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February 5, 2020

The Honorable Rosalyn H. Baker
Chair, Senate Committee on Commerce, Consumer Protection, and Health
State Senator, 6th District
State Capitol, Room 230
415 S. Beretania Street
Honolulu, Hawaii 96813

Re: Exemption of Cannabis from the Controlled Substances Act

Dear Senator Baker:

On January 31, 2020, you requested guidance and clarification regarding Senate Bill No. 2462. Specifically, you asked about the effect of the Department of Health (Department) requesting a special use exemption from the Drug Enforcement Administration (DEA) recognizing that the listing of marijuana as a federal schedule I controlled substance does not apply to Hawaii's medical cannabis program.

Senate Bill No. 2462 directs the Department to submit a written request pursuant to 21 C.F.R. § 1307.03 to the DEA. Section 1307.03 states in relevant part that:

> [a]ny person may apply for an exception to the application of any provision of this chapter by filing a written request with the Office of Diversion Control, Drug Enforcement Administration, stating the reasons for such exception . . . . The Administrator may grant an exception in his discretion, but in no case shall he/she be required to grant an exception to any person which is otherwise required by law or the regulations cited in this section.

21 C.F.R. § 1307.03 (2010). While the Department may apply for an exception to the Controlled Substances Act (CSA) for the medical use of cannabis at any time, the likelihood of such a petition being granted is extremely low. Multiple previous petitions seeking to exempt marijuana from the CSA have been denied by the DEA. These denials have been upheld by

federal courts in various circuits. In affirming the DEA's decision to deny a petition to exempt marijuana from the CSA for religious use, the court in Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1462 (D.C. Cir. 1989), noted that:

> [t]he pivotal issue, therefore, is whether marijuana usage by Olsen and other members of his church can be accommodated without undue interference with the government's interest in controlling the drug. Three circuits have so far considered pleas for religious exemption from the marijuana laws; each has rejected the argument that accommodation to sacramental use of the drug is feasible and therefore required.

While both the text of Senate Bill No. 2462 and multiple testifiers assert that a special use exemption for marijuana would be analogous to the exemption granted to the Native American Church (NAC) for the use of peyote in 21 C.F.R. § 1307.31, the two examples differ greatly. The exemption granted to the NAC for peyote did not result from a petition to exempt. Rather, the DEA drafted the rule following the California Supreme Court's ruling in People v. Woody, 61 Cal. 2d 716 (1964), which found that the Free Exercise Clause of the First Amendment prohibited the state from prosecuting a member of the NAC for using peyote in religious practices. Following the Woody case, the 89th Congress introduced and passed a measure, H.R. 2, which explicitly provided that the term "depressant or stimulant drug" did not include "peyote (mescaline) but only insofar as its use is in connection with the ceremonies of a bona fide religious organization." H.R. Rep. No. 130, 89th Cong., 1st Sess. 35 (1965). Thus, the exemption granted to the NAC for peyote remains consistent with Congressional intent as well as judicial review, unlike the proposed exemption for the medical use of cannabis.

The court in Olsen highlighted the differences between a proposed exemption for marijuana and the established exemption for peyote by noting that:

> [t]he DEA has cogently explained why a tightly-cabined exemption for peyote use in a religious rite need not mean that religious use of marijuana (or any other widely used controlled substance) must be accommodated:
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> > [T]he actual abuse and availability of marijuana in the United States is many times more pervasive . . . than that of peyote . . . The amount of peyote seized and analyzed by the DEA between 1980 and 1987 was 19.4 pounds. The amount of marijuana seized and analyzed by the DEA between 1980 and 1987 was 15,302,468.7 pounds. This overwhelming difference explains why an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies, and not for a religion which espouses continual use of marijuana.

Olsen, 878 F.2d at 1463.

Even if the DEA were to grant the Department's petition to exempt marijuana, it could have unintended consequences regarding the medical use of cannabis currently enjoyed by our state's qualifying patients, primary caregivers, qualifying out-of-state patients, and caregivers of qualifying out-of-state patients. The freedom that qualifying patients and qualifying out-of-state patients currently enjoy to use cannabis medicinally would likely be significantly curtailed should a petition for exemption be granted. In Olsen, the court characterized a proposed exemption which allowed cannabis use one day a week during a three-hour ceremony as burdensome for the government to regulate. Olsen, 878 F.2d at 1460, 1463. Here, part IX of chapter 329, Hawaii Revised Statutes (HRS), enables qualifying patients and qualifying out-of-state patients to possess up to four ounces of cannabis or manufactured cannabis products at any given time, which significantly exceeds the amounts and usage proposed in Olsen. HRS § 329-121 (2018). Thus, an exemption for the medical use of cannabis could likely impose additional controls on our state's patients and caregivers beyond what state law currently requires.

While Senate Bill No. 2462 does not currently address the rescheduling of marijuana, it is also an idea that has been pursued in the past. Rescheduling, as you may know, is different from requesting an exemption. Rescheduling would likely impose additional controls on our state's patients and caregivers beyond what is currently required under state law. In short, it could have the effect of eliminating our dispensary system and a patient's ability to grow their own cannabis, in favor of dispensing and prescription regulations required under the CSA that would severely limit patient access to cannabis. The United States Supreme Court raised this possibility in Gonzales v. Raich, 545 U.S. 1, 27-28 (2005). In Gonzales, two medical marijuana patients in California whose marijuana plants were seized by the DEA sought to have the CSA declared unconstitutional. The Court noted that:

> even if respondents are correct that marijuana does have accepted medical uses and thus should be redesignated as a lesser schedule drug, the CSA would still impose controls beyond what is required by California law. The CSA requires manufacturers, physicians, pharmacies, and other handlers of controlled substances to comply with statutory and regulatory provisions mandating registration with the DEA, compliance with specific production quotas, security controls to guard against diversion, recordkeeping and reporting obligations, and prescription requirements. See §§ 21 C.F.R. 821-830; 21 C.F.R. § 1301, et seq. (2004). Furthermore, the dispensing of new drugs, even when doctors approve their use, must await federal approval. United States v. Rutherford, 442 U.S. 544 (1979). Accordingly, the mere fact that marijuana – like virtually every other controlled substance regulated by the CSA – is used for medicinal purposes cannot possibly serve to distinguish it from the core activities regulated by the CSA.

Gonzales, 541 U.S. at 27-28.

We hope that the foregoing is helpful. If you have any further questions, please do not hesitate to contact me at 587-3050.

Very truly yours,

Tara K.C.S. Molnar
Deputy Attorney General

APPROVED:

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