# State Licensing Authority, Colorado Department of Revenue's Position:

# Legal Authority for Rule 47-900. E. Prohibiting the Consumption of Marijuana and Marijuana Products on Liquor Licensed Premises

## Rule 47-900. E., 1 CCR 203-2

***Presented to the Committee on Legal Services***
***February 3, 2017***

# Overview

- On November 18, 2016, the State Licensing Authority (SLA) adopted Rule 47-900. E. prohibiting the consumption of marijuana and marijuana products on liquor licensed premises.
- Rule 47-900. E. normally would expire in May 2018.
- At the request of a Committee member, Rule 47-900. E. is the subject of an out-of-time, expedited review and OLLS has recommended repeal of Rule 47-900. E.
- Rule 47-900. E. falls squarely within the SLA's statutory rulemaking authority and should not be repealed.

# The Colorado Liquor Code

- The Colorado Liquor Code "is deemed an exercise of the police powers of the state for the protection of the economic and social welfare and the health, peace, and morals of the people of this state" § 12-47-102(1), C.R.S.

- "The primary purpose of Colorado's liquor laws is to authorize the sale and consumption of intoxicating beverages while simultaneously protecting the public's health, safety and welfare." *New Safari Lounge, Inc. v. Colorado Springs*, 567 P.2d 372, 376 (Colo. 1977).

- The State Licensing Authority administers the Colorado Liquor Code.

# The General Assembly has delegated broad rulemaking authority to the State Licensing Authority (SLA)

- ***First***, the SLA has the duty to "[m]ake such general rules and regulations and such special rulings and findings as necessary for the proper regulation and control of the manufacture, distribution, and sale of alcohol beverages and for the enforcement of [articles 46, 47, and 48 of title 12]." § 12-47-202(1)(b), C.R.S.

- ***Second***, the General Assembly has identified several topics, and provided that the rules adopted by the SLA "may cover, without limitation" the listed subjects.
  § 12-47-202(2)(a)(I), C.R.S.

- ***Third***, one of the listed subjects permits rulemaking on "[s]uch other matters as are necessary for the fair, impartial, stringent, and comprehensive administration of [articles 46, 47, and 48 of title 12]." § 12-47-202(2)(a)(I)(R), C.R.S.

# Case law affirms the General Assembly's broad delegation of authority to the SLA.

- Where the General Assembly "has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Wine & Spirits Wholesalers v. Colo. Dep't of Revenue*, 919 P.2d 894, 897 (Colo. App. 1996).

- The "varied and complex" problems associated with the sale of alcohol beverages render it often "impracticable for the General Assembly to fix rigid standards to guide agency action, particularly in situations involving exercise of the police power, without destroying the flexibility necessary to effectuate obvious legislative goals in dealing with complex economic and social problems." *People v. Lowrie*, 761 P.2d 778, 781 (Colo. 1988) (citations omitted).

- "The General Assembly has delegated the task of regulating the sale and consumption of alcohol to the Director as the 'state licensing authority.' A substantial degree of flexibility in rulemaking is required if the Director is to effectively carry out this delegated responsibility." *Id.* at 782-83.

## Rule 47-900. E. is authorized by the broad rulemaking authority *and* any one of the following specific subjects for SLA rulemaking.

- **Subsection 12-47-202(2)(a)(I)(L), C.R.S. – authorizes the SLA to adopt rules on the subject of "health and sanitary requirements."**

- **Subsection 12-47-202(2)(a)(I)(M), C.R.S. – authorizes the SLA to adopt rules on the subject of "[s]tandards of cleanliness, orderliness, and decency, and sampling and analysis of products."**

- **Subsection 12-47-202(2)(a)(I)(P), C.R.S. – authorizes the SLA to adopt rules on the subject of "[p]ractices unduly designed to increase the consumption of alcohol beverages."**

  - **REMINDER: The above subjects represent areas that SLA rules "may cover *without limitation*." Section 12-47-202(2)(a)(I), C.R.S.**

# Health and Sanitary Requirements § 12-47-202(2)(a)(I)(L), C.R.S.

- Rule 47-900. E. is a proper exercise of the SLA's authority to regulate for "health and sanitary" requirements.

- While our January 31 memorandum inadvertently referred to the topic in (2)(a)(I)(L) as "health and safety" requirements rather than "health and sanitary" requirements, the "primary purpose" of Colorado's liquor laws is "to authorize the sale and consumption of intoxicating beverages while simultaneously protecting the public's health, safety and welfare." *New Safari Lounge, Inc. v. Colorado Springs*, 567 P.2d 372, 376 (Colo. 1977).

# Health & Sanitary Requirements: CDPHE & Industry Support

- The rulemaking record supported the SLA's finding that the rule was designed to "cover, without limitation" the subject of health requirements.
  - CDPHE's Dr. Daniel Vigil: Testified that (a) Rule 47-900. E. is in the interest of protecting public health and safety; (b) consumption of liquor and marijuana together increases impairment, and (c) consumption of liquor and marijuana together increases the likelihood of motor vehicle crashes.
  - Three liquor industry groups (for restaurants, bars and taverns): Testified in support of Rule 47-900. E. due to safety concerns and indications that many liquor liability insurers would pull out of the market if marijuana consumption were permitted on liquor licensed premises.

# Health & Sanitary Requirements: Mothers Against Drunk Drivers

- **MADD participated as a stakeholder in the rulemaking process and submitted a written recommendation in support of Rule 47-900. E.:**
  - **"Research shows that driving while high on marijuana may double the risk of an automobile crash. When both alcohol and marijuana are consumed at the same time, it is likely to result in greater impairment than either one alone."**
  - **"Detecting the combined impairment from marijuana and alcohol would be very difficult for servers at bars and restaurants. Our state and local law enforcement officers receive special training to detect this type of multiple substance impairment- training that servers won't have. While they do receive training to identify alcohol impairment, it's not reasonable to expect that servers could effectively identify the combined impairment from alcohol and marijuana and prevent impaired customers from driving. As a result, we could see more impaired drivers on our Colorado roads."**
  - **"A great deal of thought and consideration has gone into this rulemaking process to preserve public safety. We urge you to adopt the proposed rules as drafted."**

# § 12-47-202(2)(a)(I)(M): Standards of Cleanliness, Orderliness, & Decency

- The standards contemplated in § 12-47-202(2)(a)(I)(M), C.R.S., are promoted by Rule 47-900. E.
  - Marijuana use, possession, and distribution is illegal under federal criminal law and public use of marijuana is not authorized under the Colorado Constitution.
  - Other provisions of Rule 47-900, which have been upheld, require that liquor licensed businesses conduct business on the licensed premises in a decent, orderly and respectable manner, and prohibit, on liquor licensed premises, otherwise lawful activities – rowdiness, undue noise, displays or simulations of certain sexual acts, and displays of pornographic images.
  - Written submissions and testimony at the rulemaking hearing regarding greater impairment when both alcohol and marijuana are consumed raise public health and safety concerns properly the subject of a regulation based on "standards of cleanliness, orderliness, and decency."
    - *See* written submissions by CDPHE and MADD; and testimony of Dr. Vigil, CDPHE Manager, Marijuana Health Monitoring & Research Program

# Practices Unduly Designed to Increase the Consumption of Alcohol Beverages § 12-47-202(2)(a)(I)(P), C.R.S.

- Research shows that impairment is increased when both alcohol and marijuana are consumed. Liquor licensees, however, only have the ability to control one of those intoxicating substances and may not be trained to identify over-intoxication resulting from cross-consumption.

- If the SLA is authorized to promulgate a rule "on the subject of" preventing over-consumption of alcohol beverages, surely she is authorized to promulgate a rule designed to prevent *increased impairment* from the alcohol beverages that are consumed.

  - *See* written submissions by CDPHE and MADD; and testimony of Dr. Vigil, CDPHE Manager, Marijuana Health Monitoring & Research Program

# Liquor & marijuana industry regulation

- The Executive Director of the Department of Revenue serves as the State Licensing Authority for both marijuana and liquor. *See* §§ 12-43.3-201; 12-43.4-201 and 12-47-201, C.R.S. These roles are separate & distinct.

- The SLA was created "for the purpose of *regulating and controlling the licensing of* the manufacture, distribution, and sale of alcohol beverages in this state." § 12-47-201(1), C.R.S. (emphasis added).

- The regulatory distinction between the SLA for liquor and marijuana hinges not on the *type of product* sold, but on the *type of business* subject to regulation.

# Regulating & controlling liquor licensing requires more than regulation of the alcohol beverages themselves.

The rulemaking powers of the State Licensing Authority extend far beyond regulation of the product itself.

A few examples (outside the provisions on which the State Licensing Authority relied for Rule 47-900. E.):

- § 12-47-202(2)(a)(I)(B), C.R.S., permits regulation on the subject of employee and officer duties.
- § 12-47-202(2)(a)(I)(G), C.R.S., permits regulation on the subject of misrepresentation and unfair practices/competition.
- § 12-47-202(2)(a)(I)(H), C.R.S., permits regulation on the subject of signs and displays on the licensed premises.

# Conclusion

- Rule 47-900. E. does not regulate marijuana, it regulates, in accordance with the Colorado Liquor Code, conduct permitted on liquor licensed premises.

- The SLA would welcome additional legislative guidance on the subject of marijuana consumption on liquor licensed premises, however, in the absence of such guidance the SLA has properly exercised her rulemaking powers pursuant to existing statutory authority.

- Rule 47-900. E. is squarely within the SLA's rulemaking authority under the broad provisions of subsections 12-47-202(1)(b), 12-47-202(2)(a)(I) and 12-47-202(2)(a)(I)(R), and the more specific provisions of subsections 12-47-202(2)(a)(I)(L), (M), and (P), C.R.S.

- Any of these provisions, *even standing alone*, provides sufficient authority for Rule 47-900. E. The rule should stand.