

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

**TO:** Steven Ward and Levi Mendyk  
**FROM:** Legislative Council Staff and Office of Legislative Legal Services  
**DATE:** April 6, 2022  
**SUBJECT:** Proposed initiative measure 2021-2022 #126, 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 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 a series of initiatives including proposed initiatives 2021-2022 #112 through 129. The comments and questions raised in this memorandum will not include comments and questions that are addressed in the memoranda for proposed initiatives 2021-2022 #112 to 118 and 120 to 125 and the memorandum for proposed initiative 2021-2022 #119, except as necessary to fully understand the issues raised by the revised proposed initiative. Comments and questions addressed in those other memoranda may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum.

Earlier versions of this proposed initiative, proposed initiatives 2021-2022 #66 and 2021-2022 #67, were the subject of memoranda dated February 28, 2022, which were discussed at a public meeting on March 3, 2022. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meetings, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and 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. To allow businesses licensed under the "Colorado Beer Code" to sell fermented malt beverages, or "beer", to also sell wine starting March 1, 2023;
2. To add references to "and wine" and "beer" in several sections in the "Colorado Liquor Code" and the "Colorado Beer Code", purportedly to effectuate the ability of persons licensed under the "Colorado Beer Code" to sell beer to also sell wine;
3. To allow retailers licensed under the "Colorado Liquor Code" or the "Colorado Beer Code" for the sale of alcohol beverages for off-premises consumption and retailers licensed under the "Colorado Liquor Code" for the sale of alcohol beverages for on-premises consumption to deliver alcohol beverages to their customers, either through their own employees, through an independent contractor, or through a third-party delivery service that holds a delivery service permit;
4. To specify that if a licensed retailer is using an independent contractor to deliver alcohol beverages to its customers, the retailer must obtain a delivery service permit, but if the retailer is using its own employees who are at least twenty-one years of age and using the retailer's owned or leased vehicle to make deliveries, the retailer need not obtain a delivery service permit;
5. To specify the requirements for obtaining a delivery service permit and the requirements for providing delivery services;

6. To authorize the state licensing authority to enforce the delivery service requirements against licensees and delivery service permittees, and employees and independent contractors of licensees and permittees;
7. To specify that if an employee or independent contractor of a licensee that holds a delivery service permit commits a violation of the "Colorado Liquor Code" or the "Colorado Beer Code" during delivery, the licensee's license and permit are both subject to disciplinary action;
8. To specify that delivery to a minor is the equivalent of furnishing to a minor for purposes of unlawful acts subject to disciplinary action; and
9. To repeal the requirements 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:
  - a. Derive no more than fifty percent of annual gross sales revenues from sales of alcohol beverages for delivery; and
  - b. Use an employee of the licensee who is at least twenty-one years of age and who uses a vehicle owned or leased by the licensee to make the alcohol beverage 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. The amending clause for section 2 of the measure indicates that subsection (62) is being added to section 44-3-103. However, there is no subsection (62) in that section of the measure. On the other hand, there appears to be a new subsection (11.8) in section 2, but subsection (11.8) is not mentioned in the amending clause. Do the proponents intend the language labeled as "(11.8)" to actually be the new "(62)"? Or is "(62)," as listed in the amending clause, intended to instead refer to "(11.8)"? Would the proponents modify the amending clause

and the substance of section 2 to ensure both correctly reflect the proposed changes to section 44-3-103?

3. In section 2 of the measure, what is the intent of the amendment to subsection (11.5)(l) in section 44-3-103? Section 44-3-103 (11.5) defines the term "communal outdoor dining area," and the proposed change to subsection (11.5)(l) appears to add "and wine" to a provision that applies to retailers licensed under the "Colorado Beer Code" to sell beer for consumption on the licensed premises. Do the proponents intend to allow retailers licensed under the "Colorado Beer Code" for consumption on the licensed premises to also be permitted to sell wine? Section 1 of the measure declares the intent to allow "grocery and convenience stores" to sell wine, and those businesses are not permitted to sell beer for on-premises consumption. Would the proponents clarify which types of licensees under the "Colorado Beer Code" would be permitted under the measure to start selling wine on March 1, 2023?
4. Section 1 declares that the measure amends the "Colorado Beer Code" to allow, beginning March 1, 2023, grocery stores and convenience stores that are licensed to sell beer to also sell wine. Then, section 4 of the measure purports to add ("beer") and the phrase "and wine" after references to fermented malt beverage in several sections in both the "Colorado Liquor Code" and the "Colorado Beer Code," which raises the following issues:
  - a. The standard format for drafting changes to the Colorado Revised Statutes is to show the actual text of the current law being amended, to show additions to current law in SMALL CAPS, and to show language being repealed from the law in ~~stricken type~~. The method used in section 4 of the measure does not show the current law and how it is to be changed, thus making the intent ambiguous and unclear to the public. Would the proponents consider following the standard format for proposing changes to the law?
  - b. Because the proposed changes to the law in section 4 of the measure are unclear, it cannot be determined whether the ability to sell wine, in addition to beer, applies to retailers licensed to sell beer at retail for consumption off the licensed premises, to retailers licensed to sell beer for consumption on the licensed premises, or to retailers licensed to sell beer for consumption both on and off the licensed premises. What is the proponents' intent? What types of licensed retailers would be able to sell wine under the proposed measure?

- c. Section 4 does not propose to amend every reference to "fermented malt beverage" in the "Colorado Liquor Code" or the "Colorado Beer Code." What is the intent and effect of adding "and wine" to some, but not all, references to "fermented malt beverage" in those codes?
- 5. Section 5 of the measure proposes to amend section "44-4-401."
  - a. There is no section 44-4-401 in current law. What section of law do the proponents intend to amend?
  - b. The amending clause indicates that the entire section 44-4-401 is amended, but the measure includes only a subsection labeled "(1)(c)(I)(B)." If the intent is to amend only a portion of a section of statute, the amending clause should clearly state which portion of the statute is being amended.
  - c. If the proponents are intending in section 5 of the measure to amend section "~~44-4-104~~" and to amend subsection (1)(c)(I)(B), the language in the measure that purports to be section 44-4-104 (1)(c)(I)(B) does not reflect the language that appears in that section in current law. What is intended to be amended by section 5?
- 6. Section 6 of the measure appears to amend a section of statute that pertains and applies only to retailers licensed to sell beer for both on-premises and off-premises consumption. Is this the type of licensee that the measure intends to allow to sell wine in addition to beer? This section of statute actually requires these retailer licensees to apply to convert the license to a license either to sell beer for on-premises consumption or to sell beer for off-premises consumption. So, after conversion, which one of these licensees would be able to sell wine?
- 7. In section 7 of the measure, subsection (1) of the new section 44-3-911.5 appears to allow a delivery service permittee or employee or independent contractor of a permittee to deliver alcohol beverages for licensed retailers. The provision also appears to require a person licensed to sell at retail for on- or off-premises consumption to obtain a delivery service permit if the licensee uses an independent contractor to deliver alcohol beverages sold by the licensee to its customers, but if the licensee uses its own employees to deliver alcohol beverages to customers, the licensee need not obtain a delivery service permit.
  - a. It appears that amendments to section 44-4-107 (6) in section 4 of the measure may authorize a retailer licensed under the "Colorado Beer Code" to deliver beer and wine pursuant to this section, but the first

sentence of subsection (1) of section 7 of the measure states that "a delivery service permittee, or an employee or independent contractor of a delivery service permittee . . ." may deliver alcohol for licensed retailers. Does this mean that a licensed fermented malt beverage and wine retailer must also be a "delivery service permittee," even if the retailer uses its own employees to make deliveries? How does this provision work with section 44-4-107 (6) as amended in the measure? Most of the new section 44-3-911.5 seems to address delivery and requirements for a third-party home delivery service provider, and it is not clear how and whether references to a "permittee" include a licensee that is performing delivery with its own employees or independent contractors.

- b. The sentence regarding the use of an independent contractor states that the licensee "shall be authorized to apply for and to hold a delivery service permit . . . in order to use independent contractors for delivery." However, that language does not appear to require the licensee to obtain the permit in order to use an independent contractor; rather the language requires that the licensee be authorized to apply for and hold a permit in order to use an independent contractor. If the intent is to require the permit in order to use an independent contractor, would the proponents consider making that intent clearer?
  - c. What is meant by the phrase "as a privilege separate from its existing license"? What are the intended legal effects of that phrase?
  - d. Regarding the language that purports to exempt retailers that use their employees for delivery from the permit requirement, the language in the measure states that a "retailer . . . shall not require a delivery service permit . . ." If the intent is to exempt retailers who use their employees for delivery from the permit requirement, would the proponents consider rephrasing the last two sentences in subsection (1) to make that intent clear? For example, "An off-premises retailer licensed pursuant to . . . is not required to obtain a delivery service permit if . . ."
8. In section 7 of the measure, in subsection (2) of the new section 44-3-911.5, to whom does an individual or entity apply for a delivery service permit? And are there any standards for obtaining a permit, other than the requirements listed in subsection (3)? Does section 44-3-307 apply to applicants for a delivery service permit?

9. In section 7 of the measure, in subsection (4) of the new section 44-3-911.5:
- a. Does the term "delivery service permittee" include a licensed retailer that obtains a delivery service permit? If so, is it the proponents' intent to allow, for example, a licensed retail liquor store that has a delivery service permit to deliver alcohol beverages, either through its employees or an independent contractor, *for another retail liquor store*, pursuant to subsection (4)(a), or *for a restaurant* pursuant to subsection (4)(b)? The measure appears to allow that practice if "delivery service permittee" includes a licensed retailer that obtains a delivery service permit. If that is not the proponents' intent, would the proponents consider modifying the measure to make the intent clear?
  - b. Because the word "provided" has more than one meaning and can mean opposite things, it is standard drafting practice to avoid the use of "provided," "provided that," and similar phrases. The more specific words "except that", when specifying an exception to the preceding language, or "if" or "so long as", when specifying a qualifier to the preceding language, is preferred. In subsection (4)(c), consider changing "provided" to "if" if your intent is to specify a qualifier for employees who deliver alcohol beverages.
  - c. With regard to the requirement in subsection (4)(c) that delivery agents complete a certification program, does that program need to meet the requirements of section 44-3-911 (3)(d)? Does the requirement in subsection (4)(c) relate to the language in subsection (4)(b) that a certification program under subsection (3)(b) of the section satisfies the requirements in section 44-3-911 (3)(d)? Are these all the same certification program?
  - d. The term "delivery agents" is used in subsection (4)(c) but is not otherwise used or defined in the measure. What is meant by this term? Would the proponents consider defining it?

10. In section 7 of the measure, in subsection (9) of section 44-3-911.5:

- a. In the phrase, "The state licensing authority may enforce the requirements of this section against the ... licensee, ... permittee, and any employee or independent contractor of such ...", the use of "of such" creates ambiguity, as it is unclear if "of such" refers back to the permittee, the licensee, or both. Would the proponents consider removing this ambiguity by specifying if the employee or independent

contractor is of the licensee or of the permittee, or of either the licensee or permittee?

- b. In subsection (9)(a), should the word "permit" after "retailer's" instead be "license"?
- c. The last sentence of subsection (9)(a) states that delivery to a minor is to be treated a "furnishing" to a minor. What is the significance of the term "furnish" in this context? Under section 44-3-901 (1)(b), it is unlawful for any person to "sell, serve, give away, dispose of, exchange, or deliver or permit the sale, serving, giving, or procuring of any alcohol beverage to or for any person under the age of twenty-one years." If the intent of this sentence is to tie delivery to a minor to this provision, delivery is mentioned in that section, but "furnish" is not mentioned, so the effect of this sentence is unclear.

## Technical Comments

The following comment addresses technical issues raised by the form of the proposed initiative. The comment will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about the comment at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

1. It is standard drafting practice to *include in the measure the language in the current law that is being amended* and to use SMALL CAPITAL LETTERS to show the language being added to the Colorado Revised Statutes and to use stricken type, which appears as ~~stricken type~~, to show language being removed from the Colorado Revised Statutes. The text of all of the sections of law proposed to be amended in section 4 of the measure should be included in the measure, each section of statute should be included in a separate section of the measure with a distinct amending clause, and the precise manner in which those sections are to be amended should be clearly indicated in the measure.