THE STATE of ALASKA
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April 14, 2025

Alcoholic Beverage Control Board
c/o Kristina Serezhenkov, Regulations Contact
Alcohol & Marijuana Control Office
550 W 7th Ave, Suite 1600
Anchorage AK 98501

Re: Prohibited Trade Practices Regulations (our file no. 2024200415)

Dear Board Members:

This regulations project comes before the Alcoholic Beverage Control Board ("board") for consideration with changes proposed by the Department of Law ("department"), including an amendment to a provision previously approved by the department only last year. In light of these circumstances, I would like to take this opportunity for the benefit of the board to describe briefly how the regulations review process is conducted by the department and, in particular, the role that I play as the designated regulations attorney. In addition, I will explain why the offered changes are necessary to approve the proposed regulations for filing by the lieutenant governor.

The Alaska Administrative Procedure Act ("APA") requires in AS 44.62.125 that a "particular attorney, called the regulations attorney," within the Department of Law have primary responsibility over functions relating to the handling of administrative regulations. The attorney general has designated me as the regulations attorney. Among my duties as the regulations attorney under this section, is the duty to work with all administrative agencies possessing regulation-making power in drafting all new regulations, advising the agencies of legal problems encountered, and ensuring compliance with the drafting manual for administrative regulation.

In addition, I am required to "continually review" regulations to correct or remove "deficiencies, conflicts, and obsolete provisions" as I identify them. I review every regulation prior to its filing by the lieutenant governor to ensure its "legality, constitutionality, and consistency with other regulations," as well as the "existence of

statutory authority."[1] The lieutenant governor may not accept a regulation for filing unless I have provided a written statement approving the regulation.[2]

To facilitate my statutory role in overseeing all executive branch regulations, the Department of Law has housed the regulations review process in the Legislation, Regulations, and Legislative Research ("LRLR") Section, which I supervise. The attorneys in this section who support my work in regulation reviews are specially trained in the APA and the Drafting Manual for Administrative Regulations.

Neither I nor the other LRLR attorneys, however, could possibly be experts in all the diverse areas of law that regulations address. For that, we look to assistant attorneys general across the other sections of the Civil Division of the Department of Law who advise executive branch agencies and boards, such as the Alcoholic Beverage Control Board. These agency attorneys support our work by providing substantive review of regulations projects that touch on their areas of expertise. But the determination of whether a proposed regulation is legal, constitutional, and supported by sufficient statutory authority rests solely with LRLR and ultimately with me as the regulations attorney.

This project involves amendments to, among other provisions, 3 AAC 305.515, which provides exceptions to the statutory prohibition on so-called "tied-houses." A tied-house occurs when an alcoholic beverage distributor, such as a brewer or distiller, provides incentives to an alcoholic beverage retailer to induce the retailer to exclusively or preferentially carry the distributor's products. The board is granted authority in AS 04.16.017(b) to establish by regulation exceptions to the prohibition on tied-houses that are

(1) consistent with federal law;
(2) necessary to avoid practical difficulty or undue hardship on a licensee;
(3) in the best interests of the public; and
(4) consistent with the requirements of Title 4.

Pursuant to that statutory authority, the board first adopted 3 AAC 305.515 in August of 2024. Among the exceptions created in that project (Department of Law File No. 202300110.002) was 3 AAC 305.515(b)(2)(A), which authorizes a regulated alcohol distributor to provide to a retailer a product display with a total value not exceeding $800 per brand per licensed premises or $4,600 for any retailer with six or more licensed premises.

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[1] AS 44.62.060(b).

[2] AS 44.62.060(c).

In that project, public feedback was provided to LRLR arguing that the $4,600 limit on retailers with six or more licensed establishments was inconsistent with a federal regulation, 27 C.F.R. 6.83(c)(1), which says that the total value of product displays may not exceed $300 per location. As we understood it, the commenter contended that there was inconsistency because the federal regulation is limited by each retail establishment and does not provide a total dollar restriction on retailers with greater than six locations. We did not agree at that time that the additional restriction on retailers with greater than six locations was necessarily inconsistent with federal law just because the federal regulation did not contain an equivalent six-store limitation.

In this project, it is further proposed to amend 3 AAC 305.515(c)(4)(C) to change the cap on expenditures by regulated distributors for exterior signs from $400 to $800. Under 27 C.F.R. 6.102(c), the cost of signs may not exceed $400. Upon further analysis, we concluded that the proposed per-sign limit of $800 in 3 AAC 305.515(c)(4)(C) would be inconsistent with the federal cap of $400 because the regulation would authorize what federal law directly prohibits, expenditure on a sign greater than $400. Similarly, the existing exception allowing expenditure up to $800 on product displays in 3 AAC 305.515(b)(2)(A) also authorizes an amount that federal law prohibits.

We understand that the board felt that these higher limits were in the "best interest of the public" and "necessary to avoid practical difficulty or undue hardship on a licensee" under AS 04.16.017(b)(2) - (3), due to the higher costs of doing business in Alaska and because the federal cap has not changed since it was adopted in 1995.

The requirements listed in AS 04.16.017(b), however, are in the conjunctive because they are joined by the word "and." The principles of legal interpretation consequently require that each of those standards be independently satisfied, and compliance with one does not excuse compliance with the others. Thus, exceptions must be in the best interests of the public, necessary to avoid practical difficulty to licensees, *and* must also be consistent with federal law.

Because an upward deviation from the spending caps set by federal regulation creates an inconsistency with federal law by authorizing what it prohibits, we conclude that the board does not have statutory authority to adopt those amounts in regulation. My determination in this regard is not intended to frustrate the laudable goal of the board to adapt the federal limits to Alaska's unique circumstances in the interests of the public. Instead, as the regulations attorney, it is my role to ensure that these regulations are adopted in conformity with the applicable statutory authority and on the strongest possible legal footing to meet a potential legal challenge and withstand future judicial scrutiny.

I hope the foregoing is helpful to your review.

Sincerely,

Rebecca C Polizzotto
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