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MEMORANDUM

March 10, 2023

SUBJECT: Marijuana Task Force Recommendations
(Work Order No. 33-LS0401\A)

TO: Representative Cathy Tilton
Attn: Heath Hilyard

FROM: Claire Radford
Legislative Counsel



Attached is a draft bill, which implements some of the Governor's Advisory Task Force on Recreational Marijuana's (task force) final report recommendations. The following are some issues that raised in the course of drafting.

1. **"Marijuana" to "cannabis."** The task force did not include any mention of the medical use of cannabis in AS 17.37. Because task force recommendations 2 and 3 recommended treating hemp and cannabis the same and creating one regulatory authority for cannabis, all references to "marijuana" in AS 17.37 were changed to "cannabis."

However, AS 26.05.870(b) and AS 26.05.990(8) were not amended to change the term "marijuana" to "cannabis." Because of the relationship between state and federal law in relation to military justice, it may be helpful to have this term remain consistent with federal usage. Please let me know if you would you like to change "marijuana" to "cannabis" in these statutes.

2. **Definition of "cannabis."** This bill changes the term "marijuana" to "cannabis" throughout statute and defines "cannabis" in AS 17.38.900 as "any part of a plant, or seeds, from all species of the genus cannabis, whether growing or not, and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers." You will note that this term and definition are slightly different from the task force's recommendations. For example, instead of using "*Cannabis sp.*," the draft refers to "cannabis," defined in part as the "genus cannabis," which is clearer and functionally the same. The definition provided by the task force also used both "means" and "including," whereas the bill uses only the "means" language. The *Manual of Legislative Drafting* (2021) states "the word 'includes' may be used in a definition, but only as an alternative to the word 'means.'" "Means" is used to show that the definition is all-inclusive, while "includes" is used to show that a definition is not all-inclusive. If these terms are used together, it raises an issue as to what is or is not included within the definition. If the rewritten definition is not what you intended, it can be adjusted to instead use only the "includes" language.

The definition of "marijuana" was also changed in the criminal statutes to refer to the definition of "cannabis" in AS 17.38 per the task force's sixth recommendation. Currently, "marijuana" and "cannabis" have two different definitions in criminal law. The new definition of cannabis, which the task force recommended to apply throughout statutes, now includes hashish and hashish oil. Hashish and hashish oil are currently schedule IIIA controlled substances.¹ In order to avoid conflict with the new definition, hashish, hashish oil, and tetrahydrocannabinols have been removed from schedule IIIA and will now be schedule VIA substances like all other cannabis.

3. Industrial hemp. The task force also recommended that "industrial hemp" and marijuana be defined as a single plant "cannabis." Therefore the industrial hemp statutes, which comply with federal requirements, have been repealed in this bill. This means that the industrial hemp industry in Alaska is no longer in compliance with federal requirements. Treating industrial hemp as cannabis also now criminalizes certain amounts of cannabis that were previously considered legal industrial hemp. Would you like to address these issues?

4. Possession limits. The task force recommended that the existing one-ounce possession limit be amended to allow for a six-ounce limit. An increase in the possession limit was not made in AS 17.37.040(a)(2)(A) or (a)(4)(A), which restricts the amount of cannabis a patient, primary caregiver, or alternate caregiver may possess for medical purposes. Would you like corresponding changes to these sections? Additionally, would you like to increase the permissible number of mature, flowering plants under AS 17.37.040(a)(4)(B) and AS 17.38.020(2) and (3)? Note that an increase to the possession limit was also increased from one ounce to six ounces in AS 17.38.020(a)(3).

The task force recommended increasing the existing one-ounce limit to six ounces and then giving the board authority to further adjust the possession limit. This authority was not included in this bill draft. I need more information to draft this provision. What possession limits should the board be able to adjust? The possession limits under AS 17.37 and AS 17.38? The criminal possession limits in AS 11.71? Note that authorizing a board to set a criminal limit could be considered an excessive delegation of legislative authority. Further, it may raise due process concerns because a person may not have adequate notice of the conduct that would constitute a crime. If you give the board the power to adjust the possession limits, you may wish to set upper limits the board cannot go above.

5. Hemp derived products. Products that contain only cannabidiol (CBD), cannabigerol (CBG), cannabichromene (CBC), or cannabinol (CBN) and other cannabis wellness products are considered "cannabis" as that term is defined in this bill. This language has been added in AS 17.38.020(b). However, because these products are within the definition of cannabis, products containing these derivatives can be sold only by retail

¹ AS 11.71.160(f).

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cannabis stores. Since persons under the age of 21 are not permitted in retail cannabis stores, the sale of these products will be limited to persons 21 years of age or older. Despite the broad exemption language in AS 17.38.020(b), you should consider more explicitly exempting these products for persons under age 21, particularly in the criminal statutes to ensure someone is not charged for possessing these products.

One option is to amend the definition of "cannabis" to exclude products that contain only CBD, CBG, CBC, and CBN derivatives or other cannabis wellness products. Excluding these substances from the definition of "cannabis," however, means that these products would not be taxed or tracked as other cannabis is.

You should consider defining what qualifies as a "cannabis wellness product." This is a broad term, even if limited by requiring department authorization, and may possibly include products containing THC.

6. Product transfers between license types. The task force recommended that AS 17.38.070(a), which provides what actions a retail cannabis store may lawfully perform, be amended to remove paragraphs (2) - (5) to allow for product transfers between all license types. I kept and amended paragraphs (2) and (3) to ensure that delivering, transferring, and receiving were all covered, which seemed consistent with the intent of the taskforce.

Based on the requested changes to AS 17.38.070(a), AS 17.38.070(b)(3) and 17.38.070(c)(3) were also amended to allow cannabis cultivation facilities and cannabis product manufacturing facilities to receive cannabis from a retail cannabis store. Please advise if you want to amend any of these changes.

7. Cannabis Control Board. It was unclear based on the recommended changes to the membership of the board under AS 17.38.080 whether the representative of local government or a community council member should also be prohibited from being actively engaged in the cannabis industry. However, AS 17.38.080(c) specifically prohibits more than two members of the board from being engaged in the same business, occupation, or profession. Since allowing this member to be engaged in the cannabis industry may overlap with the requirement that two members be engaged in the industry under AS 17.38.080(b)(4), this amended language was drafted to exclude that possibility. AS 17.38.080(d) was also amended to prohibit a member of the board who is a representative from a local government or community council, or a family member of that person, from having a financial interest in the cannabis industry. Please let me know if that was not your intent.

8. Limitation on licenses. Under sec. 17.38.121(g) the board may limit the number of licenses available based on the public interest. There is no limitation on this limitation authority. Is the ability to limit licenses apply in the state as a whole? In a particular municipality? Or some other area? It would be better to specify how extensive the power of the board would be to limit available licenses. Additionally, limiting licenses may raise

a due process issues if the board limits licenses in a manner that prohibit existing licenses from operating. Would you like to amend this provision to exclude that possibility or create an appeals process?

9. **Cultivation.** The task force recommended the Alcohol & Cannabis Control Office and the Department of Natural Resources, Division of Agriculture work together for the regulation of cannabis cultivation. The Alcohol & Cannabis Control Office, currently named the Alcohol & Marijuana Control Office, and the Division of Agriculture, do not exist by name in statute. Therefore, the board was tasked with oversight of cannabis. The task force further recommended that the Alcohol & Cannabis Control Office and the board set cultivation requirements "with *strong deference* to the recommendations from [Division of Agriculture]."² It is unclear what it means to give "strong deference" to the division. The bill requires the board to defer to cultivation regulation recommendations from the division in the Department of Natural Resources with responsibility for agriculture. Would you like to remove this deference requirement and instead allow the board to take those recommendations into consideration or cooperate with the Department of Natural Resources when adopting regulations relating to the cultivation of cannabis?

10. **Fingerprint requirement.** Because the registration for cannabis establishments is being changed from annual to biennial, should the finger printing requirement in AS 17.38.200(a) for renewal be extended to every six years instead of every five?

11. **Repeal.** AS 17.38.200(b) allowed the board to begin accepting and processing applications to operate marijuana establishments one year after February 24, 2015. This time period has passed so this statute is now obsolete. Can this statute be repealed in this bill?

12. **Higher education.** The task force recommended a pathway for the inclusion of Alaska's education system in the cannabis industry by allowing post-secondary education establishments to invest in research and educational programs. This provision may create a problem as the majority of students in post-secondary programs are under the age of 21 and state law only authorizes a person 21 years of age or older to work at a retail cannabis store,³ cannabis cultivation facility,⁴ cannabis product manufacturing facility,⁵ or cannabis testing facility.⁶ Students under the age of 21 would not be able to legally participate in

² Emphasis in the original.

³ AS 17.38.070(a).

⁴ AS 17.38.070(b).

⁵ AS 17.38.070(c).

⁶ AS 17.38.070(d).

educational programs relating to cannabis production, growth, testing, and science if the participation exposed the student to cannabis plants, products, or derivatives. If you want to allow students under the age of 21 to participate in post-secondary programs related to cannabis or the cannabis industry, you may want to create an exception for educational purposes. If you do want to create an exception, should there be any limitations on access? For example, do you want to require supervision or allow access only in a laboratory setting?

13. **Retail cannabis store definition.** The definition of "retail cannabis store" in AS 17.38.900(27) does not include transferring or receiving cannabis from a cannabis testing facility. The current language has been taken from the definition of "retail marijuana store" which does not include transferring or receiving, despite that conduct being permitted under AS 17.38.070(a). Would you like to include transferring or receiving cannabis from a cannabis testing facility in the definition of "retail cannabis store"?

14. **Tax.** Under AS 43.61.010, the legislature may appropriate not more than 33 percent of the tax collected under AS 43.61.010 into each of the cannabis education and treatment fund, the Department of Commerce, Community and Economic Development for its duties related to cannabis, and the general fund. These three provisions add up to 99 percent. Do you want to account for the additional one percent?

The requirement that the legislature may appropriate only certain amounts to specific purposes is unenforceable. This is because the legislature retains the power of appropriation, and can choose how it wants to appropriate the money. It could follow the recommended percentages, appropriate in different percentages, or appropriate the entire amount to another purpose. To require the legislature to appropriate specific amounts would violate the dedicated funds provision.⁷

The bill lowers the current excise tax to \$12.50 an ounce. Then, section 43.61.010(h) and (i) of the bill imposes a sales tax of three percent on cannabis and cannabis products sold by retail facilities and an import tax of 10.5 percent on wholesale distributors. The task force did not recommend when to make the change from an excise tax to a sales and import tax. Right now, the bill uses the date of July 1, 2028. Please let me know if you would like a different date. When the switch happens, the excise tax will be repealed and conforming changes will be made to the tax statutes. It was unclear how to amend AS 43.61.040 and 43.61.050 when the tax scheme is changed. Please let me know what changes you would like made to these sections.

Currently, there is not much detail to how the sales tax and import tax will work. If there is too little detail in how the taxes will work under, arguably the legislature is delegating its taxing authority to the department. The Alaska Constitution requires that the power of

⁷ Art. IX, sec. 7, Constitution of the State of Alaska.

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taxation, with limited exceptions, never be relinquished.⁸ You should consider adding more detail for how you would like the import and sales taxes to operate.

Should "unregistered products" under sec. 43.61.050 include unregistered cannabis products in addition to unregistered cannabis?

15. Distributor licenses and tax. The task force's fourth recommendation was to create a cannabis wholesale distributor license in statute. This has been included in AS 17.38.121(b).

The task force's first recommendation, stage two, recommended taxing products imported with a wholesale distributor license at 10.5 percent. The recommendation did not state what 10.5 percent was of, so sec. 43.61.010(i) applies this to the value of the cannabis imported by the wholesale distributor. Please let me know if there is another measure that the 10.5 percent should be taxing instead of the value of the product.

While cannabis is legal in Alaska and a number of other states, it is still illegal under federal law. The transportation of cannabis across state lines could result in federal criminal prosecution. A cannabis wholesale distributor license that allows the importation of cannabis from another state cannot make the action legal under federal law.

You may want to add more detail to guide the board in creating the wholesale distributor license. Would a person be required to have a cannabis wholesale distributor license to import the product and then be required to obtain another license to store, sell, or manufacture the cannabis into different products? Are there any provisions that are applicable to cannabis establishments under AS 17.38 that should extend to cannabis wholesale distributors? Should there be a local option provision for wholesale distributor licenses? Note that granting broad authority for the provisions of this license to be developed in regulation may be an unconstitutional delegation of legislative power if the legislature does not provide adequate guidance for the exercise of the power.⁹

16. Tax for excess cannabis. Section 43.61.040 of the draft bill imposes a new tax on possession of cannabis plants in an amount that exceeds what is authorized for personal use. In this section "immature plant" and "mature, flowering plant" are not defined. Is "mature, flowering plant" a description that is sufficient to capture your intent or should these terms be further defined? Do you want to change the tax due on immature and mature, flowering plants under this section since the excise tax is no longer \$50 per ounce?

⁸ Art. IX, sec. 1, Constitution of the State of Alaska, states "[t]he power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article."

⁹ *State v. Fairbanks N. Star Borough*, 736 P.2d 1140, 1143 (Alaska 1987).

17. **Unregistered product.** Section 43.61.050 states that a cannabis product manufacturing facility or retail cannabis store is secondarily liable if it is in possession of unregistered product and the cannabis is subject to seizure. The cannabis product manufacturing facility or retail cannabis store is subject to a tax penalty of two times the tax assessed on comparable legal cannabis. With the excise tax changes being made in sec. 43.61.010(a), do you want to reassess the tax penalty of this provision?

18. **Cannabis testing.** The fourteenth recommendation from the task force was for the Department of Environmental Conservation (DEC) to analyze how to develop a cost-effective and in-state means to test all cannabis for heavy metals and pesticides. This requirement was added to uncodified law as it appeared to be a one-time directive. What should DEC do with this analysis? Do you want to require DEC to submit a report? If you want to require a report, who should the report be submitted to? Should there be a timeline imposed for conducting this analysis?

19. **Conditional Effect.** The licensing moratorium recommended in number eight of the task force's report was included in this bill sec. 97. How is it to be determined if the federal government has legalized or decriminalized cannabis for the purposes of this section? Currently, the chair of the board would notify the revisor of statutes when the federal government has legalized or decriminalized cannabis, meaning the chair would make the determination as to legalization or decriminalization. Would you like some other person to make this decision?

What does it mean for the board to "analyze" the cannabis industry during the moratorium?

20. **Extension of the task force.** The task force recommended that the governor extend the task force through the 33rd Alaska State Legislature. This was not addressed in this bill because the extension of a governor's task force is outside the purview of the legislature. The legislature could create a task force, but it would be located within the legislature and would be a new, separate board not composed of the same members.

21. **Existing statutory terms.** In existing law, "registration" and "licensure" are used interchangeably in AS 17.38.¹⁰ The draft does not create or change this problem. However, you should consider changing all terms in this chapter to either "licensure" or "registration" to prevent confusion.

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Attachment

¹⁰ AS 17.38.900(17) states: "registration" means registration or licensure, as determined by regulation" to solve this issue, but it would be better to just use one term.