R-39 Rev. 03/2012
(Certification page—see Instructions on back)

CERTIFICATION

This certification statement must be completed in full, including items 3 and 4, if they are applicable.

1) **I hereby certify that the above** *(check one)* ☒ Regulations ☐ Emergency Regulations

2) **are** *(check all that apply)* ☒ adopted ☐ amended ☐ repealed **by this agency pursuant to the following authority(ies):** *(complete all that apply)*

   a. *Connecticut General Statutes* section(s) 21a-408 h, 21a-408 i and 21a-408 m.

   b. Public Act Number(s) _____.
   (Provide public act number(s) if the act has not yet been codified in the Connecticut General Statutes.)

3) **And I further certify that notice of intent to adopt, amend or repeal said regulations was published in the *Connecticut Law Journal* on** March 19, 2013;
(Insert date of notice publication if publication was required by CGS Section 4-168.)

4) **And that a public hearing regarding the proposed regulations was held on** April 22, 2013;
(Insert date(s) of public hearing(s) held pursuant to CGS Section 4-168(a)(7), if any, or pursuant to other applicable statute.)

5) **And that said regulations are EFFECTIVE** *(check one, and complete as applicable)*
   ☒ When filed with the Secretary of the State

   OR ☐ on *(insert date)* _____

DATE	SIGNED *(Head of Board, Agency or Commission)*	OFFICIAL TITLE, DULY AUTHORIZED
5/13/13		Commissioner Department of Consumer Protection

*APPROVED by the **Attorney General** as to legal sufficiency in accordance with CGS Section 4-169, as amended*

DATE	SIGNED *(Attorney General or AG's designated representative)*	OFFICIAL TITLE, DULY AUTHORIZED
6/7/13	See enclosed Memorandum of June 7, 2013 Joseph Rubin	Associate Attorney General

*Proposed regulations are **DEEMED APPROVED** by the Attorney General in accordance with CGS Section 4-169, as amended, if the attorney General fails to give notice to the agency of any legal insufficiency within thirty (30) days of the receipt of the proposed regulation.*

(For Regulation Review Committee Use ONLY)

☐ Approved ☐ Rejected without prejudice

☐ Approved with technical corrections ☐ Disapproved in part, *(Indicate Section Numbers disapproved only)*

☐ Deemed approved pursuant to CGS Section 4-170(c)

By the Legislative Regulation Review Committee in accordance with CGS Section 4-170, as amended	DATE	SIGNED *(Administrator, Legislative Regulation Review Committee)*

Two certified copies received and filed and one such copy forwarded to the Commission on Official Legal Publications in accordance with CGS Section 4-172, as amended.

DATE	SIGNED *(Secretary of the State)*	BY

(For Secretary of the State Use ONLY)

MEMORANDUM

Date: June 7, 2013

Re: DCP Proposed Regulations on Palliative Use of Marijuana – Review for Legal Sufficiency

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The Commissioner of Consumer Protection (Commissioner) has submitted to the Office of the Attorney General for review proposed regulations pursuant to Act No. 12-55, *An Act Concerning the Palliative Use of Marijuana* (Act), *codified at* Conn. Gen. Stat. § 21a-408 *et seq.* The Act establishes a comprehensive regulatory framework for the palliative use of marijuana by persons with debilitating medical conditions, including among other things, requirements for the use and possession of marijuana by such persons and the licensing and regulation of producers and dispensaries of marijuana for those uses.

Under Conn. Gen. Stat. § 4-169, a proposed regulation shall not be effective until the Attorney General has reviewed and approved the legal sufficiency of the proposed regulation. Legal sufficiency under § 4-169 is defined to mean "(1) the absence of conflict with any general statute or regulation, federal law or regulation or the Constitution of this state or of the United States, and (2) compliance with the notice and hearing requirements of section 4-168." This Memorandum reviews whether the proposed regulations conflict with federal law within the meaning of §4-169 and explains why the Attorney General's Office has approved them.

First, the Commissioner has complied with the notice and hearing requirements of Conn. Gen. Stat. § 4-168.

Second, the regulations do not conflict with state law within the meaning of § 4-169. The Act requires and authorizes the Commissioner to promulgate regulations for the implementation and enforcement of a regulatory framework for the palliative use of marijuana, including among other things regulations pertaining to the licensing and standards for dispensaries, Conn. Gen. Stat. § 21a-408h; the licensing and standards for producers, Conn. Gen. Stat. § 21a-408i; written certifications issued by physicians; procedures for registration of qualifying patients and primary caregivers; the addition of medical conditions, treatments and diseases to the list of debilitating medical conditions that qualify for palliative use of marijuana; and the development of a distribution system providing for marijuana production facilities in the state on secure grounds operated by licensed producers and distribution to qualified patients or their primary caregivers by licensed dispensaries. Conn. Gen. Stat. § 21a-408m. The proposed regulations all come

within this express authority under the Act, and they do not conflict with any other state statute or regulation or the state constitution.

Third, although the issue is not free from dispute, we cannot conclude that the proposed regulations conflict with federal law within the meaning of § 4-169. It is important to emphasize that the Act expressly directs and authorizes the Commissioner to promulgate the proposed regulations. To the extent that the proposed regulations conflict with or are preempted by federal law, that conflict or preemption is not created by the proposed regulations themselves but by the legislature's enactment of the Act.

Under the Supremacy Clause of the U.S. Constitution, state laws that conflict with federal law may be preempted. Federal preemption of state law can occur in three ways: (1) where Congress expressly preempts state law (express preemption); (2) where Congress has so completely occupied a field that it intended to displace all state law in that field (field preemption); and (3) where state law conflicts with federal law either because (a) it creates an obstacle to the purposes and objectives of federal law, or (b) it would be physically impossible to comply with both federal and state law (conflict preemption). *Kurns v. Railroad Friction Prods. Corp.*, 132 S.Ct. 1261, 1265-66 (2012); *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). There is a presumption against preemption in areas – such as public health and drug regulation involved here – that have historically been subject to state police power regulation, and such state laws are preempted only when that is the "clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); *see Gonzales v. Oregon*, 546 U.S. 243, 270 (2006).

The federal Controlled Substances Act (CSA) makes the cultivation, distribution and possession of marijuana a federal crime. 21 U.S.C. § 812. Although the U.S. Supreme Court has held that Congress, through the exercise of its Commerce Clause powers, may prohibit local cultivation, sale and use of marijuana, *see Gonzales v. Raich*, 545 U.S. 1, 17-19 (2005), it has not yet addressed whether federal law preempts state laws that permit the cultivation, distribution and possession of marijuana for medical use.

The CSA does not expressly preempt state medical marijuana laws; nor does it preempt the field as to the regulation of marijuana. The CSA contains an explicit statement of its preemptive reach:

> No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between the provision of this subchapter and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. Because there is neither express preemption nor field preemption under the CSA, the only remaining question is whether state medical marijuana laws such as the Act are subject to conflict preemption because state and federal law "cannot consistently stand together."

The courts of other states that have enacted somewhat similar medical marijuana laws have disagreed on the question whether such laws conflict with federal law.[1] For example, at least two courts have concluded that state law that affirmatively authorizes large-scale cultivation and distribution of marijuana will create an obstacle to federal law enforcement efforts. *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Ore. 159, 178, 230 P.3d 518 (2010); *Pack v. Superior Court*, 199 Cal. App. 4th 1070, 1094 (2011). By contrast, several other state courts have reached the opposite conclusion, suggesting that a state law establishing a robust and comprehensive regulatory scheme, such as that contemplated by the Act and the proposed regulations, would not create a significant obstacle to federal enforcement of the CSA. *Ter Beek v. City of Wyoming*, 297 Mich. App. 446, 462, 823 N.W.2d 864 (2012), *appeal granted,* 828 N.W.2d 381 (2013); *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal. App. 4th 734, 761-62, *review denied*, 115 Cal. Rptr. 3d 89 (2010); *City of Garden Grove v. Superior Court*, 157 Cal. App. 4th 355, 386 (2007), *cert. denied*, 555 U.S. 1044 (2008); *White Mountain Health Center, Inc. v. County of Maricopa*, Dkt. CV 2012-05358 (Ariz. Super. Dec. 3, 2012), *appeal pending*, No. 1CA-CV 12-0831 (Ariz. Ct. App.). Thus, although plainly the issue continues to be open to dispute, substantial arguments and precedent exist that the proposed regulations are not preempted or in conflict with federal law.

In light of this highly unsettled and developing case law, this Office cannot reasonably conclude that the proposed regulations are clearly preempted by federal law and, therefore, conflict with federal law for purposes of legal sufficiency review under § 4-169. Accordingly, we have approved these regulations.

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[1] Courts have consistently concluded that state medical marijuana laws are not preempted under the impossibility test of conflict preemption. *E.g., Ter Beek v. City of Wyoming*, 297 Mich. App. 446, 460 (2012), *appeal granted,* 828 N.W.2d 381 (2013); *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Ore. 159, 176, 230 P.3d 518 (2010). State law is not preempted under the impossibility test if a person can simply refrain from engaging in an activity that state law permits but federal law prohibits, or vice-versa. *Wyeth*, 555 U.S. at 572-73; *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996).