MEMORANDUM

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SUBJECT: **THE REGULATE, CONTROL AND TAX CANNABIS ACT OF 2010**

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INTRODUCTION

Initiative Measure 09-0024, entitled "The Regulate, Control and Tax Cannabis Act of 2010" ("Act") has been certified by the Secretary of State and will be on California's November 2, 2010 statewide ballot. The Act legalizes for a person of 21 years of age or older the possession of one ounce of cannabis for personal consumption and the cultivation of specified amounts of cannabis for personal consumption. It cedes to local city and county governments the authority to regulate the sale of cannabis if the locality so chooses.

Section 2[1], the Act's preamble, lists as its purposes regulating cannabis in the same manner as alcohol (Section 2(B)(2)); the implementation of a legal and regulatory framework to control cultivation, processing, transportation, importation and sale of cannabis (Section 2(B)(3)); and taxing and regulating cannabis to generate billions of dollars for state and local governments. (Section 2(B)(9).)

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[1] Unless otherwise stated, all further statutory references are to the "The Regulate, Control and Tax Cannabis Act of 2010."

Critically, however, the actual statutes set forth in the Act would have the opposite effect.[2] Unlike the regulation of alcohol in the State of California, regulation of cannabis will be ceded to the local governments. The result will be an unworkable patchwork of different laws among cities and counties criminalizing and regulating cannabis. Also, the Act's passage will overly burden local governments. Enforcement of the Act will cause the loss of a number of businesses and jobs in California and will unfairly limit the rights of property owners. Lastly, its enactment will cause a torrent of uncertainty as to its application to various current criminal statutes.

The purpose of this analysis is to summarize pertinent parts of the Act's provisions and identify its most flawed aspects: ceding regulation to individual local governments, cultivation provisions, discrimination provisions, and the uncertainty of its effect on current criminal statutes.

THE ACT'S PROVISIONS

Section 1 names the initiative as "The Regulate, Control and Tax Cannabis Act of 2010".

Section 2 is the Act's preamble which consists of its findings, purposes and intent.

Section 3 sets forth what the act deems lawful activities and adds Health and Safety Code §§ 11300 through 11304. Proposed §11300 makes legal by a person of 21 years of age or older the possession, processing, sharing or transporting one ounce of cannabis for the person's personal consumption and not for sale (Proposed §11300(a)(i)), and the cultivation on specified types and areas of private property cannabis for personal consumption (Proposed §11300(a)(ii).)[3] "Personal consumption" is defined as possession or consumption in a residence, non-public place, or public place that is an authorized as a licensed premise by individual local governments. (Proposed §11300(b).) "Personal consumption" does not include: possession for sale unless licensed by a local government; consumption in public or a public place (presumably unless licensed by a local government); consumption by an operator of vehicle, boat or aircraft while it is being operated; or smoking in space while minors are present (this does not preclude other types of consumption and does not define "space"). (Proposed §11300(c).)

Proposed section 11301 enables local governments to adopt ordinances, regulations or other acts having the force of law to control, license regulate, or permit the consumption, cultivation, processing, distribution, and sale of cannabis. (Proposed §11301.) This includes licensing premises for cultivation, processing, transporting and selling (Proposed section 11301(b)), and personal consumption (Proposed §11301(e)); transportation of cannabis (Proposed §11301(f)); prohibit and punish through civil fines or other remedies for those acts not authorized by the Act (Proposed §11301(h).); establishing controls over zoning, operational restrictions, advertising, etc. (Proposed §11301(h); control advertising or public displays (Proposed §11301(j); and establish a threshold for personal consumption or cultivation that is higher than the amounts set forth in proposed section 11301 (Proposed §11301(l)).

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[2] This is of particular importance because the preamble of a statute is not binding on the interpretation of the statute and cannot overturn a statute's language. (*Yeager v. Blue Cross of California* (2009) 175 Cal.App.4th 1098.)

[3] These threshold amounts may be raised by local governments. (Proposed §11301(l).)

Proposed §11302 establishes the rules regarding imposition of taxes and fees. While local governments are allowed to collect specific taxes on cannabis-related activity (Proposed §11302(a)), the state government is not (Proposed §11302(b)).

Proposed §11303 will disallow any state or local law enforcement agency or official to attempt to, threaten to or in fact seize any cannabis, plant, or seed whose cultivation, possession, or sale is made lawful by the Act.

Proposed §11304 establishes the Act's effects and definitions. It requires construction of the act to permit intrastate transportation of cannabis from one licensed facility to another licensed facility notwithstanding the fact that intervening cities or counties do not allow for the activity. (Proposed §11304(b).) It disallows that any person be discriminated against for lawfully engaging in conduct permitted by the Act. (Proposed §11304(c).)

Section 4 proposes to amend existing Health and Safety Code section 11361 to add a subsection (c) which will criminalize furnishing marijuana to someone under 21 years of age and 18 years of age or older as a misdemeanor punishable by six months in county jail and fined up to $1,000.

Section 5 allows, through initiative or enactment by the State's legislature and signature by the Governor, the setting of higher threshold limitations (Section 4(a)) and establishment of a statewide regulatory scheme (Section 5(b)).

AUTHORITY CEDED TO LOCAL GOVERNMENTS PURSUANT TO PROPOSED §11301 IS UNWORKABLE

The Act fails to build a statewide regulatory system to regulate, control, and tax cannabis but instead allows each of the state's individual 478 cities and 58 counties unfettered authority to adopt its own cannabis regulations, all but guaranteeing complete dysfunction.

In its statement of purposes, the Act states that it seeks to "allow the Legislature to adopt a statewide regulatory system for a commercial cannabis industry." (Section 2(B)(11).) Section 5(b), as previously stated, also allows for the establishment of a statewide regulatory scheme.

However, the Act's actual proposed codifications are completely at odds with its stated purposes. As described above, proposed §11301 gives local governments the authority to adopt laws that regulate the entire field of commercial cannabis operations: cultivation, processing, distribution, transportation, sale, possession for sale. (Proposed §11301(a).) Proposed §11301 further permits each individual local government within the state to decide which "persons" (an undefined term) have access to cannabis, how much and where they can purchase, where they can consume it, how it is advertised, and how it is taxed. It also allows the individual local governments to set higher threshold limits than one ounce for personal consumption and 25 square feet area for cultivation. (Proposed §11301.)

This will create confusion and misunderstanding. For example, Los Angeles County alone has approximately 88 cities: imagine traveling eastward in the county from Santa Monica to Claremont and passing through the cities of Culver City, Los Angeles, Beverly Hills, West Hollywood, Pasadena, Glendale, Baldwin Park, and West Covina, e.g., and then imagine a

jumbled hodgepodge of completely different sets of rules and regulations governing marijuana in each individual city. The Act would create an unworkable patchwork of different marijuana activities throughout the county, thereby guaranteeing chaos. This would also be true for the entire state.

Also, this Act would place an undue burden on each local government. This is exemplified by the statewide control of alcohol which is codified by extensive legal framework set forth in article XX, section 22 of the California Constitution and the Alcohol Beverage and Control Act at Business and Professions Code sections 2300, et seq. It gives the state "the exclusive right and power to license and regulate the manufacture, sale, purchase, possession and transportation of alcoholic beverages within the State . . ." (Cal.Const., Art. XX, section 22.) It establishes a Department of Alcoholic Beverage Control ("ABC") which is headed by a director who is appointed by the Governor. (*Ibid.*) ABC is a large department whose mission is to enforce the Alcohol Beverage and Control Act. It consists of headquarters and field offices. Among its employees are peace officers who are empowered to investigate and make arrests for violations that occur on premises licensed by ABC.[4]

The Act will require each local government to set up a framework similar to the state laws governing alcohol and to employ a department that could effectively ensure that cannabis regulations are observed. The requirements placed on local governments will be unduly burdensome.

THE CULTIVATION PROVISIONS OF PROPOSED §11300(b) ARE AMBIGUOUS AND UNFAIRLY LIMIT THE RIGHTS OF PROPERTY OWNERS

Proposed §11301(a)(ii), states that a lawful occupant, lawful resident or guest may cultivate cannabis on private property owned by either the lawful occupant or resident of the private property for personal consumption only. The area of cultivation must not be more than twenty-five square feet per private residence or, in the absence of any residence, the parcel. (Proposed §11301(a)(ii).)

Additionally proposed §11304 (d) defines a residence as a "dwelling or structure, whether permanent or temporary, on private or *public property*, intended for occupation by a person or persons for residential purposes, and includes that portion of any structure intended for both commercial and residential purposes." However, in proposed §11301(a)(ii), cultivation of marijuana is restricted from unlawful or unlicensed cultivation of cannabis on *any public lands*." The Act is ambiguous as to how these provisions will apply. Does it authorize a person to camp in a public place, such as a state park or a local park, build a tent and begin growing cannabis in it? Does a local government have unfettered discretion to issue permits and licenses for cannabis cultivation in local parks, public sidewalks, etc? Can students housed at various state university residences cultivate cannabis on its property?

Also of concern is that proposed §11301(a)(ii) states "[c]ultivation on leased or rented property may be subject to approval from the owner of the property." It does not state it "*shall* be subject to approval..." This raises the question as to who determines if property owner approval is

[4] See Penal Code §830.2.

required. Is it the local government? If so, the Act will have the effect of limiting the rights of property owners to determine if their tenants are allowed to violate federal laws criminalizing marijuana possession and cultivation.

THE DISCRIMINATION PROVISIONS IN PROPOSED §11304(c) ARE OVERBROAD, PREVENTS EMPLOYERS FROM MAINTAINING A SAFE AND DRUG-FREE WORKPLACE, AND VIOLATES FEDERAL LAW AND FEDERAL MANDATES

Proposed §11304(c) of the Act provides that:

> No person shall be punished, fined, discriminated against, or be denied any right or privilege for lawfully engaging in any conduct permitted by this Act or authorized pursuant to Section 11301 of this Act. Provided however, that the existing right of an employer to address consumption that actually impairs job performance by an employee shall not be affected.

Presumably, this sweeping provision was intended, at least in part, to overturn the California Supreme Court's decision in *Ross v. Ragingwire Telecommunications, Inc.* (2008) 42 Cal.4th 920, which held that an employer could lawfully terminate an employee for testing positive for marijuana use even if the employee's drug use was authorized by the Compassionate Use Act (Proposition 215).

However, proposed §11304(c) goes even further since the provision protects all "conduct permitted by [the] Act." Thus, a California employer may no longer screen job applicants for marijuana use; regulate any employee conduct related to the use, transportation, or cultivation of marijuana;[5] or choose to maintain a drug-free workplace, unless the employer can prove actual job impairment. Although the section 2(C)(2) of the Act, which provides that the "Act is not intended to affect . . . controlled substances in the workplace or by specific persons whose jobs involve public safety," the statutory language of proposed §11304(c) is devoid of any reference to such distinction.

Additionally, and arguably more troublesome, proposed §11304(c) conflicts with the Federal Drug-Free Workplace Act of 1988 ("DFWA"), which requires that employers who receive government grants and contracts greater than $100,000 maintain a drug-free workplace. (41 U.S.C. section 701-707.) Since proposed §11304(c) would require grantees and specified contract recipients to violate the DFWA, it will preclude certain businesses, research institutions and state and local governments from obtaining billions of federal dollars. This will have devastating implications for California businesses and governments and will cause the loss of billions of dollars in jobs and income.

Also, proposed §11304(c) would require employers to violate several federal mandates. For example, the U.S. Department of Transportation requires persons who operate airplanes,

[5] The provision creates a small exception to this general principle which allows an employer to discipline an employee if they can prove actual job impairment.

locomotives, trucks and buses to be removed from their respective jobs if they test positive for any narcotic.[6]

Proposed §11304(c) also creates the absurd result of making marijuana use more protected than drinking alcohol. Under the provision, an employer would still be able to dismiss an employee for drinking while on the job, but could not dismiss the same employee for marijuana use without proving actual job impairment.

UNCERTAINTY AS TO THE EFFECT OF CURRENT STATUTES CRIMINALIZING MARIJUANA

Section 2(B)(7) provides that a purpose of Act is to:

> Ensure that if a city decides not to tax and regulate the sale of cannabis, that buying and selling cannabis within the city's limits *remain illegal*, but the city's citizens still have the right to possess and consume small amounts ....

Section 1(C)(1) which provides the Act's intent states:

> This Act is intended to limit the application and enforcement of state and local laws relating to possession, transportation, cultivation, consumption and sale of cannabis, including but not limited to the following, whether now existing or adopted in the future: Health and Safety Code sections 11014.5 and 11364.5 ...; 11054 ...; 11357...; 11358 ...; 11359...; 11360...; 11366...; 11366.5...; 11370...; 11470...; 11479...; 11703...; 11705...; Vehicle Code sections 23222 and 40000.15...

Nowhere in the Act is stated that the listed criminal statutes are eliminated nor any of them amended or repealed. The above listed statutes, therefore, would remain in the Health and Safety Code and should have some effect. Thus, there are a number of questions regarding how the legalization provisions are to be interpreted. Are they merely a defense to criminal charges? How should law enforcement implement the statutes in conjunction with existing Health and Safety Code Sections?

Adding to the uncertainty, is proposed §11301(g), which only allows a local government to adopt ordinances, regulations, or other acts having the force of law that "prohibit and punish through civil fines or other remedies the possession, sale, possession for sale, cultivation, processing, or transportation of cannabis that was not obtained lawfully from a person pursuant to this section or section 11300." Thus, it appears that if an individual sells within a city that does has not approved the sale of cannabis, the city only has a civil remedy, (fine, injunctive relief, restraining order, etc.), but the seller may still be prosecuted for state laws sales violations. Determination of state criminal liability (and not local ordinance) will be determined differently depending on the local government's cannabis ordinance.

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[6] Department of Transportation, Office of Drug and Alcohol Policy and Compliance, Clarifying Notice of Oct. 22, 2009.

CONCLUSION

The Act cedes unfettered power to local governments and unduly burdens them. The cultivation provision is ambiguous and unfairly limits the rights of property owners. The discrimination provision impinges on the rights of employers and could cost billions of dollars of losses of jobs and business to the state. Finally, the Act creates uncertainty as the effect of current statutes criminalizing marijuana.

chf/itw