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S.D. SEC. OF STATE

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Mr. Rick Weiland
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Filed this 12th day of
August, 2022
Steve Barnett
SECRETARY OF STATE

Dear Mr. Weiland:

SDCL 12-13-25 requires the South Dakota Legislative Research Council (LRC) to review each initiated constitutional amendment submitted to it by a sponsor, for the purpose of assisting the sponsor in writing the amendment "in a clear and coherent manner in the style and form of other legislation" that "is not misleading or likely to cause confusion among voters."

LRC encourages you to consider the edits and suggestions to the proposed text. The edits are suggested for sake of clarity and to bring the proposed measure into conformance with the style and form of South Dakota legislation. LRC comments are based upon the Guide to Legislative Drafting, which may be found on the South Dakota legislative [website](#).

Proposed initiated amendment to the Constitution as submitted with comments following:

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

That Article XI of the Constitution of the State of South Dakota be amended by adding a NEW SECTION to read:

The state may not tax the sale of anything sold for eating or drinking by humans, except alcoholic beverages, tobacco, or prepared food.

1. The proposed language begins with "[t]he state may not tax the sale of anything for eating or drinking..." The proposed language assumes the "state" has the authority to impose a tax on the purchase of food and beverages. The state, on its own and by its very nature, does not have, separate from the law, the authority to impose a tax. The "state" (in most instances an executive branch agency) has the authority, as provided by law, to collect certain taxes. But the *law* provides the authority to impose a tax. For example, SDCL 10-45-2 provides the following:

There is hereby imposed a tax upon the privilege of engaging in business as a retailer, a tax of four and one-half percent upon the gross receipts of all sales of tangible personal property consisting of goods, wares, or merchandise, except as otherwise provided in this chapter, sold at retail in the State of South Dakota to consumers or users.

In the SDCL 10-45-2 example, the law imposes a tax "upon the privilege of engaging in business as a retailer." Retailers collect the tax and remit it to the state in compliance with the law. The state does not impose the tax.

The perceived intent of the proposed constitutional language is to exempt the sale of certain food and beverages from tax. By beginning the proposed constitution text with "[t]he state may not tax," it is unclear if the intent is actually achieved. The proposed language simply states an existing legal reality, namely, that the state does not have the authority to impose a tax on the purchase of food and beverages. If this language were to become effective, the intended effect may not be achieved.

2. By using the term "state" in the proposed constitutional language, municipalities would not be prohibited from enacting a local ordinance requiring a tax on the purchase of food and beverages. Is this the intent of the proposal? If not, a rewrite of the language may be necessary.
3. The use of the phrase "the sale of anything sold for eating or drinking by humans" may be overly vague, inviting various interpretations in determining its meaning.

Under current law, the terms "food" and "food ingredients" are defined as follows:

"Food" and "food ingredient," any substance, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans and is consumed for its taste or nutritional value. See SDCL 10-45-1.

The statutory definition uses the terms "ingestion," "chewing," and "consumed." These terms seem to be more precise than "eating or drinking," as they may better capture the various elements of food and beverage consumption. Certain food and food ingredients are not purchased specifically for eating or drinking but may be used in the process of making specific foods or beverages. For example, coffee beans are neither eaten nor drunk. To take a narrow reading of the proposed language, coffee beans are not sold specifically "for eating or drinking." They cannot be drunk and are not eaten, generally. Given that the statutory definition of "food and food ingredient" is drafted more broadly, it includes "food" such as coffee beans, as they are "sold for ingestion...by humans" and are "consumed for [their] taste." Other examples that may create interpretive questions with the proposed language are gum, seasonings, spices, cooking oils, dietary supplements, etc. None of these examples are sold specifically for eating or drinking, but they are sold for ingestion or chewing and consumption. "Ingestion," "chewing," and "consumed" are terms with broader application that may better capture the intent of the proposed constitutional language. A rewrite of the language using terms consistent with the statutory definition of "food and food ingredients" may better clarify the intent of the proposed language. If the language is left in its current form, the question remains as to what food and beverages would be subject to tax.

The proposed language specifically provides that tobacco is an exception from "eating or drinking." Without adding defined terms to the proposed language, the tobacco exception may add to the interpretive confusion since tobacco is neither a food nor a beverage. If something that is not eaten or drunk is exempted from "eating or drinking," the language possibly could create an absurd legal reality, exempting items that generally do not apply in the ordinary sense of how "eating or drinking" are commonly understood.

Certain states that exempt the purchase of food and beverages from tax exclude candy, soft drinks, and dietary supplements from the tax exemption. Considering that the proposal is to amend the constitution,

which is more difficult to amend than state law, perhaps the sponsors should consider a broader list of exclusions.

4. The proposed constitutional language provides three exceptions to the tax prohibition: "alcoholic beverages, tobacco, or prepared food." The proposed language does not define these terms. Without definitions or a directive that definitions must be established by law, there may be questions as to what substances would qualify for the exceptions.

The sponsors should also consider changing the "or" to "and" in the clause, "except alcoholic beverages, tobacco, or prepared food." The use of "and" makes it clearer that all three of the substances are excepted. Typically, the use of "or" means that one is to be chosen from the list.

5. The sponsors may want to consider the utility of amending the constitution to create a tax exemption for the purchase of certain food and beverages. Since the constitution is more difficult to amend than state law, it may be problematic to address future considerations. For example, if consumable cannabis products are made legal in this state, would the purchase of these items automatically be exempt from tax? Often a stated goal of legalizing cannabis is the increased state revenue. The proposed language may limit future revenues if consumable cannabis products were to be legalized in South Dakota.

6. Based on the above comments, a possible rewrite of the proposed constitutional language is suggested as follows:

"The retail sale of any food or food ingredient for any purpose is exempt from any tax imposed by law or ordinance.

For purposes of this section, "food" and "food ingredients" mean substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.

Food and food ingredients exempt under this section do not include alcoholic beverages, tobacco, and prepared foods. Alcoholic beverages, tobacco, and prepared foods must be defined by law."

The ordinary meaning of "retail sale" is when a business sells a product to an individual consumer for the consumer's own use. The definitions of "food" and "food ingredients" are taken from current law (See SDCL 10-45-1). And the last sentence of the suggested language directs the Legislature to enact laws defining the excepted items.

It may be worth considering whether additional exclusions to the definition of "food" and "food ingredients" should be added, such as candy, soft drinks, and dietary supplements. And additional consideration should be given for future products, such as consumable cannabis products.

7. Although a sponsor is not statutorily required to make changes based upon the suggestions and comments provided above, you are encouraged to be cognizant of the standards established in [SDCL 12-13-24](#) and [12-13-25](#) and ensure that your language is in conformity.
8. SDCL 12-13-25 also requires the issuance of a written opinion "as to whether the initiated amendment embraces only one subject under S.D. Const., Art. XXIII, § 1" and whether it is in fact an "amendment under S.D. Const., Art. XXIII, § 1," or a "revision under S.D. Const., Art. XXIII, § 2." The proposed constitutional

change appears to embrace only one subject, taxing the purchase of food and beverages. Given the limited nature of the proposed language, it appears to be an amendment and not a revision of the constitution.

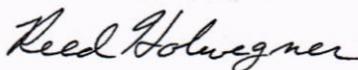
Fiscal Impact

It has been determined during this review that this proposed initiated amendment to the Constitution may have an impact on revenues, expenditures, or fiscal liability of the state and its agencies and political subdivisions. Please provide the Legislative Research Council a copy of this initiated amendment to the Constitution as submitted in final form to the Attorney General so the LRC can develop any fiscal note required by SDCL 2-9-30.

Compliance

This letter is issued in compliance with statutory requirements placed upon this office. It is neither an endorsement of the proposed initiated amendment to the Constitution nor a guarantee of its sufficiency. If you proceed with the initiated constitutional amendment, please ensure that neither your statements nor any advertising contain any suggestion of endorsement or approval by the Legislative Research Council.

Sincerely,



Reed Holwegner
Director

Enclosure

- CC: The Honorable Steve Barnett, Secretary of State
The Honorable Mark Vargo, Attorney General
Cory Heidelberger
Jim Leach