



December 2, 2022

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

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DEC 05 2022  
S.D. SEC. OF STATE

Dear Mr. Weiland:

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

**Proposed initiated amendment to the Constitution as submitted with comments following:**

**BE IT ENACTED BY THE PEOPLE OF SOUTH DAKOTA:**

*That Article XI of the Constitution of the State of South Dakota be amended by adding a NEW SECTION to read:*

**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 begins with "[t]he state may not tax the sale of anything 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 proposed constitutional 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 constitutional language is to exempt the sale of certain food and beverages from tax. By beginning the proposed constitution text with "[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. 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 suggesting 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, if that authority is provided by law." (See item 6 below for further drafting suggestions for the proposed amendment language.)

SDCL 10-52-2 provides a municipality with 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 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 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 constitutional 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 purchase of food and beverages from tax exclude candy, soft drinks, and dietary supplements from the tax exemption. Considering that the proposal is to amend the constitution, which is more difficult to amend than state law, perhaps the sponsors should consider a broader list of exclusions.

4. The proposed constitutional language provides two exceptions to the tax prohibition: "alcoholic beverages and prepared food." The proposed language does not define these terms. Without definitions or a directive that definitions must be established by law, there may be questions as to what substances would qualify for the exceptions.
5. The sponsors may want to consider the utility of amending the constitution to create a tax exemption for the purchase of certain food and beverages. Since the constitution is more difficult to amend than state law, it may be problematic to address future considerations. For example, if consumable cannabis products are made legal in this state, would the purchase of these items automatically be exempt from tax? Often a stated goal of legalizing cannabis is the increased state revenue. The proposed language may limit future revenues if consumable cannabis products were to be legalized in South Dakota.
6. Based on the above comments, a possible rewrite of the proposed constitutional 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.**

**For purposes of this section, "food" and "food ingredients" mean substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value.**

**Food and food ingredients exempt under this section do not include alcoholic beverages and prepared food. Alcoholic beverages and prepared food must be defined 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, if that authority is provided by law."**

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.

The ordinary meaning of "retail sale" is when a business sells a product to an individual consumer for the consumer's own use. The definitions of "food" and "food ingredients" are taken from current law (See SDCL 10-45-1). The suggested language also directs the Legislature to enact laws defining the excepted items.

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. And additional consideration should be given for future products, such as consumable cannabis products.

7. 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.
8. SDCL 12-13-25 also requires the issuance of a written opinion "as to whether the initiated amendment embraces only one subject under S.D. Const., Art. XXIII, § 1" and whether it is in fact an "amendment under S.D. Const., Art. XXIII, § 1," or a "revision under S.D. Const., Art. XXIII, § 2." The proposed constitutional change appears to embrace only one subject, taxing the purchase of food and beverages. Given the limited nature of the proposed language, it appears to be an amendment and not a revision of the constitution.

#### **Fiscal Impact**

It has been determined during this review that this proposed initiated amendment to the Constitution 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 amendment to the Constitution 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 proposed initiated amendment to the Constitution nor a guarantee of its sufficiency. If you proceed with the initiated constitutional amendment, 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