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MEMORANDUM

To: Steven Ward and Levi Mendyk
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: February 28, 2022
SUBJECT: Proposed initiative measure 2021-2022 #67, concerning Sales and Delivery of Alcohol Beverages

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 the 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 another initiative addressing the same topic, proposed initiative 2021-2022 #66. The comments and questions raised in this memorandum will not include comments and questions that are addressed in the memorandum for proposed initiative 2021-2022 #66, except as necessary to fully understand the issues raised by proposed initiative 2021-2022 #67. Comments and questions addressed in the other memorandum may also be relevant, and those questions and comments 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. On and after March 1, 2023, to allow a person licensed under the "Colorado Beer Code," currently referred to as a "fermented malt beverage retailer," to sell wine, in addition to beer, for consumption off the licensed premises, subject to most requirements applicable to fermented malt beverage retailer licensees under current law, and to change the name of the license to "fermented malt beverage and wine retailer" license;
2. To allow a licensed fermented malt beverage and wine retailer to conduct tastings of beer and wine on the licensed premises if the local government in which the licensed premises is located has adopted an ordinance or resolution allowing tastings in licensed premises within the jurisdiction and the local licensing authority grants the retailer's application to conduct tastings on its licensed premises;
3. On and after July 1, 2023, to prohibit fermented malt beverage and wine retailers licensed to sell beer and wine for consumption off the licensed premises from:
 - a. Selling beer or wine to customers at a price that is below the licensee's cost to purchase the beer or wine;
 - b. Permitting customers to use self-checkout to purchase beer or wine; or
 - c. Commingling the retailers' alcohol beverage purchases among multiple locations if the licensee operates as a single or consolidated corporate entity that holds multiple beer and wine off-premises retailer licenses for multiple licensed premises;
4. To prohibit a fermented malt beverage and wine retailer licensed to sell beer and wine for off-premises consumption from moving its permanent location to a new location that is within specified distances of an existing licensed retail liquor store;
5. To preclude issuance of a new fermented malt beverage and wine retailer license authorizing the sale of beer and wine for off-premises consumption if the licensed premises is located within 500 feet of a licensed retail liquor store;

6. To prohibit receipt or action upon an application submitted on or after March 1, 2023, for a new fermented malt beverage and wine retailer license authorizing the sale of beer and wine for off-premises consumption or to change the permanent location of the licensed premises if the building in which the beer and wine sales will occur is located within 500 feet of a public or parochial school or the principal campus of a college, university, or seminary, with limited exceptions;
7. To authorize the state licensing authority to establish application fees for a fermented malt beverage and wine retailer license;
8. To allow a licensed fermented malt beverage and wine retailer to deliver beer and wine to its customers, either pursuant to a delivery service permit granted to the licensee or through a third-party delivery service that holds a delivery service permit;
9. To specify the requirements for obtaining a delivery service permit and the requirements for providing delivery services; and
10. To repeal the requirement that, to deliver alcohol beverages to customers, licensed retail liquor stores, liquor-licensed drugstores, fermented malt beverage retailers licensed to sell beer for off-premises consumption, and certain businesses licensed to sell alcohol beverages for consumption on the licensed premises must derive no more than 50% of annual gross sales revenues from sales of alcohol beverages for delivery.

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. Section 1 of the measure, entitled "Declaration", states that the purpose of the measure is to allow grocery and convenience stores that are licensed to sell beer to also sell wine, and to allow home delivery of alcohol beverages by licensed retailers through third-party delivery service providers.
 - a. It appears that the measure also would allow grocery and convenience stores, if otherwise permitted by the local jurisdiction, to conduct

- tastings on their premises. Should this new permitted activity be included in the declaration?
- b. Should the declaration also mention that the intent of the measure is to repeal, in the context of alcohol beverage delivery, the limit on the amount of gross revenues that may be derived from sales of alcohol beverages for delivery?
3. With regard to section 2 of the proposed measure, which proposes to add a definition of "wine":
 - a. The phrase "as defined in section 44-3-103 (59)" is unnecessary since the new term is being added to that same section 44-3-103, C.R.S.
 - b. If the purpose of adding a definition of "wine" in article 3 is solely in reference to the use of "wine" in the term "fermented malt beverage and wine retailer," would proponents consider adding a definition of the term "fermented malt beverage and wine retailer" in section 44-3-103, C.R.S.?
 - c. Additionally, the term "fermented malt beverage and wine retailer" is being added throughout the "Colorado Liquor Code" and the "Colorado Beer Code," and it appears the term is intended to apply only to those retailers permitted to sell fermented malt beverages and wine. However, since the term is not clearly defined as limited to those retailers selling for off-premises consumption, this could create some confusion in the law for retailers and for state and local licensing authorities.
Accordingly, would the proponents consider defining the term "fermented malt beverage and wine retailer" and specifying that the term means only retailers licensed to sell fermented malt beverages and wine for consumption off the licensed premises?
4. With regard to section 3 of the proposed measure:
 - a. The amending clause specifies that section 3 amends portions of statutory section 44-3-301, C.R.S., but some of the portions listed do not exist in current law in section 44-3-301. Specifically, in section 44-3-301, there are no subsections (1)(i)(III), (6)(i)(II), (6)(k)(I), (6)(k)(II)(A), (6)(k)(IV), or (8)(b). These provisions appear to have been copied from section 44-3-901, C.R.S. These subsections should be moved to and combined with section 5 of the measure, which amends portions of section 44-3-901, C.R.S.

- b. In the proposed amendment to subsection (1)(i)(III), the current law permits retail liquor stores and liquor-licensed drugstores to allow patrons to consume "malt, vinous, or spirituous liquors" on the licensed premises as part of an authorized tasting, and the measure proposes to add "fermented malt beverage and wine retailer" to the list of licensees to which the provision applies. However, since a fermented malt beverage and wine retailer would not be permitted to offer tastings of or otherwise have on the licensed premise "spirituous" liquors, adding this license type in this list could cause confusion about whether a fermented malt beverage and wine retailer licensee could have on the licensed premises or offer tastings of spirituous liquors. The proponents might consider avoiding this confusion by adding a separate sentence applicable to fermented malt beverage and wine retailers and limit the list of alcohol beverages permitted for tastings to fermented malt beverages and wine. This same issue is raised with the proposed changes to subsection (6)(k)(II).
- c. Section 44-3-901 (1)(i)(III), C.R.S., in current law, applies to businesses licensed to sell alcohol beverages at retail for off-premises consumption. The proposed amendment to that section to add "fermented malt beverage and wine retailer" does not appear to be limited to off-premises fermented malt beverage and wine retailers. If that is the intent, would the proponents consider clarifying the language?
- d. In subsection (6)(k)(II)(A), the first reference to a "fermented malt beverage and wine retailer" is added before the clause "license under this article 3." However, that license type is issued under article 4, i.e., the "Colorado Beer Code." Would proponents correct the reference to the article under which that license is issued, while retaining the reference to article 3 in connection with retail liquor store and liquor-licensed drugstore licenses?
- e. Also in subsection (6)(k)(II)(A), the second reference to the beer and wine retailer license omits the word "fermented" before "malt beverage". Would proponents consider adding the word "fermented" before "malt"? Please also add "fermented" before "malt" in subsection (8)(b).
- f. In the proposed amendments to what appears to be section 44-3-301 (12)(a.5)(I), the current law includes a date – June 4, 2018 – for purposes of the prohibition against issuing a new fermented malt beverage retailer license authorizing the sales of beer for off-premises consumption on or

after that date if the premises is located within 500 feet of a retail liquor store. Should that date be changed to March 1, 2023, to reflect the date on which the new fermented malt beverage and wine license becomes available?

5. In section 4 of the proposed measure;
 - a. Section 44-3-313 (1)(a)(III) is included in the measure but does not appear to include any changes to current law. If a provision of current law is not being amended, and is not an introductory section of statute that is needed for context, the provision of statute should not be included in the measure.
 - b. In the proposed amendments to subsection (1)(e)(V)(B), it appears that the reference to "permanent location of the fermented malt beverage retailer's licensed premises" should be amended to add "and wine" after "beverage."
6. In section 5 of the proposed measure, in the proposed changes to section 44-3-901 (6)(p)(III), given that the measure appears to authorize certain licensees to deliver alcohol beverages either through their employees or through a third-party delivery service, should "or any other person" be added after "employee" to make it clear that it is unlawful for a licensee to allow any person to deliver alcohol beverages to its customers if the person is under 21 years of age?
7. In section 7 of the proposed measure, which proposes amendments to section 44-4-102, the legislative declaration in the "Colorado Beer Code," the current law states that "it is in the public interest that fermented malt beverages shall be sold **only** by persons licensed as provided in this article 4." (**Emphasis added**). The proposed amendment to this language to add that "fermented malt beverage and wine for consumption off the premises of the licensee . . . shall be sold at retail **only** by persons licensed pursuant to this article 4" seems to state that wine may only be sold at retail for off-premises consumption by a retailer licensed under article 4, arguably in conflict with licenses issued under article 3 of title 44 that allow the retail sale of "vinous liquors," which is wine. Would proponents consider modifying this provision to avoid conflict with article 3 licenses?
8. Sections 9 and 12 of the proposed measure appear to change the current fermented malt beverage retailer license that authorizes the licensee to sell fermented malt beverages for consumption off the licensed premises to a fermented malt beverage and wine retailer license under which the licensee

- could sell fermented malt beverages *and wine* for off-premises consumption. Does this change in the statute automatically convert all existing fermented malt beverage retailer licenses to the new fermented malt beverage and wine retailer license? Do existing licensees need to apply to convert the license? If the intent is that the licenses automatically convert, would proponents consider stating that clearly in the statute. See, for example, section 44-4-104 (1)(e)(II), C.R.S., which provided for the immediate conversion of certain licenses issued under the "Colorado Beer Code" before a certain date.
9. In section 10 of the proposed measure, in the proposed amendment to section 44-4-105 (1)(a)(I)(A), C.R.S., it appears that the word "retailer" should be added after "wine" and before "licenses." Would the proponents consider adding the word for consistency and clarity?
10. In section 12 of the proposed measure, which proposes amendments to section 44-4-107, C.R.S.:

- a. It appears that the introductory language in subsection (1) in the measure does not reflect the current law and does not show words in current law that are being repealed. If the intent is to repeal the words "fermented malt beverage" between "classes of" and "licenses," the measure should show those words in stricken type as follows: "... classes of ~~fermented malt beverage~~ licenses:" so that the change to the current law is clear.
- b. In subsections (1)(a), (1)(b), and (1)(c)(I), "fermented beverage and wine" should be changed to "fermented beverages and wine."
- c. Under section 44-4-107 (3), C.R.S., current law requires a person licensed on or after June 4, 2018, to sell fermented malt beverages at retail for consumption off the licensed premises to derive at least 20% of its gross annual revenues from the sale of food items. The proposed measure does not amend this provision, and absent any changes to that provision, it will apply to fermented malt beverage and wine retailers. Is that the proponents' intent?
- d. In section 44-4-107, C.R.S., in (4) introductory portion, the current law states: "On or after January 1, 2019, a fermented malt beverage retailer licensed under subsection (1)(a) of this section:". The proposed measure does not show the date "January 1, 2019," in stricken type and does not show the date "July 1, 2023," in SMALL CAPS to reflect that the measure is proposing to change the date. If the intent is to change that date, the

measure should read as follows: "On or after ~~January 1, 2019~~, JULY 1, 2023,..."

- e. The date indicated in subsection (4) is July 1, 2023, but the entire measure takes effect on March 1, 2023. By creating the new license type starting March 1, 2023, that appears to replace the existing license to sell beer for off-premises consumption, but by delaying the effective date of the requirements in subsection (4) until July 1, 2023, is the intent that the prohibitions in subsection (4) against selling alcohol beverages below cost or allowing customers to use self-checkout to complete alcohol beverage sales transactions would not apply to these licensees between March 1, 2023, and June 30, 2023?
 - f. Regarding the changes to section 44-4-107 (6), the current law authorizes a retailer licensed under section 44-4-107 (1)(a) to deliver fermented malt beverages to customers and specifies the requirements for providing delivery services. The proposed measure shows new language for subsection (6) but does not show the current law as stricken language. Is the intent to strike the current law in subsection (6) and replace it with the new language that appears in SMALL CAPS in the measure? If so, would proponents show the current law in subsection (6) in stricken type before the new language is added?
11. Section 13 through 18 of the proposed measure appear to replicate sections 13 through 18 in proposed initiative 2021-22 #66 and raise the same issues and questions as are outlined in the review and comment memorandum for that measure and are not repeated in this memorandum but are incorporated by reference.

Technical Comments

The technical comments in the memo for proposed initiative 2021-2022 #66 apply to proposed initiative 2012-2022 #67. 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 that briefly describes the content of the section. When amending a provision in current law,

the headnote for the section should be included in the proposed initiative and be in bold-face type. Accordingly, the headnote for the sections of the Colorado Revised Statutes that are proposed to be amended or repealed in sections 2 through 5 and 14 through 18 of the proposed measure should be included in the measure, and the headnotes for the statutory sections being amended in or added by sections 6 through 13 of the measure should appear in **bold-face type**.

2. The introductory language in a statute that is being amended should be included, even if the language in the introductory portion is not being amended, to show the context of the provision being amended. For example, in section 2 of the proposed measure, after the amending clause and before the new definition proposed to be added to section 44-3-103, the headnote and introductory language of that statute should be included as follows:

44-3-103. Definitions. As used in this article 3 and article 4 of this title 44, unless the context otherwise requires:

The same comment applies to sections 3 through 5, 8, and 14 through 18 of the measure.

3. In definitions sections in the Colorado Reviews Statutes, the defined terms are listed in alphabetical order to aid the reader in more easily locating the defined term. Accordingly, in section 2 of the measure, the new defined term "Wine" should be added in the definitions, section 44-3-103, between the defined terms "Vintner's restaurant" and "Winery", possibly as a new "(60.5)."
4. With regard to references to statutory sections, articles, titles, and subsections within sections, standard drafting practices dictate the format for these references as follows:
 - a. When referencing a statutory article or title, the article or title number should be included. If the article being referenced is the article in which the statute is include, the correct reference is to "this article 3" without referencing the title. If the article referenced is not the same article as the one in which the statute is included, the proper format is to refer to the article and the title, e.g., "article 4 of this title 44." Please correct the references to articles and titles throughout the measure consistent with this format, particularly in section 13 of the measure.
 - b. When referring to a subsection within the same section, the reference to the section number should be eliminated, and instead, the reference should be to "subsection (____) of this section." See, for example, new

section 44-3-911.5 (4), in which the reference to "44-3-911.5 (1)" should be changed to "subsection (1) of this section." See also 44-3-911.5 (3)(a), in which the reference to "subsection (1)" should be changed to "subsection (1) **of this section**". [Emphasis added]

- c. When referencing "this subsection," the subsection number should be included. See, for example, new proposed section 44-3-911.5 (3)(a), where the reference to "this subsection" should be changed to "this subsection (3)(a)".
 - d. References to "C.R.S." are not needed.
 - e. The amending clauses in the measure, which are identified as "SECTION [number]" are not included in the codified law so should not be referred to. For example, in proposed new C.R.S. section 44-3-911.5 (1), the reference to "Section 2 of this Act" should be changed to "section 44-3-411.5," if that is the intent of that reference. Please also consider changing subsection (6) to read "Nothing in this section," if that is the intent, instead of "Nothing in this act."
5. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), C.R.S., and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), C.R.S., "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "must does not mean that a person has a duty."
 6. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
 - a. The first letter of the first word of each sentence;
 - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
 - c. The first letter of proper names.
 7. While initial capitalization is needed as indicated in the above comment, words that are not proper nouns should not be capitalized, e.g., the word "division" is not a proper noun and should not be initial capitalized.
 8. In section 4 of the measure, only (1)(e)(I) introductory portion and (1)(e)(I)(C) are being amended. If the proponents wish to remove the unamended provisions from the measure, to ensure there's no confusion about what is and is

- not being amended, the amending clause will need to be updated to read "**amend** (1)(e)(I) introductory portion, (1)(e)(I)(C), (1)(e)(II), (1)(e)(IV), and (1)(e)(V) as follows:"."
9. The amending clause for section 8 of the measure should read "**amend** (2) and (3); and **add** (7) as follows:"
 10. In section 9 of the measure, although the amending clause currently says that subsection (1) is amended, not all of subsection (1) is reflected in the measure. Instead, what's being amended is the introductory portion to subsection (1). The amending clause should read "**amend** (1) introductory portion, (1)(c)(I)(a), and (1)(c)(I)(B) as follows:".
 11. In the amending clause for section 11 of the measure, since the measure proposes to amend all of subsection (1), the amending clause should simply state "In Colorado Revised Statutes, 44-4-106, **amend** (1) as follows:"
 12. In the amending clause for section 12 of the measure, the proposal amends the introductory portion of subsection (1) and amends all of subsection (4), so the clause should be changed to read "In Colorado Revised Statutes, 44-4-107, **amend** (1) introductory portion, (1)(a), (1)(b), (1)(c)(I), (4), (5), and (6); and **add** (7) as follows:". If proponents make changes to the measure in response to substantive questions about section 12 referenced earlier in the memo, the amending clause may need to be different than the example here..
 13. The amending clause for section 13 should state: "In Colorado Revised Statutes, **add** 44-3-911.5 as follows:"
 14. Additionally, in section 13, in subsection (3), the introductory portion reads "... an applicant shall do all of the following:". Subsection (3)(c) should begin "Provide" because "shall" is included in the introductory portion.
 15. Standard drafting practice is to spell out numbers, other than statutory references, in the Colorado Revised Statutes. For example, in section 13 of the measure, "21" should be changed to "twenty-one" and the reference to "(\$1,000,000)" should be deleted.
 16. Standard drafting practice is to use the Oxford comma in a series of items to avoid ambiguity, e.g., apples, berries, and cherries". The measure adds reference to a "fermented malt beverage and wine retailer" or "fermented malt beverage and wine retailer license" to a series of two or three items but does not always include the Oxford comma before the conjunction. The measure should include

the Oxford comma whenever the new terms are added to a series that results in listing three or more items.

17. If language in current law is being repealed, the language must appear in stricken type so that it is clear what language is intended to be removed from the law.