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LEGAL OPINION

TO: Representative Jonathan Singer
FROM: Office of Legislative Legal Services
DATE: October 18, 2019
SUBJECT: Creation of a state banking entity¹

Legal Question

Would a statute that creates a state banking entity violate Colorado's constitution?

Short Answer

Probably not. The potentially applicable constitutional provisions do not appear to prohibit the creation of a state banking entity by statute. Given the general assembly's plenary authority and the presumption of constitutionality of duly enacted legislation, it is unlikely that the general assembly would need to obtain voter approval to amend the constitution to create a state banking entity.

¹This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the general assembly. OLLS legal memoranda do not represent an official legal position of the general assembly or the State of Colorado and do not bind the members of the general assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties. Consistent with the OLLS' position as a staff agency of the general assembly, OLLS legal memoranda generally resolve doubts about whether the general assembly has authority to enact a particular piece of legislation in favor of the general assembly's plenary power.

Discussion

1. The question relates to a proposal to create a state banking entity.

The creation of a state banking entity is not a new concept. Indeed, publicly owned banks have a long history:

State-owned banks were common in the United States during the nineteenth century, and have been proposed in response to various economic and financial crises in the twentieth and early twenty-first centuries. However, the only U.S. state with an existing publicly owned bank is North Dakota. . . .

During the Great Depression, Oregon voted on a referendum to create a state-owned bank. At least six states² explored starting a state-owned bank during the 1970s.³

Further, since 2010, state lawmakers in "at least 16 states have introduced bills either to study the issue or to create a state bank or investment trust."⁴ Note that on September 20, 2019, California's legislature enacted a statute, AB 857,⁵ which authorized local government-owned banks. A somewhat similar bill to authorize a state bank was converted by amendment to create a task force to study the issue, but the bill has not been enacted.⁶

A bank is an entity that accepts deposits and uses the deposits to make, purchase, or guarantee loans.⁷ As described in the legal memorandum that accompanied your request,⁸ the question presented relates to a bank that is wholly owned and operated⁹

² Including Colorado, according to *The Bank of North Dakota: A model for Massachusetts and other states?*, Yolanda K. Kodrzycki and Tal Elmatad; New England Public Policy Center, Research Report 11-2, p. 21, note 3 (May 2011), <http://media.wickedlocal.com/patriotledger/documents/pdfs/fed-report.pdf> (accessed on 9/26/19). If there was a Colorado legislative measure that proposed the creation of a state banking entity, this office could not locate it, so it is unknown whether a statutory or constitutional amendment was proposed.

³*Id.*, pp. 3 and 6.

⁴ *Are State-Owned Banks a Viable Option?*, Heather Morton, NCSL LegisBrief, November/December 2011, Vol. 19, No. 45, p. 2.

⁵ https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB857

⁶ https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB528

⁷ See *The Bank of North Dakota: A model for Massachusetts and other states?*, *supra* note 2, p. 5.

⁸ The memorandum is attached as an addendum.

⁹ A "public bank as we envision it would be wholly owned and controlled by the government entity that established it" Addendum, p. 17.

by an enterprise that is exempt from article X, section 20 of the Colorado constitution (the "Taxpayer Bill of Rights" or "TABOR") as a government-owned business¹⁰ for the following purposes:

- To accept deposits¹¹ from and make loans¹² to public or private persons;
- That is subject to regulation as any other state-chartered bank;¹³ and
- For the public purposes of, among others, creating new jobs, increasing employment, providing necessary services for the community, and increasing the tax base.¹⁴

This memorandum presumes that operating a bank is a valid "business" under TABOR for purposes of establishing a government-owned enterprise. Consequently, so long as the legislation creating a state banking entity otherwise complies with TABOR (i.e., the entity can issue revenue bonds and receives less than 10% of its "annual revenue in grants from all Colorado state and local governments combined"),¹⁵ the state banking entity would be exempt from TABOR as an enterprise. Accordingly, this memorandum does not further analyze the compliance of an enabling statute for a state banking entity with TABOR.

The critical elements of this proposal that this memorandum will examine for compliance with potentially applicable constitutional requirements are making loans and accepting deposits.

¹⁰ "Establishing a public bank as a TABOR enterprise in compliance with Article X, section 20 (2)(b) of the TABOR Amendment would exempt the bank from the TABOR restrictions on revenue and expenditures." Addendum, p. 3.

¹¹ A "public bank must be an eligible depository under Colorado law". Addendum, p. 4.

¹² A "public bank has its own source of income in the form of interest on loans that it makes." Addendum, p. 23.

¹³ "We have assumed for purposes of this memorandum that a public bank owned by the state or local government would be regulated by the State Division of Banking and Banking Board under applicable laws and regulations." Addendum, p. 27.

¹⁴ "A public bank's loans to private businesses . . . would be made for public purposes, such as [to] create new jobs, increase employment, provide necessary services for the community, increase the tax base, and the like." Addendum, p. 17.

¹⁵ Colo. Const. Art. 10 §20 (2)(d): "'Enterprise' means a government-owned business authorized to issue its own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined."

2. The general assembly's plenary authority and attendant presumption of constitutionality favor its ability to create a state banking entity by bill.

The Colorado Supreme Court has repeatedly held that the general assembly's power is plenary and is limited only by express or implied provisions of the constitution.¹⁶ The general assembly may therefore enact any law not expressly or inferentially prohibited by the Colorado or United States constitutions.¹⁷

The Colorado Supreme Court has held that there is a heavy presumption of constitutionality of enacted statutes and that the presumption of a statute's constitutionality can be overcome only if it is shown that the enactment is unconstitutional beyond a reasonable doubt.¹⁸

No Colorado constitutional provision explicitly prohibits the creation of a state banking entity. Several provisions might apply but have not been applied specifically to a state banking entity.

3. A public entity may constitutionally make loans.

The general assembly has created numerous state entities that administer loan programs. *See, e.g.*, the Colorado Water Resources and Power Development Authority;¹⁹ and the Colorado Housing and Finance Authority (CHAFA),²⁰ both of which are political subdivisions of the state that are authorized to make loans.²¹ These and other authorities are listed in section 24-77-102 (15), C.R.S., as "special purpose authorities," the revenues of which are excluded from the calculation of state fiscal year spending for purposes of section 20 (7)(a) of TABOR. *See also* the Colorado

¹⁶ *People v. Y.D.M.*, 197 Colo. 403, 593 P.2d 1356 (1979).

¹⁷ *People v. Y.D.M.*, *supra*; *Denver Milk Producers v. International Broth. of Teamsters*, 183 P.2d 529, 116 Colo. 389 (Colo. 1947).

¹⁸ *Colorado Ass'n of Pub. Employees v. Board of Regents of the Univ. of Colo.*, 804 P.2d 138, 142 (Colo. 1990).

¹⁹ Created in § 37-95-104 (1), C.R.S., as a "body corporate and a political subdivision of the state".

²⁰ Created in § 29-4-704 (1), C.R.S., as a "body corporate and a political subdivision of the state".

²¹ The Colorado Water Resources and Power Development Authority administers two revolving fund loan programs: The water pollution control revolving fund, § 37-95-107.6, C.R.S., and the drinking water revolving fund, § 37-95-107.8, C.R.S. The authority makes loans from these two funds to governmental agencies and, in the case of the drinking water revolving fund, also to private nonprofit entities, and credits loan repayments to the respective funds to be used for new loans. The Colorado Housing and Finance Authority may make and purchase housing facility loans to "sponsors" (i.e., qualifying individuals, low- and moderate-income families, and legal entities) pursuant to § 29-4-710 (1)(a)(I), C.R.S.

Water Conservation Board,²² which makes loans from the Colorado water conservation board construction fund²³ to public and private persons for use in water projects.

The ability of these entities to make loans has apparently not been challenged, and there is no Colorado constitutional provision that explicitly limits state entities' ability to make loans. Indeed, in at least two instances, the state constitution explicitly authorizes state entities to make loans.²⁴ Therefore, enacting a statute to give a state banking entity the ability to make loans would apparently not violate the constitution.

4. The acceptance of deposits by a state banking entity does not violate the constitutional prohibitions on the state contracting for debt by loan or pledging its credit.

With certain listed exceptions that do not apply here, article XI, section 3 of the Colorado Constitution prohibits the state from contracting "any debt by loan in any form" When a bank accepts deposits, the depositor may be viewed as loaning the money in the depository account to the bank. The account holder becomes a creditor of the bank; the bank becomes a debtor of the depositor. As a consequence, a depository account holder has a contractual right to the return of the holder's principal (and in most instances the interest) held in the depository account. If the general assembly were to create a state banking entity, this depository arrangement could be construed as a prohibited contract for "debt by loan."

However, a case relating to the constitutional validity of a statute that authorized CHAFA to issue revenue bonds construed this constitutional prohibition fairly narrowly. The Colorado Supreme Court held that "one legislature, in effect, must obligate a future legislature to appropriate funds to discharge the debt created by the first legislature"²⁵ for prohibited debt to be created. The court reasoned that the

²² Created in § 37-60-102, C.R.S., as a state agency.

²³ Created in § 37-60-121 (1)(a), C.R.S.

²⁴ Colo. Const. art. IX, § 3 ("In order to assist public schools in the state in providing necessary buildings, land, and equipment, the general assembly may adopt laws establishing the terms and conditions upon which the state treasurer may . . . make loans [from the public school fund] to school districts."); Colo. Const. Art. XI, § 2a ("The general assembly may by law provide for a student loan program to assist students enrolled in educational institutions."). The general assembly has enacted § 22-2-125, C.R.S., to authorize loans from the public school fund and article 3.1 of title 23, C.R.S., to create the student loan division in the department of higher education as a TABOR enterprise and to direct the division to, among other purposes, guarantee student loans and purchase defaulted student loans.

²⁵ *In re Interrogatories by Colo. State Senate*, 566 P.2d 350, 355 (Colo. 1977).

purpose of article XI, section 3 of the Colorado Constitution is "to prevent the pledging of [state] revenues of future years."²⁶ The court therefore held that the statute authorizing CHAFA's bonds was constitutional, noting that the statute:

does not create a "debt" within the meaning of section 3 because it does not create an obligation "that requires revenue from a tax otherwise available for general purposes to meet it."²⁷

As noted above, this memorandum presumes that a state banking entity would be created as a TABOR enterprise, which must receive less than 10% of its annual revenue in grants from all Colorado state and local governments combined. The enacting statute would presumably not give the state banking entity any right to future appropriations to satisfy its debts or pay its operating expenses. Under this arrangement, the state banking entity would not have an enforceable right to future appropriations to satisfy any debts created by its depository accounts. Accordingly, debt prohibited by article XI, section 3 of the Colorado Constitution would not be created.

Similarly, article XI, section 1 of the Colorado Constitution prohibits the state from lending or pledging its credit, directly or indirectly, in any manner to any person. The CHAFA case discussed above also construed this provision, stating that its purpose was "to prohibit mingling of public funds with private funds."²⁸ As outlined in the following excerpt from the case, the court found that the bill authorizing CHAFA revenue bonds did not violate article XI, section 1:

Does the appropriation provided for by House Bill No. 1247 constitute the lending or pledging of the state's credit within the meaning of and in violation of section 1 of article XI of the state constitution?

The appropriation does not constitute a pledge of the state's credit in violation of section 1, article XI, of the Colorado Constitution. First, since no debt is created, there is no lending of credit. When no debt or obligation of the state is created, the state cannot be said to have lent its credit in violation of article XI, section 1.

Second, the appropriation does not fall within the policy of section 1, which is, according to *McNichols v. City and County of Denver*, 101 Colo. 316, 74 P.2d 99 (1937), to prohibit mingling of public funds with private funds. The Authority is

²⁶ *Id.* (citations omitted).

²⁷ *Id.* (citations omitted).

²⁸ *Id.* at 356.

not a "private" corporation but, as noted, is a body corporate and a political subdivision of the state.

Third, the prohibition is inapplicable because the appropriation furthers a valid public purpose. The legislative declaration . . . emphasizes that it was compelled to establish the authority to meet critical needs in the areas of low and middle-income housing and to conserve scarce energy resources being consumed in inadequately designed and constructed housing.²⁹

As concluded above, a depository account does not create debt; "since no debt is created, there is no lending of credit."³⁰ Similarly, a state banking entity would not be a private corporation, so the creation of such an entity would "not fall within the policy of section 1"³¹ because there would be no mingling of public and private funds. Finally, a state banking entity would be created to promote the public purposes of, among others, creating new jobs, increasing employment, providing necessary services for the community, and increasing the tax base.³² Because these appear to be valid public purposes, there is no violation of article XI, section 1 of the Colorado Constitution.³³

Conclusion

The potentially applicable constitutional provisions do not appear to prohibit the creation of a state banking entity by statute. Given the general assembly's plenary authority and the presumption of constitutionality of duly enacted legislation, the general assembly would probably not need to refer a concurrent resolution to a vote of the people to create a state banking entity.

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²⁹ *Id.* (citations omitted).

³⁰ *Id.*

³¹ *Id.*

³² *See supra*, note 14.

³³ *See* the cases cited in the CHAFA case for the proposition that a valid public purpose insulates a statute from an argument that it violates Article XI, § 1: *McNichols v. City and County of Denver*, 131 Colo. 246, 280 P.2d 1096 (1955) (upholding the distribution of a retirement fund to the retirees as a valid exercise of the legislative power for a definite public purpose); *California Housing Finance Agency v. Elliott*, 17 Cal. 3d 575, 551 P.2d 1193 (CA 1976); *Minnesota Housing Finance Agency v. Hatfield*, 297 Minn. 155, 210 N.W.2d 298 (Minn. 1973); *West v. Tennessee Housing Development Agency*, 512 S.W.2d 275 (Tenn. 1974); *State ex rel. West Virginia Housing Development Fund v. Waterhouse*, 158 W. Va. 196, 212 S.E.2d 724 (WV 1974).