MEMORANDUM

State of Alaska Department of Law

TO:	Marijuana Control Board	DATE:	October 23, 2020
FROM:	Jmw Joan M. Wilson Senior Assistant Attorney General Commercial, Fair Business and Child Support Section	FILE NO.:	2020200071
		TEL. NO.:	(907) 269-3039
		SUBJECT:	Exit Packaging

The Department of Law has reviewed the attached regulations of the Marijuana Control Board (board) against the statutory standards of the Administrative Procedure Act. Based upon that review, it disapproves proposed changes to 3 AAC 306.345(a)(3), 3 AAC 306.460(d)(7) and 3 AAC 306.557(7). It is possible to submit, with technical edits, the changes to 3 AAC 306.460 (d) and 3 AAC 306.557 if the edits are consistent with the board's intent. If the board wants to proceed with the changes to 3 AAC 306.460(d) and 3 AAC 306.557, the Department of Law will finalize the package for submission to the Office of the Lieutenant Governor.

A. <u>Analysis</u>

1. Opacity of exit packaging. The board adopted changes to 3 AAC 306.345, 3 AAC 306.460, and 3 AAC 306.557 designed to allow the licensee, a customer of the licensee, or an employee of the licensee to obscure marijuana or marijuana products from view when leaving licensed premises as a way to meet the regulatory requirement that marijuana, a marijuana product, or a sample leaves the premises in an opaque package. We raised concerns with these changes, and offered an alternative to the board. The board rejected that alternative on August 20, 2020.

The Department continues to conclude the regulations adopted are confusing and internally inconsistent, they do not meet the legal standards for submission to the Office of the Lieutenant Governor for filing. AS 44.62.060. The regulations are internally inconsistent because they require marijuana and marijuana products to be packaged in opaque packaging, yet conversely do not require opaque packaging if the product is handled in an "opaque manner." The term "opaque manner" is vague: we think it means that opaque packaging may be provided by the retail marijuana store or the purchaser. Therefore, the regulations are returned to the board for further work, and likely additional public comment. The issue addressed—requirements for packaging—is within the scope of the board's authority. The problem with the regulations as written include:

Internal inconsistency. Each regulation requires that marijuana, a. marijuana products, or samples must leave the premises "packaged" in "opaque, resealable, child-resistant packaging." The proposed changes state that the opaqueness component "of the package may be achieved by the consumer [or employee] placing the marijuana or marijuana product [or sample] on the consumer's [or employee's] person in an opaque matter or in the consumer's [or employee's] personal opaque bag." Proposed changes to 3 AAC 306.345(a)(3), 3 AAC 306.460(d)(7), and 3 AAC 306.557(7). On its face, the regulation both requires opaque packaging and does not require opaque packaging. If the intent is that opaque packaging not be required of the licensee, if the customer or employee keeps the item opaque or obscured in another manner, then the board may want remove the requirement of opaque packaging and add a new paragraph requiring that when a purchaser leaves the retail section of a store, or an employee leaves the licensed premises, marijuana, marijuana products, or samples are in opaque packaging and that opaque packaging may be provided by the licensee or the customer or employee.

b. Vagueness. It's not clear what placing something on a person in an opaque manner means; it may mean that the product is removed from the store but in opaque packaging provided by the consumer.

To proceed further, the Department of Law asks the board to consider its intent. Is it to make opaque packing optional, and only needed if the marijuana or marijuana product cannot be placed in a customer's or employee's opaque packaging or is it something else.

2. Testing of samples. These changes are within the scope of the board's authority, but appear incomplete. The proposed changes apply to 3 AAC 306.460 and 3 AAC 306.557, but not 3 AAC 306.455 and 3 AAC 306.550 even though the latter two regulations also address testing. Did the board consider if 3 AAC 306.455 and

3 AAC 306.550 should be changed to clearly establish testing before an employee is provided a sample?

With technical edits (attached), the changes to 3 AAC306.460 and 3 AAC 306.557, if consistent with the board's intent, could be submitted to the Office of the Lieutenant Governor by the Department of Law for filing. They will be effective 30 days after filing. Our preference is that the board meet to assure the edits are consistent with the board's intent, and to consider if 3 AAC 306.455 and 3 AAC 306.550 should also be amended.

To achieve the board's intent and keep the regulations clear, it is not necessary to add new subsections to 3 AAC 306.460 and 3 AAC 306.557 What the board formatted as new 3 AAC 306.460(e) and 3 AAC 306.557(b) would fit better in current 3 AAC 306.460(d) and 3 AAC 306.557 and still would appear to meet the board's intent. The change to 3 AAC 306.460(d) could be accomplished by the following:

The introductory language of 3 AAC 306.460(d) is amended to read:

(d) A marijuana cultivation facility may provide a sample of marijuana grown at

that facility to an employee of the facility, who is in possession of a valid marijuana

handler card for the purpose of quality control only if

•••

3 AAC 306.460(d) is amended by adding a new paragraph to read:

(8) each sample is tested as required under 3 AAC 306.455 and

3 AAC 306.645 before being provided to an employee under this subsection.

Similarly, the board's changes to 3 AAC 306.557 would appear to be met more clearly if 3 AAC 306.557 was amended as follows.

The introductory language of 3 AAC 306 557 is amended to read:

3 AAC 306.557. Quality control sampling. A marijuana product manufacturing

facility may provide a sample of marijuana concentrate or other marijuana product

produced by that facility to an employee of the facility, who is in possession of a valid

marijuana handler card for the purpose of quality control only if

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3 AAC 306.557 is amended by adding a new paragraph to read:

(8) each sample is tested as required under 3 AAC 306.550 and

3 AAC 306.645 before being provided to an employee under this section.

Please review these suggestions, and confirm if they meet the board's intent.

B. Conclusion

Attached is a hand-edited version of how the changes would look if the board wants to go forward with the changes to 3 AAC 306.460(d) and 3 AAC 306.557 while it considers if future changes are needed to 3 AAC 306.455(a) (to add "or provide an employee a sample of") and 3 AAC 306.550(a) (to add "or provide an employee a sample of"). The edit in the attached, although seemingly extensive, are technical only and intended to express the board's intent, as set out in the January 30, 2020 notice of proposed regulation changes, to require quality control of samples to be tested and to clarify that the quality control sample may only be provided to an employee of the cultivator who grew the marijuana or an employee of the manufacturer who made the marijuana product.

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(Words in **boldface and underlined** indicate language being added; words [CAND BRACKETED] indicate language being deleted.)

3 AAC 306.345(a)(3) is amended to read:

(3) marijuana or a marijuana product sold is packaged in opaque, resealable,							
child-resistant packaging when the purchaser leaves the retail section of the licensed premises;							
the packaging must be designed or constructed to be significantly difficult for children under							
five years of age to open, but not normally difficult for adults to use properly. For the purpose							
of this paragraph, the opaqueness component of the packaging may be achieved by the							
consumer placing the marijuana or marijuana product on the consumer's person in an							
opaque manner or in the consumer's personal opaque bag.							
(Frf. 2/21/2016. Register 217: am 11/8/2018. Register 228: am/ Register							
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uthority: AS 17.38.010 AS 17.38.150 AS 17.38.200 JAAC 306.345 is Unchanged.)))							
AS 17 38,070 AS 17 38 190 AS 17.38,900							
AS 17.38.121							

3 AAC 306.460(d)(7) is amended to read:

(7) samples that leave the licensed premises are packaged in opaque. reseatable, child-resistant packaging and clearly marked or labeled "For Quality Control" and the packaging is designed or constructed to be significantly difficult for children under five years of age to open, but not normally difficult for adults to use properly. For the purpose of this subjection, the opaqueness component of the packaging may be achieved by the employee placing the sample on the employee's person in an opaque manner or in the employee's personal opaque bags ((19wbl/shor: 3 AAC 306.460 is Unchanged Except that the closing period period Changes to I a Connector and the and Connector mours From 3 AAC 306.460 (5) to reflect the addition of new (100.1))

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(d)							
3 AAC 306.460 is amended by adding a new subjection to read:							
(d) A marijuana cultivation tacility may provide a sample of marijuan							
That tacility to an employee of the Lacility, who is in possession of a valid marine							
that facility to an employee of the facility, who is in possession of a valid merijuona handler cord only ib							
distributing it to an employee; and							
3 AAC 306.460 (2)-may be distributed only to an employee of the facility that grew the							
(8) Each sample is tested under 3 AAc 306. 455 and 3 AAc 306. 645 before marijuana. (Eff. 2/21/2016, Register 217; am 11/8/2018, Register 228; am _/_/, being provided							
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Authority:	AS 17.38.010	AS 17.38.150	40 17 20 200	Employer under this subsection.			
	110 17.00.010	AS 17.30.150	AS 17.38.200	this subsection.			
	AS 17.38.070	AS 17.38.190	AS 17.38.900				
	AS 17.38.121						
3 AAC 306 557(7) is amended to read:							
(7) samples that leave the licensed premises are packaged in opaque, resealable.							
child-resistant packaging and clearly marked or labeled up on the							
child-resistant packaging and clearly marked or labeled "For Quality Control" and the packaging							

is designed or constructed to be significantly difficult for children under five years of age to

open, but not normally difficult for adults to use properly. For the purpose

of this subjection, the opaqueness component of the packaging may be achieved by the

employee placing the sample on the employee's person in an opaque manner or in the

employee's personal opaque bag. The introductory language of A 3 AAC 306.557 is amended by adding a new subjection to read: (b) A sample provided under (a) of this section (1) Publisher: 3 pAC 306.460 is unchanged loss of the section that the closing period af the end of (T) changes to a Semi colon, and the "and" connector moves from 3 AAC 306.557 is amended by adding a new subjection to read: (b) A sample provided under (a) of this section

(1) must pass all applicable laboratory tests required under this chapter before

being distributed to an employee; and

(2) may be distributed only to an employee of the facility that manufactured the 3 AAC 306.557. Quality Control Sampling. A marijuana product manufacturing facility may provide a Sample of 2 marijuana concentrate or other marijuana product <u>Manufactured by that facility</u> to an employee of the Cacility, who is in possossion of a valid marijuane handler card for the porpose of quality Control only if

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 marijuana product. (Eff. 5/25/2018, Register 226; am ___/____, Register ____)

 Authority:
 AS 17.38.010

 AS 17.38.010
 AS 17.38.150

 AS 17.38.070
 AS 17.38.190

 AS 17.38.121

3 AAC 306,557 is amended to add a new parasioph to read:

(8) each sample is tested under 3 AAC 306,445, and 3 AAC 306.550 before being provided to an employee under this section.