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MEMORANDUM

TO: Robert Schraeder and Joel Allen Cathey
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: April 6, 2022
SUBJECT: Proposed initiative measure 2021-2022 #139, concerning Third-Party 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.

Purposes

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

1. To define a delivery service permittee as an individual or entity that holds a permit to deliver alcohol beverages under the new statute the measure proposes;
2. To allow a delivery service permittee or the permittee's employee or independent contractor to transport and deliver alcohol beverages from a retailer licensed under the "Colorado Liquor Code" or the "Colorado Beer Code" for the sale of alcohol beverages for off-premises consumption or from a retailer licensed under the "Colorado Liquor Code" for the sale of alcohol beverages for on-premises consumption to persons in the state who are at least twenty-one years of age;
3. To allow a retailer licensed under the "Colorado Liquor Code" or the "Colorado Beer Code" for the sale of alcohol beverages for off-premises consumption or from a retailer licensed under the "Colorado Liquor Code" for the sale of alcohol beverages for on-premises consumption to apply for and hold a delivery service permit as a separate privilege from the retailer's license;
4. To specify that an individual or entity registered to do business in Colorado, regardless of the domicile or residence of the individual or entity, may obtain a delivery service permit to provide delivery services for licensed retailers described in number 2;
5. To specify the requirements for obtaining a delivery service permit, which include:
 - a. Providing to the state licensing authority a sample contract that an applicant will enter into with a licensed retailer to provide alcohol beverage delivery services for the retailer, unless the applicant is a licensed retailer;
 - b. Submitting to the state licensing authority an outline of an internal or external certification program for delivery service personnel or contractors that addresses issues regarding delivery to persons who are legally authorized to receive delivery of alcohol beverages;
 - c. Providing proof of a general liability insurance policy;
 - d. Providing proof to the state licensing authority that the applicant provides to its employees and contractors:
 - i. Accident insurance coverage for the vehicle used for deliveries;
 - ii. Short- and long-term disability insurance;

- iii. Health insurance or a quarterly health-care stipend;
 - iv. Unemployment insurance coverage; and
 - v. Reimbursement for fuel costs incurred in providing delivery services;
6. To specify that a delivery service permittee:
- a. May deliver alcohol beverages for any off-premises retail licensees licensed under the "Colorado Liquor Code" or the "Colorado Beer Code;"
 - b. May deliver alcohol beverages for licensees included in section 44-3-911, C.R.S., that are authorized to sell alcohol beverages for consumption on the licensed premises and that the delivery may include alcohol beverages sold by the drink;
 - c. May satisfy the requirement under section 44-3-911 (3)(d), C.R.S., to have satisfactorily completed the server and seller training program established under section 44-3-1002, C.R.S., by providing a certification program for delivery service personnel and contractors;
 - d. May use its employees and independent contractors who are at least twenty-one years of age to deliver alcohol beverages if they have completed the certification program;
 - e. May facilitate alcohol beverage delivery orders by telephone, internet, or other electronic means as long as the full amount of each order is handled in a manner that gives the retailer control over the ultimate receipt of the customer's payment;
 - f. May deliver alcohol beverages at any time that the licensee is lawfully allowed to sell alcohol beverages;
 - g. Shall verify, at the time of delivery, that the recipient of the delivery is at least twenty-one years of age, and shall refuse delivery to a person who is under twenty-one years of age, fails to provide proof of identification, or appears intoxicated;
 - h. May not deliver alcohol beverages to a premises that is licensed under the "Colorado Liquor Code," the "Colorado Beer Code," or the special event liquor permit law; and

- i. Is deemed to have consented to the jurisdiction of the state licensing authority, law enforcement agencies, and Colorado courts with regard to enforcement of the delivery statute and related laws and rules;
7. To allow a permittee to renew the permit annually if the permittee maintains its qualifications and pays a fee to the state licensing authority;
8. To specify that a technology services company that provides software or a digital network application to facilitate customer orders is not required to obtain a delivery service permit but that the act of connecting consumers to licensed retailers grants the state jurisdiction over the company;
9. To specify that there is no limit on the percentage of total revenues that a licensee may derive from alcohol beverage deliveries;
10. To specify that the state licensing authority may use the same administrative proceedings applicable to licensees to enforce the requirements of the delivery service statute against delivery service permittees;
11. 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;
12. 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;
13. To specify that delivery to a minor is the equivalent of furnishing to a minor for purposes of unlawful acts subject to disciplinary action;
14. To require the state licensing authority to adopt rules regarding proper delivery of alcohol beverages;
15. To repeal the requirement 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; and

16. To specify that the measure takes effect on January 1, 2023.

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. Section 1 of the measure defines the term "delivery service permittee" as an individual or entity that holds a permit to deliver alcohol beverages under the new section 44-3-911.5 being created in section 2 of the measure. Could a person licensed under article 3 or 4 of title 44 to sell alcohol beverages in sealed containers for consumption off the licensed premises be a "delivery service permittee"? Could a person licensed under article 3 of title 44 to sell alcohol beverages for consumption on the licensed premises be a "delivery service permittee"? If licensees under the "Colorado Liquor Code" or "Colorado Beer Code" could be a "delivery service permittee", would proponents consider making that clear in the definition of that term?
3. In section 2 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 authorize a person licensed to sell at retail for on- or off-premises consumption to obtain a delivery service permit, which permit is a "privilege separate from" the licensee's existing license. This provision raises the following questions and comments:
 - a. The first sentence in subsection (1) refers to an "off-premises retailer" and describes that term as a retailer that is "licensed pursuant to this article 3 or article 4 of this title 44". Neither current law nor the proposed measure defines what an "off-premises retailer" is and what specific licensees are included in that term. Since, for example, a licensed manufacturer of vinous liquors may operate a sales room and sell vinous liquors in sealed containers for off-premises consumption, could a

licensed winery be an "off-premises retailer" under this section? If the proponents intend that term to be narrower, would proponents consider defining "off-premises retailer" for purposes of this section and listing the specific license types included in that term?

- b. Subsection (1) appears to allow delivery of alcohol beverages from "a licensee licensed for on premises consumption pursuant to this article 3". What specific licenses issued under the "Colorado Liquor Code" are included as a licensee "for on premises consumption?" Do proponents intend this phrase to apply only to persons licensed *to sell alcohol beverages at retail for consumption on the licensed premises*? Could this phrase include a person licensed as a manufacturer, e.g., a brewery, that is also authorized to sell alcohol beverages for consumption on the licensed premises? Would proponents consider specifying the particular licensees that are included in this phrase?
 - c. If a person licensed to sell alcohol beverages at retail for consumption on the licensed premises or in sealed containers for consumption off the licensed premises wishes to deliver alcohol beverages to its customers, does the measure require the licensee to obtain a delivery service permit? If so, what language in the measure imposes that requirement?
 - d. What is meant by the phrase "as a privilege separate from its existing license"? What are the intended legal effects of that phrase?
4. In subsection (2) of the new section 44-3-911.5, to whom does an individual or entity apply for a delivery service permittee? 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?
 5. Subsection (3)(c) of the new section 44-3-911.5 requires an applicant for a delivery service permit to provide proof of a general liability insurance policy but does not indicate to whom the applicant is to provide the proof. Would proponents consider specifying to whom the applicant is to demonstrate compliance with this requirement?
 6. Subsection (3)(d) of the new section 44-3-911.5 requires a delivery service permit applicant to provide certain benefits and insurance coverage to its employees and independent contractors who transport and deliver alcohol for the permittee, including accident insurance coverage for the vehicle, short- and long-term disability insurance, health insurance or a quarterly stipend for health care, unemployment insurance coverage, and fuel reimbursement.

- a. With regard to "accident insurance coverage for the vehicle used for deliveries", does this require the applicant to provide liability coverage for damage caused by the driver of the vehicle? Does it require the applicant to provide uninsured and underinsured motorist coverage to protect against damages caused to the vehicle or driver making the delivery by another driver? What specific coverages are required?
- b. With regard to the requirement to provide disability insurance, is there a minimum amount of coverage required? What level of coverage satisfies this requirement?
- c. With regard to the requirement to provide health insurance, do the proponents intend this to require the applicant to provide a health insurance policy that provides coverage as required by applicable federal and state law, including the federal "Patient Protection and Affordable Care Act"? That law imposes different requirements based on the number of employees that an employer has. If the measure requires the applicant to provide health insurance coverage to independent contractors, is it the intent that independent contractors are counted as "employees" for purposes of the federal law?
- d. What amount of quarterly stipend is required to comply with the measure? Does the quarterly stipend need to be an amount equivalent to what the covered person would have to pay for a plan on the individual market? Would proponents consider clarifying this provision?
- e. With regard to the requirement to provide unemployment insurance, current state law requires employers to pay premiums for this coverage for their employees, but not for independent contractors. Is it the proponents' intent to establish a new requirement for a person that is not the employer of an independent contractor to pay unemployment insurance premiums for an independent contractor?
- f. Articles 70 to 82 of title 8, C.R.S., the "Colorado Employment Security Act", governs requirements for employers to pay into the unemployment insurance program, and eligibility for employees to receive benefits. That act does not permit an independent contractor to receive benefits unless the person can demonstrate that the person is, in fact, an employee. Do proponents intend that this provision supersedes that act and makes an independent contractor who delivers alcohol beverages for a delivery service permittee eligible for unemployment benefits?

- g. How do these provisions apply if a person is engaged as an independent contractor for a delivery service permittee but also engages in delivery of other products for the permittee? If the requirements apply only to the delivery of alcohol beverages, how does an applicant provide these benefits only when the independent contractor is performing alcohol beverage delivery?

7. In section 13 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 section 44-3-911.5 (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), C.R.S.? 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 proponents consider defining it?

8. Subsection (5) refers to renewal fees. Section 44-3-501, C.R.S., in current law authorizes the state licensing authority to impose specified annual fees as well as application fees. Consider amending that section to allow the state licensing authority to assess fees for delivery service permits under subsections (1) and (3) of that section.
9. In subsection (9) of new section 44-3-911.5:
 - a. In the second sentence, should the word "permit" after "retailer" instead be "license"?
 - b. The last sentence of subsection (9) states that delivery to a minor is to be treated as "furnishing" to a minor. What is the significance of the term "furnish" in this context? Under section 44-3-901 (1)(b), C.R.S., 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 this 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.
10. Sections 6 and 7 of the measure appear to be repetitive in repealing same provisions of law. Section 7 should be deleted from the measure.
11. Section 8 of the measure states that it takes effect on January 1, 2023. However, section 1 (4)(a) of article V of the state constitution states that measures take effect upon proclamation of the governor declaring the vote on the measure which, in some instances, may be later than January 1 following the election. Accordingly, to accommodate for this situation and avoid a conflict with the constitution, proponents may wish to modify this provision to specify that the measure is effective "on January 1, 2023, or upon proclamation of the governor, whichever is later".

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. **Amending clauses:** Each statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed.
 - a. Each subsection, paragraph, subparagraph, and sub-subparagraph listed in an amending clause should be enclosed in parentheses. (*See the example in 1.c.*)
 - b. If you intend to add a new section to article 3 of title 44 of the Colorado Revised Statutes, it is not necessary to indicate which article and title it is being added to because the new section number includes that information, but the entire section number must be included. For example:

SECTION 2. In Colorado Revised Statutes, **add** 44-3-911.5 as follows:".
 - c. If more than one subdivision within a subsection is being amended, the full subsection number should be repeated for each subdivision listed in the amending clause so that it is clear what is being amended, for example: "... **repeal** (3)(a)(II) and (3)(a)(IV) as follows:"
2. **Headnotes:** Each section in the Colorado Revised Statutes and the Colorado constitution has a headnote. Headnotes briefly describe the content of the section. Headnotes should appear in lowercase, bold-faced type and end with a period. It is not necessary to show a new headnote in small capital letters.
3. **Division of statutory sections:**
 - a. When a provision consists of introductory language that leads into smaller subdivisions in order to form a complete sentence, that language is called an introductory portion. A subsection, paragraph, or subparagraph may also be an introductory portion. In a definitions section, the unnumbered language at the beginning of the section is also an introductory portion. For example:

44-3-103. Definitions. As used in this article 3 and article 4 of this title 44, unless the context otherwise requires: [*introductory portion*]

(9) "Club" means: [*introductory portion*]

(a) A corporation that: [*introductory portion*]

(I) Has been incorporated for not less than three years; and

- b. It is standard drafting practice to include the introductory portion in an amended section so that the reader can see the full sentence and context of the amended provision, even if the introductory portion itself is not being amended. Please include the introductory portions that are in current law before the amended provisions as appropriate.
4. **Guidelines for statutory citations:** The following guidelines for statutory citations should be used within the Colorado Revised Statutes:
- a. When referencing the section you are currently in, the section number does not need to be referenced. For example:

44-3-911.5. Third-party delivery of alcohol beverages. (3) In order to receive a delivery service permit, an applicant shall:

(a) Provide to the state licensing authority a sample contract that the applicant intends to enter into with a licensee listed in subsection (1) of *this section* for the delivery of alcohol beverages. ...*[emphasis added]*
 - b. When referencing a subsection within a different section, begin with the word "section," followed by the section number and then the subsection number. For example: "...in accordance with section 44-3-301 (11),"
 - c. When referencing a different subsection within the same section, begin with the word "subsection," followed by the subsection number, then the words "of this section." For example:

(2) Any individual, limited liability company, corporation, or partnership ... may apply for and be issued a delivery service permit that authorizes the permittee to deliver alcohol beverages from a licensee permitted for delivery by *subsection (1) of this section*, ...
 - d. Except when specifying "this section," in all other levels of the statutes, the number and letter of the level being referenced should be specified, even when you are within the same provision. For example:
 - i. Title: "this title 1"
 - ii. Article: "this article 1"
 - iii. Part: "this part 1"
 - iv. Subsection: "this subsection (2)"

- v. Paragraph: "this subsection (2)(a)"
 - vi. Subparagraph: "this subsection (2)(a)(I)"
 - vii. Sub-subparagraph: "this subsection (2)(a)(I)(b)"
- e. It is standard drafting practice when referencing statutory sections to include the word "section" before the number. For example, "*section 44-3-911.5.*" [*emphasis added*]
5. **Showing added and repealed language:** It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to and stricken type, which appears as ~~stricken type~~, to show language being removed from the Colorado constitution or the Colorado Revised Statutes.
- a. When showing language in small capital letters, it is standard drafting practice to show internal citations, such as (3)(a), without the small capital letters to avoid confusion when a lowercase paragraph letter is included in the citation.
6. **Capitalization:** Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
- a. The first letter of the first word of each sentence;
 - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
 - c. The first letter of proper names.
7. **Use of "shall" and "must":** For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "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."
8. **Spelling:** The following words are misspelled:
- a. "Healthcare" should be spelled "health-care" when modifying another word and "health care" when not modifying another word.

- b. "Long term" should be spelled "long-term" when modifying another word.
- c. "Short term" should be spelled "short-term" when modifying another word.
 - i. When "short term" and "long term" are used together and modify the same word, they should appear as "Short- and long-term disability"

9. **Striking numbers or letters in a repeal:** In 44-3-911, section 5 of the proposed initiative, subsection (3)(b) is being stricken; however, the subsection number, (3), should not be shown in stricken type since paragraph (b) is not the only paragraph under subsection (3) and the subsection number will need to remain in the statutes to precede paragraphs (a) and (c). Please remove the strikes from the subsection number.

Conversely, all of subsection (2)(c) in section 44-3-911 is being repealed, so the subparagraph numbers (I) and (II) should also appear in stricken type.

10. **Duplication of provisions:** In the proposed submission, sections 6 and 7 are identical. Only one of the sections needs to be included.