



Prepared by the LRC staff for
The Joint Committee on Appropriations
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Initiated Measure 28 – To Prohibit Taxes on Anything Sold for Human Consumption – Fiscal Analysis

This memorandum provides information regarding the fiscal impact on state revenues of initiated measure 28, to prohibit taxes on anything sold for human consumption. There could be a total reduction in state revenues between \$133.6 and \$646.2 million, depending on the interpretation of the phrase, "human consumption." A food only interpretation could see a reduction of \$133.6 million representing 9.3% of state sales tax, while a broader interpretation could see a reduction up to \$646.2 million comprising up to 46.5% of state sales tax and 100% of tobacco taxes.

Understanding the Language of IM 28

To understand the fiscal impact of initiated measure 28 (IM 28), one must first interpret its language:

Notwithstanding any other provisions of law, the state may not tax the sale of anything sold for human consumption, except alcoholic beverages and prepared food. Municipalities may continue to impose such taxes.

The key phrase is "anything sold for human consumption." "Human consumption" may be interpreted in several different ways.

One interpretation of "human consumption" limits the phrase to food only, even though the measure does not specifically provide this limitation. In this case, "human consumption" would mean the ingestion or absorption of items meant for humans into the body. This interpretation is supported by how the phrase is used in the South Dakota Codified Laws. There are 36 statutes including the phrase "human consumption." Most reference food products intended to be ingested into the human body or describe what is not meant for human ingestion.¹

Another interpretation of "human consumption" includes more than just food. The assumption in this case is, if the intent of the measure was to limit its application to food only, the word "food"² would have been used. When interpreting the language of a statute, the court looks to the "plain meaning and effect" of a phrase.³ The plain and ordinary definition of "consume" or "consumption," means "to do away with completely, to spend, or use up".⁴ This interpretation of "human consumption" would include goods and services, as both goods and services can be "done away with completely" or "used up." In economic terms, goods that are consumed are considered "nondurable", meaning those goods are "able to exist for only a short time before deteriorating."⁵ Therefore, "human consumption" could be interpreted to include nondurable goods and services.

¹ SDCL use of the words human consumption: 10-45-18.2; 10-45-18.3; 10-46-16.2; 10-46-16.3; 34-5-11.1; 34-18-1(4); 34-20B-1(5)(c); 34-20B-117; 34-20G-1(12)(b); 34-46-1(1)(7); 34A-3A-2(8); 34A-7-1(1); 35-1-1(8); 35-13-15; 39-4-22; 39-4-23; 39-4-24; 39-4-25(2); 39-4-26; 39-5-6(24); 39-5-11; 39-5-39.1; 39-6-1(2)(3)(6); 39-6-2; 39-6-3; 39-6-3.1; 39-6-9(12); 39-11-14; 40-17-1; 40-18-1.2(21)(30); 40-21-25; 40-32-2(6); 40-32-4; 40-32-5(8); 40-32-10.1; 40-32-20.

² "Food" is defined in SDCL 10-45-1(5) as "any substance, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that is sold for ingestion or chewing by humans and is consumed for its taste or nutritional value. The term, food, does not include alcoholic beverages, tobacco, or prepared food." See SDCL subdivision 10-45-1(5).

³ *US West Communications, Inc. v. Public Utilities Commission*, 505 N.W.2d 115, 123 (S.D. 1993).

⁴ <https://www.merriam-webster.com/dictionary/consume>

⁵ <https://www.merriam-webster.com/dictionary/nondurable>

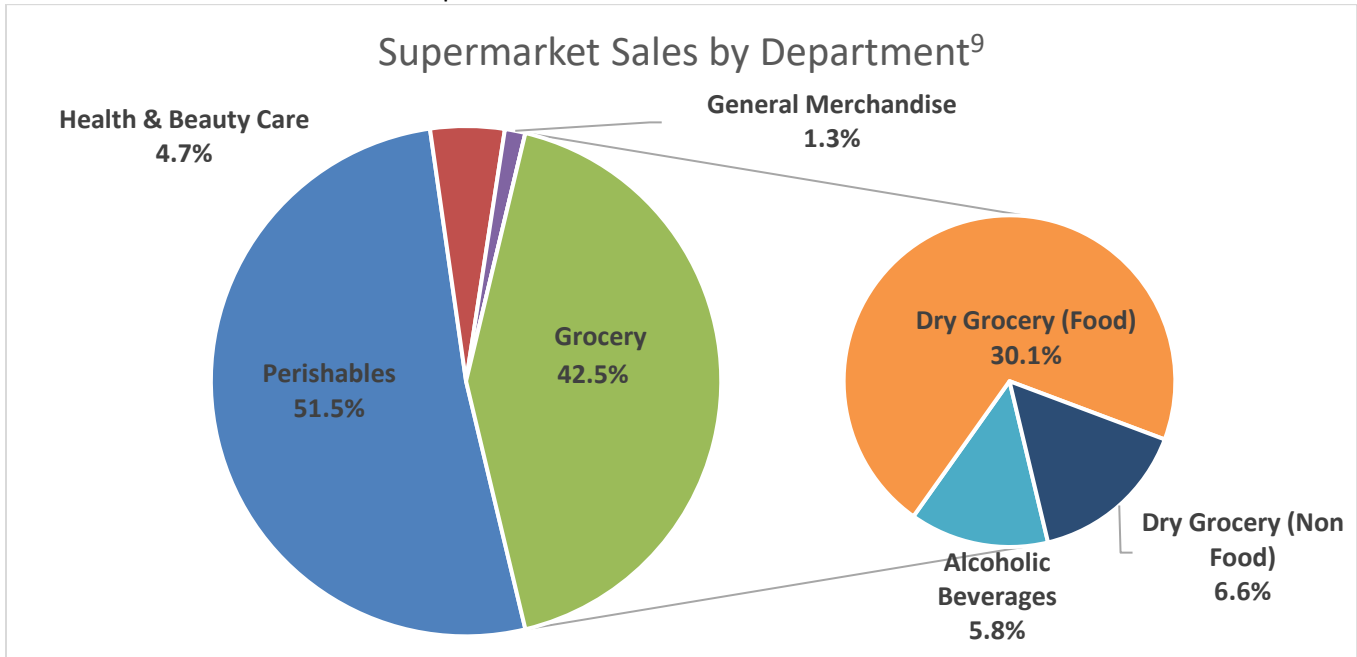
Because multiple interpretations are possible, the Legislature will likely need to clarify what "human consumption" means. This in turn, will clarify the fiscal impact of the measure.

The measure's language provides the state may continue to tax alcoholic beverages and prepared food. This means the state will continue to collect sales tax on most items sold by restaurants, fast food establishments, food trucks, and bars, and on off-sale liquor products. Certain items ordered at a restaurant would be taxed, while other items would likely not be taxed. For example, a cheeseburger, steak, chicken, fries, coffee, or other hot food would be taxed. A soft drink ordered at a restaurant would likely be taxed. However, a bottle of the same soft drink purchased at a retail store would likely not be taxed. Items like milk, juice drinks, or other products where the seller does not combine or mix two or more food ingredients to sell as a single, non-heated item would likely not be taxed.⁶

Identifying Products Sold for Human Consumption

The U.S. Bureau of Economic Analysis defines nondurable goods as, "tangible products that can be stored or inventoried and that have an average life of less than three years."⁷ The bureau defines services as "products that cannot be stored and are consumed at the place and time of their purchase."⁸ These definitions will be the framework for identifying products and services for human consumption in calculating the fiscal impact of IM 28, if "human consumption" is determined to include all nondurable goods and all services.

To understand the possible fiscal impact of eliminating the tax on anything sold for human consumption, one needs to understand what kinds of products are consumed. Supermarket sales consist mainly of food products. 51.5% of sales are perishables (meat, deli, produce, bakery, dairy, frozen foods, floral), while another 30.1% of sales are dry groceries (food).⁹ About 81% of what supermarkets sell is "food", up to about 93% of sales could be considered items for human consumption.



⁶ Definition of Prepared food, SDCL 10-45-1(8)

⁷ <https://www.bea.gov/help/glossary/nondurable-goods>

⁸ <https://www.bea.gov/help/glossary/services>

⁹ The Food Industry Association via the Progressive Grocer's 72nd Annual Consumer Expenditures Study



Retail stores such as Walmart and Sam's Club are in a different category than supermarkets. There are 15 Walmart and 2 Sam's Club stores in South Dakota. Walmart classifies 59% of its sales as groceries including dry groceries, snacks, dairy, meat, produce, deli & bakery, frozen foods, alcohol, and nonalcoholic beverages, and consumables such as health and beauty aids, pet supplies, household chemicals, paper goods, and baby products. Sam's Club classifies 63% of its sales as groceries and consumables.¹⁰ IM 28 could affect the sales tax of 59% to 63% of what Walmart, Sam's Club and similar stores sell in South Dakota.

Another category of retail store would be the Dollar General. The Dollar General considers 81% of what it sells as consumables. Dollar General defines consumables as paper and cleaning products, packaged foods, perishables, snacks, health and beauty products, pet supplies, and tobacco. The table below shows some of the products from each category. There are 78 Dollar Generals operating in South Dakota.¹¹ IM 28 could affect the sales tax for approximately 81% of Dollar General sales in South Dakota.

| Dollar General Classification of Consumables ¹¹ | | | | | | |
|--|----------------|-------------------|----------------------|----------------------------|--------------|-----------------|
| Paper & Cleaning Products | Packaged Foods | Perishables | Snacks | Health & Beauty | Pet | Tobacco |
| Paper Towels | Cereals | Milk | Candy | Soap | Pet Food | Cigarettes |
| Bath Tissue | Pasta | Eggs | Cookies | Body Wash | Pet Supplies | Chewing Tobacco |
| Paper Dinnerware | Canned Soups | Bread | Crackers | Shampoo | | |
| Trash Bags | Canned Meats | Beer | Salty Snacks | Cosmetics | | |
| Storage Bags | Fruits | Frozen Food | Carbonated Beverages | Over the Counter Medicines | | |
| Disinfectants | Vegetables | Refrigerated Food | | Dental Hygiene Products | | |
| Laundry | Condiments | Wine | | Foot Care Products | | |
| | Spice | Produce | | | | |
| | Sugar | | | | | |
| | Flour | | | | | |

Calculating the Fiscal Impact of IM 28

The methodology used in this analysis to determine the fiscal impact of IM 28 began with researching and identifying various products that could be considered as being for "human consumption" and which are sold at retail. Next relevant Standard Industrial Classification (SIC) codes applicable to the products were identified from the 2023 South Dakota SIC taxable sales data. The taxable sales data was then inflated forward two years, at a rate of 4% each year, to arrive at estimated 2025 taxable sales. Depending on the SIC code, the taxable sales were divided into categories -- services, food, tobacco, energy, personal care, paper & stationary, and other consumables. A percentage was applied to each category of items on the amount for each SIC code and then multiplied by 0.042 to reach the amount of sales tax revenue that could be impacted. The sources of information used in the analysis include South Dakota SIC taxable sales, annual reports of major businesses operating in South Dakota, and other economic and financial sources.

¹⁰ Walmart 2023 Annual Report

¹¹ Dollar General 2023 Annual Report



The table below shows the items that could possibly be defined as being for human consumption and sets forth the effect on state sales tax revenues. It is possible the overall fiscal impact could be lower or higher due to the limitations in the analysis.¹² The total possible fiscal impact on state sales tax and tobacco tax revenues could be a reduction between \$133.6 and \$646.2 million. This amount represents 9.3% to 46% of the annual state sales tax revenues and 100% of tobacco taxes.

| Items Possibly Defined as Being for Human Consumption and the Effect on State Sales Tax Revenues | |
|--|--|
| Items | Estimated Fiscal Impact to State Sales Tax Revenue |
| Services ^① | (\$335,844,178) |
| Food ^② | (\$133,576,072) |
| Energy ^③ | (\$91,690,694) |
| Tobacco ^④ | (\$42,723,674) |
| Personal Care ^⑤ | (\$17,929,338) |
| Paper & Stationary ^⑥ | (\$15,244,234) |
| Other Consumables ^⑦ | (\$9,237,777) |
| Total Possible Fiscal Impact | (\$646,245,968) |

Notes:

- ① Services includes the hiring of someone to perform a certain function.
- ② Food includes items which would be included in the definition of food as provided in SDCL 10-45-1(5).
- ③ Energy includes water, electricity, propane, gas, diesel, and other energy products.
- ④ Tobacco includes the lose of sales and excise taxes on cigarettes, cigars, chewing tobacco, vaping products, and any other product containing nicotine.
- ⑤ Paper & Stationary includes any items made out of paper, except books.
- ⑥ Personal Care includes products like toothpaste, cosmetics, shampoo, soap, non-prescription medicines, ointments, and many others.
- ⑦ Other consumables include household chemicals, disposalable plastics (plates, cups, silverware), certain baby products, and other consumables.

Sources: South Dakota SIC Taxable sales, annual reports of major businesses operating in South Dakota, and other sources

Updated Fiscal Note of IM 28

The Legislative Research Council completed a fiscal note for IM 28 on January 5, 2023. The fiscal note stated there would be a reduction of \$123.9 million in state sales tax revenues. The estimate was based on the phrase "human consumption" being interpreted to apply only to food. The fiscal note letter also stated assumptions regarding the meaning of the phrase were "just as reasonable, if not more so." This memorandum considers other reasonable interpretations of "human consumption". The original fiscal note may no longer be the best information available on the fiscal impact of IM 28. The factors affecting this include: the amount of time passed since completion of the original fiscal note, the reduction in the sales tax rate, understanding the possible interpretations of the language used, and the growth rate in sales tax.

¹² Limitations in the analysis include: 1) The use of the SIC coding for businesses in South Dakota. The coding rolls up too many different businesses into the same classification, which could cause an over or under-estimation of the fiscal impact, and 2) The percent of sales attributed to each category of items for the SIC Code.

