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## Government Accountability & Oversight Committee

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### HB 2638

**Brief Description:** Concerning the establishment of state preemption of laws and ordinances of local governments regarding provisions of the controlled substances act, chapter 69.50 RCW.

**Sponsors:** Representatives Wylie and Pollet.

#### Brief Summary of Bill

- Expands and clarifies the scope of the state preemption statute in the Controlled Substances Act through the addition of amendatory language explicitly establishing that state law preempts all local governmental regulations and ordinances pertaining to the regulation of controlled substances under the act.
- Establishes that the state preemption principle includes, but is not limited to, state statutory provisions pertaining to licensing, marketing, taxation, production, processing, and retail sale of marijuana.
- Invalidates any local law or ordinance that in any way has the effect of interfering with the development, implementation, or maintenance of a state regulated market regarding the production, processing, possession, or use of legal marijuana.

**Hearing Date:** 1/30/14

**Staff:** Thamas Osborn (786-7129).

#### **Background:**

##### Introduction to Initiative Measure No. 502.

Initiative Measure No. 502 ("I-502" or "initiative") was a ballot measure approved by Washington voters in November of 2012 that: (1) legalizes the production, processing, possession and personal use of marijuana by adults; (2) creates a framework for a regulatory scheme to be further developed by the Liquor Control Board (LCB) through its rule-making

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authority; and (3) revises provisions in criminal statute to accommodate such legalization in accordance with the requirements of the initiative.

The scope of I-502 is quite broad and contains statutory provisions that include the following:

- legalizing the personal use and possession of up to one ounce of marijuana, as well as specified products directly related to such marijuana use;
- licensing and regulating marijuana production, distribution, and retailing;
- designating the LCB as the regulatory entity responsible for the implementation of the initiative, including continuing oversight over the commercial practices and conduct of licensed marijuana producers, processors, and retailers;
- providing the LCB with very broad rule-making authority with respect to the development of the requisite regulatory scheme;
- implementing excise taxes on marijuana production, distribution, and retailing;
- creating a dedicated marijuana fund for the collection and distribution of marijuana-related tax revenues;
- deleting statutory provisions containing criminal and/or civil penalties for marijuana related activities authorized by I-502; and
- amending driving under the influence laws to include specific provisions pertaining to driving under the influence of marijuana.

The provisions of I-502 are now codified in chapter 69.50 RCW, which is Washington's Controlled Substances Act.

#### Licensing of Marijuana Producers, Processors, and Retailers.

I-502 creates three categories of marijuana marketing licenses to be issued by the LCB in implementing the statutory scheme outlined in the initiative: (1) the marijuana producer's license entitles the holder to produce marijuana for sale at wholesale to licensed marijuana processors or other producers; (2) the marijuana processor's license entitles the holder to process, package, and label marijuana for sale at wholesale to marijuana retailers; and (3) the marijuana retailer's license entitles the holder to sell marijuana products at retail prices in retail outlets.

The three categories of marijuana marketing licenses are subject to identical regulations regarding initial application fees and renewal fees. The initial application fee is \$250. The subsequent issuance and renewal fee, required annually, is \$1,000.

#### I-502 Directive Regarding the Outcome of LCB Rulemaking as it Affects Access to, and Availability of, Legal Marijuana Products.

Notwithstanding the broad discretionary authority granted to the LCB in promulgating its rules, the initiative explicitly directs the LCB to design and administer the regulatory scheme so as to ensure that the public has adequate access to licensed sources of marijuana, and marijuana-infused products, in order to discourage purchases from the illegal market. In effect, then, despite the otherwise sweeping regulatory authority granted to the LCB, this provision of the initiative constitutes an explicit, goal oriented directive that the LCB must serve in developing its rules and regulatory scheme.

#### Municipal Resistance to I-502 Provisions Regarding Local Siting of Licensed Marijuana Businesses.

During the latter part of 2013, some cities and counties have, or are threatening to, either enact ordinances establishing moratoriums on the local siting of state licensed marijuana producers, processors, and retailers, or to ban such businesses outright. While these municipalities have articulated various arguments in support of such moratoria or bans, there appears to be two dominant legal rationales at play:

1. The legalization of marijuana under I-502 is contrary to federal law and thus the state cannot require cities and counties to authorize the operation of businesses that are federally illegal.
2. The provisions of I-502, as codified in chapter 69.50 RCW, do not in fact preempt local governments from enacting their own ordinances regulating the siting of state licensed marijuana businesses in their communities.

#### State Preemption Under the Controlled Substances Act Chapter 69.50.RCW.

The Controlled Substances Act (Act), under RCW 69.50.608, creates a state preemption statute establishing that Washington state law "fully occupies and preempts the entire field of setting penalties" for violations of the Act. The statute goes on to state that municipalities may enact only those laws and ordinances relating to controlled substances that are consistent with the provisions of the Act. Finally, the statute states that "...local laws and ordinances that are inconsistent with the requirements of state law shall not be enacted and are preempted and repealed..."

#### Opinion of the Washington State Attorney General Regarding the Preemptive Effect of I-502.

In response to the resistance of some local governments to the siting of legal, licensed marijuana businesses within their jurisdictions, the LCB requested an advisory legal opinion from the State Attorney General's Office (AGO) regarding state preemption of local ordinances affecting or interfering with the implementation of I-502. In its request to the AGO, the LCB posed two questions: (1) Are local governments preempted by state law from banning state licensed marijuana producers, processors, and retailers from locating within their jurisdictions; and (2) Is a local government preempted by state law from enacting an ordinance that makes it impractical for a state licensed marijuana business to locate within its jurisdiction?

On January 16 of this year, the AGO issued its advisory opinion in response to the inquiry by the LCB. In its opinion, the AGO concluded that with respect to both questions, I-502 does not preempt a local government from either banning state licensed marijuana businesses from locating within its jurisdiction or passing an ordinance making it impractical for such businesses to locate within its jurisdiction. The opinion summarized its conclusions as follows: "Under Washington law, there is a strong presumption against finding that state law preempts local ordinances. Although Initiative 502 (I-502) establishes a licensing and regulatory system for marijuana producers, processors, and retailers in Washington State, it includes no clear indication that it was intended to preempt local authority to regulate such businesses. We therefore conclude that I-502 left in place the normal powers of local governments to regulate within their jurisdictions."

In rendering its opinion, the AGO relied heavily on three key points in determining that the regulatory provisions of I-502 do not preempt the types of local ordinances in question:

1. A local ordinance is presumed to be constitutional and must be given great deference absent clear evidence that a state statute or regulatory scheme is intended to preempt such ordinance.

2. I-502 does not contain any explicit indication that the state licensing and operating system set forth in the initiative preempts the field of marijuana regulation so as to preclude some form of local control.
3. Even when viewed in its totality as a comprehensive regulatory scheme for the the production, processing, possession, sale and taxation of legal marijuana, there is nothing implied in the language of the initiative to indicate "...an intent to preempt the entire field of regulating businesses licensed under I-502."

Although advisory legal opinions such as this from the Attorney General do not have the force of law as would a statute or court ruling, and thus do not constitute legal precedent, they are often taken seriously by the courts and accorded significant weight in the interpretation of Washington law.

**Summary of Bill:**

The state preemption statute in the Controlled Substances Act is expanded in scope through the addition of amendatory language explicitly establishing the general principle that state law preempts all local governmental regulations and ordinances pertaining to the regulation of controlled substances under the Act.

This amendment of the preemption statute specifically establishes that the state preemption principle includes, but is not limited to, state statutory provisions pertaining to licensing, marketing, taxation, production, processing, and retail sale of marijuana.

The state preemption law invalidates any local law or ordinance that in any way has the effect of interfering with the development, implementation, or maintenance of a state regulated market regarding the production, processing, possession, or use of legal marijuana.

**Appropriation:** None.

**Fiscal Note:** Requested.

**Effective Date:** The bill takes effect 90 days after adjournment of the session in which the bill is passed.