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Memorandum

To: Quinlan Steiner
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From: Tracey Wollenberg
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Date: March 12, 2015

Subject: Senate Bill 30, Version X

On Tuesday, March 10, 2015, I testified before the Senate Finance Committee on Senate Bill 30, Version X. The Committee requested my comments in writing. Below is a summary of my testimony.

Return of Marijuana to the Controlled Substances Schedule

Last month, the Senate Judiciary Committee approved a prior version of Senate Bill 30 that removed marijuana from the controlled substances schedule. Version X of Senate Bill 30 returns marijuana to the controlled substances schedule. In doing so, it presumes that marijuana remains illegal, subject to certain exceptions as passed in the initiative, rather than decriminalizing marijuana, regulating it like alcohol, and making certain marijuana-related conduct illegal. This undermines the intent of the initiative. In AS 17.38.010, the "Purpose and findings" section of the initiative, the voters declared "that the use of marijuana should be legal for persons 21 years of age or older" and identified the diversion of law enforcement resources to violent and property crimes as one of the purposes of the initiative. As noted above, the initiative itself is entitled, "An Act to tax and regulate the production, sale, and use of marijuana." Removing marijuana from the controlled substances schedule, while not required by the initiative, is more consistent with the intent of voters and the purposes of the initiative.

Inconsistencies Between the Proposed Misconduct Involving Controlled Substance Crimes Related to Marijuana and the Initiative

Section 4. AS 11.71.040. This provision would make it a class C felony to possess "one or more preparations, compounds, mixtures, or substances of an aggregate weight of 16 ounces or more containing a schedule VIA controlled substance." (As noted above, marijuana would remain a

schedule VIA controlled substance under this bill.) This proposed provision is inconsistent with the initiative in two ways.[1]

First, AS 17.38.020—the personal use provision of the initiative—permits a person to possess, grow, process, or transport up to six marijuana plants, with three or fewer being mature, flowering plants. It also allows a person to possess all the marijuana produced by the plants on the premises where the plants were grown. The proposed 16-ounce provision would limit the amount of marijuana a person could possess, even when that marijuana was produced from plants grown by the person and possessed on the premises where the plants were grown. Thus, if a single plant generally yields 3 to 4 ounces of usable marijuana, a person who procures that much from three flowering plants and stores some of that marijuana in his or her freezer before growing more will ultimately contravene this felony provision once exceeding the 16-ounce limit, even though that conduct is permitted under the initiative.

Second, because marijuana is defined in the bill (Section 18) and in the initiative (AS 17.38.900) to include "all parts of the plant," an "aggregate weight of 16 ounces or more containing a schedule VIA controlled substance" (marijuana) would mean that the plants themselves could not have an "aggregate weight" of more than 16 ounces. This was likely not the intent, as a different provision of AS 11.71.040 (which would have an equivalent penalty) prohibits possession of 25 or more marijuana plants—an amount significantly greater than plants with an aggregate weight of 16 ounces. It is possible that three mature, flowering plants, depending on their size, could have an aggregate weight of more than 16 ounces; criminalizing this conduct would contravene the initiative, which permits the possession of six marijuana plants, three of which may be mature, flowering plants.

One way to potentially fix this problem is to return to the dichotomy between marijuana plants and usable marijuana previously adopted by the Senate Judiciary Committee. This would clarify what conduct is permitted, without requiring individuals to guess as to how much their plants weigh or might weigh when fully grown.

Section 6.

AS 11.71.050(a)(1)(A). This provision would make it a class A misdemeanor to transport, manufacture or deliver, or possess with the intent to manufacture or deliver, "one or more preparations, compounds, mixtures, or substances of an aggregate weight of more than one ounce containing a schedule VIA controlled substance." This provision is inconsistent with the initiative in several ways.

First, the initiative specifically allows for the delivery of more than one ounce, contrary to this provision. Alaska Statute 17.38.020(c) permits the transfer of up to one ounce of marijuana *plus* up to six immature marijuana plants to a person at least 21 years of age without remuneration.

[1] Note that this proposed language is mirrored in revisions to AS 17.38.020 in Section 18.

Second, as noted above, the initiative permits the possession, growing, processing, or transporting of up to six plants, three of which can be flowering. Similar to the problem noted above, because marijuana is defined to include all parts of the plant, this provision would prohibit a person from growing plants with an aggregate weight of more than one ounce, effectively nullifying the 6-plant provision of the initiative.

Third, because a person is permitted, under the initiative, to possess all the marijuana from the plants on the premises where the plants were grown, and because a person is allowed to deliver up to one ounce plus six immature plants to another adult (without remuneration), there is no general prohibition under the initiative on possessing marijuana with the intent to deliver it. In other words, a person can possess more than one ounce of marijuana with the intent to deliver it; a person simply cannot deliver more than one ounce (plus six immature plants) to any one person at a given time. The provision should be clarified to reflect this.[2]

AS 11.71.050(a)(2)(E). This provision would make it a class A misdemeanor to possess "one or more preparations, compounds, mixtures, or substances of an aggregate weight of at least three ounces but less than 16 ounces containing a schedule VIA controlled substance." This provision implicates the same concerns noted above. First, under the initiative, a person can possess up to six plants, three of which are flowering; these plants may have an aggregate weight within the range precluded by this statute. Second, under the initiative, a person can possess all the marijuana from plants on the premises where the plants were grown; but the marijuana produced from three flowering plants is very likely to be more than three ounces.

Section 7. AS 11.71.050(c). The bill adds a new non-applicability section to this crime, fifth-degree misconduct involving a controlled substance, stating that the marijuana-related crimes in the statute do not apply to "a person who is lawfully possessing, manufacturing, delivering, possessing with the intent to manufacture or deliver, or transporting a schedule VIA controlled substance in accordance with AS 17.38.020." In other words, this provision says that if AS 11.71.050 criminalizes conduct that is otherwise legal under AS 17.38.020 of the initiative, the criminal provisions do not apply.

Structuring the bill this way is likely to create confusion and possibly generate litigation. In essence, the bill creates a wide class of conduct that appears to be criminalized (as noted above) but is not actually criminal and requires a person to reconcile two different provisions in two different titles (Titles 11 and 17) in order to determine what conduct is permissible. It is possible that this could lead to arrests or expenditures of resources that could otherwise be avoided if the only conduct that is criminalized is conduct that is not otherwise legalized in AS 17.38.020.

While this type of non-applicability provision is used in the criminal code, it is not common. And in those situations where it is used, the exempted conduct is generally based on certain limited factual circumstances rather than whole categories of conduct.

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[2] This concern was identified after my oral testimony of March 10 and thus was not previously provided to the Committee.

To the extent the non-applicability provision is retained, the Committee should make clear, consistent with the March 6, 2015 memorandum from Doug Gardner, Director of Legislative Legal Services, that a person is not subject to prosecution or arrest for the conduct listed in the non-applicability provision, the non-applicability provision in no way sets up a defense, and in a criminal prosecution of marijuana-related conduct under this statute, the State retains the burden of establishing that a person's conduct was both unlawful under the criminal statutes and fell outside the scope of AS 17.38.020.

Section 8.

AS 11.71.060(a)(2)(A). This provision would make it a class B misdemeanor to possess "one or more preparations, compounds, mixtures, or substances of an aggregate weight of at least two ounces but less than three ounces containing a schedule VIA controlled substance." This provision implicates the same concerns noted above with respect to AS 11.71.050(a)(2)(E).

AS 11.71.060(a)(5). This provision would make it a class B misdemeanor to possess, display, deliver, or transport "one or more preparations, compounds, mixtures, or substances of an aggregate weight of more than one ounce containing a schedule VIA controlled substance in a public place." This provision implicates the same concerns noted above with respect to AS 11.71.050(a)(1)(A).

Section 9. AS 11.71.060(c). This provision sets out a non-applicability provision related to AS 11.71.060 and shares the same concerns as the non-applicability provision in AS 11.71.050, as discussed above.

Section 10. AS 11.71.071(a)(1). This provision would make it a violation to possess "one or more preparations, compounds, mixtures, or substances of an aggregate weight of more than one ounce containing a schedule VIA controlled substance in a public place." This provision implicates the same concerns noted above with respect to AS 11.71.050(a)(2)(E). Additionally, at these lower levels, this bill may violate the privacy rights set out in *Ravin v. State*, 537 P.2d 494 (Alaska 1975), pertaining to the use and possession of marijuana by a person in his or her home. The initiative specifically states that it was not intended to diminish the right to privacy as interpreted in *Ravin*.

Penalty in AS 11.71.060(c) Denotes Criminality

Section 10. AS 11.71.071(c). This provision sets out the penalty for seventh-degree misconduct involving a controlled substance. It states that this offense is a violation punishable by a fine but allows for the imposition of certain penalties (suspended imposition of sentence under AS 12.55.085 and probation and referral to a community diversion panel) that may entitle a person to a jury trial and, if indigent, to court-appointed counsel and may essentially elevate this offense to a criminal-like status not intended by the Committee.

Drug Overdose Language Too Narrow

Section 13. In the prior version of the bill, the Senate Judiciary Committee provided an exemption from prosecution for a person who was seeking assistance for another person suffering an "adverse reaction" from marijuana use. The Committee should consider expanding this

provision from "drug overdose" to "adverse reaction" as it pertains to marijuana use given that the common understanding of the term "drug overdose" may be too narrow in this context and may not properly incentivize people to seek assistance when necessary.

Broad Definition of "Remuneration"

Section 15. Version X adopts a broad definition of remuneration as "an exchange for anything of value, whether by sale, barter, exchange, or other means." "Remuneration" is commonly understood to mean money paid for work or service; thus, this definition is significantly broader than the term used in the initiative, which was not defined. It is also broader than a corresponding alcohol provision in AS 04.11.010, which prohibits non-licensees from selling, trafficking, or bartering an alcoholic beverage.

Additionally, this broad definition may have unintended consequences, criminalizing conduct the legislature—and the initiative—intends to be legal. For example, if a friend helps a person fix his sink one weekend and, in appreciation, the person then shares a marijuana joint with the friend or gives him a small bag of marijuana below the allowable limit, it could be argued under this broad definition that the person delivered marijuana for remuneration.

Provisions Relating to Those Under 21

Section 26.

AS 17.38.210. This provision generally prohibits access of persons under 21 years of age to registered marijuana premises but provides certain limited exceptions. The provision does not include an exception for a person under 21 who is employed by an outside vendor and requires temporary access to the marijuana establishment—for example, for purposes of delivering a package or furniture or for purposes of providing construction services. It also does not permit access by a medical marijuana patient who is at least 18 but under 21 and does not have, or is not accompanied by, a parent, guardian, or spouse over 21.

AS 17.38.240. This provision would not make the records of those under 21 who commit certain marijuana violations confidential; rather, the provision would simply remove these files from CourtView, the court system's publicly-accessible database, at the conclusion of the court proceedings.

Broad Definition of "Open Marijuana Container"

Section 31. This provision defines "open marijuana container" as "a receptacle or marijuana accessory that contains any amount of marijuana and that is open or has a broken seal, and any amount of marijuana is removed." This definition is broader than the definition in the previous draft bill, which required evidence of use of marijuana in the vehicle, consistent with the purpose of the open container law. Unless the definition is amended to require removal of the marijuana in the vehicle, or use of marijuana in the vehicle, this law may capture people it is not intended to, who have no intention of using marijuana in the car and may even have taken steps to conceal it. For example, a person may take a small bag of marijuana that has been previously opened (so the seal is

broken) from his home to a friend's home. If he places it in a closed container in the back seat of his car, without ever intending to remove the marijuana in the car, he has violated the open container provision—since the seal was broken and the marijuana was neither in the trunk nor behind the last upright seat in a hatchback or similar vehicle. Similarly, because the provision includes a "marijuana accessory," a marijuana pipe that has residue in it and is in a person's purse in the back seat may qualify as an "open marijuana container."