



Bob Ferguson

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December 3, 2014

Honorable Sharon Foster, Chair  
Washington State Liquor Control Board  
3000 Pacific Avenue SE  
Olympia, Washington 98504

**RE:** CR-102 Regarding Recreational Marijuana Rules

Dear Chair Foster:

The Office of the Attorney General (“AGO”) appreciates the opportunity to submit these comments on a set of proposed administrative rules by the Washington State Liquor Control Board (“WSLCB”). In particular, we are providing comments on proposed amended WAC 314-55-077. We include with, and as a part of, our comments the attached September 1, 2014 issue paper from the Washington Healthy Youth Coalition to the SPE (Strategic Prevention Enhancement) Policy Consortium captioned “Policy Options Regarding Marijuana Products That Appeal To Kids.”

### Introduction.

As the issue paper notes, the Governor’s Results Washington initiative calls for the state to decrease the percentage of 10<sup>th</sup> graders who report using marijuana in the last 30 days from the 2012 baseline of 19.3% to 18% by 2017, as measured by the Washington State Healthy Youth Survey. The state’s effort to reduce youth marijuana use is occurring in a particularly challenging environment. For several years prior to the passage of I-502, youth marijuana use in Washington was on the rise. According to the Washington State Healthy Youth Survey (“HYS”), “Among Grade 10 and 12 students, there were significant increasing trends in 30-day marijuana use from 2002-2012.”<sup>1</sup> Moreover, youth perception of harm from marijuana use—historically a leading indicator of actual use—decreased significantly from 2002-2012 among all grade levels surveyed.<sup>2</sup> Marijuana legalization itself may present additional risks of youth marijuana use, as research shows that community norms that are favorable toward drug use (such

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<sup>1</sup>*HYS Analytic Report* at 83.

<sup>2</sup>*Id.* at 86.



## ATTORNEY GENERAL OF WASHINGTON

Honorable Sharon Foster, Chair

December 3, 2014

Page 2

as laws legalizing drugs) and the availability of drugs are risk factors that influence the potential for substance use.<sup>3</sup>

The SPE Policy Consortium, a multi-agency consortium that has developed a five-year strategic plan for substance abuse prevention, has identified marijuana products that appeal to children as posing a threat to the state's ability to meet its goal of reducing youth marijuana use. Our comments are motivated by our desire to help the state meet this goal.

Substantive comments regarding WAC 314-55-077.

Our comments cover three primary points: (1) The range of marijuana products that potentially appeal to children; (2) the analytical approach for identifying products that appeal to children; and (3) research regarding flavored products that appeal to children.

1. Because certain flavors appeal to children, all categories of marijuana products—marijuana-infused products, usable marijuana, and marijuana concentrates—with such flavors should be subject to the WSLCB's authority to review these products prior to sale and to prohibit their production and sale.

The issue paper summarizes extensive research into flavored products generally and age-restricted products in particular, and how such products appeal to children. Congress banned most flavored cigarettes—an obviously non-edible product—precisely because research showed that these products were especially appealing to children. The issue paper also refers to emerging research regarding youth-appealing flavored electronic cigarettes—another non-edible category of product.

As we understand it, WAC 314-55-077 empowers the WSLCB to prohibit only marijuana-infused products that are especially appealing to children. Because flavored usable marijuana<sup>4</sup> and flavored marijuana concentrates are potentially especially appealing to children, these categories of products likewise should be subject to the WSLCB's authority under WAC 314-55-077.

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<sup>3</sup>Jennifer A. Bailey, PhD, *Risk and Protective Factors Specific to Marijuana Use*, Symposium on Legal Marijuana in Washington, Alcohol & Drug Abuse Institute, University of Washington, November 13, 2013; *slides available at* <http://adai.uw.edu/mjsymposium/slides/bailey.pdf> (last visited December 2, 2014).

<sup>4</sup>We are aware of WAC 314-55-105(9), which provides that "A producer or processor may not treat or otherwise adulterate usable marijuana with any organic chemical or other compound whatsoever to alter the color, appearance, weight, or smell of the usable marijuana." If this rule prohibits the addition of ingredients or flavor additives that would make usable marijuana products especially appealing to kids, then it would be unnecessary to amend WAC 314-55-077 for that specific purpose.

ATTORNEY GENERAL OF WASHINGTON

Honorable Sharon Foster, Chair  
December 3, 2014  
Page 3

2. The intrinsic characteristics of certain products are what make them appealing to children. Thus, the prohibition in WAC 314-55-077 on certain products should be based on product characteristics and not on a marijuana processor's intent or motivation.

The issue paper refers to food science research that has found that sweet flavors encourage children to try unfamiliar foods and beverages and that such flavors are particularly palatable to children. The paper goes on to summarize research findings that the appeal of sweet flavors has carried over to youth use of flavored tobacco products and sweetened alcoholic beverages. This research demonstrates that certain products are intrinsically appealing to children.

However, WAC 314-55-077 appears to condition a marijuana product's prohibition on a marijuana processor's intentions or motivations: The rule prohibits "[m]arijuana-infused products that are *made to be* especially appealing to children." WAC 314-55-077(5) (emphasis added). Thus, it appears that certain products that are intrinsically especially appealing to children nevertheless may be lawfully produced and sold unless the WSLCB can demonstrate some kind of intention or motivation on the part of the processor. Such a subjective standard seemingly introduces enforcement complexity, but more importantly creates a potential loophole that undercuts the rule's ability to protect children from products that are intrinsically especially appealing to them. Instead, we recommend rule language that simply prohibits marijuana products "that are especially appealing to children."

3. The WSLCB's consideration of which marijuana products are especially appealing to children should be informed by science.

As the issue paper explains, there is a large body of science regarding the appeal that certain flavors have for children. We respectfully encourage the WSLCB to familiarize itself with this science as it considers what marijuana products may be especially appealing to children. We recognize that there is some tension between protecting against youth access to marijuana by prohibiting certain products, and providing choice and convenience to adult marijuana consumers. We respect the WSLCB's judgment as to where to strike a balance among competing interests in its implementation of I-502.

Thank you again for the opportunity to submit these comments.

Sincerely,



DARWIN P. ROBERTS  
Deputy Attorney General

DPR/rgp  
Enclosure