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MEMORANDUM

TO: Robert Schraeder and Joel Allen Cathey
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: March 31, 2022

SUBJECT: Proposed initiative measure: 2021-2022 #98, concerning Liquor Licenses

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 #96, #97 and #99 to 102. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiatives 2021-2022 #96, #97 and #99 to 102, except as necessary to fully understand the issues raised by the 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.

Purposes

The major purposes of the proposed amendment to the Colorado Revised Statutes appear to be:

1. To create parity in the number of additional licenses that businesses licensed under the "Colorado Liquor Code" to sell alcohol beverages for consumption off the licensed premises may obtain by capping the total number of licenses each licensee may obtain at twelve on or after January 1, 2022;
2. To create a new "beer and wine off-premises retailer" license type under the "Colorado Liquor Code" that allows an establishment that derives at least twenty percent of its gross annual sales revenues from the sale of food items for consumption off the licensed premises to sell malt and vinous liquors, commonly referred to as "beer" and "wine", for off-premises consumption;
3. To cap the total number of beer and wine off-premises retailer licenses issued to any one person or entity at a total of twelve licenses;
4. To require a beer and wine off-premises retailer licensee to purchase beer and wine only from licensed wholesalers;
5. To prohibit a beer and wine off-premises retailer from:
 - a. Having a direct or indirect interest in a licensed manufacturer or wholesaler;
 - b. Selling beer or wine at a price below the retailer's cost to purchase the beer or wine, with certain exceptions; and
 - c. Allowing customers to purchase beer or wine through a self-checkout mechanism that allows the customer to complete the alcohol beverage purchase without assistance from an employee of the licensee;
6. To allow a person licensed as of March 1, 2023, under the "Colorado Beer Code" to sell fermented malt beverages, also known as "beer", for off-premises consumption to apply to the local licensing authority to convert up to twelve of its existing licenses to the new beer and wine off-premises retailer license upon meeting all other requirements and subject to local licensing authority considerations at a public hearing;
7. To permit a beer and wine off-premises retailer to allow tastings of beer and wine on the licensed premises if authorized by the local licensing authority;

8. To preclude the state licensing authority or local licensing authorities from issuing:
 - a. A new beer and wine off-premises retailer license if the licensed premises is located within five hundred feet of an existing retailer liquor store; or
 - b. A new retail liquor store license if the licensed premises is located within five hundred feet of an existing beer and wine off-premises retailer;
9. To allow a retail liquor store or liquor-licensed drugstore to have an interest in a beer and wine off-premises retailer license; and
10. To authorize state and local licensing authority application and annual fees pertaining to the new beer and wine off-premises retailer license.

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. It is standard drafting practice to show language being deleted from statute in stricken type, rather than just deleting words from current law, and to show new language in SMALL CAPITAL LETTERS. It is also important to show the complete current law in lower case type. For example, in section 6 of the measure, which amends section 44-3-301, in the amendments to subsection (10)(b), the word "or" in current law in the phrase "A retail liquor store or liquor-licensed drugstore . . ." has been removed without showing that word in stricken type, and the word "or" before the other new language "BEER AND WINE OFF-PREMISES RETAILER" does not appear in small capital letters to show that it is new language being added to the statute. Similar changes or inaccuracies in current law, without showing word changes being proposed, appear in section 13 in the proposed amendments to section 44-3-901. For purposes of clearly informing the public as to the changes being proposed to current law, would proponents consider following these standard drafting practices?

3. In section 4 of the measure, which creates a new beer and wine off-premises retailer license in the "Colorado Liquor Code":
 - a. Subsection (4) allows a fermented malt beverage retailer licensed under section 44-4-107 (1)(a) to sell beer for off-premises consumption as of March 1, 2023, to apply "to a local licensing authority" to convert the license to the new beer and wine off-premises retailer license. Typically, licenses under the "Colorado Liquor Code" authorizing the sale of alcohol beverages to end consumers, i.e., "at retail", are issued by both the state and local licensing authorities. Is it the proponents' intent, for purposes of the conversion of a fermented malt beverage retailer license to a beer and wine off-premises retailer license, that only the local licensing authority consider and act on these applications?
 - b. If the answer to a., above, is "yes," then would the proponents consider eliminating the state licensing authority conversion application fees authorized in section 11 of the measure in new subparagraph (XX) in section 44-3-501 (3)(a)? If the state licensing authority is not considering these applications, does the state licensing authority need to assess an application fee?
 - c. Also with regard to subsection (4), the provision states the criteria for local licensing authorities to consider on an application to convert a fermented malt beverage off-premises retailer license to a beer and wine off-premises retailer license. Are these criteria only intended for converting an existing license but not for an application for a new beer and wine off-premises license? Is the intent that the standards set forth in sections 44-3-301 and 44-3-304 through 44-3-113 apply for applications for a new beer and wine off-premises retailer license?
 - d. Subsection (8) appears to authorize the state licensing authority to adopt rules to implement the section. Additionally, the provision authorizes the state licensing authority to adopt "regulations and issue special rulings and findings." This language appears to copy language in section 44-3-202 (1)(b), which already grants this authority to the state licensing authority. Accordingly, subsection (8) appears to be redundant as these powers are already granted in section 44-3-202(1)(b). If proponents retain subsection (8), consider eliminating "and regulations" as it is redundant with the term "rules," as noted in the definition of "rule" in section 24-4-102 (15), in the "State Administrative Procedure Act," article 4 of title 24.

- e. Under current law, a fermented malt beverage retailer licensed to sell beer for off-premises consumption may deliver beer to its customers in accordance with section 44-4-107 (6). If the licensee converts this license to a beer and wine off-premises retailer license, which license does not appear to authorize delivery to customers, would the licensee, under the converted license, no longer have the authority to make deliveries to its customers?
4. Under current law, the word "shall" is defined in section 2-4-401 (13.7), and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty." These definitions apply generally to the Colorado Revised Statutes. In section 5 of the measure, in the definition of the term "beer and wine off-premises retailer", the provision appears to impose a condition that an establishment derive a certain percentage of its gross sales revenues from the sale of food. This is not a duty, but is instead a condition. Accordingly, would the proponents consider rephrasing "shall derive" to "must derive" or "derives"?
5. In section 5 of the measure, the term "off-premises retailer" is added to the definitions section applicable to articles 3 and 4 of title 44. The term is defined to mean any licensee "under this article 3 or article 4 of this title 44" that is allowed to sell alcohol beverages for consumption off the licensed premises. However, the term "off-premises retailer" is not used in current articles 3 or 4 of title 44, and the term only appears in the measure when preceded by "beer and wine". Given that the term "beer and wine off-premises retailer" is also defined in the measure, and that is the only context in which the term "off-premises retailer" is used in the measure, the definition of "off-premises retailer" is unnecessary. Would proponents consider deleting it from the measure?
6. Sections 9 and 10 appear to amend sections 44-3-409 and 44-3-410:
 - a. Standard drafting practice is to combine all amendments to the same section of the Colorado Revised Statutes into one section in a measure. Since sections 44-3-409 and 44-3-410 are also amended in sections 2 and 3 of the measure, respectively, proponents may consider combining sections 2 and 9, which both amend section 44-3-409, and combining sections 3 and 10, which both amend section 44-3-410.

- b. The absence of the introductory language in subsection (4)(b) of section 44-3-409, which states "(b) An owner, part owner, shareholder, or person interested directly or indirectly in a retail liquor store may have an interest in:", is critical to understanding that section 9 permits retail liquor store licensees to have an interest in a beer and wine off-premises retailer license. Similar introductory language is also missing from subsection (4)(b) of section 44-3-410 regarding liquor-licensed drugstore licensees. Absent that introductory language, it is unclear to the public what change is being made to the law in these sections. As noted in the technical comments below, it is standard drafting practice to include this type of introductory language – the language that precedes a list, as in the case of these statutes – in order to provide context and clarity in the changes to the law. Would proponents consider including the introductory language in these sections, as well as in sections 2, 3, 6, 7, 8, 11, 12, and 13 of the measure?
7. In section 13 of the measure, which proposes amendments to section 44-3-901, in the amendments to subsection (6)(k)(II)(A), the list of retailers is being amended to add a reference to a beer and wine off-premises retailer in the context of an exception to off-premises retailers having open containers of alcohol beverages on the licensed premises for purposes of sampling the product. However, the phrase "in the case of a retail liquor store or liquor-licensed drugstore" after "malt, vinous, or spirituous liquors" seems to suggest that the exception still applies only to retail liquor stores and liquor-licensed drugstores. Perhaps proponents intended to specify that retail liquor stores and liquor-licensed drugstores may have open containers of malt, vinous, and spirituous liquors and beer and wine off-premises retailers may have beer and wine in open containers, in either case for purposes of sampling? Would the proponents consider making the intent of the changes to this provision clearer?

Technical Comments

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

1. It is standard drafting practice that a headnote appears in lowercase type rather than small capital letters, even when appearing in a new section; except that the first letter of the first word should be capitalized.
2. It is standard drafting practice that an internal reference should always be preceded by its name, for example "section 44-3-107 or "subsection (3)(b) of this section", unless there is a list of section or subsection numbers, in which case the words precede the list. The word "section" should be added before the section numbers references in new language in sections 44-3-505 (4)(a)(VI) and 44-3-901 (6)(p)(I)(B) and (6)(p)(III).
3. It is standard drafting practice to show the introductory portion that precedes the language being amended, if one exists, for ease of reading. For example, in section 2, section 44-3-409 (4)(b) has an introductory portion. Introductory portions are also missing in sections 44-3-410 (4)(b), 44-3-301 (10)(c)(I), 44-3-309 (1), 44-3-401 (1), 44-3-410 (4)(b), 44-3-501 (1) and (3)(a), 44-3-505 (1) and (4)(a), and 44-3-901 (1) and (6).
4. In sections 7 and 8 of the measure, not only is the introductory portion missing, but the subsection number "(1)" is also missing. Although it appears in the amending clause, it is important that the subsection number be included in the statutory text so that it is clear where the new provision is to be placed.
5. It is standard drafting practice to use SMALL CAPITAL LETTERS to show the language being added to the Colorado Revised Statutes, and stricken type, which appears as ~~stricken type~~, to show language being removed from the Colorado Revised Statutes; however, an internal reference that contains a paragraph letter, such as (a), (b), or (c) should be shown in lowercase type so as not to confuse the reader. In section 44-3-410.5 (4) of the measure, the internal reference "44-4-107 (1)(A)" should be shown in lowercase type as "44-4-107 (1)(a)."
6. Each statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, if you intend to add a new paragraph to section 44-3-401 (1), you would include the following amending clause: "In Colorado Revised Statutes, 44-3-401 **add** (1)(y) as follows:".

In each amending clause, it is necessary to include the subsection number where the paragraph is being added and each subsection number, paragraph letter, subparagraph number, and sub-subparagraph letter must be enclosed in

parentheses. For example, in section 6 of the measure, subsection (10) should be enclosed in parentheses each time it is used: "... **amend** (10)(b), (10)(c)(I)(A), (10)(c)(XII), (10)(d), and (10)(e); ..."

7. When amending a statutory section, the provisions of the section should be copied into the measure exactly as they appear in the Colorado Revised Statutes.
 - a. Within each section, a subsection number, paragraph letter, subparagraph number, or sub-subparagraph letter appears only once in each subsection. For example, in section 6 of the measure, multiple subdivisions of section 44-3-301 (10) are being amended. The subsection number, "(10)", should not be inserted before each paragraph being amended in the statutory text but rather, only before the first paragraph in subsection (10) that is being amended. The same problem occurs in multiple provisions within the measure.
 - b. Additionally, current law should appear in lowercase type. See, for example, section 5, which adds new definitions in section 44-3-103, but the introductory portion of that section, that reads "As used in this article 3 and article 4 of this title 44, unless the context otherwise requires:", is current law and should appear in lowercase type
8. Subsection numbers within a statutory section should also be enclosed in parentheses. For example, in section 6, section 44-3-301 (12)(a.5) is being amended by the addition of two new subparagraphs. Within the statutory text, subsection (12) is not being shown enclosed in parentheses before paragraph (a.5). Subsection (12)(a.5) should be shown as:

(12) (a.5) (III) Notwithstanding any other ...

(IV) Notwithstanding any other ...
9. It is standard drafting practice that within a statutory section, a section cannot be broken down into subsections unless there are at least two subsections, a (1) and a (2), and a subsection cannot be broken down into paragraphs unless there are at least two paragraphs, an (a) and a (b). Likewise, the same rule applies to breaking paragraphs down into subparagraphs and subparagraphs down into sub-subparagraphs. In section 6 of the measure, section 44-3-301 (12)(a.5)(III) includes a sub-subparagraph (A), but there is no sub-subparagraph (B). Therefore, the designation "(A)" is unnecessary and should not be used. (See the example in number 8, above.)

10. It is standard drafting practice to use SMALL CAPITAL LETTERS to show the language being added to the Colorado Revised Statutes, and stricken type, which appears as ~~stricken type~~, to show language being removed from the Colorado Revised Statutes. In section 11 of the measure, the amending clause indicates that section 44-3-501 (3)(a)(XVIII) and (3)(a)(XIX) are being *amended* and those subsections appear in the statutory text; however, they are both shown in small capital letters instead of lowercase letters. Since both subsections are current law, they should be shown in lowercase letters, and only *changes* to the current law should be shown in stricken type or SMALL CAPITAL LETTERS.
11. Only provisions of a statute that are being amended should be included in the measure, unless the statutory text is the introductory portion preceding language that is being amended, repealed, or added. In section 11 of the measure, the amending clause indicates that section 44-3-501 (3)(a)(XVIII) is being *amended* and subsection (3)(a)(XVIII) is included in the statutory text; however there are no actual amendments to that subsection. Was it the proponents' intent to show the "and" at the end of the subsection in stricken type since the proponents added a new subparagraph (XX)?