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S.D. SEC. OF STATE

December 2, 2022

Mr. Rick Weiland
Dakotans for Health
P.O. Box 2063
Sioux Falls, SD
57101

Dear Mr. Weiland:

SDCL 12-13-25 requires the South Dakota Legislative Research Council (LRC) to review each initiated measure 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](#).

Initiated measure as submitted with comments following:

BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

That Title 10 be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, the state may not tax the sale of anything sold for eating or drinking by humans, except alcoholic beverages and prepared food. This provision has no effect on the taxing authority of municipalities.

1. The proposed language provides that "[t]he state may not tax the sale of anything sold 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. As a matter of law, even if the initiated measure language were to be enacted, the question remains as to whether the tax imposed by SDCL 10-45-2 would still apply to items sold "for eating or drinking by humans," since that section of law requires it, not the "state."

The perceived intent of the proposed initiated measure is to exempt certain food and beverages from tax. By providing that the "[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. The "notwithstanding" clause also may not serve a purpose since no law gives the "state" the authority to tax. The law is the authority to tax, not the state. 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. This is further clarified by the sentence that reads:

"This provision has no effect on the taxing authority of municipalities."

The clarifying sentence seeks to address the interpretive issue as it relates to the authority of a municipality to tax food and beverages. However, it may not adequately address the interpretation offered that suggests that the authority of a municipality to tax derives entirely from the state's authority to tax, which this proposal presumably seeks to eliminate. In other words, if there is no authority at the state level, there is no authority at the municipal level, thereby making the first sentence potentially conflict with the second sentence. So, it may be argued that the clarifying sentence does not accomplish its intent if one is to give effect to the first sentence.

It may be more exacting to replace the clarifying sentence with the following:

"The exemption provided under this section does not apply to the taxing authority of a municipality. A municipality may tax the retail sale of any food or food ingredient, as provided under chapter 10-52." (See item 5 below for further drafting suggestions for the proposed amendment language.)

SDCL 10-52-2 provides a municipality the authority to "impose any non-ad valorem tax," which, based on its plain language, includes the authority to impose a tax on "anything sold for eating or drinking by humans." The two sentences together may provide the clarity needed to distinguish the separate taxing authorities of the state and municipalities.

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 the 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 of food 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 generally 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 chewing 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, chewing, or consumption. "Ingestion," "chewing," and "consumed" are terms with broader application that may better capture the intent of the proposed statutory 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.

Certain states that exempt the sale of food and beverages from tax exclude candy, soft drinks, and dietary supplements from the tax exemption. Perhaps the sponsors should consider a broader list of exclusions.

4. The proposed statutory language provides two exceptions to the tax prohibition: "alcoholic beverages and prepared food." The assumption is that the proposed language, if approved by the voters, would be codified in SDCL chapter 10-45, which provides a definition for "prepared food." Given the definitions in SDCL 10-45-1 apply to that entire chapter, the definition of "prepared food" would also apply to the proposed language. SDCL title 10 does not define "alcoholic beverages." It may add interpretive clarity if a definition is added for "alcoholic beverages."
5. Based on the above comments, a possible rewrite of the proposed statutory 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. The exemption provided under this section does not apply to the taxing authority of a municipality. A municipality may tax the retail sale of any food or food ingredient, as provided under chapter 10-52."

The proposed rewrite of the language is consistent with how tax exemptions are generally drafted. The exemption makes clear that it only applies to taxes imposed at the "state" level. To eliminate any confusion on the provision's applicability, the last two sentences also make clear that the exemption for food and food ingredients does not apply to municipalities.

As already mentioned, since the proposed language would likely be codified under SDCL chapter 10-45, the definitions of "food" and "food ingredients," and "retail sale" (see SDCL 10-45-1) would likely apply to the above suggested language. Those definitions are 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. The term, food, does not include alcoholic beverages, tobacco, or prepared food."

"Retail sale" or "sale at retail," any sale, lease, or rental for any purpose other than for resale, sublease, or subrent.

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. Further, as already suggested, since

"alcoholic beverages" is not defined in SDCL chapter 10-45, the sponsors may want to consider defining the term for added clarity.

6. 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.

Fiscal Impact

It has been determined during this review that this proposed initiated measure 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 measure 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 measure nor a guarantee of its sufficiency. If you proceed with the measure, 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
Jim Leach