

Mike Mauer, Director
Legislative Council Staff

Colorado Legislative Council
200 East Colfax Avenue Suite 029
Denver, Colorado 80203-1716
Telephone 303-866-3521
Facsimile 303-866-3855
TDD 303-866-3472



Dan L. Cartin, Director
Office of Legislative Legal Services

Office of Legislative Legal Services
200 East Colfax Avenue Suite 091
Denver, Colorado 80203-1716
Telephone 303-866-2045
Facsimile 303-866-4157
Email: olls.ga@state.co.us

MEMORANDUM

TO: James Rodriguez and Lewis Tulper
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: April 1, 2016
SUBJECT: Proposed initiative measure 2015-2016 #125, concerning a Food Store License

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.

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 malt, vinous, and spirituous liquors in sealed containers for off-premises consumption;

2. To require food stores licensed to sell malt, vinous, and spirituous 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 three thousand square feet of indoor sales area and that generates at least twenty 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 twenty-one years of age from selling malt, vinous, or spirituous liquors; and

12. 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. The proposed measure appears similar to measures submitted by different proponents, specifically, proposed initiative 2015-2016 #104. It appears that the main difference between this measure and measure #104 is that this measure proposes to allow a licensed food store to sell spirituous liquors, in addition to malt and vinous liquors. Is this accurate? Is it the proponents' intent to allow a food store licensed under the Colorado Liquor Code to sell beer, wine, and spirits?
3. With regard to subsection (3) of proposed section 12-47-425:
 - a. Would the proponents please explain the intent and meaning of this provision? Who is allowed to own or who is prohibited from owning multiple licensed businesses?
 - b. This provision uses negative words and phrases (e.g., "no owner ... shall be prohibited from ...") but appears to be actually permitting multiple licensed retail business ownership interests. If that is the intent, would the proponents consider rephrasing this provision in the positive to make the meaning clearer? For example, the provision could be restated as "Notwithstanding ... to the contrary, an owner, part owner, shareholder, or other person interested directly or indirectly in one or more retail businesses licensed pursuant to this article *may* conduct, own in whole or in part, or be interested directly or indirectly in one or more retail businesses licensed pursuant to this section." [Emphasis added]
 - c. Does this provision allow a licensed retail liquor store or liquor-licensed drugstore owner to also own a licensed food store? If so, proponents may need to make conforming amendments to sections 12-47-407 (4) and 12-47-408 (4), Colorado Revised Statutes, to avoid conflicts and confusion.

- d. If the intent of this section is to allow only a licensed food store owner to own more than one licensed food store, the proponents should consider modifying the phrase "retail businesses licensed pursuant to this article" since "this article" (article 47 of title 12, Colorado Revised Statutes) includes other types of businesses such as retail liquor stores, liquor-licensed drugstores, and possibly businesses licensed to sell alcohol for consumption on the licensed premises.
 - e. While the provision appears to allow ownership or interests in multiple licensed retail businesses, including licensed food stores, the provision does not indicate whether a licensed food store owner is permitted or prohibited from having an interest in any other type of license, such as a manufacturer's or wholesaler's license. Would the proponents consider clarifying in the measure whether licensed retail businesses are permitted or prohibited from owning an interest in other types of licenses?
 - f. Since a fermented malt beverage retailer is licensed under article 46 of title 12, C.R.S., and not under "this article," which refers to article 47 of title 12, C.R.S., can a licensed fermented malt beverage retail business own or have an interest in a food store license?
4. With regard to subsection (4) of proposed section 12-47-425:
- a. If a licensed fermented malt beverage retailer applies for and obtains a food store license, what happens to the fermented malt beverage retailer's license? Does the person retain that license and operate under two licenses? If so, does that conflict with subsection 12-47-425 (4), which appears to only allow multiple ownership interests of retail businesses licensed under "this article," article 47 of title 12, the Colorado Liquor Code, but not retailers licensed under article 46 of title 12, the Colorado Beer Code?
 - b. Rather than apply for a new food store license, should this provision allow a fermented malt beverage retail licensee to convert the fermented malt beverage license to a food store license? See, for example, language in sections 12-47-407 (5) and 12-47-408 (5), Colorado Revised Statutes, which allows retail liquor store and liquor-licensed drugstore licensees, respectively, to apply to the local licensing authority to convert or transfer their existing license to another license type. If the proponents decide to modify this provision to allow fermented malt beverage retailers to apply to convert their existing licenses to food store licenses,

proponents may need to also add a conforming amendment to section 12-47-505 (4) (a), Colorado Revised Statutes, to allow local licensing authorities to charge license conversion application fees.

- c. This provision only refers to an application to the local licensing authority. Would a licensed fermented malt beverage retailer applying for a food store license under subsection (4) only have to apply to the local licensing authority for a license? Would the fermented malt beverage retailer still need to obtain a state license issued by the state licensing authority? Would the proponents consider clarifying whether the state licensing authority has a role in issuing a food store license to a licensed fermented malt beverage retailer that applies for a food store license under subsection (4)?
5. 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?
 6. In the definition of "food store" in section 12-47-103 (8.5), as proposed in section 2 of the measure:
 - a. What is meant by the phrase "total sales, *including* fuel products as defined in section 8-20-201 (2) and lottery ticket sales *from* such total"? Is the intent to *include* fuel product and lottery ticket sales *in* a food store's total sales or *exclude* those sales *from* a store's total sales calculation? Would the proponents consider rephrasing this provision to make it clear whether fuel product and lottery ticket sales are to be included in or excluded from total sales? [Emphasis added]
 - b. What types of establishments would be included in the definition of "food store"? Is the intent to include all businesses that are eligible for a

retail license under the Colorado Beer Code? Does the term include all grocery stores? Does the term include all convenience stores?

- c. Does the three thousand-square-foot minimum indoor sales area requirement exclude any businesses that are currently able to obtain a retailer's license under the Colorado Beer Code?
 - d. Does the minimum food sales requirement exclude any businesses that are currently able to obtain a retailer's license under the Colorado Beer Code?
 - e. How many businesses do you estimate will be eligible for the food store license?
7. In section 7 of the measure, which appears to prohibit an employee of a licensed food store who is under twenty-one years of age to sell malt, vinous, or spirituous liquors, would a food store be subject to discipline under section 12-47-601, Colorado Revised Statutes, or guilty of violating the Colorado Liquor Code and subject to penalties under section 12-47-903, Colorado Revised Statutes, if the food store allowed an employee who is not twenty-one years of age to sell alcohol on the premises?
8. Should section 12-47-901 (5) (k) (I), Colorado Revised Statutes, be amended to make it unlawful for a licensed food store to "have on the licensed premises . . . any container that shows evidence of having once been opened or that contains a volume of liquor less than that specified on the label of such container"?
9. Section 12-47-901 (5) (k), Colorado Revised Statutes, includes an exception to the prohibition against open containers on a licensed retail premises when tastings are authorized on the premises. Do the proponents intend to apply the tastings exception to licensed food stores? If so, proponents should consider amending this section, as well as sections 12-47-901 (5) (i) (II) and (7) (b), Colorado Revised Statutes, and other provisions of the Colorado Liquor Code pertaining to tastings, to ensure applicability to licensed food stores.
10. Section 12-47-901 (8), Colorado Revised Statutes, prohibits, among other things, a licensed fermented malt beverage retailer from "hold[ing] or operat[ing] under any other license for the sale of any beverages containing alcohol in excess of three and two-tenths percent by weight or four percent by volume for the same premises." This provision may conflict with sections 12-47-425 (3) and (4) of section 1 of the measure. Would proponents consider making

any necessary conforming amendments to section 12-47-901 (8), Colorado Revised Statutes, to avoid conflicts with proposed section 12-47-425?

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. In section 12-47-425 (3) of section 1 of the proposed measure, 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 ..."
2. In section 2 of the proposed initiative, the section number, heading, and introductory portion are missing. Before the subsection number "(8.5)," those items should be inserted as follows:

12-47-103. Definitions. As used in this article and article 46 of this title, unless the context otherwise requires:

(8.5) "FOOD STORE" MEANS ...

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 twenty percent of gross annual income from its total sales from the sale of food items.
4. When referring to a term that is defined in section 12-47-103 for the entire Colorado Liquor Code, there is no need to refer to the specific subsection where

the term is defined. For example, since "restaurant" is a defined term in section 12-47-103 (30), and terms defined in that section apply wherever those terms appear throughout articles 46 and 47 of title 12, Colorado Revised Statutes, the phrase "as defined in subsection (3) of this section" following "other than a restaurant" in section 2 of the measure is unnecessary and should be deleted.

5. In section 5 of the proposed initiative, paragraph (f.5) should end with a semi-colon because it appears in the middle of a list.
6. In section 6 of the proposed initiative, the subsection number, (1), is missing. It should be inserted after the heading and before the words beginning "The following license fees..."