

3-15-2022

Washington Investment Trust: A Public Complement to Private Banking

Mynor Lopez

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/sjsj>

Recommended Citation

Lopez, Mynor (2022) "Washington Investment Trust: A Public Complement to Private Banking," *Seattle Journal for Social Justice*: Vol. 20 : Iss. 2 , Article 14.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol20/iss2/14>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons.

Washington Investment Trust: A Public Complement to Private Banking

Mynor Lopez

I. INTRODUCTION

A. *Why Do We Need a Public Bank?*

Small, minority-owned businesses, particularly Black-owned businesses, have traditionally been discriminated against by financial intermediaries such as banks and credit unions.¹ The financial landscape in Washington is no different despite the state's progressive image.² Local businesses are essential to marginalized communities' economic growth, development, and security.³ Small, minority-owned businesses are heavily impacted in today's current economic climate because the SARS-CoV-2⁴ (COVID-19) pandemic disproportionately impacts communities of color.⁵ Ensuring the

¹ See David G. Blanchflower et al., *Discrimination in the Small-Business Credit Market*, 85 REV. ECON. & STAT. 930, 932–33 (2003) (equity or collateral to secure a loan are typically large impediments to securing a loan).

² See COLETTE HOLT & ASSOCIATES, STATE OF WASHINGTON DISPARITY STUDY 2019 107 (2019) (minority-owned businesses are less likely to receive a loan than their white counterparts).

³ See, e.g., URB. CONSERVANCY & CIVIC ECON., THINKING OUTSIDE THE BOX 6–10 (Sept. 2009) (finding that small businesses in New Orleans recirculated money into the local economy more than the comparable big-box business); CIVIC ECON., INDIE IMPACT STUDY SERIES: A NATIONAL COMPARATIVE SURVEY WITH AMERICAN BOOKSELLERS ASSOCIATION 8 (2012) (finding that local businesses in Salt Lake City reinvested into the community at a greater rate than national stores).

⁴ SARS-CoV-2 is a novel coronavirus identified after its initial outbreak in Wuhan, China. *COVID-19, MERS & SARS*, NAT. INST. ALLERGY & DISEASE, <https://www.niaid.nih.gov/diseases-conditions/covid-19> [<https://perma.cc/QU8A-XF6B>].

⁵ Andre Dua et al., *COVID-19's effect on minority-owned small businesses in the United*, MCKINSEY & CO. (May 27, 2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19s-effect-on-minority-owned-small-businesses-in-the-united-states> [<https://perma.cc/SB6L-8GNG>].

survival of minority-owned businesses is necessary to insulate minority communities from the economic shock of the COVID-19 pandemic.

The Washington State Legislature should pass Senate Bill 5995 to create the Washington Investment Trust and expand its powers to include financing and originating loans under the Washington’s Linked Deposit Loan Program (LDLP), which could provide greater economic security to disenfranchised communities.⁶ Additionally, the legislature should increase the allocation of funds available for the LDLP for minority-, women-, and veteran-owned businesses. The legislature should also consider creating separate funding for firms that meet the criteria for a small business but are not minority-, women-, or veteran-owned.

Allowing the state to manage the disbursement of funds for the LDLP could significantly help alleviate the discriminatory practices that many small, minority-owned businesses face in securing loans to maintain and grow their businesses.⁷ The current LDLP program still requires that qualifying businesses meet a participating bank’s lending standards before receiving the benefits of the program.⁸ Implementing this program would allow the state to disburse loans that can provide small, minority-owned businesses with a government-run program that offers equitable financing outcomes for minority-, women-, and veteran-owned businesses.

Some may oppose the LDLP program because they will say it creates an inherent inequity by providing government-backed loans to specific groups of businesses that are unavailable to the remainder of the population.

⁶ Other states have created public banks to facilitate business in their states. *See, e.g.*, N.D. CENT. CODE § 6-09-01 (2021) (creating a state bank “[f]or the purpose of encouraging and promoting agriculture, commerce, and industry, the state of North Dakota shall engage in the business of banking”); AM. SAMOA CODE ANN. § 28.0206 (2017) (creating a state bank “to provide the residents of American Samoa with deposit, lending and investment opportunities, and to assist in the promotion of commerce and industry”).

⁷ *See, e.g.*, COLETTE HOLT & ASSOCIATES, *supra* note 2; Blanchflower et al., *supra* note 1.

⁸ *See* WASH. ADMIN. CODE § 326-02-030; WASH. ADMIN. CODE § 326-70-040.

However, this notion is unfounded because the legislature created the Office of Minority and Women’s Business Enterprises (OMWBE) to address inequitable public contracting outcomes.⁹ Additionally, the LDLP’s purpose is to “create jobs and economic opportunity as well as to remedy the problem of a lack of access to capital by minority and women’s business enterprises.”¹⁰ OMWBE and the LDLP program have existed for decades with no adverse effect on other groups.¹¹ One could argue that small, minority-owned businesses are not benefiting enough from these systems.¹² Current caps on the number of loans help to alleviate the risk of a significant default event. The program can require the state to use a portion of the generated income from interest on these loans to create a capital liquidity fund to protect against default issues. Also, others will contest that the financial sector is, and should remain, privately run without governmental interference, but the private sector can fail to address specific needs like financing minority-owned businesses.

B. Where Are We Going?

The second section of this comment covers the current landscape regarding the COVID-19 pandemic, the Coronavirus Aid, Relief, and Economic Security (CARES) Act, and Washington programs, which have not led to sufficient economic protections for small, minority-owned businesses. This section will also provide a background of the LDLP, OMWBE, and certification qualifications for the Minority Business Enterprise (MBE) program. More specifically, this section will look at the

⁹ See WASH. REV. CODE § 39.19.010 (2020).

¹⁰ WASH. REV. CODE § 43.86A.030 note (2020).

¹¹ COLETTE HOLT & ASSOCIATES, *supra* note 2, at 12 (finding white-owned firms to be adequately represented in contracting).

¹² *Id.* at 17 (“While some firms owned by ethnic and racial minorities and White women have successfully obtained State work, barriers remain for most M/WBEs to fair and open markets. Most have not been able to overcome the ‘market failure’ of discrimination”).

nuances of the program and how the certification process does or does not sufficiently incentivize the registration of small, minority-owned businesses to participate in the program. This program is especially significant in light of Initiative 200 (I-200), a statewide initiative that eliminated affirmative action in the state of Washington, and its anti-affirmative action impacts. The final portion of this section will briefly review the historical and current climate of public banking and the Washington Investment Trust legislation.

The third section of this comment will explore the recommendations regarding the Washington Investment Trust, including allowing the Trust to generate loans for the LDLP, to retain a portion of the interest generated to properly insure against losses, to create different siloed funds for the LDLP program, and to provide adequate safeguards for small, minority-owned businesses in the loan decision process. The fourth and final section will summarize the recommendations and key takeaways for policymakers to consider in their decision-making processes.

II. BACKGROUND

Small businesses are reeling from the impacts of COVID-19 even though the federal government disbursed small business supports.¹³ Small, minority-owned businesses are less likely to have the economic stability to withstand significant business disruptions for months.¹⁴

A. A National Pandemic, a Nuanced Response

COVID-19 became a national crisis for the United States beginning in March of 2020. By December 2021, the United States alone had over 49

¹³ Ruth Simon, *Covid-19's Toll on U.S. Business? 200,000 Extra Closures in Pandemic's First Year*, WALL ST. J. (April 16, 2021, 9:43 AM), <https://www.wsj.com/articles/covid-19s-toll-on-u-s-business-200-000-extra-closures-in-pandemics-first-year-11618580619> [https://perma.cc/RR9M-VLXP].

¹⁴ Andre Dua et al., *supra* note 5.

million cases of COVID-19 and over 780,000 deaths.¹⁵ The United States has accounted for roughly 21% of COVID-19 cases and nearly 20% of COVID-19 related deaths worldwide.¹⁶ Every state in the United States had some form of a stay-at-home order, a lockdown restriction requiring people to remain in their home except for essential work or items, and, in some cases, a reversal in re-openings to protect the public from the virus.¹⁷ In November of 2020, some jurisdictions reissued stay-at-home orders because of a significant spike in COVID-19 cases nationwide during the fall of 2020.¹⁸

As a result of these COVID-19 restrictions, many businesses closed their doors to comply with state stay-at-home orders.¹⁹ These closures caused a significant contraction of the national economy in the United States.²⁰ The First Quarter of 2020 saw a 3.4% decrease in real Gross Domestic Product (GDP), and the Second Quarter of 2020 resulted in an estimated 31.4%

¹⁵ *CDC COVID Data Tracker*, CTRS. FOR DISEASE CONTROL, https://covid.cdc.gov/covid-data-tracker/#cases_totalcases [https://perma.cc/L5U7-24N7]. Note that the proper interpretation of the reported COVID-19 cases in the United States has been questioned. *See, e.g.*, Alexis C. Madrigal & Robinson Meyer, *How Could the CDC Make That Mistake?*, THE ATLANTIC (May 21, 2020), <https://www.theatlantic.com/health/archive/2020/05/cdc-and-states-are-misreporting-covid-19-test-data-pennsylvania-georgia-texas/611935/> [https://perma.cc/WNL3-TYR3]; Hannah C., *CDC Death Count Accuracy Misinterpreted*, THE SCIENCE TIMES (Sept. 1, 2020, 7:30 AM), <https://www.sciencetimes.com/articles/27118/20200901/cdc-death-count-accuracy-misinterpreted.htm> [https://perma.cc/K4CR-R5ZF].

¹⁶ *See CDC COVID Data Tracker*, *supra* note 15; *WHO Coronavirus Disease (COVID-19) Dashboard*, WORLD HEALTH ORG. [WHO], <https://covid19.who.int/table> [https://perma.cc/6RHB-VLDG].

¹⁷ *See How All 50 States Are Reopening (and Closing Again)*, N.Y. TIMES (Oct. 1, 2020), <https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html> [https://perma.cc/Z9BH-YRRC].

¹⁸ Dustin Jones, *Cities And States Are Imposing New COVID-19 Restrictions. Experts Say It's Not Enough*, NPR (Nov. 13, 2021, 3:30 PM) <https://www.npr.org/2020/11/13/933561136/cities-and-states-are-imposing-new-covid-19-restrictions-experts-say-its-not-eno> [https://perma.cc/Z8F9-K488].

¹⁹ Simon, *supra* note 13.

²⁰ Reade Pickert et al., *U.S. Recovery Sustains Positive Momentum as Economy Reopens*, BLOOMBERG (Mar. 8, 2021, 1:00 PM), <https://www.bloomberg.com/graphics/recovery-tracker/> [https://perma.cc/5FDK-4CXT].

decrease in real GDP.²¹ This economic loss was the worst on record in the United States²² and—similar to many other countries—caused international concerns of another economic retraction on the scale of the Great Recession.²³

In response to this economic fallout, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act in March of 2020.²⁴ This bill provided financial support for individuals through increased unemployment benefits and an income-adjusted stimulus check for individuals.²⁵ The CARES Act also provided support to small businesses through the Payment Protection Program (PPP), which provided loan payment assistance to qualified small businesses to encourage employee

²¹ *Gross Domestic Product (Third Estimate), Corporate Profits (Revised), and GDP by Industry, Second Quarter 2020 BEA 20-48*, U.S. DEP'T COM. BUREAU ECON. ANALYSIS (Sept. 30, 2020, 8:30 AM), <https://www.bea.gov/news/2020/gross-domestic-product-third-estimate-corporate-profits-revised-and-gdp-industry-annual> [<https://perma.cc/5PXM-NRDJ>].

²² Scott Horsley, *3 Months of Hell: U.S. Economy Drops 32.9% In Worst GDP Report Ever*, NPR (July 30, 2020, 5:00 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/07/30/896714437/3-months-of-hell-u-s-economys-worst-quarter-ever> [<https://perma.cc/ZP7G-8FRM>]; Anneken Tappe, *US economy posts its worst drop on record*, CNN BUS. (July 31, 2020, 1:02 PM), <https://www.cnn.com/2020/07/30/economy/us-economy-2020-second-quarter/index.html> [<https://perma.cc/78U2-UPDA>]; Matthew Brown, *Fact Check: U.S. GDP drop in 2020's second quarter is the worst in modern history*, USA TODAY (Aug. 8, 2020, 9:10 AM), <https://www.usatoday.com/story/news/factcheck/2020/08/08/fact-check-u-s-quarterly-gdp-drop-worst-modern-history/5569089002/> [<https://perma.cc/P5ER-9R67>].

²³ See, e.g., Kaori Enjoji, *Japan suffers worst GDP fall on record, but it fared better than others*, CNN BUS. (Aug. 17, 2020, 4:48 AM), <https://www.cnn.com/2020/08/16/economy/japan-economy-gdp/index.html> [<https://perma.cc/V73J-RKLS>]; Eleanor Ainge Roy, *New Zealand in COVID recession after worst quarterly GDP fall on record*, THE GUARDIAN (Sept. 16, 2020, 9:15 PM), <https://www.theguardian.com/world/2020/sep/17/new-zealand-in-covid-recession-after-worst-quarterly-gdp-fall-on-record> [<https://perma.cc/T3XB-VBSM>]; *Spain's second-quarter GDP falls less than expected, still worst decline on record*, REUTERS (Sept. 23, 2020, 2:10 AM), <https://www.reuters.com/article/idUSKCN26E1E2> [<https://perma.cc/8HZY-7TLX>].

²⁴ 15 U.S.C. §§ 9001–9080.

²⁵ 15 U.S.C. § 9023; 26 U.S.C. § 6428(a).

retention on the company payroll.²⁶ But this program was soon steeped in controversy as PPP loans became an epicenter of fraud; false applications were submitted, resulting in millions of dollars in disbursements to non-eligible, or even fake, businesses.²⁷

In addition to small business supports, the CARES Act provided federal unemployment support until it ran to its end in July of 2020.²⁸ In response, President Donald Trump issued a memorandum directing federal agencies to provide support for unemployment claims,²⁹ and in March of 2021, Congress and President Joe Biden passed further COVID-19 aid in the amount of \$1.9 trillion.³⁰

In tandem with the federal government, Washington is attempting to limit the economic damage due to the pandemic within the state. In January of 2020, Washington became the first state with a confirmed COVID-19 case in the United States.³¹ On February 29, 2020, Governor Jay Inslee

²⁶ See 15 U.S.C. § 636(a)(36).

²⁷ See Megan Henney, *Feds ramp up probe into PPP fraud, charge 57 people with trying to steal \$175M*, FOX BUS. (Sept. 10, 2020), <https://www.foxbusiness.com/economy/justice-department-paycheck-protection-program-fraud-charges> [<https://perma.cc/LVW9-NADF>]; Thomas Franck, *Companies returned \$30 billion in small-business loans from Paycheck Protection Program*, CNBC (July 6, 2020, 11:16 AM), <https://www.cnbc.com/2020/07/06/companies-returned-30-billion-in-small-business-loans-from-ppp.html> [<https://perma.cc/2KPK-4G4J>]; Aaron Gregg, *Publicly traded firms paid dividends, bought their own stock after receiving PPP loans to pay employees*, WASH. POST (Sept. 24, 2020, 3:35 PM), <https://www.washingtonpost.com/business/2020/09/24/dividends-buybacks-ppp-loans/> [<https://perma.cc/7BPD-GRYG>].

²⁸ See 15 U.S.C. § 9023(e)(1) (original CARES funding, provided through July 2020, was extended by Congress in December of 2020).

²⁹ Memoranda from President Donald J. Trump to the Sec'y Lab., Sec'y Homeland Sec., and Adm'r Fed. Emergency Mgmt. Agency (Aug. 8, 2020) (on file with author).

³⁰ Jacob Pramuk, *Biden signs \$1.9 trillion Covid relief bill, clearing way for stimulus checks, vaccine aid*, CNBC (Mar. 11, 2021, 12:30 PM), <https://www.cnbc.com/2021/03/11/biden-1point9-trillion-covid-relief-package-thursday-afternoon.html> [<https://perma.cc/GJ79-8H8W>].

³¹ Michelle L. Holshue et al., *First Case of 2019 Novel Coronavirus in the United States*, 382 N. ENGL. J. MED. 929, 929 (2020). However, there are other states which had individuals with symptoms similar to COVID-19 prior to the first confirmed case in Washington. See Mike Baker, *When Did the Coronavirus Arrive in the U.S.? Here's a*

declared a state of emergency as COVID-19 began to spread in Washington.³² Following that declaration, Governor Inslee later restricted gatherings, closed public K–12 schools statewide, instituted a statewide eviction moratorium, and instituted a stay-at-home order.³³ These restrictions required that only essential businesses remain open and operate under strict guidelines to limit COVID-19 exposure.³⁴ These orders helped drastically reduce daily hospitalizations and deaths but also impacted local small businesses.³⁵ These changes drastically impacted local businesses, raising concerns of widespread economic damage in the state and

Review of the Evidence, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/05/15/us/coronavirus-first-case-snohomish-antibodies.html> [https://perma.cc/U2QN-Q9VX].

³² WASH. PROCLAMATION BY THE GOVERNOR NO. 20-05 (Feb. 29, 2020), <https://www.governor.wa.gov/sites/default/files/proclamations/20-05%20Coronavirus%20%28final%29.pdf> [https://perma.cc/L9B3-6TKB].

³³ WASH. PROCLAMATION BY THE GOVERNOR NO. 20-07 (Mar. 11, 2020), <https://www.governor.wa.gov/sites/default/files/proclamations/20-07%20Coronavirus%20%28tmp%29.pdf> [https://perma.cc/24X9-9ERG] (restriction on gatherings); WASH. PROCLAMATION BY THE GOVERNOR NO. 20-09 (Mar. 13, 2020),

<https://www.governor.wa.gov/sites/default/files/proclamations/20-09%20Coronavirus%20Schools%20Amendment%20%28tmp%29.pdf> [https://perma.cc/WK49-QR6S] (closing K-12 schools); WASH. PROCLAMATION BY THE GOVERNOR NO. 20-19 (Mar. 18, 2020),

<https://www.governor.wa.gov/sites/default/files/proclamations/20-19%20-%20COVID-19%20Moratorium%20on%20Evictions%20%28tmp%29.pdf> [https://perma.cc/7MCY-N6WN] (eviction moratorium); WASH. PROCLAMATION BY THE GOVERNOR NO. 20-25 (Mar. 23, 2020),

<https://www.governor.wa.gov/sites/default/files/proclamations/20-25%20Coronavirus%20Stay%20Safe-Stay%20Healthy%20%28tmp%29%20%28002%29.pdf> [https://perma.cc/B3LK-B6MQ] (stay-at-home order).

³⁴ See *COVID-19 Reopening Guidance for Businesses and Workers*, WASH. OFF. GOVERNOR, <https://www.governor.wa.gov/issues/issues/covid-19-resources/covid-19-reopening-guidance> [https://perma.cc/XHE6-A33Y].

³⁵ See *COVID-19 Data Dashboard*, WASH. DEPT. HEALTH, <https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard> [https://perma.cc/BD52-T4AD] (scroll down to “Roadmap to Recovery Reports,” click the dropdown menu, then click “Roadmap to Recovery Metrics before January 8, 2021 (XSLX)”).

significant budget shortfalls.³⁶ The economic impact on the state economy was severe enough for Governor Inslee to release a myriad of grants, loans, and funds to help support the economy.³⁷

Despite these economic and safety protections, Black people, Indigenous people, and people of color have disproportionately bore the impact of the COVID-19 pandemic.³⁸ Nationally, Native Americans, Black people, and Latinx individuals are more likely to contract the virus and roughly three times more likely to be hospitalized.³⁹ Black people are nearly two times

³⁶ See, e.g., Alexis Krell, *New tool shows economic impact of COVID-19 across Washington state*, THE NEWS TRIBUNE (Sept. 22, 2020, 05:45 PM), <https://www.thenewstribune.com/news/coronavirus/article245897890.html> [<https://perma.cc/XK2F-JBV3>]; Melissa Santos, *Why WA leaders aren't rushing to address state's budget shortfall*, CROSSCUT (Aug. 28, 2020), <https://crosscut.com/politics/2020/08/why-wa-leaders-arent-rushing-address-states-budget-shortfall> [<https://perma.cc/MX3A-PHMM>]; Press Release, Jay Inslee, Wash. Off. Governor, Inslee announces cancellation of some state employee raises and need for furloughs (June 17, 2020) <https://www.governor.wa.gov/news-media/inslee-announces-cancellation-some-state-employee-raises-and-need-furloughs> [<https://perma.cc/8LQH-2YS2>].

³⁷ See, e.g., Press Release, Jay Inslee, Wash. Off. Governor, Inslee, Department of Commerce Announce Support for Small Businesses (Apr. 7, 2020) <https://www.governor.wa.gov/news-media/inslee-department-commerce-announce-support-small-businesses> [<https://perma.cc/6TBP-ERWJ>]; Press Release, Jay Inslee, Wash. Off. Governor, Inslee and DFI Announce Assistance for Homeowners Unable to Make Mortgage Payments (Mar. 31, 2020) <https://www.governor.wa.gov/news-media/inslee-and-dfi-announce-assistance-homeowners-unable-make-mortgage-payments> [<https://perma.cc/DBQ2-GHWQ>].

³⁸ See Daniel Wood, *As Pandemic Deaths Add Up, Racial Disparities Persist – And in Some Cases Worsen*, NPR (Sept. 23, 2020, 1:01 PM), <https://www.npr.org/sections/health-shots/2020/09/23/914427907/as-pandemic-deaths-add-up-racial-disparities-persist-and-in-some-cases-worsen> [<https://perma.cc/7KQH-SXKT>]; *Health Equity Considerations & Racial & Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL (July 24, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html> [<https://perma.cc/6MWY-JTKS>] [hereinafter *Health Equity Considerations*]; Ibram X. Kendi, *What the Racial Data Show*, THE ATLANTIC (Apr. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/coronavirus-exposing-our-racial-divides/609526/> [<https://perma.cc/78RM-XZV8>].

³⁹ CDC COVID Data Tracker, *supra* note 15.

more likely to die after contracting COVID-19.⁴⁰ In Washington, in cases where race and ethnicity data are available, Latinx people, Black people, Pacific Islanders, and Native Americans are disproportionately impacted by COVID-19 infection.⁴¹ The disparities at both levels are caused by racist–systemic barriers that create disproportionalities in employment, healthcare access, and insurance coverage that hinder Black people, Indigenous people, and people of color from accessing healthcare and social safety nets.⁴²

In addition to the individual outcomes, COVID-19 heavily impacted businesses owned by Black people, Indigenous people, and people of color.⁴³ Although the federal government distributed millions of dollars in PPP loans to businesses, “PPP loans varied considerably based on neighborhood demographics, with small businesses in majority-white neighborhoods receiving PPP loans more quickly than small businesses in majority-Black and majority-Latino or Hispanic neighborhoods.”⁴⁴ The distribution of PPP loans predominantly relied on traditional financial intermediaries such as banks and credit unions that favored current clients in distributing funds.⁴⁵ However, Black- and Latinx-owned businesses are less likely to bank with a traditional financial intermediary.⁴⁶ Among small businesses nationwide, “loan denial rates for minority-owned firms were

⁴⁰ *Id.*

⁴¹ See *COVID-19 Data Dashboard*, *supra* note 35.

⁴² *Health Equity Considerations*, *supra* note 38.

⁴³ Andre Dua et al., *supra* note 5.

⁴⁴ Sifan Liu & Joseph Parilla, *New Data Shows Small Businesses in Communities of Color had Unequal Access to Federal COVID-19 Relief*, BROOKINGS (Sept. 17, 2020), <https://www.brookings.edu/research/new-data-shows-small-businesses-in-communities-of-color-had-unequal-access-to-federal-covid-19-relief/> [https://perma.cc/9S2Q-SMBX]; see also Andy Medici, *Hundreds of Thousands of Small Businesses Got Shortchanged on SBA Economic Injury Loans*, WASH. BUS. J. (Oct. 2, 2020, 2:54 PM), <https://www.bizjournals.com/washington/news/2020/10/02/sba-eidl-loans-gao-small-business-shortchanged.html> [https://perma.cc/LR54-QZFU].

⁴⁵ Liu & Parilla, *supra* note 44.

⁴⁶ FED. RESERVE, 2020 REPORT ON EMPLOYER FIRMS: SMALL BUSINESS CREDIT SURVEY 9 (2020).

about three times higher” than the denial rates for non-minority firms.⁴⁷ Many of the financial barriers faced by Black people, Indigenous people, and people of color stem from traditional discriminatory practices in banking and lending.⁴⁸

Despite these racist impediments to businesses owned by Black people, Indigenous people, and people of color, the U.S. Department of Commerce found the following:

Minority businesses enterprises (MBEs) contribute substantially to the U.S. economy. Businesses owned by minorities produced \$661 billion in gross receipts in 2002, and their growth rate in total gross receipts far outpaced the growth rate for non-minority-owned businesses between 1997 and 2002. In 2002, minority firms employed a workforce of 4.7 million people with an annual payroll of \$115 billion. These jobs are located across the nation, many in emerging communities and employing a large proportion of minorities. Another contribution that is often overlooked, however, is that minority business owners create an additional four million jobs for themselves.⁴⁹

In Washington, minority-owned businesses are less likely to receive a loan than their white-owned counterparts;⁵⁰ even if a minority-owned firm can secure financing, it is typically for fewer funds and higher interest rates.⁵¹

⁴⁷ *Id.*

⁴⁸ Black owned businesses bear the disproportionate brunt of loan denial. See Blanchflower, *supra* note 1, at 932–33 (2003). Traditional racist redlining has hamstrung Black businesses. See *id.* In 2010, the U.S. Department of Commerce came to similar conclusions regarding capital limits for minority-owned businesses. Robert W. Fairlie & Alicia M. Robb, U.S. DEP’T. OF COM., DISPARITIES IN CAPITAL ACCESS BETWEEN MINORITY AND NON-MINORITY-OWNED BUSINESSES: THE TROUBLING REALITY OF CAPITAL LIMITATIONS FACED BY MBES 51 (Jan. 2010), <https://www.mbda.gov/sites/default/files/migrated/files-attachments/DisparitiesinCapitalAccessReport.pdf> [<https://perma.cc/68FD-T474>].

⁴⁹ Fairlie & Robb, *supra* note 48, at 7.

⁵⁰ COLETTE HOLT & ASSOCIATES, *supra* note 2.

⁵¹ *Id.* (“[Minority-Owned Businesses] paid 7.8 percent on average for loans compared with 6.4 percent for non-[Minority-Owned Businesses]”).

The traditional saying that small businesses are the “lifeblood of the economy” is even more pronounced in Black communities, Indigenous communities, and communities of color because small businesses are more likely to reinvest funds in their communities rather than a larger chain or national businesses.⁵²

The lack of targeted COVID-19 aid from both the federal and state governments due to impasses in Congress and Washington State’s funding issues left minority-owned businesses in dire financial situations where recovery will be difficult, if not impossible.⁵³ Minority-owned businesses in Washington need economic support from a source that will not discriminate against them and will allow them to weather extended closures. Creating a financial support system for minority-owned businesses is crucial and allowing a state-financed LDLP can help alleviate some of the economic constraints on minority-owned businesses.

B. Washington’s Linked Deposit Loan Program

The LDLP was created in Washington in 1993 through the Minority and Women-Owned Business Assistance Act.⁵⁴ In passing the Act, the legislature intended to “combat discrimination in the economy” and found that discrimination is responsible for a disproportionately small number of minority-owned businesses, limited opportunities for minority-owned businesses to secure financing, and obstacles in securing bonds and contract work with the state.⁵⁵ The State Treasurer’s Office runs the program, and OMWBE certifies a firm’s small, minority-owned business status.⁵⁶

⁵² See, e.g., URB. CONSERVANCY & CIVIC ECON., *supra* note 3, at 6–10 (finding that local small, businesses in New Orleans recirculated money into the local economy more than the comparable big-box business); CIVIC ECON., *supra* note 3, at 8 (finding that local businesses in Salt Lake City reinvested into the community at a greater rate than national stores).

⁵³ Andre Dua et al., *supra* note 5.

⁵⁴ See Engrossed Substitute H.B. 1493, 53d Leg., Reg. Sess. (Wash. 1993).

⁵⁵ *Id.*

⁵⁶ *Id.*

OMWBE helps facilitate minority-owned businesses participation in public contracting.⁵⁷ The agency also provides technical assistance and guidance to minority-owned businesses.⁵⁸

For a firm to qualify for the LDLP, a business must possess one of the following state certifications: Minority Business Enterprise (MBE), Woman's Business Enterprise (WBE), Combined Business Enterprise (CBE), or a Minority Women's Business Enterprise (MWBE).⁵⁹ Each of these certifications requires that the owner of the business (1) retain 51% ownership and control of the business;⁶⁰ (2) be a socially disadvantaged person; (3) have a personal net worth lower than \$1.32 million; and (4) have a business that meets the small business definition for a specific North American Industrial Classification System (NAICS) code, which outlines the maximum number of employees and revenue a firm can have before no longer being a small business.⁶¹ The program also has funding available to veteran-owned businesses certified by the Department of Veteran Affairs (DVA), but this comment will focus on OMWBE certified firms.⁶² In

⁵⁷ *About Us*, OFF. MINORITY WOMEN'S BUS. ENTERPRISES, <https://omwbe.wa.gov/about-omwbe> [<https://perma.cc/2PVX-QNSG>].

⁵⁸ *Small Business Guide*, OFF. MINORITY WOMEN'S BUS. ENTERPRISES, <https://omwbe.wa.gov/small-business-guide> [<https://perma.cc/2PVX-QNSG>].

⁵⁹ *See Linked Deposit Loan Program*, OFF. MINORITY WOMEN'S BUS. ENTERS., <https://omwbe.wa.gov/small-business-assistance/money-loans/access-capital-access-money/linked-deposit-loan-program> [<https://perma.cc/KF47-TT49>] (list of 11 participating banks); *see also* WASH. ADMIN. CODE §§ 326-20-035, 045, 046, 047, 049, 050, 080, 081, 094, 099.

⁶⁰ Except CBEs, which are 50-50 ownerships between a socially disadvantaged person and a non-socially disadvantaged person.

⁶¹ *See* WASH. ADMIN. CODE §§ 326-20-035, 045, 046, 047, 049, 050, 080, 081, 094, 099.

⁶² *See* WASH. ADMIN. CODE § 484-60-015; WASH. REV. CODE § 43.86A.060 (2009). Note for purposes of this comment: other than a recommended increase in the funds available for Veteran-Owned Businesses (VOB), VOBs will be excluded from consideration in this comment. Additionally, although OMWBE has federal certifications pursuant to federal law, the LDLP explicitly requires state certification. WASH. REV. CODE § 43.86A.060(1)(c)(i) (2009). This restriction exists because OMWBE's Small Business Enterprise (SBE) certification does not require the owner to be a minority or a

addition to requiring state certification, the business must have secured a loan through one of the eleven participating banks.⁶³ The loans must meet specific requirements to qualify for the program: (1) a loan may not exceed more than one million dollars; (2) a business must have a lifetime limit of five million dollars in total loans through the program; and (3) an owner of multiple certified businesses must have a lifetime limit of five million dollars in total loans.⁶⁴ Currently, there is no limit on the number of loans a business can have in the program if the business is compliant with filing and loan limit requirements.⁶⁵ Additionally, OMWBE retains the authority to prioritize loans for first-time applicants to the program when funds become available.⁶⁶

Once a firm qualifies and has secured its loan with an approved bank, the owner may apply to participate in the LDLP.⁶⁷ Upon approval of the firm's program participation and fund availability, the State Treasury disburses funds totaling the loan amount directly to the depository institution, and the business will receive a discount of 200 basis points, or 2%, on the interest rate of the loan.⁶⁸ The discount cannot result in a negative interest rate but the law does not explicitly prohibit an interest rate of zero.⁶⁹

Despite the benefits of programs such as the LDLP and certification with OMWBE, many minority businesses do not certify or do not find

woman. *See Federal Certification*, OFF. MINORITY WOMEN'S BUS. ENTERS., <https://omwbe.wa.gov/certification/federal-certification> [<https://perma.cc/XRN3-JMQ9>].

⁶³ *See* WASH. REV. CODE § 43.86A.060 (2009); *Linked Deposit Loan Program*, OFF. MINORITY WOMEN'S BUS. ENTERS. <https://omwbe.wa.gov/small-business-assistance/money-loans/access-capital-access-money/linked-deposit-loan-program> [<https://perma.cc/KF47-TT49>] (list of 11 participating banks).

⁶⁴ WASH. ADMIN. CODE § 326-70-035.

⁶⁵ *Id.*

⁶⁶ *See* WASH. ADMIN. CODE § 326-70-050 (2008); WASH. REV. CODE § 43.86A.060 (2009).

⁶⁷ WASH. ADMIN. CODE § 326-70-040.

⁶⁸ *See* WASH. REV. CODE § 43.86A.060.

⁶⁹ *See id.*

certification particularly helpful in government contracting.⁷⁰ This perspective is reinforced mainly by Washington's Initiative 200 (I-200) because it explicitly bans affirmative action in state contracting.⁷¹ The proponents advertised the law as an anti-discrimination policy, but the initiative constricts affirmative action policies in the state.⁷² Since the implementation of I-200, Washington has not implemented race-conscious contracting goals, which resulted in firms not renewing their certification because of the perception that certification stigmatizes firms.⁷³ As a result of these non-renewals, contracting inclusion rates for certain groups fell below the federal threshold to be considered evidence of disparate impact.⁷⁴ In response to demands from the Washington Civil Rights Coalition,⁷⁵ Governor Inslee committed to increasing the inclusion of minority-owned businesses in state contracting.⁷⁶ Two years after that announcement, Director Chris Liu of the Department of Enterprise Services requested an opinion from Attorney General Bob Ferguson regarding I-200:

⁷⁰ See COLETTE HOLT & ASSOCIATES, *supra* note 2, at 3.

⁷¹ See WASH. REV. CODE § 49.60.400 (I-200 codified in law). However, Governor Jay Inslee ordered that state agencies begin tracking and reporting inclusion rates of minority-owned business and implementing tools to increase equity in state contracting. WASH. EXECUTIVE ORDER BY THE GOVERNOR NO. 22-01 (Jan. 7, 2022), https://www.governor.wa.gov/sites/default/files/exe_order/22-01%20-%20Equity%20in%20Public%20Contracting.pdf [<https://perma.cc/Y2MU-JT2Y>].

⁷² John Carlson, *I Helped Get Affirmative Action Banned in WA. Here's What I Think of the Plan to Bring it Back*, CROSSCUT (Apr. 25, 2019), <https://crosscut.com/2019/04/i-helped-get-affirmative-action-banned-wa-heres-what-i-think-plan-bring-it-back> [<https://perma.cc/L5SH-2KAF>].

⁷³ See COLETTE HOLT & ASSOCIATES, *supra* note 2, at 42–44.

⁷⁴ *Id.* at 109.

⁷⁵ Wash. State Civ. Rts. Coal., *Letter to Gov. Inslee: Discrimination in Contracting Demands Lawsuit*, SKANNER (Apr. 28, 2015), <https://www.theskanner.com/news/northwest/22654-letter-to-gov-inslee-discrimination-in-contracting-demands-lawsuit> [<https://perma.cc/U3FM-56TX>]; Press Release, Jay Inslee, Wash. Off. Governor, Inslee, Inslee creates subcabinet to boost business diversity (Aug. 4, 2015) <https://www.governor.wa.gov/news-media/inslee-creates-subcabinet-boost-business-diversity> [<https://perma.cc/46RF-BR3C>].

⁷⁶ *Id.*

Initiative 200 prohibit[s] the state from implementing race- or sex-conscious measures to address significant disparities in the public contracting sector that are documented in a disparity study if it is first determined that race- and sex-neutral measures will be insufficient to address those disparities? [And,] . . . [d]oes the answer to the first question depend on whether the contracts at issue are being awarded by a state agency that receives federal funds and is therefore subject to Title VI of the federal Civil Rights Act of 1964?⁷⁷

To which Attorney General Ferguson responded as follows:

Initiative 200 does not categorically prohibit all uses of race- or sex-conscious measures in state contracting. The measure allows the use of measures that take race or gender into account in state contracting without elevating a less qualified contractor over a more qualified contractor. In narrow circumstances, an agency may be allowed to use a narrowly tailored preference based on race or sex when no other means is available to remedy demonstrated discrimination in state contracting. State agencies may also employ race- or sex-based preferences when necessary to do so in order to avoid losing eligibility for programs providing federal funds.

The conclusions summarized above do not solely depend on whether an agency receives federal funds. The conclusion that Initiative 200 allows race- or sex-conscious measures that do not amount to preferences applies without regard to whether the agency receives federal funds. The conclusion that agencies may use preferences based on race or sex in order to remedy sufficiently documented discrimination in state contracting also applies without regard to whether the agency receives federal funds. The conclusion that an agency may employ a preference when necessary to do so in order to avoid the loss of eligibility for

⁷⁷ Wash. Att’y Gen., Opinion Letter on Use of Race- or Sex-Conscious Measures or Preferences to Remedy Discrimination in State Contracting (Mar. 20, 2017).

federal funds necessarily depends upon the agency's receipt of federal funds in that program or some other program.⁷⁸

To help expedite the state's work and provide a clear path toward race-conscious contracting, community members introduced Initiative 1000 (I-1000) to soften the language of I-200 and allow for some race-based goals;⁷⁹ however, in an effort to block I-1000, Referendum 88 defeated the initiative in 2019.⁸⁰

Strengthening the LDLP can increase the number of OMWBE certified firms. Increasing incentives for firm certification will have a proxy effect of expanding the pool of certified firms for public contracting and providing local minority-owned businesses with funds to grow, which will eventually infuse their communities with more capital. Though the statewide disparity study suggests providing bonding guarantees for public contracting,⁸¹ a broad lending approach and a restructuring of the LDLP may encourage small, minority-owned firms to participate sooner in public contracting by directly increasing their capacity for work rather than simply eliminating a single barrier. Leveraging a public bank's benefits can help create a significant incentive for minority-owned businesses to certify with OMWBE.

C. Public Banking Historically

Public banking is not a novel idea in the United States.⁸² Alexander Hamilton, John Jay, and James Madison advocated for a strong federal

⁷⁸ *Id.*

⁷⁹ Joseph O'Sullivan, *Washington Voters Narrowly Rejecting Affirmative Action in Referendum 88*, SEATTLE TIMES (Nov. 6, 2019, 10:16 AM), <https://www.seattletimes.com/seattle-news/politics/election-results-2019-referendum-88-affirmative-action-washington-state/> [https://perma.cc/Q3SZ-SM3A].

⁸⁰ *Id.*

⁸¹ See COLETTE HOLT & ASSOCIATES, *supra* note 2, at 136.

⁸² See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (allowing a national public bank); N.D. CENT. CODE § 6-09-01 (2021) (establishment of the Bank of North Dakota, a public bank under state charter).

government in the Federalist Papers.⁸³ In his role as Secretary of the Treasury, Hamilton believed that a strong central bank and public depository were inherent in the federal government's powers and advocated for the creation of the First Bank of the United States after the ratification of the Constitution.⁸⁴ The First Bank received significant support amongst framers of the Constitution: “[T]wenty-one [of the Founding Fathers who] were in the first federal government, including President Washington, Treasury Secretary Hamilton, Attorney General Randolph, ten senators, and eight members of the House of Representatives. Of those twenty-one men, sixteen supported the Bank, and five opposed it.”⁸⁵

The First Bank was crucial in establishing lending needs in the country and creating a national currency.⁸⁶ Congress failed to renew the First Bank's charter before its expiration in 1811, which created a gap until its renewal in 1816.⁸⁷ During that time, state banks filled the financial institution gap, and by the time Congress rechartered the Bank of the United States, the states chartered over 700 banks.⁸⁸ The Bank of the United States eventually came under the criticism of President Andrew Jackson (who was highly skeptical of banks and the banking industry at large) and Congress allowed the bank's charter to lapse in 1836.⁸⁹

Today, public banking has become a resurgent issue at the federal level as former presidential candidates, Senator Bernie Sanders and Senator Elizabeth Warren, both advocated for remaking post offices into basic

⁸³ See THE FEDERALIST NO. 21 (Alexander Hamilton).

⁸⁴ See Michael Coblenz, *The Fight Goes on Forever: “Limited Government” and the First Bank of the United States*, 39 S. ILL. U. L. J. 391, 405 (2015).

⁸⁵ *Id.* at 438.

⁸⁶ See Jerry W. Markham, *Banking Regulation: Its History and Future*, 4 N.C. BANKING INST. 221, 224 (2015).

⁸⁷ Coblenz, *supra* note 84, at 440–41.

⁸⁸ See Markham, *supra* note 86, at 224–26.

⁸⁹ See *The War Against the Bank*, USHISTORY, <https://www.ushistory.org/us/24d.asp> [<https://perma.cc/3C4B-EEZY>].

deposit banks.⁹⁰ This change would allow every person in the country to utilize a local post office to meet their basic checking needs.⁹¹ Moreover, Representative Rashida Tlaib and Representative Alexandria Ocasio-Cortez co-sponsored the Public Banking Act.⁹² The Public Banking Act would create a federal charter for “public lending banks and public payment banks.”⁹³ The bill would facilitate the creation of public banks at the state and local levels of government by alleviating many of the barriers to entry into the federal payments system, creating an incubator program, and granting funding for local bank development.⁹⁴

Public banks also exist at the state level. The Bank of North Dakota (BND) and the Territorial Bank of American Samoa (TBAS) were both created to fill financial gaps in their respective locales.⁹⁵ North Dakota’s legislature created the BND in 1919 to respond to the state’s agriculture-based economic needs.⁹⁶ The BND served as a financial institution during the Great Depression to help keep the economy of North Dakota stable.⁹⁷ The BND foreclosed on land in the state, but it allowed the original owners

⁹⁰ See Senator Elizabeth Warren, *Coming to a Post Office Near You: Loans You Can Trust?*, HUFFPOST (Apr. 3, 2014), https://www.huffpost.com/entry/coming-to-a-post-office-n_b_4709485 [<https://perma.cc/V3ZG-8EBE>]; *Fair Banking for All*, SEN. BERNIE SANDERS, <https://berniesanders.com/issues/fair-banking-for-all/> [<https://perma.cc/VE37-VXBL>].

⁹¹ See SANDERS, *supra* note 90.

⁹² Public Banking Act, H.R. Res. 8721, 116th Cong. (2020).

⁹³ H.R. Res. 8721.

⁹⁴ See Emily Stewart, *Exclusive: Rashida Tlaib and AOC Have a Proposal for a Fairer, Greener Financial System — Public Banking*, VOX (Oct. 30, 2020, 12:57 PM), <https://www.vox.com/policy-and-politics/21541113/rashida-tlaib-aoc-public-banking-act> [<https://perma.cc/3FMH-XCFP>].

⁹⁵ N.D. CENT. CODE § 6-09-01 (2021) (“For the purpose of encouraging and promoting agriculture, commerce, and industry, the state of North Dakota shall engage in the business of banking”); AM. SAMOA CODE ANN. § 28.0206 (2017) (to provide the residents of American Samoa with deposit, lending, and investment opportunities, and to assist in the promotion of commerce and industry).

⁹⁶ See N.D. CENT. CODE § 6-09-01 (2021); *History of BND*, BANK N.D., <https://bnd.nd.gov/history-of-bnd/> [<https://perma.cc/D9TB-KMB3>].

⁹⁷ BANK N.D., *supra* note 96.

to remain on the land, and the bank usually resold land back to the original owners.⁹⁸ After the Great Depression, the BND expanded its book of business to eventually include infrastructure spending,⁹⁹ student lending,¹⁰⁰ and receiving of public deposits.¹⁰¹ North Dakota created the BND prior to the introduction of federal programs like the Federal Deposit Insurance Corporation (FDIC)¹⁰² and had access to the Federal Reserve before the requirement of deposit insurance.¹⁰³ In place of being federally insured, the state guarantees public deposits received by the BND.¹⁰⁴ Other states, including Washington, look to the BND as a model for creating a state-run bank.¹⁰⁵ However, it is important to consider the implications of federal regulation when creating a state-run bank, such as the FDIC insurance requirement.

Compared to the BND, the TBAS is a nascent bank established in 2016.¹⁰⁶ The territory of American Samoa created TBAS in response to the Bank of Hawaii deciding to leave the territory.¹⁰⁷ The Bank of Hawaii's departure left American Samoa with one operating bank, the Australia and

⁹⁸ *Id.*

⁹⁹ See N.D. CENT. CODE §§ 6-09-46.1 to 49 (2021).

¹⁰⁰ See N.D. CENT. CODE § 6-09-48 (2021).

¹⁰¹ See N.D. CENT. CODE § 6-09-15(8) (2021).

¹⁰² The FDIC was created in 1933 in response to the bank runs of the Great Depression. See *What We Do*, FED. DEPOSIT INS. CORP., <https://www.fdic.gov/about/what-we-do/index.html> [<https://perma.cc/3LHR-KQFR>].

¹⁰³ See 12 U.S.C. § 332 (law requiring depository insurance for members of the Federal Reserve System, which was added in 1928; the BND was founded in 1919).

¹⁰⁴ N.D. CENT. CODE § 6-09-10 (2021).

¹⁰⁵ See generally *Expert Testimony: Should Vermont Form a State Owned-Bank?*, VTDIGGER (Jan. 25, 2010) <https://vtdigger.org/2010/01/25/expert-testimony-should-vermont-form-a-state-owned-bank/> [<https://perma.cc/Q8S3-MGWX>]; YOLANDA K. KODRZYCKI AND TAL ELMATAD, THE BANK OF NORTH DAKOTA: A MODEL FOR MASSACHUSETTS AND OTHER STATES?, NEW ENG. PUB. POL. CTR., (2011); S.B. 5995, 66th Leg., Reg. Sess. (Wash. 2019).

¹⁰⁶ See Rob Blackwell, *American Samoa Finally Get a Public Bank. And U.S. States Are Watching*, AM. BANKER (Apr. 30, 2018, 9:45 PM), <https://www.americanbanker.com/news/american-samoa-finally-gets-a-public-bank-and-us-states-are-watching> [<https://perma.cc/R93D-SZ2Z>].

¹⁰⁷ *Id.*

New Zealand Banking Group.¹⁰⁸ The Bank of Hawaii's departure left American Samoa looking for another bank to offer competition, to ensure investment flowing into the territory, and to provide banking needs for its largely cash-based economy.¹⁰⁹ American Samoa encountered a hurdle in establishing the TBAS because conducting basic banking needs, such as processing debit transactions, wiring money, and accepting payments and transfers, requires a Master Account with a Federal Reserve Bank to access the national payments system.¹¹⁰

The bank's most significant impediments to entry of the Federal Reserve were the lack of federal deposit insurance and TBAS's goal of taking deposits from individuals.¹¹¹ The Federal Reserve Bank of San Francisco was hesitant to approve a bank that did not have federal insurance and was in direct competition with private sector banking.¹¹² The TBAS is a public bank, and membership with the Federal Reserve requires depository insurance.¹¹³ The Fono, American Samoa's legislative branch,¹¹⁴ decided to guarantee deposits through the territorial government¹¹⁵ rather than the FDIC to avoid the FDIC's stringent regulatory requirements.¹¹⁶ TBAS's application process took nearly two years because of the FDIC insurance requirement, which TBAS could not secure.¹¹⁷ In 2018, the TBAS became a member of the Federal Reserve and has been meeting the territory's basic banking needs ever since.¹¹⁸

¹⁰⁸ Interview with Robert Ho Chee, Comm'r, Am. Sam. Off. of Fin. Insts. (Nov. 4, 2020).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See 12 U.S.C. § 332; see also Interview with Robert Ho Chee, *supra* note 108.

¹¹⁴ American Samoa's legislative body.

¹¹⁵ AM. SAMOA CODE ANN. § 28.0206 (2017).

¹¹⁶ Interview with Robert Ho Chee, *supra* note 108.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

The BND was created to support agricultural lending and has since expanded;¹¹⁹ the TBAS was created to become a financial institution after the only United States-based bank pulled out of the territory.¹²⁰ These government-created banks do not compete with privately owned banks but rather complement them. Each state created its respective bank to fill a niche or gap left by the country's traditional financial institutions and, thus, are public complements to the current banking system.

III. RECOMMENDATIONS

In Washington State, the legislature introduced a bill to create a public bank.¹²¹ Support for public banking has increased over recent years, and many states have begun researching the feasibility of public banks.¹²² Public banks can create fairly robust economic benefits for a state, such as stabilizing the local economy after a recession.¹²³ Like North Dakota and American Samoa, Washington's state bank should target filling a niche financial gap by providing financing under the LDLP as a narrow solution to a larger problem of systemic discrimination within the state government.

¹¹⁹ N.D. CENT. CODE § 6-09-01 (2021).

¹²⁰ AM. SAMOA CODE ANN. § 28.0206 (2017).

¹²¹ S.B. 5995, 66th Leg., Reg. Sess. (Wash. 2019).

¹²² See, e.g., Sylvia Chi & Sushil Jacob, *After the Coronavirus Pandemic, Let Public Banks Lead the Rebuilding*, NON-PROFIT Q. (Aug. 18, 2020), <https://nonprofitquarterly.org/after-the-coronavirus-pandemic-let-public-banks-lead-the-rebuilding/> [<https://perma.cc/3NY8-WNV7>]; Sadeef Ali Kully, *Council Bills Could Pave the Way for a Public Bank in NYC*, CITYLIMITS (Sept. 29, 2020), <https://citylimits.org/2020/09/29/council-bills-could-pave-the-way-for-a-public-bank-in-nyc/> [<https://perma.cc/2ZPP-GQXE>]; Darryl C. Murphy, *Bank of Philadelphia? Study Says a Public Bank Could Help Small Biz Survive COVID*, THE PHILA. TRIB. (Oct. 2, 2020), https://www.phillytrib.com/news/health/coronavirus/bank-of-philadelphia-study-says-a-public-bank-could-help-small-biz-survive-covid/article_4579813e-09ef-56d6-b071-6e766c6cd03e.html [<https://perma.cc/E5UH-LY9T>].

¹²³ See DEMOS.ORG & THE MAIN STREET ALLIANCE, PUTTING WASHINGTON MONEY TO WORK FOR WASHINGTON: INTRODUCING THE WASHINGTON INVESTMENT TRUST 1 (2011), https://www.demos.org/sites/default/files/publications/Washington_banks.pdf [<https://perma.cc/LL8Z-9EC2>].

Unlike the BND and the TBAS,¹²⁴ the Washington Investment Trust (“the Trust”) would not be a depository institution.¹²⁵ Although it could take public deposits from cities and state governmental agencies, it would not take private deposits from individuals or businesses.¹²⁶ As structured in Senate Bill (S.B.) 5995, the Trust would generate revenue for the state by the interest accumulated from the state and local governmental entities’ deposits.¹²⁷ The bill’s scope is broad to ensure that the Trust has room to grow, as demonstrated by the bill’s large intent section.¹²⁸ Eight of Washington’s forty-nine senators supported S.B. 5995, and legislators in both the house and the senate supported past iterations of the bill.¹²⁹ Now is the time to pass legislation instituting a public bank to help small businesses recover and grow after the economic contraction caused by COVID-19, but the bill should be redrafted to allow for the inclusion of the LDLP in its funding authority. This section will review the history and current language of S.B. 5995, then propose how to amend the legislation to facilitate the LDLP.

A. The Bill

The Washington Investment Trust was introduced in the 2011 legislative session.¹³⁰ The original bill’s language focused on creating a Trust solely to

¹²⁴ See AM. SAMOA CODE ANN. § 28.0206(5)(A) (allowing TBAS to accept deposits); N.D. CENT. CODE § 6-09-15(8) (allowing the BND to accept deposits like any other financial institution).

¹²⁵ S.B. 5995, 66th Leg., Reg. Sess. (Wash. 2019).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ WASH. ST. LEG., SB 5995 - 2019-20, <https://app.leg.wa.gov/billsummary?BillNumber=5995&Initiative=false&Year=2019> [<https://perma.cc/C5GP-RRR9>]; WASH. ST. LEG., SB 5995 - 2017-18, <https://app.leg.wa.gov/billsummary?BillNumber=5995&Initiative=false&Year=2017> [<https://perma.cc/W8T7-95YQ>].

¹³⁰ See H.B. 1320 62d Leg., Reg. Sess. (Wash. 2011); see also S.B. 5238 62d Leg., Reg. Sess. (Wash. 2011).

take deposits from state agencies and invest the proceeds from the interest generated from the deposits into the state’s general fund.¹³¹ The bill has been revised over the years to include more decision-makers in the leadership of the Trust and to allow local jurisdictions to participate in depositing funds.¹³²

The Trust is designed to facilitate and reduce the cost of Washington’s infrastructure and programmatic needs.¹³³ In the bill, the legislature states the intent of the Trust would be to “produce new revenue for the state without raising taxes while also creating greatly expanded financing capacity for infrastructure and other projects for public benefit . . . [and] future generations.”¹³⁴ The bill also outlines the intent of the legislature to follow up the Trust with comprehensive economic reform, including “small and new business start-up supports.”¹³⁵

As proposed in the bill, the Trust would be governed by a Commission consisting of the Governor, the Lieutenant Governor, the Attorney General, the State Treasurer, and the State Auditor, and it would have appropriate rulemaking authority to manage the banking needs of the state.¹³⁶ The Trust would serve as a depository for “state moneys or funds” and would be required to maintain minimum leverage capital requirements while also being exempt from state taxes.¹³⁷ To ensure that the Trust will be properly managed, it will have a president and an advisory board to review management, services, policies, and procedures.¹³⁸

¹³¹ See H.B. 1320 62d Leg., Reg. Sess. (Wash. 2011).

¹³² See H.B. 2967 64th Leg., Reg. Sess. (Wash. 2016); S.B. 5464 65th Leg., Reg. Sess. (Wash. 2017); S.B. 5949 66th Leg., Reg. Sess. (Wash. 2019); S.B. 5995 66th Leg., Reg. Sess. (Wash. 2019).

¹³³ See S.B. 5995, 66th Leg., Reg. Sess. (Wash. 2019).

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ See *id.*

¹³⁷ See *id.*; see also 12 C.F.R. § 325.3 (leverage capital requirements of non-FDIC insured institutions).

¹³⁸ See S.B. 5995, 66th Leg., Reg. Sess. (Wash. 2019).

The bill also exempts the Investment Trust from Washington’s deposit and investment laws for public depositories.¹³⁹ The Trust’s current structure allows it to function without depository insurance because the Trust does not manage deposits from members of the public; however, if the Trust expands its services to include taking deposits from private individuals, all deposits within the Trust would be insured by the state.¹⁴⁰

B. The Public Solution to a Private Inequity

The legislature must amend S.B. 5995 to (1) allow the Washington Investment Trust to make loans authorized under LDLP and enable the State Treasurer to allocate funds for the LDLP to the Washington Investment Trust to issue those loans; (2) establish an intermediary reference prime rate for the State Treasurer and allow the State Treasurer time to develop a prime rate calculation; (3) increase the financial allocations for the program; and (4) allocate adequate reserves to protect the Trust from delinquent payments and defaults.

1. Lending

S.B. 5995 does not directly address or implement the other economic reforms it discusses in its intent section, such as lending.¹⁴¹ However, reallocating the LDLP into the bill would align with the bill’s intention to develop economic reform programs.¹⁴² The legislature’s intent for the Trust is for the “state-owned bank [to] produce new revenue for the state without raising taxes while also creating greatly expanded financing capacity for infrastructure and other projects for the public benefit that will grow much-

¹³⁹ See *id.* (“The trust may accept deposits of public funds, but is exempt from the requirements of chapter 39.58 RCW [Washington’s public deposit laws]”).

¹⁴⁰ See WASH. REV. CODE § 39.58.020 (1996) (statute allowing the state to establish depository insurance requirements).

¹⁴¹ See generally S.B. 5995, 66th Leg., Reg. Sess. (Wash. 2019).

¹⁴² *Id.*

needed capacity for future generations.”¹⁴³ Allowing lending through the LDLP serves both of those purposes since the LDLP program can generate funding by providing profit through interest on these loans, and the loans can help facilitate infrastructure development throughout the state by stimulating the growth and development of OMWBE certified firms.¹⁴⁴

A lending program through the state would need to comply with both federal and state-level regulations and law. First, loans generated by the state must meet the disclosure requirements of the Truth in Lending Act (TILA).¹⁴⁵ The TILA would require that the Trust disclose loan cost information so that the applicant can make an informed choice in their search for a loan.¹⁴⁶ Second, the Trust must comply with Regulation O, which limits the types of loans that lenders can make to their executive officers, directors, and principal shareholders.¹⁴⁷ Third, the Trust would need to comply with the prohibition against unfair, deceptive, or abusive acts or practices under Title X of the Dodd-Frank Act.¹⁴⁸

Ensuring that the Trust complies with these regulations simplifies potential issues in joining the Federal Reserve of San Francisco by eliminating non-compliance with federal law. I suggest that the bill be amended to include a section that addresses the need to comply with these regulations and laws. The section should read similar to that of the TBAS’s explicit compliance section,¹⁴⁹ as follows:

NEW SECTION – COMPLIANCE WITH FEDERAL LENDING LAW. (1) The Trust shall make no extension of credit to Insiders, as defined in 12 CFR Chapter II, Subchapter A, Part 215, also known as “Regulation O,” except in compliance with all the

¹⁴³ *Id.*

¹⁴⁴ See COLETTE HOLT & ASSOCIATES, *supra* note 2, at 136, 39–42.

¹⁴⁵ See 15 U.S.C. §§ 1601–1616 (2021).

¹⁴⁶ See 15 U.S.C. §§ 1602, 1603.

¹⁴⁷ See *generally* 12 C.F.R. § 215; 12 U.S.C. § 1972.

¹⁴⁸ 12 U.S.C. §§ 5531–5538.

¹⁴⁹ See AM. SAMOA CODE ANN. § 28.0210 (2015).

provisions, including reporting provisions of Regulation O, as they may be amended from time to time.

(2) The Trust shall make all disclosures required under the truth in lending act, 15 U.S.C. Sec. 1601 et seq., when making a loan under the linked deposit loan program.

(3) The Trust shall comply with all prohibitions against unfair, deceptive, or abusive acts under the Dodd-Frank Act, 12 U.S.C. Sec. 5531 et seq., when making a loan under the linked deposit loan program.¹⁵⁰

The Trust also encounters issues with the Public Records Act of Washington.¹⁵¹ The disclosure of personal information, such as social security numbers and personal contact information, of those seeking loans under the LDLP would unnecessarily subject the state to risk of tortious liability.¹⁵² However, state law already creates a right to privacy, and an agency violates that right if the information divulged “(1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public.”¹⁵³ The law also exempts state agencies and officials from liability if an accidental disclosure occurs and results in loss or damage, but only if the agency or official acted in good faith.¹⁵⁴ Additionally, the public disclosure law protects against releasing financial information connected to small loans and financing except when required by other law.¹⁵⁵ Other laws the Trust would be required to comply with are the Controlled Substances Act¹⁵⁶ and the Bank Secrecy Act.¹⁵⁷ Both of these Acts require certain types of reporting and information sharing to prevent money laundering and

¹⁵⁰ *See id.*

¹⁵¹ *See generally* WASH. REV. CODE §§ 42.56.001-904.

¹⁵² *See* WASH. REV. CODE § 42.56.050 (creating a right to privacy for public information); WASH. REV. CODE § 42.56.060 (creating liability if a public official is not acting in good faith).

¹⁵³ WASH. REV. CODE § 42.56.050 (1987).

¹⁵⁴ WASH. REV. CODE § 42.56.060 (1992).

¹⁵⁵ WASH. REV. CODE § 42.56.230(5), (6) (2021).

¹⁵⁶ *See* 21 U.S.C. § 873 (2011).

¹⁵⁷ *See* 31 U.S.C. §§ 5312 (2021).

criminal activity.¹⁵⁸ The Trust’s rulemaking process should ensure that it complies with any issues under both of these Acts.

The Trust should also be explicit about these protections and exemptions and how they apply to the records created by the Trust. Both the BND¹⁵⁹ and the TBAS¹⁶⁰ have sections that address the confidentiality of customers’ information. The BND has a specific section addressing unlawful conduct because it takes deposits from individuals.¹⁶¹ S.B. 5995’s section 18 should include a new subsection under the current version as shown in bold in the following excerpt:

NEW SECTION. Sec. 18. TRUST RECORDS. (1) Under RCW 42.56.270 and 42.56.400, certain trust business records and records of the department relating to the Trust are exempt from public disclosure.

(2) Financial and commercial information and records submitted to either the department or the commission for the purpose of administering this chapter may be shared between the department and the treasurer. These records may also be used in any suit or administrative hearing involving any provision of this chapter.

(3) This section does not prohibit:

(a) The issuance of general statements based on the reports of persons subject to this chapter as long as the statements do not identify the information furnished by any person; or

(b) The publication by the director or the commission of the name of any person violating this chapter and a statement of the manner of the violation of that person.

[(4) Commercial or financial information of a customer, whether obtained directly or indirectly, except for routine credit inquiries or unless required by due legal process. As used in this subsection, “customer” means any person who has

¹⁵⁸ See 31 U.S.C. §§ 5312 (2021); 21 U.S.C. § 873 (2018).

¹⁵⁹ See N.D. CENT. CODE § 6-09-35 (2001).

¹⁶⁰ See AM. SAMOA CODE ANN. § 28.0213 (2015).

¹⁶¹ See N.D. Cent. Code § 6-08.1-06 (1985).

transacted or is transacting business with, or has used or is using the services of, the Trust, or for whom the Trust has acted as a fiduciary with respect to Trust property.]¹⁶²

In addition to state law, the Trust must also comply with Washington State’s Constitution. Washington’s constitution is more nuanced and offers distinct protections and restrictions not contained in the federal Constitution.¹⁶³ There are some state-level constitutional provisions that impede the state from creating a lending program.¹⁶⁴ In particular, Washington has a constitutional barrier in creating lending authority under the Trust.¹⁶⁵ Section five of Article VIII of the Washington State Constitution states, “[t]he credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation.”¹⁶⁶ Additionally, section seven of Article VIII of Washington’s constitution addresses a similar issue of lending by the state by stating the following:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.¹⁶⁷

The Washington State Supreme Court has construed these two sections to have identical meaning and that the purpose of these provisions is to “prevent state funds from being used to benefit private interests where the

¹⁶² See S.B. 5995, 66th Leg., Reg. Sess. (Wash. 2019).

¹⁶³ See, e.g., WASH. CONST. art. IV, § 3 (holding elections for the state’s supreme court); WASH. CONST. art. VII, § 12 (requiring a budget stabilization account).

¹⁶⁴ See WASH. CONST. art. VIII, § 5.

¹⁶⁵ See WASH. CONST. art. VIII, §§ 5, 7.

¹⁶⁶ WASH. CONST. art. VIII, § 5.

¹⁶⁷ WASH. CONST. art. VIII, § 7.

public interest is not primarily served.”¹⁶⁸ The court uses a two-prong test to determine whether a gift of state funds has occurred.¹⁶⁹ The first prong asks whether the state expended funds to carry out a purpose of the government.¹⁷⁰ If not, the second prong “focuses on the consideration received by the public for the expenditure of public funds and the donative intent of the appropriating body in order to determine whether or not a gift has occurred.”¹⁷¹

When analyzing the first prong of the test, the court looks at whether (1) the program suits a governmental purpose and (2) a private interest is incidental to the public benefit derived.¹⁷² The court presumes that a “[governmental] program . . . [is] constitutionally valid, and the burden of overcoming that presumption lies with those challenging [the government’s] authority.”¹⁷³

The court should find that allocation of funds for the LDLP satisfies the first prong because the Washington state legislature found that discrimination against minority- and women-owned businesses is significant enough to justify creating a state agency in OMWBE.¹⁷⁴ Furthermore, the legislature found that minority- and women-owned businesses have been traditionally excluded from access to capital and created a supplemental program to help these firms secure affordable access to funding for small contractors.¹⁷⁵ In light of that intent, the program is only accessible by firms certified by OMWBE and DVA, and the program

¹⁶⁸ CLEAN v. State, 130 Wash. 2d 782, 797, 928 P.2d 1054 (1996), *as amended* (Jan. 13, 1997) (inclusion of Appendix A with a copy of Engrossed House Bill 2115 (1997), which changed the law surrounding local financing for sports arenas) (quoting Japan Line, Ltd. v. McCaffree, 88 Wash. 2d 93, 98 (1977)).

¹⁶⁹ *Id.* at 797–98.

¹⁷⁰ *Id.* at 797.

¹⁷¹ *Id.* at 797–98.

¹⁷² City of Tacoma v. Taxpayers of City of Tacoma, 108 Wash. 2d 679, 696–97, 705 (1987).

¹⁷³ *Id.* at 702.

¹⁷⁴ See WASH. REV. CODE § 39.19.010 (1987).

¹⁷⁵ See WASH. REV. CODE § 43.86A.060 (2009).

promotes the inclusion of minority-, women-, and veteran-owned businesses in public contracting.¹⁷⁶ The court should determine that the state running the programs is constitutionally valid since the legislature found that combatting discrimination against minority-, women-, and veteran-owned businesses in government contracting is a purpose of government.

Additionally, the court should recognize the significant public benefit the state secures by increasing the inclusion of minority-, women-, and veteran-owned businesses in state contracting. Improving access to capital for minority-, women-, and veteran-owned businesses increases their ability to compete with other contractors at the subcontractor and prime contractor levels.¹⁷⁷ Expanding the pool of competitive contractors that can perform the work the state needs to accomplish is crucial in reducing the state's contracting costs, which allows the state to stretch its funding further.¹⁷⁸

Alternatively, if the court finds loans made by the state to certified firms do not meet the fundamental purpose threshold, the court then turns to the second prong of the analysis: the donative intent of the appropriating body and consideration received.¹⁷⁹ First, when issuing loans, the state would not intend for the loans to be a gift, as loans necessarily require repayment with interest and to be adequately collateralized to ensure the State receives some form of consideration if the borrower defaults on the loan.¹⁸⁰ Previous case law has held that county-level taxes used to generate revenue for constructing a new stadium that would be leased to a Major League Baseball team was constitutional because the State retained an interest in the stadium.¹⁸¹ Simply put, the court found that retaining a property interest,

¹⁷⁶ WASH. REV. CODE § 43.86A.060(2)(c) (2009).

¹⁷⁷ See COLETTE HOLT & ASSOCIATES, *supra* note 2, at 83–85.

¹⁷⁸ See *id.*

¹⁷⁹ CLEAN v. State, 130 Wash. 2d 782, 798 (1996), *as amended* (Jan. 13, 1997).

¹⁸⁰ See *id.* at 799 (holding a property interest after the use of funds is not a gift or loan of credit).

¹⁸¹ See generally *id.* at 800–01.

such as ownership in a stadium, assumes that the State did not intend the funds to be a gift.

Second, allowing the Trust to issue LDLP loans provides the state with substantial consideration because it helps to insulate the state from the risk of discrimination claims.¹⁸² When businesses apply for OMWBE certification, they are required to choose specific industries they operate in and are then assigned a NAICS code.¹⁸³ Each code has a different threshold for the number of employees and revenue that the business can generate before it is no longer a small business.¹⁸⁴ A recent study found that Black- and Asian-owned businesses in Washington were disparately impacted in state contracting across all NAICS codes.¹⁸⁵ Black-owned businesses were utilized at 70.4% of their availability, and Asian-owned business were utilized at a rate of 29.3% of their availability.¹⁸⁶ Similarly, Latinx-owned firms also experienced a disparate impact because of their concentration in particular industries.¹⁸⁷ When excluding one specific NAICS code (238220: plumbing, heating, and air-conditioning), Latinx firms are also disparately impacted by the State's contracting practices.¹⁸⁸ Providing little or no support to these businesses could place the state at greater risk of

¹⁸² See 29 C.F.R. § 1607.4(D) (1981) (“A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact”); COLETTE HOLT & ASSOCIATES, *supra* note 2, at 11 (“A substantively significant disparity supports the inference that the result may be caused by the disparate impacts of discrimination. Second, a statistically significant disparity means that an outcome is unlikely to have occurred as the result of random chance alone.”).

¹⁸³ WASH. ADMIN. CODE § 326-20-099 (2019).

¹⁸⁴ See *generally* U.S. SMALL BUS. ADMIN., Table of Small Business Size Standards Matched to North American Industry Classification System Codes, https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%202019%2C%202019.pdf [https://perma.cc/QN2F-DC22].

¹⁸⁵ See COLETTE HOLT & ASSOCIATES, *supra* note 2, at 5–14.

¹⁸⁶ *Id.* at 12.

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

perpetuating discriminatory contracting practices and open the possibility of a discrimination suit.¹⁸⁹

As outlined earlier, minority-owned businesses need access to capital to have the capacity to participate in larger governmental contracting but are disproportionately impacted by discriminatory banking practices.¹⁹⁰ The state and local communities would also benefit from the development of minority-owned businesses as increased access to capital has been linked to increased local economic development.¹⁹¹ Small businesses create approximately 65.1% of all new jobs in the country.¹⁹² One's access to wealth or capital starkly limits entrepreneurial opportunities.¹⁹³ And for businesses run by people of color, access to capital and wealth is limited due to systemic racism in the financial sector and the racial wealth gap.¹⁹⁴ Addressing capital issues through the LDLP helps alleviate one obstacle for minority-owned firms. Increasing minority-owned business capital can help bridge the racial wealth gap by increasing investment in local communities as small businesses are more likely to invest in their community.¹⁹⁵

¹⁸⁹ See *id.* at 17.

¹⁹⁰ Robert Fairlie et al., *Black and White: Access to Capital among Minority-Owned Startups* 30-32 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28154, 2016); Lloyd Blanchard et al., *Do Lenders Discriminate Against Minority and Woman Entrepreneurs?*, 63 J. URB. ECON. 467, 479-93 (2008); Blanchflower, *supra* note 1, at 942.

¹⁹¹ See Timothy Bates & Alicia Robb, *Greater Access to Capital Is Needed to Unleash the Local Economic Development Potential of Minority-Owned Businesses*, 27 ECON. DEV. Q., 250, 250-59 (2013); Fairlie & Robb, *supra* note 48, at 10.

¹⁹² See U.S. SMALL BUS. ADMIN. OFF. OF ADVOCACY, FREQUENTLY ASKED QUESTIONS (Oct. 2020), <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf> [<https://perma.cc/6FQK-3UPS>].

¹⁹³ See Lynnise E. Phillips Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS U. L.J. 419, 441 (2018).

¹⁹⁴ See *id.* at 441; Fairlie & Robb, *supra* note 48, at 51; Blanchflower, *supra* note 1, at 942-43.

¹⁹⁵ See, e.g., URB. CONSERVANCY & CIVIC ECON., *supra* note 3, at 6-10 (finding that local small, businesses in New Orleans recirculated money into the local economy more than the comparative big-box business); CIVIC ECON., *supra* note 3, at 8 (finding that local businesses in Salt Lake City reinvested into the community at a greater rate than national stores).

Simply shifting the authority of the program to the Trust does not adequately address the nuance of the program. The current program should remain within the authority of the State Treasurer of Washington because it manages the state’s financial investments, and the LDLP is funded through surplus funds that the State Treasurer holds.¹⁹⁶ Additionally, the bill clearly states that the Treasurer retains the authority to “manage and invest” the funds necessary to meet the operational needs of the state government.¹⁹⁷ The legislature included this language because the Treasurer is required by law to manage and disburse monies for the state.¹⁹⁸ Removing that authority would upend the state’s current financial structure.

In order to facilitate the LDLP, the State Treasurer “may purchase a certificate of deposit that is equal to the amount of the qualifying loan made by the qualified public depository or . . . that is equal to the aggregate amount of . . . qualifying loans”¹⁹⁹ This section’s language should be changed to allow the State Treasurer the authority to allocate funds for the Trust to disburse with the LDLP’s current discount.²⁰⁰ RCW 43.86A.060(1), which establishes the LDLP, should read as follows:

(1) The state treasurer shall establish a linked deposit program for investment of deposits in ~~qualified public depositories~~ Washington investment trust. ~~As a condition of participating in the program, qualified public depositories must~~ The loans issued by the Trust must make qualifying loans as provided in this section. ~~The state treasurer may purchase a certificate of deposit that is equal to the amount of the qualifying loan made by the qualified public depository or may purchase a certificate of deposit that is equal to the aggregate amount of two or more qualifying loans made by one or more qualified public depositories. . . .~~

¹⁹⁶ See WASH. REV. CODE §§ 43.84.080, 43.86A.060.

¹⁹⁷ S.B. 5995, 66th Leg., Reg. Sess. (Wash. 2019).

¹⁹⁸ See WASH. REV. CODE § 43.08.010 (2009).

¹⁹⁹ WASH. REV. CODE § 43.86A.060(1) (2009).

²⁰⁰ WASH. REV. CODE §§ 43.86A.060(1), (2)(d) (2009).

(2)(d) Where the interest rate on the loan to the minority or women's business enterprise or veteran-owned business does not exceed an interest rate that is two hundred basis points below the prime interest rate calculated by the state treasurer ~~the qualified public depository~~ would charge for a loan for a similar purpose and a similar term, except that, if the preference given by the state treasurer to the qualified public depository under subsection (3) of this section is less than two hundred basis points, ~~the qualified public depository~~ the Trust may reduce the preference given on the loan by an amount that corresponds to the reduction in preference below two hundred basis points ~~given to the qualified public depository~~;²⁰¹

Additionally, S.B. 5995 should be amended to include a section to empower the Trust to disburse loans under the LDLP, as follows:

NEW SECTION. Sec. 8. LOANS UNDER THE LINKED DEPOSIT LOAN PROGRAM. (1) The Trust has the power to issue qualifying loans under the linked deposit loan program under RCW 43.86A.060. The total sum of all loans made by the Trust must not exceed the available funds outlined in RCW 43.86A.030(2).

(2) The Washington investment trust commission may adopt rules, in consultation with the state treasurer, office of minority and women's business enterprises, and the department of veteran's affairs, regarding the implementation of this section.

However, the Trust should be the entity to disperse the funds. As payments on these loans are received during the life of the loan, the corresponding profits should be allocated to the Trust to help defray the cost of program management, and any remaining profit should be released to the General Fund of the State. OMWBE should retain its current rulemaking authority to prioritize loan applications under the program because OMWBE serves as the sole certifier of minority- and women-owned businesses in the state

²⁰¹ WASH. REV. CODE § RCW 43.86A.060(1).

and thus has access to the most recent and relevant data on the certification of a business in the LDLP.²⁰²

2. Prime Rate

The second major issue the bill must resolve is establishing a prime rate. The Trust and Treasury would need a reference rate so that the State Treasurer can establish its prime rate for the loans disbursed through the LDLP as the loan rate is currently set by the bank and not the State.²⁰³ Traditionally, many private banks and lenders relied on the London Interbank Offered Rate (LIBOR) to aid in determining the prime rate for lending and financial instruments.²⁰⁴ However, LIBOR became steeped in controversy after the discovery of rate manipulation by USB, the creator of LIBOR.²⁰⁵ As a result, the legislature should consider using the Secured Overnight Financing Rate (SOFR) developed by the Alternative Reference Rates Committee under the Federal Reserve of the Bank of New York as a temporary rate until the Treasury can establish its own calculations for prime rates.²⁰⁶

The Federal Reserve of New York developed SOFR in response to the LIBOR scandal.²⁰⁷ Several financial institutions and intermediaries used LIBOR as its metric to establish fixed-rate and variable-rate financial instruments.²⁰⁸ Hence, in partnership with other private entities, the Federal Reserve of New York established SOFR as the new reference rate to ensure

²⁰² See WASH. REV. CODE § 43.86A.060(5) (2009).

²⁰³ See *Linked Deposit Loan Program*, *supra* note 59.

²⁰⁴ See generally C. Cowden W. Rayburn, *The Libor Scandal and Litigation: How the Manipulation of Libor Could Invalidate Financial Contracts*, 17 N.C. BANKING INST. 221 (2013).

²⁰⁵ See *id.*

²⁰⁶ See FED. RESERVE BANK N.Y., *Alternative Reference Rates Committee*, <https://www.newyorkfed.org/arrc/index.html> [<https://perma.cc/LD7T-FTUZ>].

²⁰⁷ See *id.*

²⁰⁸ See *id.*

stability in the financial industry.²⁰⁹ However, financial law professionals have criticized SOFR's implementation and the volatility of SOFR as a reference rate because it tended to have larger day-to-day rate changes compared to LIBOR.²¹⁰ To avoid the volatility of SOFR and to provide more stable lending interest rates, the legislature should grant the State Treasurer the discretion to create its prime rate calculation for term loans, credit lines, and property loans made under the LDLP. Allowing the State Treasurer to establish its own rates permits it to remove the volatile variables inherent in SOFR because SOFR is based on national trading rather than localized information.²¹¹ Because each of these loans has traditionally had a different interest rate based on the type of loan's inherent risk and appropriate collateralization, the legislature should give the State Treasurer one year to create these rates.

3. Allocation

Third, the legislature should increase the funds allocated for both OMWBE and DVA certified firms and create a separate allocation for Small Business Enterprises (SBE) and Disadvantaged Business Enterprises (DBE). Currently, OMWBE certified firms (excluding SBEs and DBEs) and DVA certified firms are allocated \$175 million and \$15 million, respectively.²¹² OMWBE's allocation should be increased to \$250 million to provide a buffer of capital to insure against defaults and increased demand of the program. DVA's allocation should be increased to \$30 million to create a buffer for increased applications and address any firms

²⁰⁹ See *id.*

²¹⁰ See Chris Barnes, *What Does SOFR Volatility Mean for LIBOR Fallbacks?*, CLARIUS FIN. TECH. (Oct. 22, 2019) <https://www.clarusft.com/what-does-sofr-volatility-mean-for-libor-fallbacks/> [<https://perma.cc/AQB6-GW8G>].

²¹¹ See FED. RESERVE BANK N.Y., *Secured Overnight Financing Rate Data*, <https://www.newyorkfed.org/markets/reference-rates/sofr> [<https://perma.cc/PW7N-2HGG>].

²¹² WASH. REV. CODE § 43.86A.030(2) (2010).

currently waitlisted.²¹³ Additionally, the legislature should consider allocating another \$50 million to SBEs and DBEs to insulate the program from litigation under I-200.²¹⁴

4. Capital Requirements

Finally, the legislature needs to develop cash requirements for loans to firms that lose their certification by either failing to recertify or growing too large to qualify as a small business in their respective business category or that default on loans.²¹⁵ Currently, because the program operates through private lenders, the state withdraws the funds allocated to the bank when a firm becomes too large and the 2% discount is removed from the loan.²¹⁶ In order to address the ineligibility of a firm because it grows too large for the program, the legislature should provide a six-month or one-year grace period for the firm to find a suitable private lending institution with which it can refinance the loan out of the program. This provides the state an opportunity to avoid substantive and procedural due process issues because the Trust would need to provide the firm an appropriate opportunity to secure funding before losing a state-provided benefit.²¹⁷ Additionally, the legislature should require that the agency reserve 10% of their maximum allocation for each type of certification (OMWBE or DVA) to ensure that there is no increased cost to the state in holding these loans for the duration

²¹³ It is worth noting the legislature recently tried but failed to increase the allocation for DVA. *See* S. B. 5167, 66th Leg., Reg. Sess. (Wash. 2019).

²¹⁴ I-200 is the colloquial name for Washington's anti-affirmative action statute. *See Washington Initiative 200, Affirmative Action Initiative (1998)*, BALLOTPEdia, [https://ballotpedia.org/Washington_Initiative_200,_Affirmative_Action_Initiative_\(1998\)](https://ballotpedia.org/Washington_Initiative_200,_Affirmative_Action_Initiative_(1998)) [<https://perma.cc/KQV2-EELC>].

²¹⁵ A certified business must meet the small business definition for a specific North American Industrial Classification System (NAICS) code. *See* WASH. ADMIN. CODE § 326-20-099 (2019).

²¹⁶ *See Linked Deposit Loan Program, supra* note 59 (Participants decertified by OMWBE will have their loans removed from the program, at which time they will lose the interest rate reduction).

²¹⁷ *See* WASH. CONST. art. I, § 3.

of the grace period as the state originally would have contemplated holding the loan for the entire term. Along with creating fail-safes for the Trust, the legislature should require that OMWBE consider the firm's risk of becoming too large to qualify for the LDLP in its prioritization scheme.²¹⁸ Ensuring that a lender is adequately capitalized is a hallmark of sound lending practices and helps to protect the lender from being debilitated by a few defaults occurring at any given time.²¹⁹

Overall, these changes would help create a stable income for the Trust and help support small, minority-owned businesses in the state of Washington. Creating a more robust financing system for certified firms will help create more stable outcomes for these businesses and the state agencies that contract with the firms.²²⁰

C. Criticisms

There is a plethora of criticism of public banking institutions tracing back to the Jackson presidency.²²¹ The first is that banking is a private industry, and the government should not be involved in the sector beyond regulation.²²² The second is that financial reform should focus on facilitating marijuana banking in the state.²²³

²¹⁸ See WASH. REV. CODE § 43.86A.060(5) (2009).

²¹⁹ FREDDIE MAC, *The 4 Cs of Qualifying for a Mortgage* (Sept. 02, 2021), <https://myhome.freddiemac.com/blog/homeownership/20171204-4Cs-qualifying-mortgage> [<https://perma.cc/QLA9-M478>] (the 4 C's are considered in all forms of lending).

²²⁰ See generally Fairlie & Robb, *supra* note 48.

²²¹ See *The War Against the Bank*, *supra* note 89.

²²² See, e.g., Jeff Spross, *Why Democrats should be cautious about public banking*, THE WEEK (Oct. 16, 2019), <https://theweek.com/articles/871793/why-democrats-should-cautious-about-public-banking> [<https://perma.cc/Y84G-YTDS>]; Mark A. Calabria, *Promises of Public Banks Don't Match Reality*, CATO INST. (Mar. 5, 2015), <https://www.cato.org/commentary/promises-public-banks-dont-match-reality> [<https://perma.cc/MP8Z-BGRY>].

²²³ See WASH. ST. TREASURER, *State Treasurer Pellicciotti Calls for Legal Cannabis Banking* (Apr. 12, 2021), <https://tre.wa.gov/legal-cannabis-banking/> [<https://perma.cc/SGK4-ALML>].

1. Criticism 1: Banking is Private and Should Remain Private

In the modern United States, public banking institutions are rare at the state level.²²⁴ The United States' current financial system intermediated over \$118 trillion in assets in the Second Quarter of 2020.²²⁵ A large portion of the financial mediation in the United States is structured through private banks, and two of the five largest financial institutions in the world, J.P. Morgan Chase and Bank of America, are private banks based in the United States.²²⁶ The banking industry has long been a central player in business lending and is likely hesitant to leave millions of dollars in lending potential with a public entity.²²⁷

There is a plethora of criticism of public banking institutions tracing back to the Jackson presidency and his well-known hatred and distrust of public banks and the banking industry as a whole.²²⁸ However, public banking has had a marked benefit in North Dakota.²²⁹ The BND helped stem losses from both the early 2000s dot com bubble and the 2009 financial crisis.²³⁰ Additionally, BND serves as a public depository, small business lender and

²²⁴ The Bank of North Dakota (BND) and the Territorial Bank of American Samoa (TBAS), two state run banks. *See* N.D. CENT. CODE § 6.9.15(8) (allowing the Bank of North Dakota to accept deposits like any other financial institution); AM. SAMOA CODE ANN. §28.0206 (2017) (establishing TBAS).

²²⁵ BD. OF GOVERNORS OF THE FED. RSRV. SYS., THE FED. RSRV., FINANCIAL ACCOUNTS OF THE UNITED STATES: SECOND QUARTER 2020 3 (2020), [federalreserve.gov/releases/z1/20200921/z1.pdf](https://perma.cc/NA46-PH5P) [https://perma.cc/NA46-PH5P].

²²⁶ *See* Nathan Reiff, *10 Biggest Banks in the World*, INVESTOPEDIA (July 30, 2020), <https://www.investopedia.com/articles/investing/122315/worlds-top-10-banks-jpm-wfc.asp> [https://perma.cc/KXJ8-B3PN].

²²⁷ *See* Jeff Daniels, *California Bill to Create State-Chartered Public Banks Criticized by the Industry as 'Misguided'*, CNBC (Mar. 12, 2019, 3:31 PM), <https://www.cnbc.com/2019/03/12/california-bill-to-create-local-public-banks-criticized-as-misguided.html> [https://perma.cc/28X6-NZDM].

²²⁸ *See The War Against the Bank*, *supra* note 89.

²²⁹ *See* Josh Harkinson, *How the Nation's Only State-Owned Bank Became the Envy of Wall Street*, MOTHER JONES (Mar. 28, 2020) <https://www.motherjones.com/politics/2009/03/how-nations-only-state-owned-bank-became-envy-wall-street/> [https://perma.cc/A49P-CQ9H].

²³⁰ *See id.*

guarantor, and student loan financier.²³¹ Also, in American Samoa, the TBAS came to fruition to provide banking for American Samoan residents when the last American-owned depository institution withdrew from the territory.²³² The lack of finance options in American Samoa left the territory without a commercial loan for over five years.²³³ Public banks fill a crucial role for communities and locales largely ignored by commercial banks.²³⁴

As outlined earlier, a multifaceted approach is necessary in assisting small, minority-owned businesses to thrive. A combination of programs including financing, business incubation, and race-conscious contracting inclusion measures can help create appropriately capitalized minority-owned firms that can engage in public contracting.²³⁵ Also, as recommended by the statewide disparity study, increasing financing capacity is a small portion of the reforms needed to reduce contracting and economic disparities between white-owned firms and minority-owned firms.²³⁶ Addressing systemic discrimination piece-meal is a recipe for inefficiency and ineffective outcomes.

2. Criticism 2: Marijuana Banking

Many have argued that Washington should focus on providing banking for the marijuana industry, but this issue implicates federal law and ties the hands of state lawmakers who address the issue.²³⁷ Providing banking needs

²³¹ See N.D. CENT. CODE § 6-09-15 (2022).

²³² See Blackwell, *supra* note 106.

²³³ See *id.*

²³⁴ See generally JASON JUDD & HEATHER MCGHEE, BANKING ON AMERICA: HOW MAIN STREET PARTNERSHIP BANKS CAN IMPROVE LOCAL ECONOMIES (2011), https://www.demos.org/sites/default/files/publications/Demos_NationalBankPaper.pdf [<https://perma.cc/VFV5-PL5S>]; KARL BEITEL, MUNICIPAL BANKING: AN OVERVIEW (2016), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Municipal-Banking-Overview-201604-1.pdf> [<https://perma.cc/KR2K-X5J3>].

²³⁵ See Bates & Robb, *supra* note 191; Fairlie & Robb, *supra* note 48.

²³⁶ COLETTE HOLT & ASSOCIATES, *supra* note 2, at 17.

²³⁷ See James J. Black & Marc-Alain Galeazzi, *Cannabis Banking: Proceed with Caution*, AM. BAR ASS'N (Feb. 6, 2020),

for marijuana businesses requires that the public bank issue payments for and receive payments for the sale or processing of marijuana, which requires that the Trust be a member of the Federal Reserve's payment system and have a Master Account with a Federal Reserve Bank.²³⁸ Although this is a need for the state, securing a Master Account means complying with the Banking Secrecy Act and the Controlled Substances Act, which do not allow a bank to facilitate the financing of illicit drugs and drug use, and marijuana is still illegal at the federal level.²³⁹ As a result, the Federal Reserve would likely not admit a bank to its system if the bank's sole focus was providing banking services to the marijuana industry.

IV. CONCLUSION

The Washington state legislature should create the Washington Investment Trust and allow the Trust to originate loans under the Linked Deposit Loan Program. The creation of a state-run lending program would support OMWBE's mission to address systemic racism and the exclusion of minority-, women-, and veteran-owned businesses in the state of Washington.²⁴⁰ Washington's most recent disparity study showed that Washington has created an environment where businesses owned by Black people and Asian people are under-included in public contracting.²⁴¹

https://www.americanbar.org/groups/business_law/publications/blt/2020/02/cannabis-banking/ [<https://perma.cc/N4VC-C4YU>]; Paull Dunford, *Cannabis banking in 2021: Changes in Washington will change your credit union*, CUIINSIGHT (Jan. 28, 2021), <https://www.cuinsight.com/cannabis-banking-in-2021-changes-in-washington-will-change-your-credit-union.html> [<https://perma.cc/C3ZZ-PRVB>]; DEP. FIN. INSTS., *Marijuana in Washington State - Financial Services Issues*, <https://dfi.wa.gov/banks/marijuana> [<https://perma.cc/6XVS-A234>].

²³⁸ Randall Guynn et al., *Davis Polk Discusses Who Can Have a Federal Reserve Master Account*, COLUM. L. SCH. BLUE SKY BLOG (May 12, 2021), <https://clsbluesky.law.columbia.edu/2021/05/12/davis-polk-discusses-who-can-have-a-federal-reserve-master-account/> [<https://perma.cc/6R9X-L9G8>].

²³⁹ See 21 U.S.C. § 873; 31 U.S.C. § 5311–5332; 21 C.F.R. § 1308.11.

²⁴⁰ See WASH. REV. CODE § 39.19.010 (2020).

²⁴¹ COLETTE HOLT & ASSOCIATES, *supra* note 2, at 12.

Businesses owned by Black people, Indigenous people, and people of color have traditionally encountered disparate access to capital and discriminatory lending practices.²⁴² Reforming the LDLP can help these businesses secure loans that allow them greater participation in public contracting by providing them with an influx of capital to make them competitive in traditional contract bids.²⁴³ This infusion of capital can help these businesses grow and help facilitate reinvestment into these communities because small businesses are more likely to reinvest in their communities than big-box businesses.²⁴⁴

²⁴² See generally Blanchflower, *supra* note 1.

²⁴³ COLETTE HOLT & ASSOCIATES, *supra* note 2, at 20.

²⁴⁴ URB. CONSERVANCY & CIVIC ECON., *supra* note 3, at 6–10 (finding that local small, businesses in New Orleans recirculated money into the local economy more than the comparable big-box business); CIVIC ECON., *supra* note 3, at 8 (finding that local businesses in Salt Lake City reinvested into the community at a greater rate than national stores).

