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Department of Public Health & Human Services

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Steve Bullock, Governor

Sheila Hogan, Director

TO: Nick Domitrovich, Deputy Chief Legal Counsel

FROM: Robert Lishman, Staff Attorney

DATE: April 9, 2020

RE: Application of March 26, 2020, Directive to vaping and tobacco product businesses

This memorandum addresses whether vape and tobacco shops constitute non-essential businesses that must cease retail operations under Governor Bullock's March 26, 2020, *Directive Implementing Executive Orders 2-2020 and 3-2020 providing measures to stay at home and designating certain essential functions* ("Directive").[1] The memorandum does not apply to licensed medical marijuana dispensaries, which are explicitly identified as essential businesses that may continue operations under the Directive. Directive, p. 6.

The Directive requires businesses to cease all activities unless the business is an essential business or the business activity meets the definition of Minimum Basic Operations. Directive, p. 2. The term "Minimum Basic Operations" includes activities necessary to maintain the value of business inventory, preserve the condition of physical plant and equipment, ensure security, process payroll/ employee benefits, and related functions. Minimum Basic Operations does not include the continuation of retail sales. *See* Directive, p. 8.

The Directive specifically sets forth the types of essential businesses that may continue operations. Directive, pp. 5-8. Tobacco and vape shops are not specifically designated as essential businesses. Businesses engaged in the retail sale of food, beverages, or other household products (e.g. cleaning and personal care products) are designated as essential businesses. Directive, p. 6.

Applying the above-cited provisions, businesses whose sales primarily involve grocery or other household products, but who also sell vaping or tobacco products (e.g. convenience stores, grocery stores, and drug stores) are essential businesses that may continue to operate. In contrast, businesses exclusively selling or primarily involved in the sale of vaping or tobacco products (e.g. standalone tobacco and vape shops) constitute non-essential businesses that may only engage in Minimum Basic Operations.

Determining whether a business is primarily involved in the sale of tobacco or vaping products should be based on the totality of the circumstances, including but not limited to whether inventory consists primarily of tobacco or vaping products and whether the business has historically been engaged in the sale of grocery or other household products. For example, a business who only recently began selling grocery or other household items (e.g. hand-sanitizer, masks, snack food) and whose shelves are

[1] A copy of the Directive is electronically accessible at: https://covid19.mt.gov/Portals/223/Documents/Stay%20at%20Home%20Directive.pdf?ver=2020-03-26-173332-177.

primarily stocked with tobacco or vaping products should not be considered an essential business under the Directive. Interpreting the Directive in a manner that would allow a non-essential business to continue non-essential services simply by stocking a few grocery or other household items would render meaningless the Directive's distinctions between an essential and non-essential business. It would also contravene the Directive's overall intent to slow the spread of COVID-19 to the greatest extent feasible by ensuring the maximum number of persons self-isolate while enabling only essential services to continue. Directive, p. 9.

It is my opinion businesses exclusively selling or primarily involved in the sale of vaping or tobacco products must cease retail activity and close to the public under the Directive.