease land, physical structures, and furnishings for the bank to begin operations;

13. To capitalize the bank with revenues and funds of the state that would otherwise be deposited in private financial institutions, other funds as permitted by sound banking practices, and funds generated by revenue bonds issued by the bank; and
14. To require that state funds held by private banks prior to the establishment of the state bank be transferred to the state bank within ten working days from when the board of directors declares that the bank is ready to receive the transfer of funds, which transfer must begin no later than two years from the effective date of the proposed initiative.

Substantive Comments and Questions

The substance of the proposed initiative raises the following 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 subsection (1) of the proposed initiative?
3. In paragraph (c) of subsection (2), what is the definition of "public interest"?
4. Subsection (1) of the proposed initiative declares that the state bank will operate as a "tabor enterprise."
 - a. Subsection (8) of the proposed initiative allows the capitalization of the bank to include "any proceeds from taxes and other revenues and funds of the state." Is it your intent that these funds would satisfy the requirements of section 20 of article X of the state constitution (also known as the "Taxpayer's Bill of Rights" or "TABOR") that the state bank would receive under ten percent of its annual revenue from the state government?
 - b. Subsection (8) also requires all funds and other assets of the state held by private financial institutions to be transferred to the state bank. How would it be ensured that those funds are under the required ten percent of annual revenue limit of TABOR? Who would make this determination? What would happen if these transfers exceeded the ten percent annual revenue limit of TABOR?

- c. Is it possible that the state bank would not actually ever satisfy the requirements to be an enterprise under TABOR? If so, would the proponents consider amending TABOR to create an exception for the state bank?
5. Subsection (3) (d) of the proposed initiative states that the state bank may accept deposits of any business lawfully operating under the constitution and laws of Colorado but which does not have a bank or financial institution in the state which may lawfully accept deposit of its moneys. Do the proponents intend for this language to permit the state bank to accept deposits from the marijuana industry in Colorado?
6. Colorado law currently provides a system for the protection of deposits of public money 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 money. 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 state's system of banking regulation 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?
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. 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?

8. Will the requirements of TABOR 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 paragraph (f) of subsection (3) of the proposed initiative, which states that all the provisions of the proposed initiative are self-executing and severable and supersede conflicting state constitutional, state statutory, state chartered, or other state or local provisions 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; G. Edward Griffin, *The Creature from Jekyll Island: A Second Look at the Federal Reserve* (Amer. Media, 3rd 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 (3) 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. Subsection (4) does not state that candidates for the board of directors are non-partisan, or that political parties may not endorse candidates for these positions. Do you intend to allow these elections to be partisan?
13. Under subsection (5) (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?
14. Subsection (6) 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 "are operated principally in the interests of their shareholders," as stated in subsection (2) (a)?
 - b. If the board (or 4 of the 7 members of the board, constituting a controlling group) were to act in a way that violated the principles stated in this proposed 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 Col-

orado constitution, conflicts with article V or with the due process principles discussed in *Cottrell v. Denver*, 636 P.2d 703, 709 (Colo. 1981)?

15. 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 money 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 "All specifically allocated funds ...," do the proponents believe that it is feasible for all assets of the state that are held by or invested by private financial institutions to be transferred to the state bank within ten working days after "the bank is ready to receive the transfer of funds"? If so, how?

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.

The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

X-X-XXXX. Headnote. (1) Subsection.

(a) Paragraph

(I) Subparagraph

(A) Sub-subparagraph

(B) Sub-subparagraph

(II) Subparagraph

(b) Paragraph

(2) Subsection

(3) Subsection

Bullet points, as used in Section 1 of the proposed initiative, should be replaced with the appropriate subdivision markers.

1. It is standard drafting practice when referencing statutory sections to include the word "section" before the number. For example, "section 24-35-204.5, [C.R.S.]".

In Section 22 (1) (c) of the proposed initiative, the text refers to “this amendment” when it should refer to “this section.”

Also in (1) (c), publicly owned should not be hyphenated.

2. It is standard drafting practice to use SMALL CAPITAL LETTERS (rather than ALL CAPS) to show the language being added to and stricken type, which appears as stricken type, to show language being removed from the Colorado constitution or the Colorado Revised Statutes. However, normal capitalization rules still apply. In the proposed initiative, proper nouns, such as “U.S.” and “Germany” should be capitalized. The first word of every new sentence should be capitalized. Additionally, the beginning of each numbered or lettered subdivision should begin with a capital letter, even if the text is a continuation from a sentence that began in a previous, larger subdivision (an example of this is the bullet-pointed list in (1) (a) of Section 22. Words that are common nouns are not capitalized; for example, the headnote in (3) of Section 22 currently appears “**Establishment of State-owned Bank**” but should read “**Establishment of state-owned bank.**”
3. The headnote at the beginning of the proposed initiative is currently “**State-owned bank. Statement of intent.**” Because the statement of intent only applies to (1), it should appear after, not before the (1) designation. In other words, the headnote should appear: “**State-owned bank. (1) Statement of intent.**”
4. When referencing other sections of the Colorado Constitution or Colorado Revised Statutes, the common convention is to start by naming the smallest subsection first and working up to the largest. For example, a citation in (3) of Section 22 appears as: “...AS DEFINED IN COLORADO CONSTITUTION, ART. 10,

- §20 (A) (2).” It should appear: “...AS DEFINED IN SECTION 20 (2) (d) OF ARTICLE 10 OF THE COLORADO CONSTITUTION.”
5. Section (3) (b) of the proposed initiative contains “and/or”. It is unnecessary to include this term. Simply use the word “or”, which includes the meaning of the word “and” in statutory language.
 6. In (3) (c) of the proposed initiative, specify the paragraph referred to by stating, “PURSUANT TO THIS PARAGRAPH (c).”
 7. In (3) (d) of the proposed initiative, specify the constitution referred to by stating “UNDER THE COLORADO CONSTITUTION.”
 8. The section following (3) (d) is listed as (3) (f). It should be (3) (e) in order to continue the sequence.
 9. The headnote after (4) contains two punctuation errors. First, a dash should separate headnote entries. Second, headnotes end with periods. The headnote should appear: “**Governance of state bank – elected officials.**”
 10. The best way to refer to members of Congress in (4) (a) is with the term “Congressional members.”
 11. The word “moneys” should be replaced with “money.”
 12. The effective date at the end of the proposed initiative should read: “This section is effective January 1, 2017.”