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Mr. Rick Weiland
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Filed this 12th day of
August, 2022
Steve Barnett
SECRETARY 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, tobacco, or prepared food.

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.

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. Is this the intent of the proposal? If not, a rewrite of the language may be necessary.
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 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 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 or chewing and 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.

The proposed language specifically provides that tobacco is an exception from "eating or drinking." Without adding defined terms to the proposed language, the tobacco exception may add to the interpretive confusion since tobacco is neither a food nor a beverage. If something that is not eaten or drunk is exempted from "eating or drinking," the language possibly could create an absurd legal reality, exempting items that generally do not apply in the ordinary sense of how "eating or drinking" are commonly understood.

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,