

**LOCAL GOVERNMENTS
AND
MARIJUANA REGULATION**

**A Resource Guide for the
City of Homer, Alaska**

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PART ONE: INTRODUCTION

Recent changes to Alaska’s marijuana laws create significant legal challenges for state and local regulators. In November 2014, Alaska voters approved Ballot Measure 2 (BM2), an act that legalized¹ personal recreational marijuana use and possession and allowed for the creation of a commercial marijuana industry that would tax and regulate marijuana in a manner similar to alcohol.²

The effective date of the laws enacted by BM2 was February 24, 2015. On that date, personal possession of marijuana for recreational use became legal in the state, but commercial activity was still not permitted. Rather, on that date a nine-month rulemaking period began for the Alaska Marijuana Control Board (MCB) to craft the regulatory framework for the industry.³ That process was completed on November 20, 2015.⁴ Pursuant to the Alaska Administrative Procedures Act (APA), the final

¹ Like Colorado’s Amendment 64 and Washington’s Initiative 502, Alaska’s Ballot Measure 2 is credited with having “legalized” marijuana, but that term is misleading. “Legalized” implies that an activity is no longer subject to any criminal or civil penalties. But marijuana remains a Schedule VIA controlled substance under the Alaska Criminal Code, and failure to comply with state laws regulating marijuana cultivation, use, and sale can result in a penalty, ranging from a civil fine to felony prosecution. Thus, more accurately, Ballot Measure 2 legalized some marijuana conduct, decriminalized other conduct, and kept some conduct illegal. Despite these technicalities, the terms “legalize” and “decriminalize” are often used interchangeably. See David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 Harv. L. & Pol’y Rev. 359, 362 n.13 (2014); Jason Brandeis, *Ravin Revisited: Alaska’s Historic Common Law Marijuana Rule At The Dawn Of Legalization*, 32 Alaska Law Review 309, 311 n.4 (2015).

² 2014 Ballot Measure No. 2 - 13PSUM An Act to Tax and Regulate the Production, Sale, and Use of Marijuana. Initiative summary text available at: <http://www.elections.alaska.gov/doc/bml/BM2-13PSUM-ballot-language.pdf>. Full initiative text here: https://www.commerce.alaska.gov/web/portals/g/pub/MJ_BallotMeasure2.pdf

³ AS 17.38.080; AS 17.38.090(a). The 2014 General Election vote was certified on November 24, 2014. Statutes enacted by ballot measure take effect 90 days later. The effective date of implementation for BM2 was February 24, 2015. See “What is the timeline for implementation of the proposition?” at <https://www.commerce.alaska.gov/web/abc/MarijuanaInitiativeFAQs.aspx>. If the board has not adopted regulations by this date, local governments have the option of establishing their own regulations. AS 17.38.110.

⁴ The MCB adopted final marijuana industry regulations on November 20, 2015, and amended them on December 1, 2015. See <https://www.commerce.alaska.gov/web/abc/MarijuanaRegulations.aspx>

regulations have been submitted to the Lieutenant Governor for review. Under the APA, the regulations will take effect 30 days after the Lieutenant Governor signs them into law.⁵

The MCB will grant or deny a completed application within 90 days after it is received. However, the MCB has indicated that it may issue testing and cultivation facility licenses first, with retail and product manufacturing licenses to follow. Such a sequence makes it more likely that retail and manufacturing licensees will have access to legally grown and tracked marijuana for their inventories before opening for business. Additionally, all license holders will be required to use a specific marijuana inventory tracking system to assure that marijuana sold in licensed retail stores was grown, produced and tested by licensed establishments. The MCB has stated that no licenses will be issued before the tracking system is implemented. The anticipated date of implementation is May 23, 2016.

The first state licensed marijuana establishments are therefore expected to be open no earlier than mid-2016.⁶ This means that Alaska will soon be one of just four states where people will be able to lawfully grow, buy, and sell recreational⁷ marijuana through a state-approved regulatory system.

⁵ The regulations were signed by Lieutenant Governor Mallott before January 24, 2016. Accordingly, the MCB will begin accepting online marijuana establishment license applications by February 24, 2016, as required by statute AS 17.38.100(b).

⁶ AS 17.38.100(b) requires the MCB to begin accepting and processing applications to operate marijuana establishments one year after the effective date of the act, February 24, 2016. If the board has not adopted regulations by this time, applications may be submitted directly to local regulatory authorities. AS 17.38.110(g). Action must be taken on registration applications within 90 days of receipt. AS 17.38.100(d). This means the first licenses would be issued no later than May 24, 2016, but businesses may not be ready to open and fully operate until sometime thereafter.

⁷ The terms “recreational” and “medical” refer to the purpose for which marijuana use is authorized by law, not necessarily to a distinct type of marijuana, though there are certain strains of marijuana and marijuana derivatives which lack psychoactive properties and are therefore usually exclusively used for medical purposes. See Limited Access Marijuana Product Laws, Nat’l Conf. of State Legislatures, <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx#Table%202>; Julie Anderson Hill, Banks, Marijuana, and Federalism, 65 Case W. Res. L. Rev. 597, 598 n.2 (2015); Recreational marijuana laws allow marijuana use for any personal purpose, and the sale of recreational-use marijuana is referred to as retail sale. See generally John Hudak, Colorado’s Rollout of Legal Marijuana Is Succeeding: A Report on the State’s Implementation of Legalization, 65 Case W. Res. L. Rev. 651 (2015). Conversely, medical marijuana laws require a physician’s certification that an individual has a medical condition for which marijuana is a treatment. People may then use this reason as a defense against criminal charges for use and possession of marijuana. In some states, medical marijuana laws allow for the purchase and sale of marijuana for medicinal use.

Such a significant shift raises several legal concerns. First, marijuana remains prohibited by federal law. The Controlled Substances Act (CSA) makes it a federal crime to use, possess, or sell marijuana. The legalization of marijuana at the state level also poses conflicts with federal tax and commerce laws. Second, the ballot initiative tasked the State of Alaska's Alcoholic Beverage Control (ABC) Board with crafting regulations to govern the production, sale, possession, and use of marijuana. This responsibility then shifted to a newly-formed Marijuana Control Board,⁸ but the implementing regulations are not yet officially in effect, and no marijuana establishment licenses have been granted. Thus, though there is a nearly-complete framework in place, the full legal landscape of marijuana regulation in Alaska has yet to unfold. This is significant, and this process must be closely monitored because the regulations, and nascent industry, will affect or involve nearly every area of legal expertise, including administrative law, banking, contracts, criminal law, employment law, intellectual property, land use and zoning, real estate, regulatory compliance, tax law, and torts. Further, the regulatory process will not resolve all of the legal issues raised by marijuana legalization. Additional statutory changes will be needed to mesh the marijuana regulations with existing state statutes and regulations, as well as with Alaska's existing common law rule governing personal marijuana use and Alaska's medical marijuana act. Finally, local jurisdictions will have significant input into managing marijuana businesses within their borders, including the opportunity to opt-out of certain aspects of the marijuana industry and monitoring compliance with public health, fire, safety, and tax ordinances.

This resource guide provides general background on marijuana use and production, summarizes federal marijuana laws and Alaska state marijuana laws and regulations, and discusses issues related to local government administration of a marijuana industry within its borders. Given the role that local governments will play in investigating and enforcing the state regulations, as well as any locally-imposed conditions and requirements, it is important for municipalities to consider developing their own protocols and to be familiar with the state regulations governing inspection, license suspension and revocation, seizure of marijuana and marijuana products, and all public health and safety standards applicable to the marijuana industry.

⁸ See 2015 SCS CSHB 123(FIN) available at <https://www.commerce.alaska.gov/web/portals/9/pub/HB-123.pdf>

PART TWO: MARIJUANA PRODUCTION AND CONSUMPTION TERMINOLOGY⁹

Marijuana is the general term for a preparation of the female¹⁰ cannabis plant or its dried flowers for use as a psychoactive drug or medication. For most, this term connotes the stereotypical image of greenish dried plant matter which can be rolled in a paper “joint” or smoked in a pipe. While this type of consumption is still prevalent, methods of marijuana production and consumption have become quite varied in recent years; there are now numerous ways to prepare marijuana for consumption, and even more ways to actually consume it. To be effective, regulations governing marijuana use, cultivation, production, and sale must reflect current production and usage trends.

Understanding the law of marijuana regulation first requires a familiarity with the terminology of the marijuana industry. To begin, marijuana is sought out because it contains cannabinoids, chemical compounds unique to the cannabis plant which are absorbed into the bloodstream upon use and then carried to the brain where they act upon the human brain’s cannabinoid receptors. There are two main cannabinoids which produce significant effects: Tetrahydrocannabinol (THC), a psychoactive component

⁹ Information in this section is collected from several sources: (1) a white paper prepared by the Coalition for Responsible Cannabis Legislation (CRCL) and provided to the State of Alaska (available at http://commerce.state.ak.us/dnn/Portals/9/pub/CRCL_White_paper_provided_by_Coalition_for_Responsible_Cannabis_Legislation.pdf). The state seems to respect CRCL’s views (two members of that group were appointed to the Alaska Marijuana Control Board; one presumes they will use their group’s understanding of the terms in their official board work. <https://www.adn.com/article/20150701/walker-names-appointees-alaskas-first-marijuana-control-board.>); (2) Wikipedia ([https://en.wikipedia.org/wiki/Cannabis_\(drug\)](https://en.wikipedia.org/wiki/Cannabis_(drug))); (3) Leafly (<https://www.leafly.com/news/cannabis-101/glossary-of-cannabis-terms>); and The Cannabist (<http://www.thecannabist.co/2014/06/13/marijuana-terms-and-definitions-cannabis-lexicon-glossary-pot-terminology/13174/>).

¹⁰ Female plants are distinct from male plants in that they are the ones that produce flowers which contain the high percentage of cannabinoids that hold both their psychoactive and medicinal properties.

that may produce feelings of euphoria, relaxation, or increased appetite, and Cannabidiol (CBD) which is often used as a medical treatment for pain, inflammation, anxiety, and to manage seizures without the psychoactive effects (the "high" or "stoned" feeling) associated with THC. Different strains of the cannabis plant contain varying proportions of THC and CBD.



MARIJUANA FLOWER/BUD¹¹

As stated above, the most historically common form of marijuana and means of consuming marijuana was to smoke part of the plant—to heat the plant material directly until it burned and then to inhale the smoke, either through a cigarette/joint or a pipe of some part. The part of the plant that is smoked is the flower. Also referred to as "bud(s)" these are the "hairy," sticky, fluffy, crystal-covered parts of the plant located at the top of the plant stalks. Buds are harvested and used for recreational or medicinal purposes as they are the part of the plant that contains the highest concentrations of active cannabinoids.¹² Buds are dried and cured before consumption.

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¹² Other parts of the plant, such as the "fan leaves" (found on the upper part of the plant) or the "sugar leaves" (found nearest the flowers) do not contain high levels of THC and are often discarded. However, "trim," which refers to any leftover plant material (including the leaves and flowers) may be processed to produce kief, hash oil, or other concentrates. The stalks of the



DRIED MARIJUANA FLOWER/BUD¹³

As the rate of consuming marijuana by smoking marijuana flower has decreased, consumption of marijuana derivatives called “concentrates” has increased. Concentrates have gained in popularity because they offer a more potent consolidation of THC than the traditional flower buds. The main forms of marijuana concentrates are:

- Kief: Kief is a collected amount of trichomes that have been separated from the cannabis plant. Trichomes are the resin production glands of the cannabis plant, appearing as small outgrowths on the surface of the flowers and upper leaves of

cannabis plant are used in the production of hemp. It is worth noting that all parts of the cannabis plant are included in the definition of marijuana, discussed below.

¹³ " Licensed under Public Domain via Wikimedia Commons - https://commons.wikimedia.org/wiki/File:Bubba_Kush.jpg#/media/File:Bubba_Kush.jpg

the cannabis plant. They are often described as hairs or crystals, though technically they are neither. THC, CBD and other cannabinoids are all produced in these glands.



MARIJUANA BUD WITH TRICHOMES¹⁴

Kief is separated from the rest of the plant by mechanical or thermal processes (e.g., sieve, filter, freezing the flowers allows the trichomes to be shaken off and gathered). Since the trichomes contain the majority of the cannabinoids, kief is known to be extremely potent. Kief can be smoked or eaten by itself or used to create hash, oils, or edible products.

¹⁴ Licensed under Public Domain via Wikimedia Commons - <https://commons.wikimedia.org/wiki/File:Kolkata-Kut.jpg#/media/File:Kolkata-Kut.jpg>



*KIEF*¹⁵

- Hash (or hashish): Hash is kief (essentially a powder of pure trichomes) pressed into a small block of solid material.

¹⁵ "Kief (yellow)" by Mjpresson - Own work. Licensed under CC BY 3.0 via Wikimedia Commons [https://commons.wikimedia.org/wiki/File:Kief_\(yellow\).jpg#/media/File:Kief_\(yellow\).jpg](https://commons.wikimedia.org/wiki/File:Kief_(yellow).jpg#/media/File:Kief_(yellow).jpg)



*HASH/HASHISH*¹⁶

- Hash Oil: An extract produced by exposing cannabis plant material to a solvent and then evaporating the solvent. What remains is a sticky resinous dark oily liquid. Hash oil can be consumed directly into the lungs, or used to create edible products or tinctures. Hash oil has become very popular because of its high potency.

Some extractors used in the hash oil production process are similar in design to a coffee machine, where the solvent drips through the marijuana and leaches out the cannabinoids. The process for extraction can also be similar to that used to extract lavender oils, vanilla extract, or other familiar oils and extracts.

¹⁶ Licensed under Public Domain via Wikimedia Commons - <https://commons.wikimedia.org/wiki/File:Hashish-2.jpg#/media/File:Hashish-2.jpg>



*HASH OIL*¹⁷

- Butane Hash Oil (“BHO”): BHO is a potent concentrate made by dissolving marijuana buds or flowers in a solvent (usually butane). The resulting product has very high THC levels and presents a thick, sticky oil, a moldable goo, or plastic-like resinous bits depending on the exact manufacturing method. The various forms of BHO may be referred to as honey oil, dabs, earwax, wax, shatter, or ice.

¹⁷ "Drop of cannabis oil" by Ryan Bushby(HighInBC) - Licensed under CC BY 2.5 via Wikimedia Commons-
https://commons.wikimedia.org/wiki/File:Drop_of_cannabis_oil.jpg#/media/File:Drop_of_cannabis_oil.jpg



*BUTANE HASH OIL*¹⁸

This extraction method has generated significant controversy. Individuals who attempt to extract hash oil in their homes often use butane, which is easy to procure, but is also a volatile flammable gas. In an uncontrolled environment (such as the home), butane hash oil extraction can lead to fires and explosions. It is important to note that the danger lies in the extraction method (using butane), not the product of the extraction (hash oil), which itself is not volatile.

¹⁸ Photo by Andres Rodriguez (available at <https://www.flickr.com/photos/symic/8283444548/in/photolist-dGbYqo-dBT0NT-dGbJsN-di6oNz-dG6jf8-dBYPid-dpm2WP-dCzfgH-dsQJEj-dBYPts-dyMt4o-dsQyCa-dBrLv-dsQz1z-dpm386-dCzfx3-dCzfDq-dG6DFa-dsQJnq>)



BUTANE HASH OIL "HONEY"¹⁹



SHATTER

- Tincture: A tincture is a liquid marijuana extract made with alcohol or glycerol. Tinctures are made by extracting cannabinoids from marijuana flowers using

¹⁹ By Vjiced (Own work) [CC BY-SA 3.0 (<http://creativecommons.org/licenses/by-sa/3.0>)], via Wikimedia Commons

high-proof spirits. Tinctures are ordinarily consumed orally by using a dropper to place the tincture under the tongue. Tinctures can also be applied to the skin.



*TINCTURE*²⁰

- Infusions: Leaves, flowers, or concentrates may be infused into a solvent (such as butter, cooking oil, glycerin, or skin moisturizer) and then used to prepare marijuana foods (edibles) or applied topically.

²⁰ "Homemade Tincture" by Nekenasoa. <https://flic.kr/p/s8jK98>.



MAKING MARIJUANA BUTTER²¹

In short, concentrates are typically made either by removing and collecting the trichomes from the flower/bud; or by dissolving the flowers/buds into a solvent thereby extracting the THC. The resulting product has a very potent THC count and can take many forms, including a powder, a solid brick, a liquid, or a viscous oil.

²¹ "Cannabutter" by Realclark at English Wikipedia - Transferred from en.wikipedia to Commons.. Licensed under Public Domain via Wikimedia Commons - <https://commons.wikimedia.org/wiki/File:Cannabutter.jpg#/media/File:Cannabutter.jpg>



MARIJUANA BUTTER INFUSION²²

There are three main ways in which marijuana concentrates are consumed: eating, “vaping,” or “dabbing.”

- Eating marijuana is straightforward: one ingests an edible marijuana product. “Edibles” include a broad range of foods that have been infused with marijuana extracts. Edible products commonly include baked goods such as cookies and brownies, but have expanded to include other confections, candies, and beverages.²³

²² “Cannabis Butter” by Cannabis Training University - Own work. Licensed under CC BY-SA 3.0 via Wikimedia Commons - https://commons.wikimedia.org/wiki/File:Cannabis_Butter.JPG#/media/File:Cannabis_Butter.JPG

²³ Since most marijuana regulations are tied to the weight of the marijuana in question, it is important to note that the total weight of an edible product includes all of the ingredients that combined to make the product. The total weight of the product does not equal the weight of the marijuana concentrate used to introduce THC into the recipe. AS 17.38.900g(6) specifies that “marijuana” does not include “the weight of any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products.”

A subset of edibles includes “adulterated” food or drink products. These are food products which existed without marijuana in a form ready for consumption to which marijuana was subsequently added. For example, candy bars or Gummy Bears sprayed down with a marijuana concentrate and then repackaged and sold.



MARIJUANA COOKIE W/LABEL²⁴

- “Vaping” refers to using a vaporizer to consumer marijuana. Vaporizers heat marijuana-infused oils (or parts of the plant itself) to a temperature that produces a cannabinoid-laced vapor to inhale. Many believe vaporizing is healthier than smoking since there is no smoke to ingest; nothing is burned in a vaporizer. Vaporizers are now very compact (similar to e-cigarettes) and have correspondingly gained in popularity.

²⁴ "KCCS Cookie" by Subvertc - Own work. Licensed under CC BY-SA 3.0 via Wikimedia Commons - https://commons.wikimedia.org/wiki/File:KCCS_Cookie.JPG#/media/File:KCCS_Cookie.JPG

- “Dabbing” involves dropping marijuana concentrates onto a heated surface (such a skillet or a nail) and inhaling the resulting fumes/smoke/vapor.

PART THREE: OVERVIEW OF FEDERAL AND STATE MARIJUANA LAWS

State and federal laws governing the regulation of marijuana can be quite different. Marijuana use, possession, and distribution are prohibited under federal law and as such carry strict criminal penalties. For many years, all state marijuana laws largely mirrored federal law and banned marijuana. But recently a number of states, including Alaska, have enacted marijuana laws that diverge from the federal prohibition. Alaska is one of 23 states (and Washington, D.C.) whose laws permit medical marijuana use, and is one of four states where a taxed and regulated commercial marijuana industry will exist for recreational marijuana.

Understanding the distinctions between federal and state marijuana laws, as well as where those laws overlap, is crucial for lawmakers and regulators in states with marijuana industries.

Federal Marijuana Prohibition

In 1970, the federal government enacted the Controlled Substances Act (CSA), a comprehensive drug law that classified substances in five different categories (referred to as schedules) according to their medical value, potential for danger, and likelihood of addiction and abuse.²⁵ Penalties for violation of each schedule varied, with Schedule I substances considered the most dangerous, and therefore the most restricted, with harsh punishments for possession, use, or distribution.

Marijuana is listed as a Schedule I narcotic because it has “a high potential for abuse,” “no currently accepted medical use in treatment,” and “a lack of accepted safety for use of the drug or other substance under medical supervision.”²⁶ Other drugs included in Schedule I include ecstasy, heroin, LSD, and peyote.²⁷ Under the CSA, criminal penalties for use, possession, and sale of marijuana are serious and can include life in prison depending upon the amount of marijuana involved and the circumstances surrounding the conviction.²⁸ The CSA remains in force and the Supreme Court has

²⁵ 28 U.S.C. § 801 et seq.

²⁶ 21 U.S.C. § 812, (b)(1)(A)–(C)

²⁷ 21 U.S.C. §§ 812(b)(1), 812(c)(c)(10) (2012).

²⁸ 21 U.S.C. § 841(b) (2012).

upheld the federal government's ability to regulate marijuana.²⁹ Federal courts have also repeatedly affirmed the Drug Enforcement Agency's (DEA) decision to keep marijuana in Schedule I.³⁰

Despite this federal prohibition, over the past 20 years a number of states have passed laws decriminalizing or legalizing limited types of marijuana use within their borders. Beginning with California in the mid-1990s, states started passing medical marijuana laws, which allowed the use of marijuana to treat certain health conditions. Alaska was among the first four states to enact such a law, approving a medical marijuana law by ballot initiative in 1998. Currently, 23 states and Washington, D.C. permit some level of marijuana use for medical purposes, though the details vary by jurisdiction.³¹

In response to increased acceptance at the state level, and growing popular and political support for medical marijuana, federal policy began to shift. In 2009, the "Ogden Memo," prepared by the Obama Administration's Department of Justice, announced a significant change. The "Ogden Memo" explained that federal resources should not focus on prosecuting individuals acting in concert with their state's marijuana laws.³² This was viewed as a "hands-off"³³ policy toward enforcement of federal marijuana laws in states where marijuana use was authorized under those states' laws. But in 2011, in response to the expansion of marijuana industries in several states, the Department of Justice explained that the Ogden Memo had been misread by those

²⁹ *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

³⁰ *Americans for Safe Access v. Drug Enforcement Admin.*, 706 F.3d 438, 440–41 (2013). There is significant debate as to whether marijuana belongs in this schedule. See, e.g., Chemerinsky, *Cooperative Federalism* 62 *UCLA L. REV.* 74, 82 at n. 22.

³¹ See <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> for a complete list and restrictions/requirements for each law

³² In that memorandum, Deputy Attorney General David Ogden wrote to U.S. Attorneys around the country, providing them with enforcement priority guidance: "As a general matter, pursuit of [federal] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." U.S. Dep't Of Justice, Office Of The Deputy Attorney General, *Memorandum For Selected United States Attorneys: Investigations And Prosecutions In States Authorizing The Medical Use Of Marijuana* 1–2 (2009). Available at: <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>

³³ Chemerinsky, *Cooperative Federalism and Marijuana Regulation*, 62 *UCLA L. Rev.* 74, 87 (2015).

who saw it as a “green light” to begin large-scale marijuana production.³⁴ The “Cole Memo” stepped federal policy back from the Ogden Memo by clarifying that state and local laws permitting marijuana activity were not a defense to federal prosecution.³⁵ A number of enforcement actions followed, or were threatened, and wound up shutting down numerous medical marijuana businesses operating in accordance with state laws throughout the country.³⁶

The November 2012 general election brought the need for an additional federal statement about state-level marijuana regulation. There, voters in Colorado and Washington approved ballot measures that would legalize personal recreational marijuana use for adults 21 years and older and to allow the licensed commercial sale of marijuana. These laws repealed criminal penalties for possession of small amounts of marijuana and directed the state legislatures create frameworks to tax and regulate the production and sale of marijuana for recreational purposes. These two states would now allow adults to lawfully purchase and sell marijuana for recreational purposes—not just marijuana for medical use—in retail establishments.

In response, the United States Department of Justice (DOJ) explained that while it remains committed to enforcing the federal marijuana prohibition, it would not immediately take legal action to attempt to overturn the Colorado and Washington laws. Instead it would take a “trust but verify” approach. The “Cole Memo II” outlined several key parts of this new policy: it allowed the Colorado and Washington recreational marijuana legalization laws to go into effect; permitted medical marijuana distributors and suppliers operating in compliance with state laws to continue; and reiterated that federal resources should not be used to prosecute seriously ill medical marijuana patients, their caregivers, or individuals who possess small amounts of marijuana for other personal uses.³⁷

³⁴ Id. at 87.

³⁵ Id. at 88; U.S. Dep’t Of Justice, Office Of The Deputy Attorney General, Memorandum For All United States Attorneys: Guidance Regarding The Ogden Memo In Jurisdictions Seeking To Authorize Marijuana For Medical Use 2 (2011) [hereinafter Cole Memo], available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>

³⁶ Id., Kamin, The Limits of Marijuana Legalization in the States, Iowa Law Review Bulletin, Vol. 99.39 at 40-41. Available at: http://ilr.law.uiowa.edu/files/ilr.law.uiowa.edu/files/ILRB_99_Kamin.pdf

³⁷ Cole Memo II available at: <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

The linchpin of the policy is that it requires state governments to take an active role in creating and implementing “strong and effective regulatory and enforcement systems” to mitigate the potential harm legalization and decriminalization could pose to public health, safety, and other law enforcement efforts. If state regulatory protocols are eventually found to be insufficient, DOJ could challenge the states’ regulations themselves and/or bring individual enforcement or criminal actions.

The memo also identified eight instances where federal marijuana laws would still be enforced by DOJ, irrespective of state laws, in order to prevent:

- distribution of marijuana to minors;
- revenue from marijuana sales going to criminal enterprises;
- exportation of marijuana from states where it is legal to states where it is not;
- the use of state-authorized marijuana activity as a cover or pretext for other illegal activity;
- violence and use of firearms in the cultivation and distribution of marijuana;
- driving under the influence of marijuana and other public health consequences associated with marijuana use;
- growing marijuana on public lands; and
- marijuana use or possession on federal property.

In short, at this time, the federal government will largely leave states alone to regulate marijuana within their borders, so long as the regulatory processes are sufficiently strict, federal concerns are addressed, and potential negative consequences are minimized. This approach respects state sovereignty and allows state-level marijuana legalization experiments to continue. However, the shift from the Ogden Memo policy to the federal government “flexing its muscle” under the Cole Memo and then back to an even more relaxed approach with the Cole Memo II illustrates the danger of relying too heavily on such executive policies. Such policies can change without notice and without formal legislative or court action. Essentially, DOJ has made a non-binding promise to forestall enforcement of the federal marijuana prohibition—a promise which exists at the whim of the current executive with no guarantee it will be continued by the next administration.³⁸

This leaves the states that have “legal-but-not-entirely-legal”³⁹ marijuana in a precarious situation. In addition to the fear of arrest, criminal prosecution, and asset

³⁸ See David Blake & Jack Finlaw, *Marijuana Legalization in Colorado: Learned Lessons*, 8 Harv. L. & Pol’y Rev. 359, 362 n.6 (2014)

³⁹ Chemerinsky, *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. Rev. 74, 113 (2015).

forfeiture for marijuana professionals (growers, the owners and employees of dispensaries, investors, etc.) other difficulties exist that can stall the development of a legal marijuana industry. Section 280E of the Internal Revenue Code prohibits marijuana business operators from deducting operating expenses, such as rent and the costs of paying employees, from their taxes.⁴⁰ This puts marijuana businesses at a serious disadvantage and makes running a marijuana business very difficult. Another burden is the difficulty marijuana businesses have in obtaining basic banking services.⁴¹ The original Cole Memo warned financial institutions that knowingly engaging in transactions involving the proceeds of activities known to be violating the CSA may also be in violation of federal drug laws, federal money laundering laws, and other federal commerce and financial laws. As a result, banks and credit card companies have ceased working with marijuana businesses, leaving the marijuana industry mostly a cash-only enterprise. This requires businesses to keep lots of cash on hand, to pay their employees and tax bills with cash, sets them up as prime crime targets, makes it more difficult to track sales, enforce tax payments, and prevent illegal diversion. State and local jurisdictions must also wrestle with questions about contract law (whether contracts with marijuana businesses may be deemed unenforceable), employment law (such as whether employees can be terminated for off-duty marijuana use), whether marijuana use can be a grounds for revocation of probation or parole.⁴²

The federal government has taken limited action to remedy these problems. In February 2014, the US Justice Department and Treasury Department issued joint statements on how banks could work with marijuana businesses. Adherence to strict guidelines was required and many banking institutions were still hesitant to enter the industry due to fear of fines or other penalties. At the end of 2014, the U.S. Treasury Department's Financial Crimes Enforcement Network reported there were 105 banks and credit unions working with legal-state marijuana companies. In late 2015, a survey found that 60% of legal marijuana businesses do not have bank accounts.

The recently-passed federal budget included several marijuana provisions. One prevents the Department of Justice and the Drug Enforcement Agency from spending any money on interfering with state medical marijuana laws, the other prevents the

⁴⁰ See Kamin, *The Limits of Marijuana Legalization in the States*, *Iowa Law Review Bulletin*, Vol. 99.39 at 45 and Leff, *Tax Planning for Marijuana Lawyers* (available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2226416)

⁴¹ See Kamin, *Id.* at 47.

⁴² *Id.* 44-47

DOJ and the DEA from using funding to interfere with state research programs for industrial hemp.⁴³

Over the past few years, Congress has considered several other pieces of legislation aimed at remedying this tension between state and the federal law. To date, none of these bills “have gained much traction.”⁴⁴ Examples include bills that would:

- remove marijuana from the CSA schedule of drugs and the enforcement and punishment provisions of the federal code;⁴⁵
- reschedule marijuana to allow marijuana for medical use in the states where medical marijuana has been legalized and to ensure “an adequate supply of marijuana is available for therapeutic and medicinal research;”⁴⁶
- amend the asset forfeiture provisions of the CSA to prohibit the seizure of real property used in activities performed in compliance with state marijuana laws;⁴⁷
- prohibit the DEA and the DOJ from spending taxpayer money to raid, arrest, or prosecute medical marijuana patients and providers in states where medical marijuana is legal;⁴⁸
- prohibit any provision of the CSA from being applied to any person acting in compliance with state marijuana laws,⁴⁹ and

⁴³ <http://www.adn.com/article/20151221/congress-softens-marijuana-policy-key-obstacles-remain-alaskas-path>

⁴⁴ See Chemerinsky, *supra*, at 113–14 (listing proposed bills).

⁴⁵ Ending Federal Marijuana Prohibition Act of 2013, H.R. 499, 113th Cong. § 101 (2013). Federal law would continue to prohibit trafficking and the unlicensed cultivation, production, manufacturing, and sale of marijuana.

⁴⁶ States’ Medical Marijuana Patient Protection Act, H.R. 689, 113th Cong. § 4 (2013).

⁴⁷ States’ Medical Marijuana Property Rights Protection Act, H.R. 784, 113th Cong. § 3 (2013).

⁴⁸ H. Amdt. 748, 113th Cong. (2013–14) (amending Commerce, Justice, Science, and Related Agencies Appropriations Act, H.R. 4660, 113th Cong. (2013–14)).

⁴⁹ Respect State Marijuana Laws Act of 2013, H.R. 1523, 113th Cong. § 2 (2013).

- provide legal immunity from criminal prosecution to banks and credit unions providing financial services to marijuana-related businesses acting in compliance with state law.⁵⁰

Alaska State Marijuana Laws

Much like the federal Controlled Substances Act, on its face the Alaska Criminal Code prohibits all marijuana-related activity.⁵¹ There are, however, three exceptions to Alaska's general proscription of marijuana which allow marijuana use under state law in limited circumstances. The first is the result of the ballot measure enacted by Alaska voters in 2014. Ballot Measure 2, titled "An Act to tax and regulate the production, sale, and use of marijuana," created new state statutes that permit persons over 21 years of age to use marijuana for recreational purposes and instructed the Alaska Legislature to develop a regulatory scheme for the taxation and regulation of recreational marijuana production and sale.⁵² Alaska is now one of just four state that will allow the taxation and regulation of retail recreational marijuana. The second exception comes from the Medical Uses of Marijuana for Persons Suffering from Debilitating Medical Conditions Act, originally passed by voters as another ballot in 1998.⁵³ This law permits individuals who have consulted with a doctor and registered with the state to use marijuana to treat "debilitating medical conditions."⁵⁴ The last exception comes from the Ravin Doctrine, a common law rule created through a series of state court decisions beginning in 1975. Ravin allows adults over 19 to possess a small amount of marijuana in the home for personal use.⁵⁵

These three exceptions are discussed in greater detail in a subsequent section.

⁵⁰ Marijuana Business Access to Banking Act of 2013, H.R. 2652, 113th Cong. § 3 (2013).

⁵¹ See AS 11.71.060(a)(1) (stating penalty for display of any amount of marijuana). However, Alaska has historically rated marijuana offenses as among the least serious of all drug offenses and continues to classify it as a Schedule VIA substance—a drug with the lowest degree of danger to a person or the public. *Waters v. State*, 483 P.2d 199, 201 (Alaska 1971) (finding an absence of foundation for characterization of marijuana offender as the worst type of drug offender for sentencing purposes); AS 11.71.190(a), (b).

⁵² See generally AS 17.38 et seq.

⁵³ AS 17.37.080

⁵⁴ AS 17.37.070(4)

⁵⁵ Jason Brandeis, *Ravin Revisited: Alaska's Historic Common Law Marijuana Rule At The Dawn Of Legalization*, 32 *Alaska Law Review* 309, 337 (2015).

Interplay Between Federal and State Marijuana Laws

As explained above, the CSA makes all marijuana possession, use, and sale illegal, and violations of the CSA's marijuana provisions carry steep criminal penalties. Thus, those who use, possess, grow or sell marijuana in compliance with state laws that tax and regulate medical or recreational marijuana still violate federal law and can be prosecuted for doing so. The idea that the same conduct could be legal and illegal in the same jurisdiction at the same time is a complicated and confusing concept. The legal question raised here, whether the federal CSA preempts, and thereby renders invalid, state laws that conflict with the CSA, hovers over all discussions of changes to state and local marijuana law and policy.

Federal preemption of state laws is based on the U.S. Constitution's Supremacy Clause, which states that federal law is "the supreme law of the land" and it trumps conflicting state laws. The constitutional question at issue turns on whether state laws legalizing marijuana create such an impermissible "conflict" such that the CSA prohibits any and all marijuana use and possession. No federal court has answered the broad question of whether the federal CSA preempts state laws that conflict with the CSA, and full analysis of this question is beyond the scope of this memo.⁵⁶ But, in short, legal scholars cite the Tenth Amendment's anti-commandeering rule as the counterbalance that protects a state's ability to enact marijuana legislation that diverges from federal policy. The anti-commandeering rule precludes the federal government from forcing states to enact coexistent, or even complimentary, controlled substance laws, or from requiring state officers to enforce federal drug laws within the state.⁵⁷ States can therefore experiment with different legalization and decriminalization programs, but the resulting state-federal relationship is complicated and potentially antagonistic.

⁵⁶ Several state courts have ruled against local government officials seeking to invalidate state medical marijuana laws as preempted by federal law U.S Supreme Court denied certiorari when it was sought in these cases. See Chemerinsky, 62 UCLA L. Rev 74, at 102 and Mikos, On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime, 62 Vand. L. Rev. 1419.

⁵⁷ *New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions"); *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress cannot compel states to enact or enforce a federal regulatory program); Robert A. Mikos, On The Limits Of Supremacy: Medical Marijuana And The States' Overlooked Power To Legalize Federal Crime, 62 VAND. L. REV. 1421, 1446 (2009) ("The preemption power is constrained by the Supreme Court's anti-commandeering rule. That rule stipulates that Congress may not command state legislatures to enact laws nor order state officials to administer them.").

PART FOUR: THE LEGAL STATUS OF MARIJUANA IN ALASKA

As explained above, Alaska’s marijuana laws are unique in the nation. Three other states, Colorado, Washington, and Oregon, currently allow personal possession and retail sale of limited amounts of marijuana for recreational use.⁵⁸ Twenty-two other states and Washington, DC allow some form of marijuana cultivation, sale, and use for medicinal purposes. But only Alaska combines recreational and medical marijuana legalization with a common-law right to personal marijuana use in the home. The result is a complex system that permits limited marijuana use under various fact-specific circumstances based on three separate bodies of law. Whether marijuana-related activity is permitted under Alaska law ultimately depends on the location of the activity, the amount of marijuana in question, and the age of the possessor.

It is important to note that the term “marijuana” can refer to numerous derivatives of the cannabis plant, all taking different forms, having different methods of consumption, and containing varying levels of psychoactive chemicals.

The Alaska Statutes currently contain two definitions for marijuana. The most recent was added by 2014 Ballot Measure 2, which defines marijuana as:

all parts of the plant of the genus cannabis whether growing or not, the seeds thereof, the resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including marijuana concentrate. “Marijuana” does not include fiber produced from the stalks, oil, or cake made from the seeds of the plant, sterilized seed of the plant which is incapable of germination, or the weight of

⁵⁸ Pursuant to Oregon Ballot Measure 91 (passed November 2014), Oregonians may currently grow limited amounts of marijuana on their property and possess limited amounts of recreational marijuana for personal use. This home grow/personal possession provision took effect on July 1, 2015. The Oregon Liquor Control Commission (OLCC) also has the authority to tax, license and regulate recreational marijuana grown, sold, or processed for commercial purposes. The OLCC will begin accepting applications for growers, wholesalers, processors and retail outlets on January 4, 2016 with the ability for consumers to buy marijuana at a retail outlet expected to start during the fall of 2016.

<http://www.oregon.gov/olcc/marijuana/Pages/Frequently-Asked-Questions.aspx>.

In late July the Governor of Oregon signed a bill that will allow medical marijuana dispensaries in Oregon to sell small amounts of marijuana to adults over 21 for recreational purposes beginning on October 1, 2015. That law will sunset on December 31, 2016. <http://www.reuters.com/article/2015/07/30/us-usa-marijuana-oregon-idUSKCN0Q404520150730>; <http://whatslegaloregon.com/#gift-or-share>.

any other ingredient combined with marijuana to prepare topical or oral administrations, food, drink, or other products.⁵⁹

This definition incorporates the different methods of marijuana production and consumption described above, but it differs slightly from the preexisting definition found in the Alaska Criminal Code.⁶⁰ The main difference is that the statutory definition created by the initiative specifically includes “resin extracted from any part of the plant, and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin, including marijuana concentrate.” AS 17.38.900(6). Conversely, the previous definition specifically excludes “the resin or oil extracted from any part of the plants, or any compound, manufacture, salt, derivative, mixture, or preparation from the resin or oil, including hashish, hashish oil, and natural or synthetic tetrahydrocannabinol” from the definition of marijuana. AS 11.71.900(14). This is significant because the new definition allows for marijuana derivatives and concentrates such as hash and hash oil to be considered “marijuana,” listed as a Schedule VIA controlled substance (one with the least potential for harm and danger) instead of being separately listed as Schedule IIIA controlled substance, which has a higher degree of probable danger and a corresponding greater penalty for use.⁶¹

The incongruence between these definitions illustrates the complexity of modern marijuana regulation. “Traditional” marijuana, the actual flowers and buds, or other smoke-able THC-containing parts of the cannabis plant, are now consumed/used apace with other marijuana derivatives, such as edibles and concentrates.⁶²

⁵⁹ AS 17.38.900(6)

⁶⁰ The Alaska Criminal Code states the following:

“marijuana” means the seeds, and leaves, buds, and flowers of the plant (genus) Cannabis, whether growing or not; it does not include the resin or oil extracted from any part of the plants, or any compound, manufacture, salt, derivative, mixture, or preparation from the resin or oil, including hashish, hashish oil, and natural or synthetic tetrahydrocannabinol; it does not include the stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the stalks, fiber, oil or cake, or the sterilized seed of the plant which is incapable of germination. AS 11.71.900(14).

⁶¹ AS 11.71.060(f)(1),(2)

⁶² The statutes created by BM2 provide some additional clarification by defining terms such as “marijuana products” (“concentrated marijuana products and marijuana products that are comprised of marijuana and other ingredients and are intended for use or consumption, such as, but not limited to, edible products, ointments, and tinctures.” AS 17.38.900(11))

Personal Marijuana Use, Possession, Cultivation, and Transfer

Recreational Marijuana

Alaska law allows individuals to possess and use marijuana for recreational (i.e., non-medical) purposes. The following acts are legal under Alaska state law, if performed by persons 21 years of age or older:

- Possessing, using, displaying, purchasing, or transporting one ounce or less of marijuana.⁶³
- Possessing, growing, processing, or transporting no more than six marijuana plants (with three or fewer being mature, flowering plants).⁶⁴
- Possession of the marijuana produced by lawfully-possessed marijuana plants on the premises where the plants were grown.⁶⁵
- Transferring one ounce or less of marijuana and up to six immature marijuana plants to a person who is 21 years of age or older without remuneration.⁶⁶
- Non-public⁶⁷ consumption⁶⁸ of marijuana.⁶⁹
- Assisting another person who is 21 years of age or older with any lawful marijuana conduct described in AS 17.38.⁷⁰
- Possessing, using, displaying, purchasing, or transporting marijuana accessories.⁷¹

⁶³ AS 17.38.020(1)

⁶⁴ AS 17.38.020(2).

⁶⁵ AS 17.38.020(2)

⁶⁶ AS 17.38.020(3)

⁶⁷ "In public" means in a place to which the public or a substantial group of persons has access and includes highways, transportation facilities, schools, places of amusement or business, parks, playgrounds, prisons, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. 3 AAC 304.990(a)(6)(A)-(B). It does not include an area on the premises of a licensed marijuana retail store designated for on-site consumption. 3 AAC 306.990(a)(6)(C).

⁶⁸ Consumption means the act of ingesting, inhaling, or otherwise introducing marijuana into the human body. AS 17.38.900(3)

⁶⁹ 17.38.020(4)

⁷⁰ AS 17.38.020(e)

- Manufacture, possess, or purchase marijuana accessories.⁷²
- Distribution or sale of marijuana accessories to a person who is 21 years of age or older.⁷³

Medical Marijuana

Alaska law allows individuals to possess and use marijuana to treat certain medical conditions under the direction of a physician.⁷⁴ An individual seeking to do so must first become a registered medical marijuana patient by submitting an application to join the Medical Marijuana Registry.⁷⁵ The application is submitted to the Alaska Bureau of Vital Statistics and must contain a physician's statement certifying that the patient suffers from a "debilitating medical condition"⁷⁶ and that the patient might benefit from the medical use of marijuana.⁷⁷ If the application is approved, the Division will then issue an identification card and add the applicant's name to the state registry of all authorized users.⁷⁸

Registered patients may then possess up to one ounce of marijuana and six plants (of which only three can be flowering and producing usable marijuana at any time).⁷⁹ They may not smoke marijuana in public, but may possess it in public under certain conditions: the marijuana must be in a sealed container, the marijuana must be

⁷¹ AS 17.38.010(1), .060

⁷² 17.38.060

⁷³ 17.38.060

⁷⁴ AS 17.37.010–17.37.080 (2012)

⁷⁵ Application available at:
<http://dhss.alaska.gov/dph/VitalStats/Documents/PDFs/MedicalMarijuana.pdf>

⁷⁶ See ALASKA STAT. § 17.37.070(a)–(c) (broadly defining "debilitating medical condition" as including "cancer, glaucoma, positive status for immunodeficiency virus, or acquired immune deficiency syndrome" or any other chronic diseases, or treatment for such diseases, which produce "cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis.").

⁷⁷ § 17.37.010(c).

⁷⁸ § 17.37.010.

⁷⁹ § 17.37.040(a)(4)(A)–(B).

concealed, and the individual must be transporting it to a location where it is permissible to use it.⁸⁰

A medical marijuana patient may also designate a “primary caregiver” and an “alternative caregiver.”⁸¹ The caregiver designation means patients with debilitating illnesses do not have to be responsible for procuring or cultivating their own marijuana; designated caregivers may possess marijuana to the extent the individual they are caring for can.⁸²

The medical marijuana law does not authorize patients or caregivers to buy or sell marijuana.⁸³ Registered medical marijuana patients and their caregivers have an affirmative defense to prosecution for marijuana-related activity that would otherwise violate state law.⁸⁴

The *Ravin* Doctrine

The Alaska Supreme Court’s 1975 decision in the case *Ravin v. State of Alaska* created a legal doctrine that permits adults (those over 19 years of age) to possess and use a modest amount of marijuana in their homes.⁸⁵ *Ravin* was based on an interpretation of the Alaska Constitution’s right of privacy. The court balanced that right against the

^{80.} AS 17.37.040(a)(2)(A)–(C).

^{81.} § 17.37.010(a).

^{82.} See § 17.37.040(a)(3) (“a patient may deliver marijuana to the patient’s primary caregiver and a primary caregiver may deliver marijuana to the patient for whom the caregiver is listed”). Neither the Act nor the Alaska Administrative Code specifically defines the duties of a primary or alternative caregiver. See §§ 17.37.010–17.37.080 (omitting a definition of a primary or alternative caregiver). But the Act does explain that if the medicinal marijuana patient is a minor, the minor’s parent or guardian must serve as the primary caregiver and “control the acquisition, possession, dosage, and frequency of use of marijuana by the patient.” § 17.37.010(c)(3). It follows that the caregiver for an adult patient would serve in a similar role.

⁸³ Alaska law only permits the primary caregiver to “deliver” marijuana to his or her patient, and vice versa. § 17.37.040(a)(3). “Deliver” means the “actual, constructive, or attempted transfer from one person to another of a controlled substance whether or not there is an agency relationship.” § 11.71.900(6). Conversely, such a noncommercial transfer is not permissible under *Ravin*. See *Wright v. State*, 651 P.2d 846, 849 (Alaska Ct. App. 1982) (“We conclude that non-commercial transfers of small quantities of marijuana must be deemed to fall within the ambit of the prohibition against distribution which is contained in AS 17.12.010.”).

⁸⁴ AS 17.37.030(a).

⁸⁵ 537 P.2d 494 (Alaska 1975).

state's interest in promoting public health and safety by banning all marijuana use. Ultimately, the court found that any potential negative impacts of recreational marijuana use by adults in the privacy of their homes were not harmful enough to justify a blanket marijuana ban.

The activity protected by the Ravin Doctrine (which includes Ravin and several subsequent opinions) is narrow. It only applies to personal use and possession of small amounts of marijuana in the privacy of the home (an amount currently understood by the Alaska courts as less than four ounces).⁸⁶ It does not permit transporting marijuana in public, commercial marijuana activity, any marijuana use by minors, or driving under the influence of marijuana.

Personal Marijuana Cultivation (“Home Grow”)

Alaska law allows people 21 years and older to cultivate marijuana for personal use (known as a “home grow”), subject to the following limitations:

- A person 21 years of age or older may grow up to six marijuana plants, three of which may be mature, flowering plants.⁸⁷
- Marijuana must be grown in a location where the plants are not subject to public view without the use of binoculars, aircraft, or other optical aids;⁸⁸
- Marijuana plants must be secure from unauthorized access;⁸⁹
- Marijuana may only be grown on property lawfully in possession of the cultivator or with the consent of the person in lawful possession of the property.⁹⁰
- Persons 21 and over may possess, purchase, distribute, or sell marijuana grow accessories.⁹¹

⁸⁶ This four ounce limit includes usable marijuana as well as the weight of any marijuana plants. See *Noy v. State*. “For purposes of calculating the aggregate weight of a live marijuana plant, the aggregate weight shall be one-sixth of the measured weight of the marijuana plant after the roots of the marijuana plant have been removed.” AS 11.71.080.

⁸⁷ AS 17.38.020(2).

⁸⁸ AS 17.38.030(a)(1)

⁸⁹ AS 17.38.030(a)(2).

⁹⁰ AS 17.38.030(a)(3).

⁹¹ AS 17.38.060, AS 17.38.900(7).

Commercial Marijuana Production And Sale

Comparison of State Laws Regulating Commercial Marijuana Production And Sale

Colorado, Washington, Alaska, and Oregon have legalized the limited possession, cultivation, and recreational use of marijuana for adults 21 years old and over. Via ballot initiatives in 2012, Colorado and Washington became the first states to approve regulatory systems for retail recreational marijuana sales. Alaska and Oregon followed suit in 2014, and those states are in the process of implementing their regulatory frameworks.

The laws governing marijuana production, sale, and use in these four states share some similarities: for example, all four prohibit sales to persons under 21 and do not allow marijuana use in public. But there are significant differences as well: Washington does not permit any home cultivation for personal use; Alaska and Oregon levy excise taxes at the wholesale level based on the weight of the marijuana sold, whereas Colorado and Washington tax the value of wholesale and retail transactions; and Alaska is the only one of the four states without a designated revenue use plan for marijuana taxes; and licensure fees vary amongst the states.⁹²

Marijuana Establishments

The laws enacted as part of Ballot Measure 2 required state or local regulators to establish a system of licensing and control under which the commercial marijuana industry in Alaska would function. The Act did not instruct any public or private organization to establish retail outlets for sale of marijuana in Alaska, nor did it guarantee that any would exist. The ballot measure simply assumed that demand for retail marijuana existed in Alaska, and it allows for a regulated market to operate to meet that demand.

The act authorizes the operation of four types of “marijuana establishments”⁹³ in the state: marijuana cultivation facilities,⁹⁴ marijuana testing facilities,⁹⁵ marijuana product

⁹² See LRS report to Sen. McGuire (11/28/14) at 1, Table 1. (available at: https://www.alaskasenate.org/2016/files/5614/1763/1020/Leg_Research_Report_on_Marijuana_Legalization.pdf)

⁹³ AS 17.38.900(9): “Marijuana establishment” means a marijuana cultivation facility, a marijuana testing facility, a marijuana product manufacturing facility, or a retail marijuana store.

⁹⁴ AS 17.38.900(8); “an entity registered to cultivate, prepare, and package marijuana and to sell marijuana to retail marijuana stores, to marijuana product manufacturing facilities, and to other marijuana cultivation facilities, but not to consumers.”

manufacturing facilities,⁹⁶ and retail marijuana stores.⁹⁷ Lawful operation of any such establishment is contingent upon a current, valid registration and all persons acting as owner, employee, or agent of the establishment must be at least 21 years of age.⁹⁸

Lawful Activities of Marijuana Establishments

Notwithstanding any other provision of law, the following acts, when performed by one of the four types of marijuana establishments with a current, valid registration, or a person 21 years of age or older who is acting in his or her capacity as an owner, employee or agent of a marijuana establishment, are lawful and shall not be an offense under Alaska law or be a basis for seizure or forfeiture of assets under Alaska law.⁹⁹

Retail Marijuana Store¹⁰⁰

- (1) Possessing, displaying, storing, or transporting marijuana or marijuana products, except that marijuana and marijuana products may not be displayed in a manner that is visible to the general public from a public right-of-way;
- (2) Delivering or transferring marijuana or marijuana products to a marijuana testing facility;
- (3) Receiving marijuana or marijuana products from a marijuana testing facility;
- (4) Purchasing marijuana from a marijuana cultivation facility;
- (5) Purchasing marijuana or marijuana products from a marijuana product manufacturing facility; and
- (6) Delivering, distributing, or selling marijuana or marijuana products to consumers.

⁹⁵ AS 17.38.900(12); "an entity registered to analyze and certify the safety and potency of marijuana."

⁹⁶ AS 17.38.900(10); "an entity registered to purchase marijuana; manufacture, prepare, and package marijuana products; and sell marijuana and marijuana products to other marijuana product manufacturing facilities and to retail marijuana stores, but not to consumers."

⁹⁷ AS 17.38.900(13); "an entity registered to purchase marijuana from marijuana cultivation facilities, to purchase marijuana and marijuana products from marijuana product manufacturing facilities, and to sell marijuana and marijuana products to consumers."

⁹⁸ AS 17.37.080(a)-(d)

⁹⁹ AS 17.38.070(e) provides that it is lawful under Alaska law to lease or otherwise allow property to be use as a marijuana establishment.

¹⁰⁰ AS 17.38.070(a)(1)-(6)

Marijuana Cultivation Facility¹⁰¹

- (1) Cultivating, manufacturing, harvesting, processing, packaging, transporting, displaying, storing, or possessing marijuana;
- (2) Delivering or transferring marijuana to a marijuana testing facility;
- (3) Receiving marijuana from a marijuana testing facility;
- (4) Delivering, distributing, or selling marijuana to a marijuana cultivation facility, a marijuana product manufacturing facility, or a retail marijuana store;
- (5) Receiving or purchasing marijuana from a marijuana cultivation facility; and
- (6) Receiving marijuana seeds or immature marijuana plants from a person 21 years of age or older.

Marijuana Product Manufacturing Facility¹⁰²

- (1) Packaging, processing, transporting, manufacturing, displaying, or possessing marijuana or marijuana products;
- (2) Delivering or transferring marijuana or marijuana products to a marijuana testing facility;
- (3) Receiving marijuana or marijuana products from a marijuana testing facility;
- (4) Delivering or selling marijuana or marijuana products to a retail marijuana store or a marijuana product manufacturing facility;
- (5) Purchasing marijuana from a marijuana cultivation facility; and
- (6) Purchasing of marijuana or marijuana products from a marijuana product manufacturing facility.

Marijuana Testing Facility¹⁰³

- (1) Possessing, cultivating, processing, repackaging, storing, transporting, displaying, transferring or delivering marijuana;
- (2) Receiving marijuana or marijuana products from a marijuana cultivation facility, a marijuana retail store, a marijuana products manufacturer, or a person 21 years of age or older; and
- (3) Returning marijuana or marijuana products to a marijuana cultivation facility, marijuana retail store, marijuana products manufacturer, or a person 21 years of age or older.

¹⁰¹ AS 17.38.070(b)(1)-(6)

¹⁰² AS 17.38.070(c)(1)-(6)

¹⁰³ AS 17.38.070(d)(1)-(3)

PART FIVE: ALASKA MARIJUANA INDUSTRY REGULATIONS

Regulatory Authority

Ballot Measure 2 granted the Alaska Legislature the authority to establish a Marijuana Control Board (MCB) to oversee the cultivation, manufacture, and sale of marijuana in the state.¹⁰⁴ In the absence of the creation of such a board, the authority for rulemaking and the promulgation of regulations would rest with the Alcoholic Beverage Control (ABC) Board.¹⁰⁵ The Alaska Marijuana Control Board was established in April 2015¹⁰⁶ and thus had nine months from the effective date of the Act (February 24, 2015) to adopt regulations consistent with the parameters set out in Ballot Measure 2.

Regulatory Guidance

As a preliminary matter, marijuana industry regulations were required to include and comply with the following:¹⁰⁷

- Procedures for the issuance, renewal, suspension, and revocation of a registration to operate a marijuana establishment;
- A schedule of application, registration, and renewal fees, provided that application fees shall not exceed \$5,000, with this upper limit adjusted annually for inflation, unless the board determines a greater fee is necessary to carry out its responsibilities under this chapter;
- Qualifications for registration that are directly and demonstrably related to the operation of a marijuana establishment;

¹⁰⁴ AS 17.38.080

¹⁰⁵ AS 17.38.080

¹⁰⁶ See HB 123; http://www.legis.state.ak.us/basis/get_fulltext.asp?session=29&bill=HB123. Board members are appointed by the Governor and confirmed by a majority vote of the legislature in joint session. AS 17.38.080(b). Board members are selected based on the following criteria: (1) one person from the public safety sector; (2) one person from the public health sector; (3) one person currently residing in a rural area; (4) one person actively engaged in the marijuana industry; and (5) one person who is either from the general public or actively engaged in the marijuana industry. AS 17.38.080(b)(1)-(5). Though the initial Board must contain two representatives with experience in the marijuana industry. See SCS CSHB 123(FIN) Sec. 10.Gov. Walker appointed the initial five MCB members on July 1, 2015; <http://www.gov.state.ak.us/Walker/press-room/full-press-release.html?pr=7224>.

¹⁰⁷ AS 17.38.090

- Security requirements for marijuana establishments, including for the transportation of marijuana by marijuana establishments;
- Requirements to prevent the sale or diversion of marijuana and marijuana products to persons under the age of 21;
- Labeling requirements for marijuana and marijuana products sold or distributed by a marijuana establishment;
- Health and safety regulations and standards for the manufacture of marijuana products and the cultivation of marijuana;
- Reasonable restrictions on the advertising and display of marijuana and marijuana products; and
- Civil penalties for the failure to comply with applicable regulations.

Additionally, several procedures for the application process for registration and licensing are included in the statute:

- Each application for a registration to operate a marijuana establishment must be submitted to the MCB.¹⁰⁸
- Each renewal application for a registration to operate a marijuana establishment must be submitted to the MCB, and may be submitted up to 90 days prior to the expiration of the current registration.¹⁰⁹
- Upon receipt of an application or renewal application, the MCB will forward a copy of the registration and half of the registration fee to the local regulatory authority where the applicant desires to operate the marijuana establishment (unless the local government has not established such a regulatory authority).¹¹⁰
- The MCB shall issue an annual registration to an applicant within 45-90 days of receipt of an application or a renewal application.¹¹¹ Applications may be denied if the board finds the applicant is not in compliance with regulations enacted pursuant to AS 17.38.090, or if the board is notified by the relevant local

¹⁰⁸ AS 17.38.100(a)

¹⁰⁹ AS 17.38.100(a)

¹¹⁰ AS 17.38.100(c)

¹¹¹ AS 17.38.100(c).

government that the applicant is not in compliance with applicable local marijuana ordinances and regulations.¹¹²

These lists may be expanded, as the MCB maintains broad power over the cultivation, manufacture, and sale of marijuana in the state.¹¹³ The MCB also has identified goals which will likely guide and influence its rulemaking:

- Keep marijuana away from underage persons;
- Protect public health and safety;
- Respect privacy and constitutional rights;
- Prevent diversion of marijuana, and
- Degrade illegal markets for marijuana.¹¹⁴

And, though its role in the regulatory process is limited, the legislature can influence and direct regulators through implementing legislation, with the following limitations: (1) the legislature cannot repeal an initiative within two years of the effective date;¹¹⁵ (2) legislation “tantamount to repeal” is similarly prohibited;¹¹⁶ and the Act prohibits rules that make the operation of retail marijuana establishments “unreasonably impracticable.”¹¹⁷

In short, Ballot Measure 2 did not contemplate a significant direct role for the legislature in crafting the regulatory framework or enforcing the state’s retail marijuana laws. Rather, most of the power resides in the Marijuana Control Board and local governments.

¹¹² AS 17.38.100(c).

¹¹³ AS 17.38.084(a)

¹¹⁴ These goals were identified by the ABC Board before the MCB was created. Preliminary Considerations for Implementation of AS 17.38 (Prepared for the Alcoholic Beverage Control Board and Public, Feb. 12, 2015)
http://commerce.state.ak.us/dnn/Portals/9/pub/Preliminary_Considerations_for_Implementati onofAS%2017.38.pdf

¹¹⁵ AK Const. Art. XI, Sec. 6

¹¹⁶ Warren v. Thomas, 568 P.2d 400 (1977)

¹¹⁷ AS 17.38.090(a); This term is defined in the Act as “Measures necessary to comply with the regulations require such a high investment of risk, money, time, or any other resource or asset that the operation of a marijuana establishment is not worthy of being carried out in practice by a reasonably prudent businessperson.” AS 17.38.900(14)

Summary Of Alaska Marijuana Industry Regulations

Ballot Measure 2, codified in AS 17.38, established the broad framework for regulating marijuana in Alaska. The task of crafting the specific implementing rules was charged to the ABC Board, or a Marijuana Control Board, if the Legislature created one. Legislation creating the MCB passed on the last day of the 2015 legislative session, five members were later appointed to the Board, and the MCB met for the first time on July 2, 2015. The Legislature took no other formal action with respect to state marijuana laws during the most recent legislative session, though several marijuana-related bills were introduced.

Pursuant to this statutory requirement, the Alaska Marijuana Control Board (MCB) drafted a set of regulations to govern the marijuana industry in Alaska.¹¹⁸ The regulations are comprehensive, covering all aspects of the industry, including cultivating marijuana plants, converting cultivated marijuana into marijuana products (such as edibles and concentrates), safety and quality testing for marijuana and marijuana products, and retail sale. The regulations include extensive requirements for business, including dictating how and when retail stores may operate and advertise, and mandate special training requirements for all marijuana establishment employees.

The regulations also assert control over marijuana production, requiring stringent adherence to potency limits, quality standards, safety protocols, inventory tracking, and product packaging and labeling requirements. The regulations provide the MCB with broad investigation and enforcement powers, allowing it to inspect premises and business records as it sees fit.

In short, the marijuana industry in Alaska is heavily regulated. The regulations are spread across nine articles:

1. Licensing, Fees (3 AAC 306.005 - 3AAC 306.100)
2. Local Options (3 AAC 306.200 - 3AAC 306.260)
3. Retail Marijuana Stores (3 AAC 306.300 - 3AAC 306.360)
4. Marijuana Cultivation Facilities (3 AAC 306.400 - 3AAC 306.480)
5. Marijuana Product Manufacturing Facilities (3 AAC 306.500 - 3AAC 306.570)
6. Marijuana Testing Facilities (3 AAC 306.600 - 3AAC 306.675)
7. Operating Requirements for All Marijuana Establishments (3 AAC 306.700 - 3AAC 306.755)
8. Enforcement, Civil Penalties (3 AAC 306.800 - 3AAC 306.850)
9. General Provisions (3 AAC 306.905 - 3AAC 306.990)

Spread amongst these articles are several regulations that are of concern to local governments, as municipalities may be involved in numerous aspects of the licensure

¹¹⁸ 3 AAC Chapter 306: Regulation of Marijuana Industry.

process and will play an important role in implementing the regulations, enforcing requirements, and monitoring the industry. For example:

- Local governments may protest a license application.¹¹⁹
- Local governments may suggest conditions for a new application or renewal (and will have responsibility for monitoring compliance with such adopted conditions).¹²⁰
- Local governments are expected to notify the Board if marijuana establishments violate any applicable statute or regulation.¹²¹
- Marijuana establishments must comply with all applicable health and safety requirements and are subject to inspection by “the local fire department, building inspector, or code enforcement officer to confirm that no health or safety concerns are present.”¹²²
- Local governments may prohibit outdoor marijuana production.¹²³

Additionally, numerous other proposed regulations, including signage and security requirements, enforcement of age restrictions, security zoning compliance, and public health and safety concerns, appear as if they will require local oversight.

The local option regulations are also of significant concern to local governments. These regulations are modeled on the Alaska local option statutes for alcohol establishments. The local option regulations include rules prescribing types of local options, a change of a local option, the removal of a local option, the effect on licenses of a prohibition on sale, the prohibition of importation or purchase after a local option election, the effect on licenses of a restriction on sale, licensing after a prohibition on sale except on premises operated by a municipality, the procedure for local option elections, and notice of results of a local option election.

Other regulations of note include:

- Who cannot obtain a license: those who have a previous felony conviction, those who have been found guilty of certain alcohol offenses, including selling alcohol to a minor, have a misdemeanor controlled substances conviction during the past five years, or a specific marijuana-related conviction within the last two years.¹²⁴

¹¹⁹ 3 AAC 306.010(c), .060(a).

¹²⁰ 3 AAC 306.060(b)

¹²¹ 3 AAC 306.060(c)

¹²² 3 AAC 306.735(a).

¹²³ 3 AAC 306.430(b).

¹²⁴ 3 AAC 306.010(d)

- Zoning restrictions: “The board will not issue a marijuana establishment license if the licensed premises will be located within 500 feet of a child-centered facility including a school, daycare, or other facility providing services to children; a building in which religious services are regularly conducted; or a correctional facility” or “if the licensed premises will be located in a liquor license premises.”¹²⁵
- Licenses will only be issued to residents of the state, with certain conditions applying to ensure residency when the license is issued to a business entity.¹²⁶
- Application fee for new establishment license set at \$1,000.¹²⁷
- Annual license fees set at:
 - for a marijuana retailer license, \$5000;
 - for a limited marijuana cultivation facility license, \$1000;
 - for a marijuana cultivation facility license, \$5000;
 - for a marijuana extract only manufacturing facility license, \$1000;
 - for a marijuana product manufacturing facility license, \$5000;
 - for a marijuana testing facility license, \$1000.¹²⁸
- Retail stores will have to comply with requirements for signage, hours of operations, restricting certain areas, and requirements for marijuana handler permits for employees.¹²⁹
- Marijuana sales transactions will be limited to the following:
 - one ounce of usable marijuana;
 - seven grams of marijuana-infused extract for inhalation, or
 - marijuana or marijuana products containing no more than 5600 mg of THC.¹³⁰
- Marijuana may only be sold to a consumer who is physically prints on the licensed premises; sales over the internet are not permitted.¹³¹

A more detailed summary of the regulations follows, with a focus on items of significance to local government.

¹²⁵ AAC 306.010(a), (b)

¹²⁶ 3 AAC 306.015(b)

¹²⁷ 3 AAC 306.100

¹²⁸ 3 AAC 306.100(d)

¹²⁹ 3 AAC 306.310, .320, .325, .715

¹³⁰ 3 AAC 306.355

¹³¹ 3 AAC 306.710(a)(5).

Licensing and Fees

Article 1 provides further detail on the four different license types authorized by statute and required for operation of a marijuana establishment in the State of Alaska (retail marijuana store license, marijuana cultivation facility license, marijuana product manufacturing facility license, and marijuana testing facility license).¹³² This section outlines the process for applying for a new license, renewing a license, or transferring a license;¹³³ establishes the fees applicable for each type of license;¹³⁴ describes the role of the public and local governments in the application process;¹³⁵ and establishes a process for license seekers to challenge or appeal adverse decisions.¹³⁶

Numerous restrictions are placed on the MCB's ability to issue a marijuana establishment license. For example, the MCB will not issue a license if: the licensed premises would be located within 500 feet of school grounds, a recreation or youth center, a building used for religious services, or a correctional facility;¹³⁷ the licensed premises would be located in a liquor license premises;¹³⁸ when the location of the licensed premises would conflict with a local zoning ordinance;¹³⁹ or when the person seeking the license has a certain criminal history.¹⁴⁰

Marijuana establishment licenses will only be issued to a specific individual, to a partnership, a limited liability company, a corporation or a local government.¹⁴¹ No one other than a licensee may have a financial interest in the business for which a license is issued.¹⁴² Individuals or sole proprietors seeking a license must be residents of the State of Alaska,¹⁴³ meeting the residency requirement standard applicable for a permanent fund dividend.¹⁴⁴ For a partnership, each partner must be a resident of the state.¹⁴⁵ A limited liability company must be qualified to do business in the state and each member of the company must be a resident.¹⁴⁶ For a corporation, the corporation must be qualified to do business in the state or incorporated in Alaska¹⁴⁷. Applications require

¹³² 3 AAC 306.005

¹³³ 3 AAC 306.020

¹³⁴ 3 AAC 306.100

¹³⁵ 3 AAC 306.060, .065, .070

¹³⁶ 3 AAC 306.075, .080., .085, .090, .095

¹³⁷ 3 AAC 306.010(a)

¹³⁸ 3 AAC 306.010(b)

¹³⁹ 3 AAC 306.010(c)

¹⁴⁰ 3 AAC 306.010(d)

¹⁴¹ 3 AAC 306.015(a)

¹⁴² 3 AAC 306.015(a)

¹⁴³ 3 AAC 306.015(b)(1)

¹⁴⁴ 3 AAC 306.015(e)(2)

¹⁴⁵ 3 AAC 306.015(b)(2)

¹⁴⁶ 3 AAC 306.015(b)(3)

¹⁴⁷ 3 AAC 306.015(b)(4)

extensive information, including a detailed operating plan (including plans for security, inventory tracking, employee qualifications, waste disposal, transportation and delivery of products, signage and advertising) and a criminal history background check (3 AAC 306.055). There is public notice of each application. 3 AAC 306.025.

Local governments have the opportunity to protest any marijuana establishment license application (application for a new marijuana establishment license, renewal of a license, or transfer of a license to another person). 3 AAC 306.060. Protests must be filed no later than 60 days after the application notice is posted. 3 AAC 306.060(a). A protest is filed by sending the MCB director and applicant a written explanation of the reasons for the protest. Id. If a protest is filed, the MCB will deny the application unless it determines that the protest was arbitrary, capricious, or unreasonable. Id. A local government may also recommend a condition placed upon a marijuana establishment license. Similarly, the condition will be imposed unless it is found to be arbitrary, capricious, or unreasonable.¹⁴⁸ If the board imposes a condition recommended by a local government, the local government may be responsible for monitoring compliance with the condition.

Local Option

Article 2 details the local option rules, whereby a local government may prohibit the sale or importation for sale of marijuana and any marijuana product, and the operation of any marijuana establishment, within its borders. 3 AAC 306.200(a)(1)-(2). Such a local option may be effectuated by a public majority vote on the the question to approve the option, or a local government's assembly or city council may pass an ordinance to the same effect. 3 AAC 306.200(a). A ballot question to adopt a local option must follow certain procedures and contain specific language. 3 AAC 306.200(b); .230. The regulations also provide instructions for changing or removing a local option, and the impact of an adopted local option on existing licenses. 3 AAC 306.210, .220, .230, .250. The results of local option elections must be publicly noticed. 3 AAC 306.260.

If a local option to prohibit the sale of marijuana or any marijuana product is enacted, a person may not knowingly bring,¹⁴⁹ send,¹⁵⁰ or transport¹⁵¹ marijuana or marijuana products for sale into the area within the boundary of that local government, nor may any person who resides within the boundary of that local government purchase

¹⁴⁸ 3 AAC 306.015(b).

¹⁴⁹ "bring" means to carry or convey or to attempt or solicit to carry or convey. 3 AAC 306.240(d)(1).

¹⁵⁰ "Send" means to cause to be taken or distributed or to attempt or solicit or cause to be taken or distributed, and includes these of the United States Postal Service.

¹⁵¹ "Transport" means to ship by any method, and includes delivering or transferring or attempting or soliciting to deliver or transfer marijuana or marijuana products to be shipped to, delivered to, or left or held for pickup by any person.

marijuana or marijuana products from another person in violation of the local option. 3 AAC 306.240(a), (b). However, a licensed marijuana establishment may transport marijuana through the boundaries of a jurisdiction that has banned the purchase and sale of marijuana, provided certain conditions are met. 3 AAC 306.240(c).

Marijuana Establishments

Articles 3-7 establish rules for all types of marijuana establishments in the State of Alaska, including retail marijuana stores (Article 3), marijuana cultivation facilities (Article 4), marijuana product manufacturing facilities (Article 5), and marijuana testing facilities (Article 6). The regulations also include a section on operating requirements applicable to all marijuana establishments and license types (Article 7).

Operating Requirements for All Marijuana Establishments

All marijuana establishment licensees, employees, or agents, who sell, cultivate, manufacture, test or transport marijuana or marijuana products, or who check the identification of customers or visitors, must obtain a marijuana handler permit before receiving a license or beginning such employment. 3 AAC 306.700(a). To obtain a marijuana handler permit, a person must complete an education course and pass a written test administered by the MCB. 3 AAC 306.700(b). All marijuana establishments must restrict access to the public and employ certain security and surveillance measures. 3 AAC 306.710, .715, .720. Marijuana establishments must carefully track their inventory, maintain records, and may only transport marijuana and marijuana products, or dispose of marijuana waste, according to certain guidelines. 3 AAC 306.730, .740, .750, .755.

Importantly for local governments, local fire departments, building inspectors, and code enforcement officers are authorized to inspect marijuana establishments to ensure that no health or safety concerns are present. 3 AAC 306.735.

Retail Marijuana Stores

Licensed retail marijuana stores may sell marijuana and marijuana products purchased from licensed marijuana cultivation facilities and product manufacturing facilities for consumption off the licensed premises. 3 AAC 306.305(a)(1)-(2). In limited circumstances, marijuana and marijuana products may be consumed in designated areas on the licensed retail premises. 3 AAC 306.305(a)(4). Prior approval from the MCB will be necessary for such a "marijuana cafe"¹⁵² to operate, and local anti-smoking ordinances which apply in public places would remain in effect. Alaska will be the first state to allow such limited public marijuana consumption.

¹⁵² <http://www.npr.org/2015/12/24/460843950/alaskas-pot-cafes-will-give-patrons-a-taste-of-cannabis>

There are numerous other restrictions on retail marijuana store operations. For instance, marijuana may not be sold to anyone under 21 years of age, or to anyone under the influence of alcohol or any other controlled substance. 3 AAC 306.310(a)(1)-(2). Any marijuana or marijuana product sold must be properly labeled and packaged. 3 AAC 306.310(a)(3), .345. Marijuana may not be sold in a quantity exceeding the following in a single transaction: one ounce of usable marijuana, seven grams of marijuana concentrate, or marijuana products containing more than 5,600 mg of THC. 3 AAC 306.355. Retail marijuana stores must be closed to consumers between 5:00am and 8:00am each day. Marijuana may only be sold to a consumer who is physically present on the licensed premises; sales over the internet are not permitted. 3 AAC 306.710(a)(5). Additionally, no marijuana or marijuana products may be sold until all required laboratory testing of such products is completed. 3 AAC 306.340.

There are also restrictions on marketing and advertising of marijuana and marijuana products for sale. A retail marijuana store may not offer or deliver samples, or free marijuana or marijuana products, to a consumer as a marketing promotion or for any other purpose, 3 AAC 306.310(b)(3)(A)-(B), and there are limits on coupons and other promotional activities. 3 AAC 306.360(d). A retail marijuana store may have no more than three signs that identify the store visible to the public, signs must be in a window or attached to the outside of the store, and may not exceed 4,800 square inches. 3 AAC 306.360(a).

Advertisements may not represent therapeutic effects of marijuana, nor may they appeal to children. 3 AAC 306.360(b). Advertisements must contain health warnings. 3 AAC 306.360(e). There are also restrictions on the permissible location of marijuana advertising. Such advertising may not be placed within 1,000 feet of a child-centered facility (such as a school, childcare facility, recreation center, park, or library); on or in public transit vehicles or public transit shelters; on or in publicly owned property; within 1,000 feet of a substance abuse facility; or on a college campus. 3 AAC 306.360(c).

Marijuana Cultivation Facilities

Except as provided in the personal use marijuana rules contained in AS 17.38.020, or under the *Ravin Doctrine* or Alaska's medical marijuana law, a person may not "plant, propagate, cultivate, harvest, trim, dry, cure, package, or label marijuana grown at a place under that person's control, or sell marijuana grown at a place under that person's control to any marijuana establishment unless the person has obtained a marijuana cultivation facility license . . . or is an employee or agent acting for a licensed marijuana cultivation facility." 3 AAC 306.400(a). Marijuana cultivation licenses come in two sizes: "standard," with no listed size restrictions, or "limited," which may have no more than 500 square feet of space under cultivation. 3 AAC 306.400(a)(1)-(2); 3 AAC 306.405; 3 AAC 306.410. With such limited licenses available, individuals may be able to grow commercial marijuana in their homes, depending on local zoning ordinances. All

marijuana cultivation facility employees or agents are required to have a marijuana handler permit. 3 AAC 306.425.

Premises licensed for marijuana cultivation are generally limited to the cultivation of marijuana plants, which will yield bud and flower for sale. However, such facilities may produce marijuana concentrates and extracts if the facility also has a marijuana product manufacturing license and such activity occurs in a secure area separate from any cultivation area. 3 AAC 306.450. A marijuana cultivation facility may not sell any marijuana until all required laboratory testing is complete on each harvest batch. 3 AAC 306.455. Marijuana cultivation facilities must package and label the marijuana they sell according to specific guidelines. 3 AAC 306.470, .475.



*Marijuana Greenhouse*¹⁵³

Marijuana cultivation facilities may be wholly indoors, in a fully enclosed secure greenhouse with rigid walls, a roof and doors, or production of marijuana may occur outdoors, so long as the outdoor facility is enclosed by a physical barrier and public view is obscured by a wall or fence at least six feet high. 3 AAC 306.430. Whether the

¹⁵³ Photo source: <https://pixabay.com/en/marijuana-colorado-marijuana-grow-269851/>

cultivation and production of marijuana occurs indoors or outdoors, marijuana cultivation facilities must ensure that any marijuana at the facility cannot be observed by the public from outside the facility and does not emit an odor detectable to the public outside the facility, except as allowed by a local conditional use permit. 3 AAC 306.430(c)(1)-(2). Local governments may prohibit outdoor production. 3 AAC 306.430(b).

Marijuana Product Manufacturing Facilities

A licensed marijuana product manufacturing facility may purchase marijuana from a cultivation facility or another product manufacturing facility; extract marijuana concentrate (see 3 AAC 306.555 for more details); manufacture, refine, process, cook, package, label, and store marijuana concentrates or any marijuana product for topical use on the body (such as ointments, salves, patches, or tinctures) and any product intended for consumption (such as edibles). 3 AAC 306.505(3). Marijuana product manufacturing facilities may sell marijuana products to licensed retail marijuana stores or other licensed product manufacturing facilities. They may also transport marijuana and provide limited samples of their products in furtherance of their licensed activities. 3 AAC 306.505.

Marijuana product manufacturing facilities may not: sell marijuana or marijuana products directly to a consumer; sell any products that are not manufactured, packaged, and labeled in compliance with state regulations; allow any person to consume marijuana on the licensed premises. 3 AAC 306.510. There are also limits on the types of products that may be produced: marijuana product manufacturing facilities may not sell “adulterated” edible marijuana products; any product that “closely resembles” a familiar food or drink item; or any product that “would appeal to children.” 3 AAC 306.510(a)(4); 3 AAC 306.510(b). All products must adhere to strict potency guidelines. A single serving of a marijuana product may not exceed five mg active THC and a single packaged unit of marijuana product to be eaten or swallowed may not exceed ten servings, or 50 mg active THC. 3 AAC 306.560. The THC must be homogenous, or evenly distributed throughout the product. Id. Products must be packaged and labeled as required by the regulations. 3 AAC 306.565, .570.



*KIEF*¹⁵⁴

Additionally, MCB approval is necessary for each product a marijuana product manufacturing facility seeks to manufacture for sale. 3 AAC 306.525. Approval for new products, subsequent to the initial license application, will require separate application and fee payment. 3 AAC 306.525(c). Additionally, no marijuana products may be sold to retailers until all required laboratory testing is complete. 3 AAC 306.550.

A more limited license is available that allows only for the production of marijuana concentrate on the licensed premises. 3 AAC 306.515. Such facilities may not convert marijuana concentrate into any other product. There are specific guidelines applicable to the production of marijuana concentrate which apply to both standard production facilities and limited concentrate-only facilities. 3 AAC 306.555

¹⁵⁴ Licensed under Public Domain via Wikimedia Commons - <https://upload.wikimedia.org/wikipedia/commons/a/a9/Keif.jpg>



*HASHISH*¹⁵⁵

In addition to obtaining a license, ensuring that all employees have marijuana handler certification, and complying with the regulations that apply to all other marijuana establishments, marijuana product manufacturing facility employees who handle

¹⁵⁵ "American medical hashish(10)" by Mjpresson - Own work. Licensed under CC BY-SA 3.0 via Wikimedia Commons - [https://commons.wikimedia.org/wiki/File:American_medical_hashish\(10\).jpg#/media/File:American_medical_hashish\(10\).jpg](https://commons.wikimedia.org/wiki/File:American_medical_hashish(10).jpg#/media/File:American_medical_hashish(10).jpg)

marijuana at the facility must obtain a state food safety worker card.¹⁵⁶ Marijuana product manufacturing facilities must comply with the Alaska Food Safety Code, local kitchen-related health and safety standards for food establishments, and are subject to inspection by local safety officials, including fire departments, building inspectors, and code enforcement officers.¹⁵⁷

Marijuana Testing Facilities

Marijuana testing facilities play an important role in Alaska’s marijuana regulatory framework. As discussed in previous sections, no marijuana or marijuana products can be sold to retailers or the public until all required testing is completed. Required tests may include potency analysis, moisture content, foreign matter inspection, microbial screening, pesticide, other chemical residue, and metals screening, and residual solvents levels.¹⁵⁸

To ensure objectivity, no licensee of any marijuana testing facility, nor any agent or employee of a testing facility may have an ownership interest in, or any other direct or indirect financial interest in any other licensed marijuana establishment.¹⁵⁹

Enforcement and Civil Penalties

Representatives of the MCB, including the director, enforcement agents, or other employees, have broad inspection authority over marijuana establishments to ensure compliance with all applicable laws and regulations. 3 AAC 306.800. They may enter any marijuana establishment and inspect the licensed premises and access business records, computer files, and the marijuana inventory tracking system. 3 AAC 306.800. This power extends to local governments as “peace officers,” defined to include a member of the police force of a municipality, a village public safety officer, a regional public safety officer, and any officer whose duty is to enforce and preserve the public peace, may also inspect licensed marijuana establishment premises and business records at any reasonable time. 3 AAC 306.800; 3 AAC 306.900(31).

Following an inspection, an inspection report, advisory report, or notice of violation may be issued. 3 AAC 306.805. Such action may lead to suspension or revocation of a marijuana establishment license. 3 AAC 306.805, .810, .815, .820. In cases where a marijuana establishment poses an immediate threat to the public health, safety, or welfare, a summary suspension of the license, requiring an immediate stop to the offending activity, may be ordered. 3 AAC 306.825. In addition, the MCB may impose

¹⁵⁶ 3 AAC 306.530(b).

¹⁵⁷ 3 AAC 306.545.

¹⁵⁸ 3 AAC 306.645(a)

¹⁵⁹ 3 AAC 306.605(d)

civil fines ranging from \$10,000 to \$50,000 depending on the number of violations, or up to three times the amount of the monetary gain that resulted from the violation.

PART SIX: CIVIL AND CRIMINAL PENALTIES FOR MARIJUANA CULTIVATION, POSSESSION, AND SALE

As explained above, Alaska state law generally proscribes all marijuana-related activities, and attached criminal penalties for violations. But limited marijuana production, use, possession, and sale is permitted in certain circumstances. When activities fall outside of those narrow conditions, criminal penalties still apply. The applicable penalties depend on a combination of factors, including the purpose of the use/possession, the intent of the user/possessor, the location of the use/possession, the age of the user/possessor, and the amount of marijuana involved.

The Alaska Statutes classify the most common marijuana crimes and penalties across a spectrum from violations (punishable by a civil fine) to felonies. Other than exempting certain conduct from criminal penalties, there were no formal criminal punishment provisions contained in Ballot Measure 2. Thus, for example, an unregistered marijuana cultivation facility or testing center operating without a license could be charged under the existing criminal statutes prohibiting marijuana possession as well as penalized for violating the civil licensure provisions.

During the past legislative session, the Alaska Legislature considered several bills aimed at updating Alaska's statutes to reflect recent changes in state marijuana laws.¹⁶⁰ However, the only marijuana-related bill to pass was the one establishing the MCB; no changes to Alaska's criminal statutes were made.

Marijuana Violations

- A violation is a noncriminal offense punishable only by a fine.¹⁶¹
- Public consumption of marijuana is classified as a violation punishable by a fine up to \$100.¹⁶²
- A marijuana home grow that does not comply with the statutory requirements (i.e., the grower is under 21; there are more than six plants; more than three mature,

¹⁶⁰ See, e.g. SB30, HB75.

¹⁶¹ AS 11.81.900(63)

¹⁶² AS 17.38.040.

flowering plants; the grow is not secure; or is visible to public) is a violation punishable by a fine up to \$750.¹⁶³

Marijuana Misdemeanors

- Misconduct Involving a Controlled Substance in the Sixth Degree (MICS-6).
This crime includes:
 - Use or display of any amount of marijuana. AS 11.71.060(a)(1)¹⁶⁴
 - Possession of less than one ounce of marijuana. AS 11.71.060(a)(2)¹⁶⁵
 - Penalty: Class B Misdemeanor; punishable by up to 90 days in prison and a \$2,000 fine.¹⁶⁶

- Misconduct Involving a Controlled Substance in the Fifth Degree (MICS-5).
This crime includes:
 - Manufacture or delivery,¹⁶⁷ or possession with intent to manufacture or deliver, less than one ounce of marijuana.¹⁶⁸
 - Possession of one ounce or more of marijuana¹⁶⁹
 - Penalty: Class A Misdemeanor, is punishable by up to one year in prison and a \$10,000 fine.¹⁷⁰

¹⁶³ AS 17.38.030(b)

¹⁶⁴ AS 17.38.020(A) renders this section inapplicable to persons over 21 who are in possession of one ounce or less of marijuana.

¹⁶⁵ AS 17.38.020(A) renders this section inapplicable to persons over 21 who are in possession of one ounce or less of marijuana.

¹⁶⁶ AS 11.71.060(b); 12.55.135(b); 12.55.035(b)(6).

¹⁶⁷ "deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance whether or not there is an agency relationship. AS 11.71.900(6).

¹⁶⁸ AS 11.71.050(a)(1); Under AS 17.38, this would be applicable to amounts greater than one ounce. AS 17.38 also allows adults over 21 to transfer up to one ounce of marijuana to another person without remuneration.

¹⁶⁹ AS 11.71.050(a)(2)(E). Under AS 17.38, this would be applicable to amounts greater than one ounce.

¹⁷⁰ AS 12.55.135(a); 12.55.035(b)(5); AS 11.71.050(b)

Marijuana Felonies

- Misconduct Involving a Controlled Substance in the Fourth Degree (MICS-4).
This crime includes:
 - Manufacture, delivery, or possession with intent to manufacture or deliver, one ounce or more of marijuana.¹⁷¹
 - Possession of four ounces or more of marijuana. AS 11.71.040(a)(3)(F)
 - Possession of any amount of marijuana with reckless disregard that the possession occurs on or within 500 feet of school grounds; or at or within 500 feet of a recreation or youth center; or on a school bus. AS 11.71.040(a)(4)(A)(i)-(ii), 11.71.040(a)(4)(B)
 - Possession of 25 or more marijuana plants. AS 11.71.040(a)(3)(G), (d).
 - Penalty: Class C Felony, punishable by a prison sentence of up to five years and a \$50,000 fine.¹⁷²

- Misconduct Involving a Controlled Substance in the Third Degree (MICS-3).
This crime includes:
 - Delivery of any amount of marijuana to a person under 19 years of age who is at least three years younger than the person delivering it.¹⁷³
 - Penalty: Class B Felony, punishable by a prison sentence of up to ten years and a \$100,000 fine.¹⁷⁴

Driving Under The Influence Of Marijuana

Alaska law prohibits driving under the influence of a controlled substance. Marijuana is a Schedule VIA controlled substance, so it is illegal to operate a motor vehicle under the influence of marijuana (or a combination of marijuana, any other controlled substance, inhalant, or alcoholic beverage).¹⁷⁵ Driving while under the influence (DUI) is a Class A misdemeanor, with increasing minimum penalties depending on the number of prior

¹⁷¹ AS 11.71.040(a)(2). Under AS 17.38, this would be applicable to amounts greater than one ounce.

¹⁷² AS 11.71.040; 12.55.125(e); 12.55.035(b)(4).

¹⁷³ AS 11.71.030(a)(2).

¹⁷⁴ AS 11.71.030(C); AS 12.55.125(d); AS 12.55.035(b)(3).

¹⁷⁵ AS 25.35.030(a)(1)

convictions,¹⁷⁶ or it can be a Class C Felony depending on the number and recentness of prior convictions.¹⁷⁷

Determining if the operator of a motor vehicle is under the influence of marijuana is not as straightforward as determining if a driver is under the influence of alcohol. First, there is no Breathalyzer or other “quick” scientific test for marijuana. Second, residual THC (the psychoactive ingredient in marijuana) can remain in the human body for extended periods of time. Thus, testing for “active” THC is necessary to determine if an individual is currently operating a vehicle under the influence of marijuana.¹⁷⁸ Testing for active THC requires a blood test, which cannot be administered in the field, may require a warrant, and is far more invasive, expensive, and time consuming than an oral breathalyzer test for alcohol. Given these constraints, determination of whether a driver is operating a vehicle under the influence of marijuana in Alaska is generally made through the observations of an investigating officer trained in drug recognition.¹⁷⁹

THC levels alone may still not provide an accurate determination if a person is driving while impaired. If a blood test is performed, there is significant debate over what amount of active THC in the bloodstream constitutes impairment or even indicates that a person is “high.”¹⁸⁰ People metabolize THC at different rates and the degree of impairment can vary greatly. Alaska does not currently have a set limit on blood marijuana content to determine when a driver is impaired because of marijuana.¹⁸¹ The state takes a zero tolerance approach, criminalizing driving with any amount of controlled substances (including THC) in the bloodstream.¹⁸²

¹⁷⁶ AS 25.35.030(b)

¹⁷⁷ AS 25.35.030(n)

¹⁷⁸ See <http://www.npr.org/2014/02/23/280310526/with-support-for-marijuana-concern-over-driving-high-grows>; <http://www.adn.com/article/20150408/how-do-alaska-police-test-marijuana-drivers-suspected-dui>

¹⁷⁹ See Blake and Finlaw, Marijuana Legalization in Colorado: Lessons Learned at 375-76; <http://www.adn.com/article/20150408/how-do-alaska-police-test-marijuana-drivers-suspected-dui>; <http://www.adn.com/article/20150506/highly-informed-followup-cannabis-dui-and-request-readers>.

¹⁸⁰ See Blake and Finlaw at 376; See <http://www.npr.org/2014/05/21/314279711/without-a-marijuana-breathalyzer-how-to-curb-stoned-driving>

¹⁸¹ AS 25.35.030(a)(2) specifies th blood alcohol content (BAC) of 0.08% or more constitutes driving under the influence of alcohol.

¹⁸² i.e., any amount of THC renders a driver per se impaired

Laws, policies, and technologies regarding testing for marijuana intoxication continue to evolve, but it is unclear how this issue will develop in Alaska. Ballot Measure 2 did not amend Alaska's driving under the influence statute, nor has the Alaska Legislature taken any subsequent action to address marijuana use and driving. Relying on an officer's drug recognition expertise, maintaining a zero tolerance THC limit, or adopting a protocol with a specific baseline, all raise concerns and have limitations. However, Colorado and Washington, two other states with legalized marijuana, have set the DUI limit for THC in the blood at five nanograms of active THC per milliliter of whole blood. Other jurisdictions, such as Los Angeles, are testing oral swab technology.¹⁸³

At a minimum, it is important for local law enforcement to be adequately trained in drug impairment recognition.

PART SEVEN: LOCAL REGULATION

The federal government has not repealed its marijuana prohibition, but it has supported a grant of significant control over marijuana regulation to the states. Over twenty states have legalized some form of marijuana use and the number is likely to keep growing. As a result, states are left to determine the amount of power, if any, they should give to local governments to regulate marijuana.¹⁸⁴

Regulation of the commercial marijuana industry in Alaska will involve a mix of state and local oversight. The statutes enacted by BM2 contemplate the creation of a strong regulatory framework established by a state agency with local governments tasked with implementing the regulations. In the event that the state agency, in this case the Marijuana Control Board (MCB), fails to adopt regulations pursuant to AS 17.38.090, or does not timely accept or process registration applications pursuant to AS 17.38.100, there is a mechanism for local governments to establish a local regulatory agency and fill that role.¹⁸⁵

Otherwise, local governments may enact ordinances governing the time, place, manner, and number of marijuana establishment operations within its jurisdiction;¹⁸⁶ and may

¹⁸³ <http://www.npr.org/2014/02/23/280310526/with-support-for-marijuana-concern-over-driving-high-grows>

¹⁸⁴ See Mikos, *Marijuana Localism*, 65 *Case Western L Rev* 719 (2015).

¹⁸⁵ AS 17.38.110(c). Additional details regarding the procedures that must be followed by local governments and local regulatory authorities if the MCB does not timely adopt regulations or process applications can be found in AS 17.38.110(d)-(k).

¹⁸⁶ AS 17.38.110(b)

establish and enforce civil penalties for violation of such time, place, manner, and number ordinances.¹⁸⁷

Local governments who have established local regulatory authorities will receive a copy of all registration or renewal applications and one half of the application fee for all applicants seeking to open a marijuana establishment in their jurisdiction.¹⁸⁸ Local governments are also expected to communicate with the MCB, and notify the MCB if an applicant is not in compliance with any applicable local ordinances and regulations concerning marijuana establishments in effect at the time of application.¹⁸⁹ Such notification must occur prior to the MCB's registration decision.

Opt-Out Provisions

AS 17.38.110(a) provides the option for local government to prohibit the operation of marijuana cultivation facilities, marijuana product manufacturing facilities, marijuana testing facilities, or retail marijuana stores through the enactment of an ordinance or by a voter initiative. Communities can therefore opt out of allowing the manufacture and sale of marijuana within their jurisdictions, but cannot ban marijuana entirely. AS 17.38.020 states that personal use, possession, cultivation, and transfer of marijuana remains lawful in all political subdivisions in the state, and local governments also remain bound by the Alaska Supreme Court's ruling in *Ravin v. State of Alaska* regarding individual constitutional privacy rights and marijuana use and possession.

Opt-out provisions are discussed in more detail in a previous section.

Local Civil and Criminal Penalties

Political subdivisions in Alaska have different levels of authority to maintain self-government depending on how they are organized among various classes of cities and boroughs. Alaska state criminal laws apply in political subdivisions, and local governments adopt and incorporate provisions of the Alaska Criminal Code, including the Alaska Controlled Substances Act, into their ordinances.¹⁹⁰

¹⁸⁷ AS 17.38.110(b)

¹⁸⁸ AS 17.38.100(c)

¹⁸⁹ AS 17.38.100(d)

¹⁹⁰ See, e.g., Anch. Mun. Ord. 08.35.010(a): The Controlled Substances Act set forth in the Alaska Statutes 11.71 is hereby adopted by reference and incorporated in this code, pursuant to Charter section 10.04. Specific provisions for municipal enforcement are listed in this section. No person shall violate any provision of this section or any applicable law of the Controlled Substances Act as may be hereinafter amended by the State of Alaska, nor any rule or

Local ordinances pertaining to marijuana use, possession, cultivation and sale, as well as possession of marijuana accessories, must be interpreted and applied in a manner consistent with changes to state law legalizing certain types of marijuana activities. Relevant code sections from Cordova, Homer, and Kodiak are discussed below.

Cordova: The Cordova Municipal Code prohibits the use or be under the influence of certain drugs within the city. It is likely that marijuana is included in the list of prohibited substances, though the list referenced in the Code refers to a 1979 Alaska Statute that has since been amended.¹⁹¹ Cordova also prohibits any person from being in public and intoxicated in such a manner as to be hazardous to motor vehicle traffic.¹⁹² It appears that failure to comply with either of these code sections are considered violations.¹⁹³

Homer: The Homer City Code prohibits the sale or possession of “drug paraphernalia,”¹⁹⁴ which has a comprehensive definition covering most items used in the cultivation and consumption of marijuana.¹⁹⁵ Violation of these code sections is punished under the “general penalty” provision of the Homer City Code.¹⁹⁶ However, the Code does contain an exception for “drug paraphernalia” that is “specifically authorized and permitted under the provisions of AS Title 17 and by such rules and regulations as are adopted pursuant thereto.”¹⁹⁷

Kodiak: The Kodiak City Code prohibits the possession and use of “narcotic drug[s]”¹⁹⁸ and “drug paraphernalia.”¹⁹⁹ “Drug paraphernalia” also has a broad definition which covers most items used in the cultivation and consumption of marijuana.²⁰⁰ However, the code does have an exception stating that “This section shall not apply to . . . any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items.”²⁰¹ Thus this section may not apply to lawfully registered marijuana establishments.

regulation adopted by any authorized agency of the State of Alaska pursuant to the Controlled Substances Act.

¹⁹¹ Cordova Mun. Code Sec. 9.12.010 (amended 1979)

¹⁹² Cordova Mun. Code Sec. 9.12.020 (amended 1979)

¹⁹³ Cordova Mun. Code Sec. 9.40.010 (amended 1979)

¹⁹⁴ Homer City Code Sec. 6.12.020 (amended 1982)

¹⁹⁵ Homer City Code Sec. 6.12.010 (amended 1982)

¹⁹⁶ Homer City Code Sec. 6.12.030 (amended 1982)

¹⁹⁷ Homer City Code Sec. 6.12.020 (amended 1982)

¹⁹⁸ Kodiak City Code Sec. 08.48.010

¹⁹⁹ Kodiak City Code Sec. 08.48.020

²⁰⁰ Kodiak City Code Sec. 08.48.020(c)

²⁰¹ Kodiak City Code Sec. 08.48.020(d)(1)

PART EIGHT: REVENUE-GENERATING ASPECTS OF REGULATION

Marijuana and Revenue-Generating Opportunities

Many communities have used the marijuana industry to generate revenue. Typically, revenue generation is by both license fees and taxation. However, it is through excise and sales taxes that communities are seeing the largest financial impact.

Alaska Statute 29.35.010(6) grants municipalities “general powers, subject to other provisions of law . . . to levy a tax or special assessment, and impose a lien for its enforcement.” The Alaska Constitution requires that a “liberal construction shall be given to the powers of local government units.”²⁰²

Municipal Sales, Use and Excise Tax

AS 29.45.650-710 authorizes the levy of sales and use taxes at the municipal level. The statutes give broad authority to municipalities to levy taxes on sales, rents and services provided within the municipality. Currently, the sales tax in Homer is 7.5% (4.5% City of Homer and 3% Kenai Peninsula Borough).²⁰³

It is unclear whether the Kenai Peninsula Borough (“Borough”) will implement a sales tax on marijuana. If it does, AS 29.53.440 requires the City to levy a sales tax on every source already taxed by the Borough or none at all. Therefore, if the Borough decides to implement a sales tax on various aspects of the cultivation, distribution and sale of marijuana, the City will have to impose the same sales tax or none at all.

Conversely, the Borough could choose to exempt a marijuana sales tax if the City decides to implement the tax. In 2005, the sales tax laws changed to allow a borough to exempt any source from the borough sales tax if it is taxed by a city within the borough. However, if the Borough does not implement a sales tax, the City will incur the cost of collecting the sales tax. This could prove to be costly.

²⁰² *Liberati v. Bristol Bay Borough*, 584 P.2d 1115, 1120 (Alaska 1978).

²⁰³ According to the Colorado Department of Revenue, Colorado counties have cumulatively generated \$3,849,973 in sales tax on retail marijuana sales during May 2015. Colorado’s retail marijuana sales tax is 2.9%; Retail marijuana has an additional 10% sales tax, which represents 85% of total 10% retail marijuana tax that is retained by the State. See <https://www.colorado.gov/pacific/sites/default/files/0515%20Marijuana%20Sales%20Tax%20by%20County%20Report.pdf>

Excise Tax

An excise tax is a tax on the performance of an act. An excise tax resembles an import or manufacturing tax. Due to the nature of the excise tax, it is not subject to voter ratification.

Based on preliminary research, it appears that the City can establish an excise tax independent of the Borough. As stated above, AS 29.35.010(6) provides: "All municipalities have the following general powers, subject to other provisions of law . . . to levy a tax or special assessment, and impose a lien for its enforcement." The Alaska Supreme Court is reluctant to impose limitations on the taxing authority of municipalities where none are expressed. The fact that only property taxes and sales taxes are mentioned in AS 29.45 is not likely to be construed as a prohibition on taxes that are not mentioned. Therefore, it appears that the City can levy an excise tax independent of the Borough.

However, if the Borough forgoes an excise tax, the City will be tasked with collecting the tax. The cost of independently pursuing an excise task will need to be explored more thoroughly to determine whether the benefits outweigh the costs. The City may wish to approach the Borough about implementing an excise tax to offset this cost.

Additionally, the State will impose an excise tax on the sale or transfer of marijuana from a marijuana cultivation facility to a retail marijuana store or marijuana product manufacturing facility. This should not preclude the City from imposing its own excise tax as there is no general prohibition against like municipal and state taxes.

License and Application Fees

AS 17.38.100 mandates that individuals must register with the Marijuana Control Board to operate a marijuana establishment. The Board will begin accepting registration applications on February 24, 2016.

Upon receiving an application, the Board must immediately forward a copy of each application and half of the registration application fee to the local regulatory authority for the local government in which the applicant wishes to operate a marijuana establishment. The application fee for a new marijuana establishment license is set at \$1,000.²⁰⁴ The application fee for a renewal marijuana establishment license is set at \$600.²⁰⁵

The annual license fees are set at:

²⁰⁴ 3 AAC 306.100(a).

²⁰⁵ 3 AAC 306.100(b)

- for a marijuana retailer license, \$5000;
- for a limited marijuana cultivation facility license, \$1000;
- for a marijuana cultivation facility license, \$5000;
- for a marijuana extract only manufacturing facility license, \$1000;
- for a marijuana product manufacturing facility license, \$5000;
- for a marijuana testing facility license, \$1000.²⁰⁶

The fee for a marijuana handler permit card is \$50.²⁰⁷

License fees are not automatically shared with local governments, but the application fees will generate a steady stream of revenue on an annual basis for local municipalities.

Other Sources of Revenue

There are other potential revenue sources through the regulation of marijuana. The new law provides for the cultivation, testing, processing, packaging, transporting and sale of marijuana. The City will regulate many, if not all, of these aspects of marijuana becoming legalized. The City will likely be able to collect fees for building design and inspection, business registration issuance, suspension and/or revocation, as well as other various fees associated with starting and operating a business. These options will need to be explored more fully once the pending marijuana legislation is passed.

Municipalities will also want to consider embracing the fast growing marijuana tourism industry. In Colorado and Washington, small businesses are connecting travelers with marijuana shopping expeditions, visits to growers, lodging in marijuana-friendly hotels, and other opportunities to consume marijuana.²⁰⁸ Recreational Marijuana became legal in Colorado and Washington in 2014. Hotels.com found that Denver hotel searches went up 73% compared to the year before, for the Marijuana festival weekend of April 2014, the first to be held following legalization of marijuana sales.²⁰⁹ Other entrepreneurs are creating cannabis cooking classes, spa treatments and pot-smoking airport layovers.²¹⁰ Municipalities should be prepared to work with small business owners given the success of the marijuana tourism industry.²¹¹

²⁰⁶ 3 AAC 306.100(d)(1)-(6)

²⁰⁷ 3 AAC 306.100(e).

²⁰⁸ Boom Your 'Bud And Breakfast', Marijuana Tourism is Growing In Colorado and Washington, <http://www.forbes.com/sites/julieweed/2015/03/17/book-your-bud-and-breakfast-marijuana-tourism-is-growing-in-colorado-and-washington/>

²⁰⁹ Id.

²¹⁰ Id.

²¹¹ Alaska as destination for cannabis tourists depends on regs, <http://www.alaskajournal.com/2015-10-21/alaska-destination-cannabis-tourists-depends-regs>

PART NINE: ZONING, LAND USE, AND THE ENVIRONMENT

While state entities may struggle with the scope of marijuana-related activities permitted under State of Alaska law, municipalities will remain responsible for regulating the location and operation of the marijuana dispensaries and grow facilities within their boundaries. Much like the introduction of any new industry in a municipality, municipal governments will need to develop deliberate and transparent processes for adopting and revising zoning laws, land use practices, and even comprehensive community planning to address the introduction of the marijuana industry. Early introduction and consideration of these zoning and land use issues will be necessary to ensure a smooth transition when the Marijuana Control Board begins accepting business licenses applications in February 2016.

Understanding Land Use Regulations Adopted by the State of Alaska

Although first and second class boroughs are obligated to provide for planning, platting, and land use regulation on an area wide basis, the Marijuana Control Board has proposed regulations that impose minimum zoning and land use regulations. Thus, these regulations must be taken into account when drafting municipal land use ordinances.

Primarily, the State regulations involve the implementation of buffer zones. Currently, 3 AAC 306.010 requires a 500-foot buffer zone between a licensed marijuana establishment and a child-centered facility (including schools, daycare, or any other facility providing services to children), a building in which religious services are regularly conducted, or a correctional facility. The regulations also prohibit the Marijuana Control Board from issuing a marijuana establishment license if the premises are located in a liquor license premises.

The regulation also prohibits the Marijuana Control Board from issuing a marijuana establishment license when a municipality protests the application under 3 AAC 306.060 on the grounds that the applicant's proposed licensed premises are located in a place within the municipality where a local zoning ordinance prohibits marijuana establishments, unless the municipality has approved a variance of the local ordinance.

Consequently, municipalities should consider whether they wish to have additional minimum buffer distance requirements for the separation of certain uses from licensed marijuana producers, processors, or retailers. As discussed below, marijuana cultivation operations generate a great deal of odor that many people find offensive. While there are preventative measures that operators can take, an odor may still persist. Municipalities will need to take this into consideration when determining the location

of these types of facilities as the odor may impact the surrounding businesses or create a nuisance for those living and working nearby.

Environmental Impacts of Marijuana Industry on Land Use Regulation

As is the case with any industry, all branches of the marijuana industry will have an impact on the community in which the industry operates. This memorandum attempts to provide introduction to each of the potential impacts, including but not limited to the social, legal, and environmental impacts as each of these impacts should be considered when devising land use regulations. While the social and legal issues surrounding the industry have been discussed throughout this resource guide, environmental considerations may have the largest impact on local land use regulations, including but not limited to controlling odor emissions, ensuring proper ventilation, and responsible water and energy usage.

Odor Emissions and Commercial Grow Operations

Marijuana can emit a very strong odor that many people find offensive. The odor can migrate in and around a cultivation facility. Some marijuana strains can generate such a strong odor that its detectable by a commercial grow operation's surrounding neighborhoods.

Municipalities will need to consider modifying their building codes to require air filtration systems to greatly reduce the impact of the odor. Requiring filters, especially in cultivation rooms, can be an effective way to cut down citizen complaints about marijuana odor.

The City of Denver, Colorado issued guidelines for Best Management Practices for cultivation facilities to control the odor. The City promotes the use of Activated Carbon Filters, Negative Ion Generation technology, and Ozone Generators. These technologies filter, trap or breakdown the odor causing agents associated with growing and processing marijuana. Municipalities should require grow facilities to employ a similar type of filtration system to reduce the marijuana odor and citizen complaints.

Ventilation

Municipalities should also consider amending their building codes to require proper ventilation in indoor marijuana grow facilities. Indoor growers are experiencing serious issues with mold due to the amount of humidity that's created through the growing process. Mold, of course, poses serious health concerns for the people living and working in the facility. Mold can also compromise a building's structural integrity as it can cause rotting and decomposition of any wood used in the building's construction. Some grow operations, depending on their heating system and the type and amount of fuel they use, may require an air quality permit.

Waste Disposal

In addition to these primary environmental concerns, there are numerous other peripheral environmental considerations municipalities may need to consider. For example, many growers use chemicals during the marijuana cultivation process. This can contaminate the water supply if not treated and disposed of properly. This type of contamination can also cause issues for the wastewater treatment systems that are charged with filtering a city's drinking water. The result can be an increase in the costs of treatment or possibly impacting downstream ecologies.

Legalization states have already implemented licensing rules that require marijuana stems and organic waste from growing and processing operations to be rendered unusable by mixing them with 50 percent other materials and grinding them up before disposal or composting.

The current proposed regulations contain a provision discussing waste removal. Specifically, 3 AAC 306.740 requires that litter, waste, and rubbish be properly removed. The regulation also requires that waste disposal equipment be maintained to avoid contaminating any area where marijuana or marijuana products are stored, displayed or sold, as well as to prevent odor and avoid attracting pests. Additionally, dangerous waste regulations will need to be followed if grow facilities and dispensaries generate hazardous waste.

Water and Light

Marijuana cultivation requires a great deal of water and light. According to a study published in 2012, a typical indoor marijuana grow room has the same power density- about 200 watts per square foot- as a data center. Pot growers use about a third of the electricity used by all the data centers in the U.S. In California, marijuana production accounts for about 3% of electricity used. This is because growing marijuana requires the use of heaters, carbon dioxide and ozone generators, carbon filters, dehumidifiers, fans, and high intensity lights.

Municipalities should consider energy efficiency rebates for growers who use efficient lighting systems. Another option is requiring marijuana growers to use renewable energy for a portion of their operation. While this may increase the growers' costs, it will help take pressure off the electrical grid and the growers can recoup the cost through the rebate program.²¹²

²¹² <http://www.adn.com/article/20151225/pot-growing-expands-power-demands-tax-us-grids>

PART TEN: PRESENT AND FUTURE REGULATORY CHALLENGES

There are numerous challenges associated with creating, implementing, and monitoring a regulatory framework for a marijuana industry, as well as documented risks which can be mitigated through a comprehensive legalization plan.

Some of the risks and challenges posed by marijuana legalization have been discussed elsewhere in this memo. Chiefly, federal marijuana prohibition still exists, leading to much uncertainty about the future of legalization and the possibility of criminal charges against those involved in the industry. Risk of diversion of legal marijuana back into the black market is a concern, especially as it relates to compliance with the guidelines set out in the Cole Memo. Federal prohibition also continues to affect the day-to-day business operations of licensed marijuana businesses, including lack of access to banking services, lines of credit, and high tax rates. Effective DUI enforcement remains a pressing public safety concern as does the possibility of increased marijuana use by youth.

Included in this section are several examples of issues that have presented in the course of implementing marijuana legalization plans in other states, and should be of concern to Alaska policymakers and regulators. Before discussing those issues, it is important to note that it is too early to conclude whether the policy of legalizing marijuana in Colorado and Washington has been successful, nor is it clear how exactly to measure “success” in this context. But numerous commentators have discussed the success of these states’ initial implementation of their marijuana legalization plans. Regarding Colorado in particular, the Brookings Institute notes:

“Colorado’s strong rollout is attributable to a number of elements. Those include: leadership by state officials; a cooperative, inclusive approach centering on task forces and working groups; substantial efforts to improve administrative communication; adaptive regulation that embraces regulatory lookback and process-oriented learning; reorganizing, rebuilding, and restaffing critical state regulatory institutions; and changes in culture in state and local government, among interest groups, and among the public.”²¹³

Implementing a marijuana legalization law involves “design, construction, and execution of institutions, rules, and processes related to a system of legalized marijuana.”²¹⁴ According to Brookings, “Success occurs when those institutions, rules,

²¹³ See Hudak, Colorado’s Rollout of Legal Marijuana Is Succeeding: A Report on the State’s Implementation of Legalization at 2 (available at <http://www.brookings.edu/~media/research/files/papers/2014/07/colorado-marijuana-legalization-succeeding/cepmmjcov2.pdf>)

²¹⁴ Id. at 4.

and processes produce a system consistent with the goals of that policy.” This raises the biggest current challenge for Alaska: the regulations that will govern the state’s marijuana industry have not yet been finalized. Thus, it is unclear how many marijuana establishment licenses will be issued, where the establishments will be located, and what issues may arise. To meet this challenge, state and local lawmakers must look to the experiences in these other states and make an effort to emulate their best practices, while adapting them to the unique requirements of governing in Alaska. This will involve not just formal legal and regulatory actions, but also informal efforts such as strong leadership, public outreach and education, and coordinated community communication.

It is also important to note that data gleaned from the experiences in Colorado and Washington is limited—regulated sales of recreational marijuana have only been occurring in those states since 2014. Thus this is a small sample size, but the information is instructive. Additionally, both Colorado and Washington (and now Oregon as well) had some previous experience with retail marijuana sales, as those states’ recreational marijuana industries followed years of permitting commercial sale of medical marijuana.

Home Grow Operations

Ballot Measure 2 and the Ravin Doctrine provide individuals with the ability to cultivate marijuana in their homes for non-commercial purposes (known as “home grows”). Restrictions on the size of home grows are provided in state statute, but monitoring home grows is difficult, as they will exist absent the registration and reporting requirements applicable to commercial marijuana establishments.

There are several risks inherent in home grow practices. First, there is risk that home growers will grow more marijuana than they are permitted to. This removes customers, revenue, and taxes from the retail market, and presents an opportunity to divert marijuana back to the black market, which risks federal intervention. Second, home grows present problems relating to product safety and quality assurance. Home grows also raise more localized concerns, including environmental hazards and increased crime.

A final, specific issue raised by home grows involves butane hash oil extraction. As explained in a previous section, this process involves using a solvent to extract THC- or CBD-rich oils from marijuana. The extract is then used for dabbing, vaping, or cooked into edibles. Butane is a popular solvent used in home extraction processes, but it is highly flammable and has led to at least one reported explosion in Alaska.²¹⁵

²¹⁵ See http://www.newsminer.com/news/local_news/hash-oil-cited-in-north-pole-explosion-that-damaged-home/article_88f8195e-8005-11e4-8979-73b90be67d4f.html

Edible Marijuana

Edible marijuana has proven to be a challenging aspects of legalization for state regulators. In Colorado, for example regulators did not anticipate that such a high demand for edible marijuana products would exist. Colorado now estimates that edible marijuana products accounted for nearly 45% of the legal marijuana market in 2014 (this includes food, drinks, and pills).²¹⁶



Challenges and concerns with regulating edible marijuana products exist on several fronts. First, it is difficult to identify and monitor public use of edibles because the products themselves may not offer any notice that they contain marijuana. Unlike burning marijuana to smoke it, dabbing, or vaping, once an edible marijuana product has been removed from its packaging, (or in the case of homemade edibles, where there is no packaging), it may appear indistinguishable from any other edible product.

Second, serving sizes for edible marijuana may not be clear and intuitive. Because product dosing and standard serving sizes for marijuana edibles is much different than standard food, relying on individuals to appropriately self-regulate their intake may be problematic. One oft-mentioned example is the marijuana brownie that contains six

²¹⁶www.cdc.gov/mmwr/preview/mmwrhtml/mm6428a6.htm?s_cid=mm6428a6_e

servings. This requires users to divide the product into sixths, or bite off a small chunk to consume an appropriate amount. Additionally, the effects of edible marijuana may not be felt for 30-60 minutes after the product is ingested, as opposed to the immediate effects often felt after smoking marijuana.²¹⁷ Thus, new users may overconsume in order to achieve the “high” feeling they are seeking. Further education and research is needed to address these issues, though research has been limited because of the federal prohibition on marijuana.

Overconsumption can lead to negative health consequences, including extreme fatigue, upset stomach, and potentially negative psychoactive effects. One case has identified marijuana intoxication from edibles as a contributing factor in a teenager’s death.²¹⁸

Inconsistent potency is another issue with regulating edibles. Colorado has reported numerous examples of edible marijuana products containing significantly more or less THC than was indicated on package labeling. Such errors and inaccurate labeling can also lead to overconsumption, even though users may follow directions carefully.

Marijuana edibles have also taken numerous forms (such as candies, chocolates, brownies, and cereals) which appeal to children or may be accidentally ingested by children.

Colorado has begun to address these issues by appointing a dedicated state working group to this topic and passed legislation requiring the creation of rules to address specific concerns about edibles, such as establishing equivalency standards between marijuana flower and edible marijuana and expanding potency testing.

Defining Public v. Private Use, Marijuana Cafes and Social Clubs

To date, marijuana legalization laws have not included opportunities to use marijuana outside of private settings. Regulations that do not permit marijuana to be consumed in public or where it is sold, and clean-air statutes and ordinances which ban tobacco and marijuana smoke, combine to limit the places where marijuana can be consumed. The same was true in Alaska. As the MCB drafted Alaska’s marijuana industry regulations, it was expected that marijuana use would remain permitted only in non-public areas. This raised issues for individuals who wished to use marijuana in social settings and for businesses who sought to accommodate those users. This matter recently came to a head, with the state issuing cease-and-desist letters to marijuana social clubs—“public locations run for the exclusive purpose of providing a controlled environment in which

²¹⁷ <http://www.thedailybeast.com/articles/2014/06/13/smoke-vs-snack-why-edible-marijuana-is-stronger-than-smoking.html>

²¹⁸ www.cdc.gov/mmwr/preview/mmwrhtml/mm6428a6.htm?s_cid=mm6428a6_e

to consume marijuana and socialize with like-minded consumers.”²¹⁹ At such establishments, people pay a membership fee to access a space where they can bring their own marijuana to smoke and share with others, and some clubs have additional free marijuana available.²²⁰ The state argued that these clubs violate the state law that prohibits consuming marijuana in public, which “includes a business to which the public or a substantial portion of the public has access.”²²¹ The state also likens the situation to alcohol “bottle clubs,” which are also prohibited by state statute.

Lack of places to consume marijuana is a concern for some residents of Alaska, but it could be especially difficult for tourists. Other than a private residence or a hotel (of which the number of rooms which allow smoking of any sort may be restricted, assuming there are marijuana-friendly hotels), the options for non-residents to consume marijuana are limited. If people who are visiting Alaska can legally purchase marijuana, they believe accommodations should be made so that there is a place for them to safely consume it.

Part of this debate has been resolved. Under the regulations, licensed retail marijuana establishments in Alaska can seek approval from the MCB to permit consumption of marijuana or a marijuana product purchased on the licensed premises in a designated area on the licensed premises.²²² In other words, this opens the door for marijuana retailers to establish “marijuana cafes,” where individuals can buy and consume marijuana. Alaska would be the first state to have such cafes.²²³

Several complications still exist on this front, even with the ability of the MCB to grant on-site consumption licenses. First, local governments may object to such licenses, which could impede the operation of marijuana cafes in certain jurisdictions. Second, some municipalities ban smoking in general, and marijuana smoking in particular, by ordinance.²²⁴ In those jurisdictions, the form of marijuana that could be consumed on-site would be limited; additional guidance may be needed to distinguish between burning and smoking marijuana, vaping, and eating an edible product. Fourth, the current regulations do not contain a license type for stand-alone marijuana social clubs,

²¹⁹ Mikos at 374.

²²⁰ <http://www.adn.com/article/20150702/state-takes-aim-marijuana-social-clubs>

²²¹ Id.

²²² 3 AAC 306.305(a)(4)

²²³ <http://www.npr.org/2015/12/24/460843950/alaskas-pot-cafes-will-give-patrons-a-taste-of-cannabis>

²²⁴ <http://www.ktva.com/cannabis-cafes-conflict-with-anchorage-consumption-laws-763/>

which would not necessarily sell marijuana or have a retail license. Such clubs continue to occupy a wide “gray space” between private residences, where marijuana use is legal, and public facilities like restaurants and bars, where it is not.²²⁵ The legal question this may ultimately turn on is whether a public facility that charges a membership or initiation fee or monthly dues creates a space private enough to allow marijuana use on the premises. Finally, on-site consumption raises several policy and local governance questions, including zoning, public health, nuisance complaints, and increased risk of DUI.²²⁶

Employment and Drug Testing

Despite the legal status of marijuana under state law, public and private employees and employers must be aware of how marijuana use can affect their job status. This is particularly important in safety-focused industries like oil and gas, seafood processing, transportation and health care, where many workers have the potential to be drug tested. Additionally, as discussed in the DUI section of this memo, testing for marijuana use can reveal use that occurred previously, during non-work hours.

The Colorado Supreme Court recently ruled that businesses can fire employees who use marijuana during their off-time.²²⁷ In that case, an employee of Dish Network became quadriplegic in a car accident and used marijuana to control leg spasms. His marijuana use was lawful under Colorado’s medical marijuana law. In 2010, he was fired from his job as a customer service representative after failing a random drug test. Dish Network has a zero tolerance drug policy.

The employee sued, claiming wrongful termination. A trial court dismissed the suit, finding that the state’s medical marijuana law did not make the use of marijuana a “lawful activity” that is protected against employment discrimination. The Colorado Court of Appeals affirmed, finding the termination was lawful because marijuana is prohibited by federal law. The Colorado Supreme Court upheld these decisions, holding that the federal prohibition on marijuana makes the drug unlawful despite Colorado’s approval of its use for medicinal purposes. That ruling is not binding on Alaska courts, but it could guide the Alaska Supreme Court if faced with a similar question.

²²⁵ Mikos at 374

²²⁶ Id.

²²⁷ See *Coats v. Dish Network* (available at: https://www.courts.state.co.us/userfiles/file/court_probation/supreme_court/opinions/2013/13sc394.pdf)

Security

It is anticipated that marijuana establishments will remain a mostly cash-only enterprise for some time. In general, cash-dependent businesses face numerous security risks, including increased likelihood of internal and external theft. Regulations that mandate stringent security protocols, such as extensive video surveillance, can reduce the incentive for illegal activity by increasing the likelihood of detection. The potential for off-premises crimes committed against employees who are paid in cash must also be considered.



These security risks correspond with a growth in business opportunities for marijuana security specialists, ranging from consulting on facilities design to designing security protocols, to performing security operations.