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MEMORANDUM

TO: Matthew Callaway and Jonathan Leddy
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: January 31, 2018
SUBJECT: Proposed initiative measure 2017-2018 #125 concerning Labeling Requirements for Genetically Modified Food

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 make findings and a declaration concerning the reasons for requiring labeling genetically modified food;
2. To require labeling of genetically modified food;

3. To define "genetically engineered" and "genetically modified," as well as other words used in the labeling requirements;
4. To include failure to identify genetically modified food in the definition of misbranding; and
5. To direct the Colorado Department of Public Health and Environment to promulgate regulations for carrying out the labeling requirements.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. What will be the effective date of the proposed initiative?
2. Under section 1-40-105.5, Colorado Revised Statutes, the director of research of the Legislative Council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections, for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
 - a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
 - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
 - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at BallotImpactEstimates.ga@state.co.us.
3. 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?
4. Section 25-5-401.5 (3) of the proposed measure states that "federal law does not provide for the regulation of the safety and labeling of genetically modified

- food." Are you aware that the federal Agricultural Marketing Act of 1946 (7 U.S.C. 1621 et seq.) was amended in 2016 to establish a national disclosure standard for bioengineered foods? Are you also aware that as a part of that law, Congress explicitly preempted states from enacting their own laws relating to labeling or disclosure of whether a food is bioengineered or was developed or produced using bioengineered food? How can this proposal be viable when federal law already applies?
5. Do you see any potential First Amendment issues with requiring this labeling? Is the desire for informed choice sufficient to create a legitimate government interest?
 6. Section 25-5-402 (12.5) of the proposed measure says that the term "genetically engineered" or "genetically modified" means "food produced from or with an organism or organisms with its genetics altered... ." But doesn't this definition actually relate to something done to the food rather than the food itself?
 7. Regarding section 25-5-411 (1)(q) of the proposed measure:
 - a. The first sentence is not a complete sentence. Consider rephrasing it along the following lines: (q) BEGINNING JULY 1, 2020, IF FOOD HAS BEEN GENETICALLY MODIFIED OR HAS BEEN PRODUCED WITH GENETIC ENGINEERING, THE WORDS "CONTAINS GENETICALLY MODIFIED INGREDIENTS" MUST OCCUPY A MINIMUM OF TWELVE AND ONE-HALF PERCENT OF THE SURFACE AREA OF THE PRINTED LABELS USED IN PACKAGING, HOLDING, AND TRANSPORT BY THE MANUFACTURER, AND THE LABEL SHALL BE MAINTAINED BY THE DISTRIBUTER AND DISPLAYED IN A CLEAR AND CONSPICUOUS MANNER ON THE RETAIL STORE SHELF OR BIN IN WHICH THE FOOD IS DISPLAYED FOR SALE BY THE RETAILER. THIS SUBSECTION (1)(q) DOES NOT APPLY TO:
 - b. Subsection (1)(q) requires labels on genetically modified products to be placed in "a clear and conspicuous manner" on food containers. Is this definition adequate? Do you anticipate the Colorado Department of Public Health and Environment promulgating rules to clarify the labeling requirements?
 8. Will the Colorado Department of Public Health and Environment carry out inspections to enforce the labeling requirements? How would the department test a product on the shelves to verify if it has not been genetically modified?

Consider giving the department specific rulemaking authority regarding inspections.

9. Section 25-5-411 (1)(q)(VI) of the proposed measure requires no labeling for "food consisting entirely of or derived entirely from, an animal that has not itself been genetically engineered." Do retailers know whether an animal has been genetically engineered?
10. Section 25-5-411 (4) of the proposed measure says there is no private right of action against a distributor, manufacturer, or retailer for failure to conform to the labeling requirements. Is it your intent that the penalties of section 25-5-405 apply to distributors, manufacturers, or retailers in this situation?
11. Does this proposal affect products already on the shelves?
12. What current products would be affected by this proposal?
13. The language in section 25-5-411 (3)(b) of the proposed measure may be redundant. It says that the substance "was entirely segregated from, and has not knowingly been commingled with a food or food component" that has been modified. If it was segregated, it could not have been commingled. Is this correct?
14. Is there any chance that this proposal would cause manufacturers, distributors, or retailers to cease the sale of certain items in Colorado? Is this the intent of the proposal?

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. At the beginning of the amending clause, number each section, part, etc. that is being amended or added with a section number (e.g., **SECTION 1.**, **SECTION 2.**) in bold-faced type, followed by a period. For example:

SECTION 1. In the constitution of the state of Colorado, **add** article XXX as follows:

Each of the sections in the proposed initiative should be in bold-faced type. In Section 3 of the proposed initiative, a period rather than a semi-colon should follow "3."

2. Each statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. The instruction word (e.g., **amend**, **add**, or **repeal**) should be in bold-faced type. For example, if you intend to add a new article to title 39 of the Colorado Revised Statutes, you would include the following amending clause: "In Colorado Revised Statutes, **add** article __ to title 39 as follows:"
3. Each section in the Colorado Revised Statutes has a headnote. Headnotes briefly describe the content of the section. A headnote should be in lowercase and bold-faced type, and only the first letter of first word of the headnote should be capitalized. The headnote in section 25-5-401.5 should be in lowercase, bold-faced type, and the section number and headnote in section 25-5-411 should be in bold-faced type.
4. The headnote used in section 25-5-401.5 is a misnomer. The declaration is not being made by the legislature, so it is not a "legislative" declaration. Consider eliminating the word "legislative" from the headnote.
5. 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;
 - c. The first letter of proper names (e.g., Colorado); and
 - d. Roman numerals.
6. The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

X-X-XXXX. Headnote. (1) Subsection.

(a) Paragraph

(I) Subparagraph

(A) Sub-subparagraph

(B) Sub-subparagraph

(II) Subparagraph

(b) Paragraph

(2) Subsection

(3) Subsection

In section 25-5-401.5, the first provision following subsection (1) is also labeled "(1)" and the subsequent provisions are numbered consecutively after "(1)." Since the first subsection (1) is an introductory portion and the following provisions should follow the introductory portion and need it to be complete sentences, those provisions should be lettered "(a)," "(b)," "(c)," etc.

In section 25-5-411, sub-subparagraph letters "(a)" and "(b)" following subparagraph (V) should be capital letters.

7. When a list of paragraphs follow an introductory portion and are not complete sentences on their own, all but the last paragraph should end with a semi-colon. All of the paragraphs following subsection (1) in section 25-5-401.5 should end with a semi-colon except the last one, which should end with a period. The provision currently numbered as subsection (4) has extra punctuation at the end. The period should be eliminated.
8. "United States" should always be spelled out in the Colorado Revised Statues, not abbreviated.
9. In Section 2 of the proposed initiative, the statutory section number, headnote, and introductory portion should be included before the first new subsection.
10. In section 25-5-402, subsection (12.5) is an introductory portion; however, only paragraphs (a) and (b) follow the introductory portion to make a complete sentence. In order to properly number the provisions within subsection (12.5), consider changing the first number from "(12.5)" to "(12.5) (a)" and renumbering the following paragraphs, currently lettered as "(a)" and "(b)," to "(I)" and "(II)" and changing the paragraph currently lettered as "(c)" to "(b)."

The remaining subparagraphs, currently numbered as "(I)" and "(II)," would remain as they are.

11. In Section 3 of the proposed initiative, the amending clause indicates that subsection (1)(r) is being added, however, (r) is not included in the following section. Additionally, subsection (5) is included in the section but is not listed in the amending clause.
12. 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."
13. The correct way to cite a provision of the Colorado Revised Statutes is as follows:
 - a. When referring to a subsection, paragraph, subparagraph, or sub-subparagraph that is in the same statutory section but not the same subsection, paragraph, subparagraph, or sub-subparagraph: Subsection (1) of this section, subsection (1)(a) of this section, subsection (1)(a)(I) of this section, or subsection (1)(a)(I)(A) of this section.
 - b. When referring to the same subsection, paragraph, subparagraph, or subparagraph that the citation is in: This subsection (1), this subsection (1)(a), this subsection (1)(a)(I), or this subsection (1)(a)(I)(A).
14. The word "which" is nonrestrictive, while the word "that" is restrictive. When you can eliminate the element, choose the word "which." When you can't eliminate the element, choose the word "that." In section 25-5-411 (1)(q)(V), the word "which" should be "that."
15. In section 25-5-411, subsection (1)(q)(V) is an introductory portion and indicates that only one of the two provision following it is required. The word "or" should be added after sub-subparagraph (A) to further clarify the requirement.
16. The beginning of the sentence in section 25-5-411 (3)(b) is awkward and unclear. Consider rearranging the sentence to read:

"(b) OBTAINS A SWORN STATEMENT FROM THE PARTY THAT SOLD THE SEED OR FOOD TO THE PERSON ..."

17. The following words are misspelled: "long term" should be spelled "long-term" and "publics" should be spelled either "public" or "public's."