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## MEMORANDUM

**TO:** Blake Harrison and John Grayson Robinson

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**DATE:** February 29, 2016

**SUBJECT:** Proposed initiative measure 2015-2016 #103, concerning the sale of beer and wine by food stores

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

This initiative was submitted with a series of initiatives including proposed initiatives 2015-2016 #104 to 106. The comments and questions raised in this memorandum will not include comments and questions that are addressed in the memoranda for proposed initiatives 2015-2016 #104 to 106, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in those other memoranda may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum.

Earlier versions of this proposed initiative, proposed initiatives 2015-2016 #51 and 52 and proposed initiatives 2015-2016 #60 and 61, were the subject of memoranda dated November 16, 2015, and December 9, 2015, respectively, and were discussed at public meetings on November 18, 2015, and December 15, 2015, respectively. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meetings, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

## Purposes

The major purposes of the proposed amendment to the **Colorado Revised Statutes** appear to be:

1. To create a food store license in the Colorado Liquor Code that would allow food stores to sell only malt and vinous liquors in sealed containers for off-premises consumption;
2. To require food stores licensed to sell malt and vinous liquors to purchase the liquor products only from wholesalers licensed under the Colorado Liquor Code;
3. To specify that a person who owns an interest in a retail business licensed under the Colorado Liquor Code is not precluded from conducting, owning, or having an interest in one or more licensed food stores;
4. To permit a business that holds a valid fermented malt beverage retailer's license in effect on July 1, 2017, to apply to the local licensing authority for a food store license if the licensee otherwise complies with the requirements for a food store license;
5. To specify that, when reviewing and making a determination on a food store license application submitted by a currently-licensed fermented malt beverage retailer, the local licensing authority may:
  - a. Deem as proven the satisfactory nature of the applicant's character, record, or reputation if the applicant, at the time of application, has a valid, unexpired fermented malt beverage retailer license and is not subject to any pending administrative or criminal proceedings; and

- b. Consider the reasonable requirements of the neighborhood and the desires of its adult inhabitants in accordance with current law;
6. To require the state licensing authority to adopt rules and other findings as necessary to implement food store licenses;
7. To define a food store as an establishment, other than a restaurant, that offers food items for sale at retail premises that have at least 3,000 square feet of indoor sales area and that generates at least 20 percent of its annual gross sales income, including income from fuel products and lottery ticket sales, from the sale of food items;
8. To define food items as any raw, cooked, or processed edible substance, ice, and nonalcohol beverage intended for human consumption;
9. To authorize the state licensing authority and local licensing authorities to issue food store licenses;
10. To establish state and local license fees for food store licenses;
11. To prohibit a food store employee who is under 21 years of age from selling malt or vinous liquors;
12. To repeal, as of January 1, 2019, provisions of law authorizing local licensing authorities to issue licenses under the Colorado Beer Code that authorize the sale of fermented malt beverages either for consumption off the licensed premises or for consumption on and off the licenses premises; and
13. To specify that the measure takes effect July 1, 2017.

## **Substantive Comments and Questions**

The substance of the proposed initiative raises the following comments and questions:

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Under current law, section 12-47-202 (1) (b), Colorado Revised Statutes, states: "The state licensing authority shall: (b) Make such general rules and regulations and such special rulings and findings as necessary for the proper regulation and control of the manufacture, distribution, and sale of alcohol beverages and for the enforcement of this article and articles 46 and 48 of this title and alter,

- amend, repeal, and publish the same from time to time." Given that the state licensing authority is required to adopt rules for the proper regulation, control, and enforcement of the "Colorado Liquor Code", is proposed section 12-47-425 (5), which requires rulemaking and rulings specific to food store licenses, necessary? Does proposed section 12-47-425 (5) provide any new authority or impose any new requirement on the state licensing authority not already granted or imposed under current law?
3. With regard to the definition of "food store", prior proposals required that 25 percent of an establishment's gross annual income from total sales, excluding fuel products and lottery ticket sales, come from the sale of food items. The current measure reduces the food items percentage of total sales income to 20 percent and includes fuel products and lottery ticket sales in the total sales calculation. Additionally, this measure includes a minimum indoor sales area square footage requirement.
    - a. What is the intent and effect of reducing the percentage of income from food items sales from 25 percent to 20 percent? By reducing the food items sales percentage, does the measure include or exclude additional types of establishments? If so, what other establishments would be included in or excluded from the definition of "food store"?
    - b. How does the inclusion of fuel products and lottery ticket sales in the calculation of gross annual income from total sales affect the definition of a "food store"? Does inclusion of those sales expand or limit the types of establishments included in the definition of "food store"?
    - c. With regard to the requirement that a food store contain at least 3,000 square feet of indoor sales area, what is the effect of this requirement? Does this requirement expand or limit the types of establishments included in the definition of "food store"?
    - d. Is the intent or effect of the changes to the definition of "food store" to include or exclude convenience stores in the measure?
    - e. How many businesses do you estimate will be eligible for the food store license?
  4. With regard to section 8 of the measure, repealing, as of January 1, 2019, provisions of law authorizing local licensing authorities to issue licenses under the Colorado Beer Code that permit the retail sale of fermented malt beverages:

- a. In comparing this measure with proposed initiatives 2015-2016 #104, 105, and 106, it appears that this proposal and #106 would repeal fermented malt beverage retail licenses, but neither proposal #104, which contains the same definition of "food store" as this measure, nor #105, which does not contain the same definition of "food store" as this measure, repeal fermented malt beverage retail licenses. What is the purpose of repealing fermented malt beverage retail licenses in this measure and in measure #106 but not in measures #104 and 105?
  - b. What is the purpose and intent in repealing fermented malt beverage retail licenses?
  - c. Will currently-licensed fermented malt beverage retailers be able to obtain a food store license under proposed section 12-47-425? Will the repeal of fermented malt beverage retail licenses exclude any businesses from obtaining any kind of liquor license?
  - d. Assuming the definition of "food store" in this proposal excludes convenience stores, will section 8 of the proposal effectively eliminate the ability of a convenience store to obtain any type of retail liquor license on or after January 1, 2019?
  - e. Does repealing fermented malt beverage retail licenses, which could result in the elimination of the ability of a class of businesses to obtain a liquor license, raise a separate subject?
5. It appears that, with the exception of the limitation on the types of alcohol beverages that a food store may sell, a food store license is similar to other types of retail establishments licensed under the Colorado Liquor Code to sell alcohol beverages in sealed containers for off-premises consumption, namely retail liquor stores and liquor-licensed drugstores. The Colorado Liquor Code imposes certain restrictions, and applies certain requirements, on licensed retail liquor stores and liquor-licensed drugstores. For example, those establishments are only permitted to sell two thousand dollars' worth of alcohol beverages to establishments licensed for on-premises consumption, such as brew pub, distillery pub, tavern, club, and hotel and restaurant licensees. Would the proponents consider adding to the proposal conforming amendments to provisions in the Colorado Liquor Code that apply to other retail licensees authorized to sell alcohol beverages for off-premises consumption?
  6. Both retail liquor stores and liquor-licensed drugstores are allowed to apply to the local licensing authority for authority to conduct tastings of alcohol

beverages on the licensed premises if located in a jurisdiction that has adopted an ordinance or resolution authorizing tastings. The proposal does not appear to authorize licensed food stores to conduct tastings. Is the proponents' intent to preclude licensed food stores from seeking authority to conduct tastings on the licensed premises?

## Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. Each section in the Colorado Revised Statutes has a headnote. Headnotes briefly describe the content of the section and should appear in bold lowercase type rather than in SMALL CAPS. The headnote to proposed section 12-47-425 should appear as "**Food store license.**"
2. In section 12-47-425 (3), the word "from" before the phrase "being directly or indirectly interested" is unnecessary. The word "from" first appears before "conducting," but not before "owning," so as written, the phrase reads "prohibited from conducting, owning ..., or from being directly or indirectly interested ..."
3. The definition of "food store" contains the phrase "provided that," which is considered a proviso. While provisos may appear in current law, the current and preferred practice in statutory drafting is to avoid using provisos. In statutory drafting, provisos have most often been used to make exceptions to preceding provisions but are sometimes improperly used. It appears that in the definition of "food store," the proviso is indeed improperly used since the language following "provided that" is not actually an exception to, but rather a requirement for an establishment to qualify as, a food store. The intent of the definition of food store would be clearer if "provided that" was deleted and the definition reworded to more clearly state that, to be a food store, along with the other components in the definition, an establishment must offer food for sale and must generate at least 20 percent of gross annual income from its total sales from the sale of food items.