

SENATOR GARY CAMMACK, CHAIR | REPRESENTATIVE DEAN WINK, VICE CHAIR  
JASON HANCOCK, DIRECTOR | SUE CICHOS, DEPUTY DIRECTOR | DOUG DECKER, CODE COUNSEL  
500 EAST CAPITOL AVENUE, PIERRE, SD 57501 | 605-773-3251 | SDLEGISLATURE.GOV



January 6, 2017

RECEIVED

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S.D. SEC. OF STATE

Ms. Melissa Mentele  
New Approach SD  
241 N. 7<sup>th</sup> Street  
Emery, SD 57332

Dear Ms. Mentele:

Pursuant to SDCL 12-13-25, this office is required to review each initiated measure. Further, this office is required by SDCL 12-13-24 to determine if each initiated measure is written in a clear and coherent manner in the style and form of other legislation and that it is worded so that the effect of the measure is not misleading or likely to cause confusion among voters. You are under no obligation to accept any of the suggestions contained in this letter. But please keep in mind the legal standards established in SDCL 12-13-24.

The draft language of the initiated measure submitted to this office is not written in the same style and form used for preparing legislation for the South Dakota Legislature. It may be helpful to review the drafting manual for legislation that may be found on the LRC website or you may find examples of legislation introduced in previous sessions to provide a format for preparing your proposed initiated measure.

The title for the proposed measure should begin with an active verb that expresses the subject of the proposed measure. Findings and declaration of purpose are rarely used in legislation and it does not appear that the proposed findings list any facts, but expresses an opinion of the purpose of the measure. There are several other style and form issues that are either outlined in this letter or marked on the proposed measure.

Do not attempt to amend or propose the catchline for each section of law as the catchline is not part of the statute. The publisher and Code Counsel will amend or prepare the catchlines. Also, never attempt to assign the codification number for any new section as that will be determined by the publisher and Code Counsel.

In general, avoid multi-paragraph sections by making each paragraph a separate section and use internal references, if needed. Section 13 of the measure as submitted to this office is a prime example of a multi-paragraph section. These paragraphs should be made into separate sections.

We do not use numerals in the drafting of legislation, except for the drafting of special appropriations. Please avoid the use of pronouns whenever possible by using gender-neutral terms that could be substituted for several of these pronouns. We also write in the active voice and use the singular subject instead of the plural when drafting. The simplest way to accurately state a proposition is the preferred format. Please use short and concise sentences and avoid long complex sentences.

When drafting bills or amendments we use "may not" instead of "shall not." A negative used with "may" negates the obligation and permission to act and is the stronger prohibition. A negative used with "shall" negates the obligation but not the permission to act and therefore is avoided.

If the voters were to adopt this initiated measure, federal law would still apply to conduct related to marijuana use, possession, production, sale, or transportation. Passage of this initiated measure would place South Dakota law in conflict with federal law.

The initiated measure does not specify which department will be responsible for regulating marijuana in South Dakota. There are no such bodies within South Dakota that have regulatory authority called the "SD Liquor Board" or "Retailers Association." You must choose an existing department that will assume the regulatory authority over the activities covered by this Act.

The definitions section includes terms that are commonly repeated or terms that need to be defined to ensure complete clarity in their intended use. Terms that are defined in this section should not include definitions of legal substance. Therefore, the substantive legal definitions for "Marijuana cultivation facility" and "Possession limit" should be moved to their own section of the Act as they regulate activities related to these terms and do not merely provide a clarifying definition.

With regard to the definition of "Possession limit" there is a likely constitutional question under the Constitution of the United States, as this section would apply two separate standards of possession limits for persons in the state based on their state of residency.

Sections 3 and 9 of the Act attempt to provide an exception to illegal conduct. Activities that are not explicitly prohibited under law are deemed legal activities. In order to legalize an activity that is currently illegal, the statute that prohibits that activity should be repealed or amended. Because this Act is not attempting to carve out an exception to existing law that would remain intact if the Act were adopted, but instead seeks to overturn existing marijuana prohibitions, the language of existing statutes should be amended to accomplish the Act's goal or the Act would likely "cause confusion among voters." Consider amending §§ 22-42-6, 22-42-7, and 34-20B-70.

The civil violations that are provided under several provisions of the Act are not penalties recognized within the South Dakota code. Penalties that are recognized are either civil penalties that must be imposed by an agency with the proceeds directed to a particular fund, or they are criminal penalties that fit within a specific class of either a misdemeanor or a felony depending upon the severity of the violation and the extent of the penalty. A person in violation of a regulation is "subject to" a civil penalty; a person in violation of a criminal code is "guilty of" a particular class of offense. Refer to the Drafting Manual, pp 11-12, to identify the form of criminal penalty to be imposed with the appropriate class.

Section 7 of the Act would prohibit the purchase of marijuana by a minor with the use of a false identification. The primary offense under this section is the prohibition against a minor purchasing marijuana. Any other offense, such as the use of a false identification, is an offense that would be charged under separate statutes already in existence.

Section 8 of the Act provides for a felony with a penalty that does not fit within the classes of felony that exist within the South Dakota code. We ascribed a Class 6 to this felony because it is the closest to the penalty described in the section.

Section 11 of the Act provides for a complete defense to a person's reasonable reliance on a minor's identification when purchasing marijuana or marijuana products. As stated above, the simplest way to accurately state a proposition is the preferred format. Existing language in § 34-46-5 provides a simpler way of accomplishing the same objective as the language in this section.

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Section 19 of the Act provides that contracts related to the operation of a marijuana establishment would be enforceable under South Dakota law. If this Act were adopted by voters, this section would be in direct conflict with § 53-9-1, which provides that any contract contrary to an express provision of law, including federal law, is unenforceable. Consider removing this section of the Act and instead amending § 53-9-1 to achieve the objective of the Act and avoid any "confusion among voters."

Section 22 of the Act creates a likely constitutional question under Article 12 of the South Dakota Constitution.

Severability clauses may be used in other states; however, severability is a long-established doctrine of the South Dakota Supreme Court. This is sometimes referred to as "the doctrine of severability." Section 23 of the draft as it was submitted to this office should be deleted.

The effective date of initiated measures is determined by § 2-1-12 to be the day following the completion of the official canvass by the State Canvassing Board. Therefore, Section 24 of the Act should be removed.

Section 25 of the Act likely raises a constitutional question regarding separation of powers.

The final section of the bill is unnecessary. Reservations in South Dakota are subject to federal law with regard to marijuana legalization.

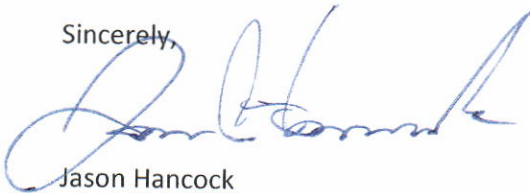
Finally, the proposed initiated measure is lengthy. Please keep in mind that the proposed measure along with the Attorney General explanation, instructions to signers, and signature blocks must all fit on a single initiative petition form.

Attached is a copy of your proposed initiated measure with all our suggested style and form changes.

Please note that if you proceed with your initiative that a prison or jail population cost estimate must be requested pursuant to SDCL 2-1-19.

This letter constitutes neither an endorsement of your initiated measure nor a guarantee of its statutory sufficiency. It does constitute fulfillment of your responsibility pursuant to SDCL 12-13-25 to submit your draft to this office for review and comment. If you proceed with your initiated measure, please take care to ensure that your statements or advertising do no imply that this office endorses or approves your proposals.

Sincerely,



Jason Hancock  
Director

JH/WC/ct

Enclosure

CC: The Honorable Shantel Krebs, Secretary of State  
The Honorable Marty Jackley, Attorney General