



OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Phone (605) 773-3215
Fax (605) 773-4106
<http://atg.sd.gov>

RECEIVED

FEB 27 2023

SD Secretary of State

MARTY J. JACKLEY
ATTORNEY GENERAL

MARK W. BARNETT
CHIEF DEPUTY ATTORNEY GENERAL

February 27, 2023

Honorable Monae L. Johnson
Secretary of State
500 E. Capitol
Pierre, SD 57501

RE: Attorney General's Statement (Initiated Measure Prohibiting Taxes on Anything Sold for Human Consumption)

Dear Secretary Johnson,

Enclosed is a copy of a proposed initiated measure, in final form, that the sponsor submitted to this Office. In accordance with state law, I hereby file the enclosed Attorney General's Statement for this initiated measure.

By copy of this letter, I am providing a copy of the Statement to the sponsor.

Very truly yours,

Marty J. Jackley
ATTORNEY GENERAL

MJJ/dd
Enc.

Filed this 27th day of

February 2023

SECRETARY OF STATE

Cc/encl: Richard P. Weiland
Reed Holwegner – Legislative Research Council

INITIATED MEASURE
ATTORNEY GENERAL'S STATEMENT

RECEIVED
FEB 27 2023
SD Secretary of State

Title: An Initiated Measure Prohibiting Taxes on Anything Sold for Human Consumption.

Explanation:

Currently, the State collects tax on the sale or use of certain goods, including foods and drinks. Many municipalities also collect these taxes.

This initiated measure prohibits the State from collecting sales or use tax on anything sold for human consumption. The measure eliminates these sources of revenue for the State.

Human consumption is not defined by state law. However, its common definition includes more than foods and drinks.

The measure does not prohibit the collection of sales or use tax on alcoholic beverages or prepared food. Prepared food is defined by law to include food that is sold heated or with utensils.

The measure may affect the State's obligations under the tobacco master settlement agreement and the streamlined sales tax agreement. The master settlement agreement resulted from multi-state lawsuits against cigarette manufacturers for the public health effects of smoking. South Dakota's annual share of the master settlement agreement is approximately \$20 million. The streamlined sales tax agreement is a multistate program designed to simplify the collection of sales and use tax for companies selling in multiple jurisdictions.

Judicial or legislative clarification of the measure will be necessary.

Filed this 27th day of

February 2023

Monae L. Johnson

SECRETARY OF STATE

RECEIVED

FEB 27 2023

SD Secretary of State

December 7, 2022

By email and U.S. Mail

Mark.Vargo@state.sd.us
Attorney General Mark Vargo
1302 E. Hwy 14, #1
Pierre, SD 57501

Reed.Holwegner@sdlegislature.gov
Director Reed Holwegner, LRC
500 E. Capitol Ave.
Pierre, SD 57501

Monae.Johnson@state.sd.us
Secretary of State Monae Johnson
500 E. Capitol Ave. Ste. 204
Pierre, SD 57501

Greetings:

In accordance with SDCL 12-13-25.1, I submit the following proposed initiated measure in final form:

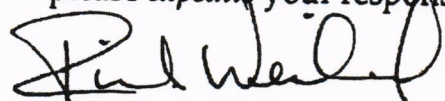
BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

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 human consumption, except alcoholic beverages and prepared food. Municipalities may continue to impose such taxes.

I ask the Attorney General to prepare the necessary title and explanation for this initiated measure. Per SDCL 2-9-30, I ask the Director of the Legislative Research Council to prepare the necessary fiscal note for it.

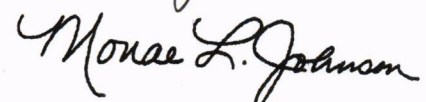
Because of the delay in our ability to begin collecting signatures caused by the Attorney General's misinterpretation of our previous submission on this subject, please *expedite* your response to this request. Thank you.



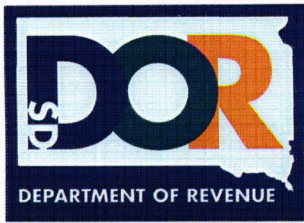
Rick Weiland
Dakotans for Health
P.O. Box 2063
Sioux Falls, SD 57101

Filed this 27th day of

February 2023



SECRETARY OF STATE



SOUTH DAKOTA DEPARTMENT OF REVENUE

445 East Capitol Avenue • Pierre, SD 57501
(605) 773-3311 • dor.sd.gov

Attorney General

FEB 17 2023

February 17, 2023

HAND DELIVERED

Attorney General Jackley:

Respectfully, the South Dakota Department of Revenue ("Department") provides the following comments and observations regarding your Initiated Measure Draft Attorney General's Statement regarding "An Initiated Measure Prohibiting Taxes on Anything Sold for Human Consumption." Your Draft was received by the South Dakota Secretary of State on February 7, 2023.

In the fifth paragraph of your draft, you correctly note concerns regarding the master settlement agreement. The Department submits that an additional, similar concern arises regarding the Streamlined Sales and Use Tax Agreement.

South Dakota has been a participant in the Streamlined Sales Tax Project since its inception. The Streamlined Sales and Use Tax Agreement was first adopted in 2002. South Dakota's participation in the Streamlined Sales Tax Project was vital to the United States Supreme Court's decision in South Dakota v. Wayfair, 585 U.S. ___, 138 S.Ct. 2080 (2018), which held that South Dakota could impose its state sales tax on remote sellers making sales into South Dakota.

The Streamlined Sales and Use Tax Agreement requires that the state sales tax base and the municipal sales tax base be identical. Streamlined Sales and Use Tax Agreement, Section 302 A. The state sales tax base of SDCL ch. 10-45 consists of all tangible personal property, services, and products transferred electronically that are sold at retail, except for any tangible personal property, services, or products transferred electronically that are specifically exempt from the state sales tax by a statute in SDCL ch. 10-45.

Currently, the state sales tax rate is 4.5% for all items within the state sales tax base. The Streamlined Sales and Use Tax Agreement requires a state to have one sales tax rate for all items, "except that a member state may impose a single additional rate, which may be zero, on food and food ingredients and drugs as defined by state law pursuant to the Agreement." Streamlined Sales and Use Tax Agreement, Section 308 A (emphasis added).

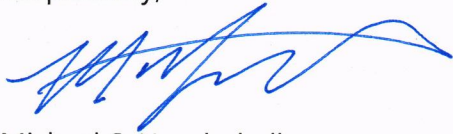
The language of the proposed Initiated Measure would create a sales tax exemption for "anything sold for human consumption." Because the state sales tax base and the municipal sales tax base must be the same, the adoption of an exemption for "anything sold for human consumption" in South Dakota would mean that the state sales tax base and the municipal sales tax base would not include as taxable "anything sold for human consumption."

The Initiated Measure includes the sentence "[m]unicipalities may continue to impose such taxes." The legal import of this sentence is in doubt. The sentence could signal that the state sales tax base and the municipal sales tax base are going to be different, one with and one without the "anything sold for human consumption" items subject to the respective sales taxes. Alternatively, the sentence could signal that the municipalities have a newfound source of authority to impose a new type of sales tax, not present in current law (SDCL ch. 10-52). Either interpretation would likely place the South Dakota sales tax system in conflict with the Streamlined Sales and Use Tax Agreement, which is of significant concern to the Department.

Finally, the Department agrees with your observation that "[j]udicial or legislative clarification of the measure will be necessary." The ambiguities and consequences of using the undefined phrase "anything sold for human consumption" will likely require further clarification should the Initiated Measure ultimately be approved by the voters. It is unclear to the Department why the drafters of the Initiated Measure used the undefined phrase "anything sold for human consumption" instead of statutorily defined terms such as "food" and "food ingredients."

The Initiated Measure raises many questions in a complicated area of law. It is a challenge to craft a meaningful Attorney General's Statement within the statutory word limit. Please accept these comments in the manner intended, to be helpful and informative, and consider adding to the Statement the negative impact the measure would have on South Dakota's compliance with the Streamlined Sales and Use Tax Agreement.

Respectfully,



Michael S. Houdyshell
Secretary
South Dakota Department of Revenue

cc: Katie Hruska, General Counsel, Office of the Governor

Attorney General

FEB 17 2023

JAMES D. LEACH

Attorney at Law
1617 Sheridan Lake Road
Rapid City, SD 57702-3483
Tel: (605) 341-4400
Fax: (605) 341-0716

Legal Secretary
Verma J. Stehly

Legal Assistant
Raquel L. Vokenroth, CLA

jim@southdakotajustice.com

February 15, 2023

By email and U.S. Mail

Attorney General Marty Jackley
Office of the Attorney General
1302 E Hwy 14, Suite 1
Pierre SD 57501-8501

Re: Your Draft Statement re proposed Constitutional Amendment and
proposed Initiated Law re: Sales Tax on Food and Drink

Dear Attorney General Jackley:

I am the attorney for Rick Weiland and Dakotans for Health, who submitted the proposed initiated constitutional measure and law concerning sales tax on food and drink. I write in response to your Draft Attorney General's Statements for these proposals. Because they are in substance identical, I address both in this letter.

Your Drafts raise more questions than they answer. I respectfully ask that you clarify your Drafts as follows, so that they are "clear" and "simple" and so they "educate the voters of the purpose and effect" of the proposed measures, in accordance with SDCL 12-13-25.1.

- Please specifically state that municipalities' ability to collect sales tax is not affected. While this might seem obvious, Attorney General Vargo's position to the contrary, which he refused to explain, and which directly contradicted the LRC's opinion, at the least muddied the waters.

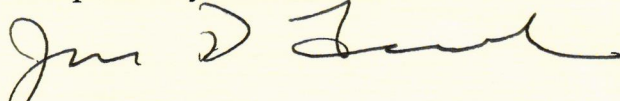
February 15, 2023

Attorney General Marty Jackley

Page 2

- The draft says that the “common definition” of “[h]uman consumption” includes more than “foods and drinks.” We don’t know what you refer to. Please be more specific.
- The draft says that eliminating the State sales tax on food “*may* prevent the State from carrying out its obligations under the tobacco master settlement agreement” (emphasis added). Then it says that South Dakota’s annual share of the agreement is about \$20 million. Are you saying that the entire \$20 million “*may*” be at stake? Or some part of it? And what is the likelihood of this occurring? Please be more specific.

Respectfully submitted,



James D. Leach

JDL/hs

cc: Rick Weiland

Dougherty, Debbie

From: Jim Leach <jim@southdakotajustice.com>
Sent: Wednesday, February 15, 2023 12:15 PM
To: ATG Ballot Comments
Cc: rickweiland.com, rick
Subject: [EXT] Response to Draft Attorney General's Statement re: Proposed Constitutional Amendment and Initiated Law re: Sales Tax on Food and Drink

Dear Attorney General Jackley:

I am the attorney for Rick Weiland and Dakotans for Health, who submitted the proposed initiated constitutional measure and law concerning sales tax on food and drink. I write in response to your Draft Attorney General's Statements for these proposals. Because they are in substance identical, I address both in this letter.

Your Drafts raise more questions than they answer. I respectfully ask that you clarify your Drafts as follows, so that they are "clear" and "simple" and so they "educate the voters of the purpose and effect" of the proposed measures, in accordance with SDCL 12-13-25.1.

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The draft says that eliminating the State sales tax on food "may prevent the State from carrying out its obligations under the tobacco master settlement agreement" (emphasis added). Then it says that South Dakota's annual share of the agreement is about \$20 million. Are you saying that the entire \$20 million "may" be at stake? Or some part of it? And what is the likelihood of this occurring? Please be more specific.

Respectfully submitted,

/s/ James D. Leach

James D. Leach



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MARTY J. JACKLEY
ATTORNEY GENERAL

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FEB 07 2023

SD Secretary of State

MARK W. BARNETT
CHIEF DEPUTY ATTORNEY GENERAL

February 7, 2023

Honorable Monae Johnson
Secretary of State
500 E. Capitol
Pierre, SD 57501

Filed this 7th day of

February 2023

SECRETARY OF STATE

RE: Attorney General's Draft Statement (Initiated Measure: Prohibiting Taxes on Anything Sold for Human Consumption)

Dear Secretary Johnson,

Enclosed is a copy of a proposed initiated measure, in final form, that the sponsor submitted to this Office. In accordance with state law, I hereby file the enclosed *draft* Attorney General's Statement for the purposes of receiving public comment on the same.

By copy of this letter, I am providing a copy of the *draft* Statement to the sponsor.

Very truly yours,

Marty J. Jackley
ATTORNEY GENERAL

MJJ/dd
Enc.

Cc/encl: Richard P. Weiland
Reed Holwegner – Legislative Research Council

RECEIVED

FEB 07 2023

SD Secretary of State

INITIATED MEASURE
DRAFT ATTORNEY GENERAL'S STATEMENT

Title: An Initiated Measure Prohibiting Taxes on Anything Sold for Human Consumption.

Explanation:

Currently, the State collects tax on the sale or use of certain goods, including foods and drinks. Many municipalities also collect tax on the sale or use of goods.

This initiated measure prohibits the State from collecting sales or use tax on anything sold for human consumption. The measure eliminates these sources of revenue for the State.

Human consumption is not defined by state law. However, its common definition includes more than foods and drinks.

The measure does not prohibit the collection of sales or use tax on alcoholic beverages or prepared food. Prepared food is defined by law to include food that is sold heated or with utensils.

The measure may prevent the State from carrying out its obligations under the tobacco master settlement agreement. The master settlement agreement resulted from multi-state lawsuits against cigarette manufacturers for the public health effects of smoking. South Dakota's annual share of the master settlement agreement is approximately \$20 million.

Judicial or legislative clarification of the measure will be necessary.

Filed this 7th day of

February 2023

Monae L. Johnson

SECRETARY OF STATE

RECEIVED

FEB 07 2023

SD Secretary of State

December 7, 2022

By email and U.S. Mail

Mark.Vargo@state.sd.us
Attorney General Mark Vargo
1302 E. Hwy 14, #1
Pierre, SD 57501

Reed.Holwegner@sdlegislature.gov
Director Reed Holwegner, LRC
500 E. Capitol Ave.
Pierre, SD 57501

Monae.Johnson@state.sd.us
Secretary of State Monae Johnson
500 E. Capitol Ave. Ste. 204
Pierre, SD 57501

Greetings:

In accordance with SDCL 12-13-25.1, I submit the following proposed initiated measure in final form:

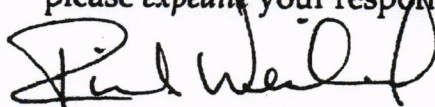
BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

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 human consumption, except alcoholic beverages and prepared food. Municipalities may continue to impose such taxes.

I ask the Attorney General to prepare the necessary title and explanation for this initiated measure. Per SDCL 2-9-30, I ask the Director of the Legislative Research Council to prepare the necessary fiscal note for it.

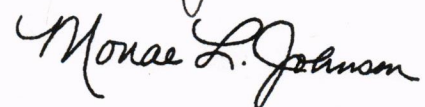
Because of the delay in our ability to begin collecting signatures caused by the Attorney General's misinterpretation of our previous submission on this subject, please *expedite* your response to this request. Thank you.



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

Filed this 7th day of

February 2023



SECRETARY OF STATE



January 5, 2023

JAN - 6 2023

Hon. Monae Johnson
Secretary of State
500 E Capitol Avenue
Pierre, SD 57501

Dear Secretary Johnson,

The Legislative Research Council (LRC) received an initiated measure to reduce the tax on anything sold for human consumption, except alcoholic beverages and prepared food. The initiated measure requires a fiscal note because it was determined it may have an impact on revenues, expenditures, or fiscal liability of the state or its agencies and subdivisions. SDCL 2-9-31 requires the fiscal note be no longer than fifty words. If this measure is approved by the people of South Dakota, the measure will take effect on July 1, 2025.


The fiscal note examines the fiscal impacts associated with no longer taxing anything sold for human consumption, except alcoholic beverages and prepared food. The methodology revolves around calculating the revenue generated with and without the exemption based the proportion of total expenditures attributable to food. Data on expenditures of food at home from the U.S. Bureau of Labor Statistics, income elasticity of consumption, state sales tax revenues, and other research and data contributed to this methodology. The South Dakota Department of Revenue was contacted to provide relevant data for this analysis.

The model produced an estimate showing a reduction in state sales tax of \$123.9 million for fiscal year FY2026, beginning July 1, 2025. Municipalities could still tax anything sold for human consumption. The actual amount of state sales tax revenue lost will vary from this estimate, as it is a point-in-time estimate completed at least two years prior to implementation.

In any fiscal estimate, assumptions must be made as to future economic activity and the meaning of words found in the initiated proposal filed with the Secretary of State. In neither the draft proposal nor the LRC's review, dated December 2, 2022, is the phrase "anything sold for human consumption" used or suggested. For purposes of this fiscal note, the LRC assumes that phrase only includes food items because of the modifying language "except alcoholic beverages and prepared food" and does not personal tangible property and services, both of which can also be sold for human consumption. Other assumptions as to the meaning of this phrase may be just as reasonable, if not more so.

Enclosed is a copy of the initiated measure, in final form, that was submitted to this office. In accordance with SDCL 2-9-31, I hereby submit the Legislative Research Council's fiscal note with respect to this initiated measure.

Sincerely,



Reed Holwegner
Director

Enclosures

Cc: Rick Weiland
Mark Vargo, Attorney General

SOUTH DAKOTA LEGISLATIVE RESEARCH COUNCIL

FISCAL NOTE

INITIATED MEASURE

**AN INITIATED MEASURE –
THE STATE MAY NOT TAX THE SALE OF ANYTHING SOLD FOR HUMAN
CONSUMPTION, EXCEPT ALCOHOLIC BEVERAGES AND PREPARED FOOD.**

Beginning July 1, 2025, the State could see a reduction in sales tax revenues of \$123.9 million annually from no longer taxing the sale of anything sold for human consumption, except alcoholic beverages and prepared food. Municipalities could continue to tax anything sold for human consumption.

Approved: *Reed Holwegner* Date: *January 5, 2023*
Director, Legislative Research Council

STATE OF SOUTH DAKOTA



OFFICE OF ATTORNEY GENERAL

1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501

Phone (605) 773-3215

Fax (605) 773-4106

<http://atg.sd.gov>

MARK A. VARGO
ATTORNEY GENERAL

CHARLES D. McGUIGAN
CHIEF DEPUTY ATTORNEY GENERAL

December 22, 2022

Richard P. Weiland
Dakotans for Health
PO Box 2063
Sioux Falls, SD 57101

Re: **Proposed Initiated Measure Concerning Sales Tax on Food and Beverages - Revised Submission**

Dear Mr. Weiland:

This letter acknowledges our receipt of the submission of your revised proposed initiated measure concerning sales tax on food and beverages. Your revised proposed measure was received on December 9, 2022. As required by SDCL 12-13-25.1, the Attorney General will prepare a draft title and explanation for the measure and file it with the Secretary of State on or before February 7, 2023. You will be provided a copy of the title and explanation at the time it is filed.

Sincerely,

A handwritten signature in black ink, appearing to read "SRB", followed by a horizontal line.

Steven R. Blair
Assistant Attorney General

SRB/dd

cc: Reed Holwegner, Director - Legislative Research Council
Hon. Monae L. Johnson, Secretary of State

December 7, 2022

Attorney General

By email and U.S. Mail

DEC -9 2022

Mark.Vargo@state.sd.us
Attorney General Mark Vargo
1302 E. Hwy 14, #1
Pierre, SD 57501

Reed.Holwegner@sdlegislature.gov
Director Reed Holwegner, LRC
500 E. Capitol Ave.
Pierre, SD 57501

Monae.Johnson@state.sd.us
Secretary of State Monae Johnson
500 E. Capitol Ave. Ste. 204
Pierre, SD 57501

Greetings:

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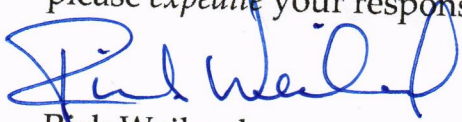
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I ask the Attorney General to prepare the necessary title and explanation for this initiated measure. Per SDCL 2-9-30, I ask the Director of the Legislative Research Council to prepare the necessary fiscal note for it.

Because of the delay in our ability to begin collecting signatures caused by the Attorney General's misinterpretation of our previous submission on this subject, please *expedite* your response to this request. Thank you.



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

DEC -5 2022

PRESIDENT PRO TEMPORE LEE SCHOENBECK, CHAIR | SPEAKER SPENCER GOSCH, VICE CHAIR
REED HOLWEGNER, DIRECTOR | SUE CICHOS, DEPUTY DIRECTOR | JUSTIN GOETZ, CODE COUNSEL

500 EAST CAPITOL AVENUE, PIERRE, SD 57501 | 605-773-3251 | SDLEGISLATURE.GOV



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.

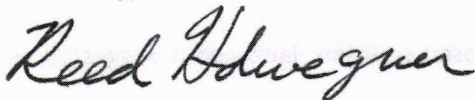
Fiscal Impact

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

December 7, 2022

By email and U.S. Mail

Mark.Vargo@state.sd.us
Attorney General Mark Vargo
1302 E. Hwy 14, #1
Pierre, SD 57501

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Monae.Johnson@state.sd.us
Secretary of State Monae Johnson
500 E. Capitol Ave. Ste. 204
Pierre, SD 57501

Greetings:

In accordance with SDCL 12-13-25.1, I submit the following proposed initiated measure in final form:

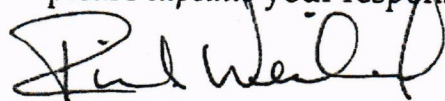
BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:

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 human consumption, except alcoholic beverages and prepared food. Municipalities may continue to impose such taxes.

I ask the Attorney General to prepare the necessary title and explanation for this initiated measure. Per SDCL 2-9-30, I ask the Director of the Legislative Research Council to prepare the necessary fiscal note for it.

Because of the delay in our ability to begin collecting signatures caused by the Attorney General's misinterpretation of our previous submission on this subject, please *expedite* your response to this request. Thank you.



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