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SUBJECT: Executive Order 121 (EO 121; Work Order No. 32-GH2695\A)

TO: Representative Tiffany Zulkosky
Attn: Katy Giorgio

FROM: Andrew Dunmire
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On the first day of this session, Governor Dunleavy transmitted Executive Order 121 (EO 121) to the House. This order will divide the Department of Health and Social Services (DHSS) into two new departments: the Department of Health (Health) and the Department of Family and Community Services (DFCS).

The Alaska Constitution, art. III, sec. 23, permits the governor to "make changes in the organization of the executive branch." Prior governors used executive orders to merge two departments together[1] and to transfer functions from one department to another department.[2] Direct precedent also exists for splitting an existing department into two departments.[3] However, little authority sheds light on the permissible scope of an executive order.

The Alaska Supreme Court has considered a challenge to the creation of a new department by executive order. EO 55 created the Department of Corrections in 1983. About three decades later, a prisoner filed a *pro se* lawsuit alleging, among other claims, that "DOC's creation by executive order violated the separation of powers doctrine."[4] The Alaska Supreme Court's analysis of this claim was cursory: it found "no merit" to the

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[1] Executive Order 39 (1977) merged the Department of Highways and the Department of Public Works into one department.

[2] Executive Order 107 (2003) transferred functions from the Department of Fish and Game to a deputy commissioner of natural resources.

[3] Executive Order 55 (1983), created the Department of Corrections by removing it from the Department of Health and Social Services.

[4] *Rae v. State*, 407 P.3d 474, 477 (Alaska 2017).

argument and simply noted that "the Constitution itself, in article III, section 23, clearly empowers the executive to adjust the organization of its agencies."[5]

Similarly, past attorney general opinions have not substantively analyzed whether creating a new department within the executive branch is constitutional—they simply presume the act is constitutional.[6] Attorney general opinions have also endorsed the practice of amending statutes to effectuate department changes: for example, the 1979 opinion cited above contains a footnote stating that "[u]nder Article III § 23 of the Alaska Constitution and AS 24.30.130(b), executive orders can create statutory law" and attached EO 39 as an appendix.[7] But EO 121 differs vastly in scope from prior orders – while EO 39 was only seven pages in length and it enacted eight new statute sections, the document length and the breadth of statutory changes contained in EO 121 is unprecedented.[8]

EO 121 also dwarfs EO 55 in breadth. The latter was 16 pages long and almost exclusively consisted of amendments to then-existing statutes that made conforming grammatical changes such as amending "Division of Corrections" to "Department of Corrections" (or amending "Commissioner of Health and Social Services" to "Commissioner of Corrections"). The creation of new statute sections in EO 55 was confined to only 11 lines of text in one section.[9] In contrast, EO 121 is 100 pages long and makes numerous amendments to existing statutes, enacts and repeals over 100 statute sections, and amends policy that is currently codified in statute. In sum, EO 121 looks more like a bill than any previous executive order.

Before reviewing EO 121 I searched for caselaw that would define the scope of a governor's ability to create or amend existing statutory law. Unfortunately I could find none. Nevertheless, the bounds of executive authority is implied by the separation of

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[5] *Id.* at 478 (footnote omitted). AS 24.30.130(b) was subsequently renumbered as AS 24.08.210.

[6] *See, e.g.*, 1979 Inf. Op. Att'y Gen. (March 23; J-66-470-79), 1979 WL 22785, (discussing Executive Order 39 (1977), which created the Department of Transportation and Public Facilities).

[7] *Id*. at n.1. *See also* 1979 Inf. Op. Att'y Gen. (June 29; A66-534-79) ("[I]f the Governor decided to reorganize the executive branch so that the statutory duties of one department would be taken over by another department, the change in the existing statutes must be accomplished by an executive order.").

[8] EO 119, which also proposed to split DHSS in Health and DFCS, was longer than and at least as robust as EO 121, but Governor Dunleavy withdrew that order after this office identified that it contained numerous changes to substantive law.

[9] EO 55, sec. 38.

powers doctrine. Our constitution vests the legislative power exclusively in the legislature.[10] The executive branch would usurp this power if it could enact legislation via executive order. And yet the governor must have some ability to amend statutes, otherwise he could not effectuate art. III, sec. 23. Thus, while the line separating a permissible executive order from an impermissible policy enactment is ill-defined, a line nevertheless exists. Having watched recent presentations before both the House and Senate Health & Social Services Committees, I understand that the governor's administration agrees that it would be inappropriate to use EO 121 to enact substantive changes to statute.[11] That assessment comports with the advice Legislative Legal Services gave to the legislature last year regarding EO 119.

With that context, I have reviewed EO 121 in search of provisions that might enact a substantive change to law or that pose other problems, such as poor drafting technique or the introduction of statutory inconsistencies. For the reasons documented below, EO 121 contains several dozen sections that warrant the legislature's consideration.

Sec. 2. This section relates to criminal history background checks administered by the Department of Public Safety. Page 3, line 2, of EO 121 permits a background check to be run for Health for an entity listed in AS 47.32.010(c), but AS 47.32.010(c) defines entities that are regulated by DFCS, not Health. It is unclear why a reference to subsection (c) was added here.

Sec. 3. This section amends AS 12.65.120(a), a statute relating to the state child fatality review team. Currently, this team exists in DHSS and includes a social worker with DHSS who is appointed to the team by the commissioner of health & social services. EO 121 makes a substantive change by moving the child fatality review team to Health, but stating that the social worker must come from another department (DFCS) and be appointed by another commissioner (the commissioner of family and community services).

Sec. 5. This section replaces a chapter cite ("AS 47.80") with a citation to a single statute ("AS 44.29.600"). It is unclear why the executive order changes a chapter cite to a section cite or what effect the change might have.

Sec. 14. Currently DHSS's commissioner sits on the Emergency Response Commission. This section names the Commissioner of Health to that commission, but not the Commissioner of DFCS. This reflects a change in policy, as the commissioner who

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[10] Art. II, sec. 1, Constitution of the State of Alaska.

[11] Senate Health & Social Services Committee, testimony of Stacie Kraly, Department of Law, February 10, 2022, at 2:47 pm ("There are a lot of changes to statute [in EO 121], but they are not substantive changes; they are technical changes . . . . If they were substantive then this executive order would be inappropriate and void.").

oversees all of the programs to be housed in DFCS would no longer partake in the Emergency Response Commission.

Sec. 15. Page 9, lines 7 - 8, changes "fees received under AS 47.32" to "fees received by entities listed under AS 47.32.010(b)." This new language is narrower and contains a qualification that does not exist in current statute. It is unclear what effect, if any, this amendment will cause. This section relates to Health, but the same issue exists in the statute covering DFCS, as documented below for sec. 16.

Sec. 16. This section makes the same change to statute as that flagged for sec. 15, but in relation to DFCS; accordingly, it references AS 47.32.010(c) instead of subsection (b).

Sec. 27. This section enacts 21 new statutes, which are mostly renumbered statutes that currently exist in AS 47.30. However, EO 121 makes a nonconforming change to existing law in at least four statutes:[12]

> **AS 44.25.210.** This recodifies current AS 47.30.016. However, subparagraph (b)(2)(B) adds "established by AS 44.29.600," which does not exist in the current statute. It is unclear what effect this change might have.
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> **AS 44.25.260.** This recodifies current AS 47.30.041. The current statute states that the commissioner of DHSS is an advisor to the board of the Alaska Mental Health Trust Authority. The new statute would designate the commissioner of Health—but not DFCS—as an advisor to the board. This would result in a substantive change to law, as the commissioner tasked with overseeing the Alaska Psychiatric Institute would no longer advise the Mental Health Trust Authority.
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> **AS 44.25.270.** This recodifies current AS 47.30.046. The section mandates that the Alaska Mental Health Trust Authority prepare a proposed budget each year. The new statute only requires that a copy of this proposed budget be provided to the commissioner of Health,[13] not the DFCS commissioner. This is a change from current law, under which a copy of the proposed budget must be provided to the commissioner who oversees the Alaska Psychiatric Institute.

Sec. 28. The current statute (AS 44.29.020(a)) states that DHSS "shall administer the state programs of public health and social services, including . . . ." This section will

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[12] I use the term "at least" because these types of changes are difficult to identify in cases, as here, in which a statute is essentially being repealed and reenacted. When a statute is amended, the current language is printed in the bill. That is not the case here, so I had to go through each new statute line by line and compare it with the existing statute. You may want to ask the Department of Law if they are aware of any additional statutory changes in this section not identified in this memo.

[13] Page 17, lines 4 - 7.

amend that statute so that it reads that Health "shall administer state programs, including . . . ." In other words, this change removes the qualification that currently exists in statute. The result is a much broader mandate that, essentially, permits Health to run *any* state program, not just those programs enumerated in the statute.[14]

For additional problems related to this section, see the discussion below for proposed AS 44.30.020.

Secs. 29 - 32. These sections relate to fees for service and appear to bolster the statutory authority surrounding those fees. In other words, the executive order grants authority over a greater range of statutory services than currently exists. You may wish to ask the Department of Law for an explanation of these changes.

Sec. 35. This section reenacts 26 statute sections that are currently codified in AS 44.29. Many of these reenactments are problematic.

> **AS 44.29.650.** This recodifies current AS 47.80.080. The spanned citation that currently exists in statute is "AS 47.80.030 - 47.80.090." With the renumbering that EO 121 effectuates, that spanned citation should be updated to read "AS 44.29.600 - 44.29.660," however, this section contains what appears to be a drafting error and actually reads "AS 44.29.600 - 44.29.670."
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> **AS 44.29.660.** This recodifies current AS 47.80.090, which grants a statutory mandate to the Governor's Council on Disabilities and Special Education. Subsections (5) and (9) in the current statute direct this council to work with DHSS on an annual plan "prescribing programs that meet the needs of persons with developmental disabilities as required under" federal law and to submit to the commissioner of DHSS a proposed interdepartmental program budget for services to disabled persons. The revisions in EO 121 change this to only include Health, not DFCS, which results in the commissioner and department that oversee Juvenile Justice, OCS, API, and the Pioneers Home being excluded.
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> **AS 44.29.670.** This recodifies current AS 47.80.095. Subsection (b) directs "the department" to consider the vision of support services needed for new and existing services for persons with physical and mental disabilities. But whereas the current statute applies to DHSS,[15] the amendment in this section leaves the term "department" undefined.
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> **AS 44.29.750.** This recodifies current AS 47.45.200. The current statute names the commissioner of DHSS (or the commissioner's designee) as a member of the

[14] See AS 01.10.040(b) ("When the words 'includes' or 'including' are used in a law, they shall be construed as though followed by the phrase 'but not limited to.'").

[15] See AS 47.80.900(2).

Alaska Commission on Aging. The amendment in this section changes that to the commissioner of Health. This constitutes a substantive amendment to law, as it results in the commissioner responsible for overseeing the Pioneers' Home being removed from the Alaska Commission on Aging.

Sec. 36. This enacts new statute sections to establish DFCS (art. 1) and the Pioneers' Homes Advisory Board (art. 2). The amendments in art. 1 are problematic.

AS 44.30.020. This statute section should be reviewed in conjunction with sec. 28. The current statute (AS 44.29.020) requires DHSS to administer the state programs of public health and social services. Subsection (b) of the current statute directs that DHSS "shall comply with AS 15.07.055 to serve as a voter registration agency to the extent required by state and federal law, including 42 U.S.C. 1973gg (National Voter Registration Act of 1993)." By operation of AS 44.30.020, EO 121 removes that mandate from DFCS.[16] This constitutes a substantive change in law, as no other statute will give DFCS the mandate to serve as a "voter registration agency." The effect of this change is unknown; AS 15.07.055(a)(2) currently designates "divisions of [DHSS] *that provide public assistance* through the food stamp program, Medicaid program, Special Supplemental Food Program for Women, Infants, and Children (WIC), and Alaska temporary assistance program" as voter registration agencies. And while EO 121 appears to transfer those divisions to Health, proposed AS 47.06.010(1) would direct DFCS to "administer applicable *public assistance*."

AS 44.30.030. This statute section derives from current AS 44.29.022. But in this new statute, subsection (c) adds language referencing "the community behavioral health system" that does not exist in the current statute (see AS 44.29.022(d)). This new language may constitute a substantive change to law, and you may wish to ask the Department of Law for an explanation of its purpose.

Sec. 41. This section amends the statutory delegation of duties that currently apply to DHSS, but would only apply to Health after a department split. "Welfare services" and "institutional care" are removed from Health's mandate in proposed subsections AS 47.05.010(10) and (11). It is unclear why these terms are taken out when Health will be tasked with administering public assistance. This may constitute a substantive change in law, and I advise that you ask the Department of Law for an explanation.

Sec. 42. Currently, AS 47.05.090(a) states that DHSS may "enter into the Interstate Compact on Adoption and Medical Assistance and supplementary agreements with agencies of other states for the provision of adoption and medical assistance under AS 47.07 and other provisions of this title for eligible children with special needs." This section amends the law by stating that Health and DFCS "may **cooperate**" on this matter.

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[16] The mandate would remain codified in statute for Health in AS 44.29.020(b). *See* page 29, lines 28 - 30.

Presumably this means that they may cooperate with each other, but the language is ambiguous. It also likely constitutes a substantive change in law: the current status is that one principle department makes this agreement. If EO 121 goes into effect, then two departments will have to decide this. What if the commissioners disagree? Would this statute authorize one department to enter the compact if the other department chooses not to?

Sec. 44. AS 47.05.300(a) is vague. Currently the subsection applies to an individual or entity that is required by statute or regulation to be licensed or certified *by DHSS*. After the revision, the plain language would make it apply to an "individual or entity that is required by statute or regulation to be licensed or certified . . . ." As it is worded, there is no qualification that the license or certification must come from Health or DFCS. Would the amendment to this section then make it apply to any entity that is required to be licensed under Title 8?

Secs. 45 - 49. A similar problem exists here as in sec. 44. After the revisions in EO 121, the word "department" will be undefined for AS 47.05.310.[17] The result is that the term will not serve as a qualifier in these statute subsections. Once again, would the resulting law apply beyond Health or DFCS to, for example, an individual licensed by the Department of Commerce, Community, and Economic Development?

Sec. 51. This section amends AS 47.05.310(h) so that the resulting law would state that an entity or individual that is not required to be licensed or certified by either department is ineligible to receive a payment from the "applicable" department. I do not know how to interpret this. If neither department requires a person to be licensed, then which department is the "applicable" department?

Sec. 56. This section has the same problem as sec. 51. Which department is the "applicable" department if neither department requires the individual or entity to be licensed or certified?

Sec. 63. The effect of this section may constitute a substantive change to the law. The current statute permits an individual dissatisfied with a decision of a variance committee to apply to the commissioner of DHSS for reconsideration. This section splits that review authority between the two new commissioners, resulting in two bifurcated reconsideration channels. Whereas the current commissioner of DHSS would be aware of *all* reconsideration requests that an individual applies for, under EO 121 the commissioner of DFCS would not be aware of such requests in Health, or vice versa.

Sec. 65. This section adds a new chapter to Title 47. The following sections in that new chapter are problematic.

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[17] *Compare* the current version of AS 47.05.390 with the proposed version of that statute (beginning on page 57, line 25).

AS 47.06.010. Paragraph (2) directs DFCS to "adopt regulations necessary for the conduct of its business and for carrying out federal and state laws." This language broadens the scope of rulemaking authority above what is currently bestowed on DHSS. Current AS 47.05.010(2) limits this provision to regulations necessary for carrying out "federal and state laws granting adult public assistance, temporary cash assistance" and other assistance programs.

Additionally, currently AS 47.05.010(5) directs DHSS to "cooperate with the federal government in matters of mutual concern pertaining to adult public assistance . . . ." This direction was omitted in this new statute despite the fact that AS 47.06.010(1) directs DFCS to "administer applicable public assistance."[18]

AS 47.06.030. Currently, AS 47.05.012 grants DHSS the authority to adopt or amend a regulation that incorporates by reference material from a preapproved list of documents. EO 121 would enact this new statute to grant that same authority to DFCS. However, the list of approved documents in AS 47.06.030 is drastically reduced from that contained in AS 47.05.012. This section clearly constitutes a substantive change to the law.

AS 47.06.050. This section, similar to sec. 42 (as discussed above), permits Health and DFCS to inter into the Interstate Compact on Adoption and Medical Assistance. However, the language in this section differs slightly from that in sec. 42, and it is unclear what effect, if any, the different wording would cause. Additionally, the definition of "state" found in this section is not present in sec. 42.[19]

Sec. 72. This section amends AS 47.30.523(a). The current version of the statute declares that it "is the policy of the state that . . . the community mental health program be coordinated, to the maximum extent possible, with the programs established under AS 47.80 . . . ." The executive order retains that language, but it makes no amendment to this statute to reflect that the Governor's Council on Disabilities and Special Education as well as the Statewide Independent Living Council have been repealed out of AS 47.80 and reenacted into AS 44.29.[20] This is a major drafting error that has the effect of

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[18] Furthermore, after EO 121 goes into effect, AS 47.05.010(1) will mandate that Health "shall administer adult public assistance." The result will be one mandate given to two principle departments.

[19] And the definition of "state" used in this new section is broader than the typical meaning of that term in statute, found in AS 01.10.060(a)(13).

[20] See page 90, lines 20 - 22, which repeal AS 47.80.030 - 47.80.095 (the Governor's Council on Disabilities and Special Education) and AS 47.80.300 - 47.80.330 (the Statewide Independent Living Council). Those program statutes are reenacted in their new statutory location on pages 32 - 37.

substantively changing the law: if EO 121 goes into effect, it would no longer be the explicit "policy of the state" that the community mental health program be coordinated with the Governor's Council on Disabilities and Special Education and the Statewide Independent Living Council.

Sec. 78. This statute would task both DFCS and Health with preparing, and periodically revising and amending, a plan for an integrated mental health program. This may constitute a substantive change to the law, as assigning one task to two departments could frustrate legislative oversight.

Sec. 84. This section substantially rewrites AS 47.32.050(a). Perhaps the rewrite does not change the meaning of the statute, but it nevertheless effectuates a substantial rewording of existing statute.

Secs. 89 - 90. These sections appear to contain errors, which make them difficult to understand. Both of these sections amend a subsection of AS 47.32.090 to read "[t]he department **with licensing authority under (a) of this section** . . . ." But (a) of this statute section does not grant licensing authority; it instead states that a person may file a complaint "with the department that has licensing authority . . . ." These sections appear to be referring to the department with which the claim is filed, but as they are written it is unclear to what department or entities these provisions would apply. It would be helpful if this language was more clear. Another drafting error occurs toward the bottom of sec. 90, which enacts a sentence reading: "The Department of Health and the Department of Family and Community Services shall adopt regulations to implement this subsection for the entities licensed by that department." This sentence is ungrammatical.

Sec. 94. On page 81, line 14, the executive order changes the word "department" to "regulatory" in AS 47.32.130(b)(2)(A). This changes the sentence to require that formal written notice of a revocation or suspension decision include a statement of any "regulatory" requirement—instead of any "department" requirement—that the respondent submit a written response. This could constitute a substantive change to the statute.

Sec. 95. The same issue exists here as in sec. 94.

Sec. 96. This section demonstrates the problems that result from having one statute apply to two different departments. The word "applicable" in this context is ambiguous. It seems that it is intended to refer to the same department "that provide[d] notice of a violation," but that is not obvious from the statute. As demonstrated above (see the discussions referencing both departments' mandate to administer public assistance), EO 121 results in some overlap in the function of the two new departments. If one department provides notice to an entity under AS 47.32.140, but the entity believes that the other department is the "applicable" department, how would this statute subsection be interpreted? Could the entity submit a plan of correction to the department that did not provide notice of the violation?

Sec. 101. This section changes current statutory language from "within 15 days" to "not later than 15 days." The change may change the manner in which deadlines are calculated, which would be a substantive amendment of statute.

Sec. 109. This section substantially rewords AS 47.32.180(c). The rewording is so substantial that it may change the way in which this subsection is interpreted. Furthermore, it is unclear why this statute would need to be amended in this manner to effectuate the department split.

Sec. 110. Currently, AS 47.32.190 states that the divisions within DHSS assigned to implement AS 47.32 "shall have access to any information compiled or retained by other divisions of" DHSS. This section amends the statute by isolating the two departments from each other. (For example, a division within DFCS could access information from other divisions within DFCS, but it could not access information from divisions within Health.) This constitutes a substantive change to the law, and it could frustrate the purpose of this statute, which is "to assist in administering the provisions of" current AS 47.32.

Sec. 116. This section amends AS 47.37.050, which creates an interdepartmental coordinating committee to assist "in formulating a comprehensive plan for prevention of alcoholism and drug abuse and for treatment of alcoholics, intoxicated persons, and drug abusers." This section removes the commissioner of DHSS as chairperson, and appoints the commissioner of Health as chairperson. The commissioner of DFCS does not serve on the committee, which means that the commissioner who oversees the Alaska Psychiatric Institute, Juvenile Justice, and OCS will not be part of the interdepartmental committee focused on alcoholism and drug abuse. This is a substantive change to the law.

Sec. 118. This section changes an "and" to an "or," which changes the meaning of the statute. This is a substantive change to the law.

Sec. 119. This section adds qualifying language ("for purchases made by the respective departments") to a statute that authorizes DHSS to adopt regulations. This added language could constitute a substantive change to the law.

Sec. 120. This section replaces DHSS with Health in AS 47.80.100(a). The statute currently mandates that DHSS, in conjunction with other departments, "plan, develop, and implement a comprehensive system of services and facilities for persons with disabilities that is consistent with the state plan adopted" by the Governor's Council on Disabilities and Special Education. The result of this amendment is substantive, as DFCS will no longer have a statutory mandate to engage in this process despite the fact that DFCS oversees programs that serve persons with disabilities, such as OCS, Juvenile Justice, and the Alaska Psychiatric Institute.

Sec. 121. Similar to sec. 120, this section replaces the commissioner of DHSS with the commissioner of Health in a statute that requires an annual report to the Alaska Mental

Health Trust Authority that addresses helping persons with disabilities become gainfully employed in the general workforce. The result is that the commissioner of DFCS will no longer oversee this report, which is a substantive change to existing law.

Sec. 125. This uncodified section states that a person who applied for assistance and was determined eligible under a statute that is repealed may continue to receive the assistance "so long as the person remains eligible." It is unclear under what statute a person who meets this criteria would "remain[] eligible."

Sec. 126. This uncodified section states that a facility or entity that is operating under a valid license or approval issued under a statute repealed or amended by EO 121 may continue to operate under that license or approval "as provided in this section." But it is unclear what "as provided" means, as the section offers no explanation. Without an explanation, this section could cause those facilities or entities to lose their license.

Sec. 133. This uncodified section states that a department affected by EO 121 "may proceed to adopt regulations" to implement EO 121. The executive branch is therefore granting itself rulemaking authority.

Conclusion. This executive order greatly exceeds the length and scope of prior executive orders, such as EO 39 and EO 55, that merged or split executive branch departments. Additionally, it contains a number of drafting errors, introduces ambiguity into the Alaska Statutes, and it amends statutes in a manner that may be considered as substantive. Given the breadth of statutory amendments needed to split a department as large as DHSS, a bill might be a more appropriate vehicle. Unlike an executive order, a bill going through the legislative process would permit the legislature to 1) identify and correct oversights and drafting errors, and 2) make policy decisions when necessary.

Additionally, the errors documented above should not be considered an exhaustive list. I have merely reviewed EO 121 with the principle objective of identifying obvious drafting errors and examples of substantive statute revision. I have not, for example, reviewed the entirety of Titles 44 and 47 in search of additional statutes that should have been included in EO 121. I have also not reviewed all the statutes listed in secs. 123 and 134 - 137 to ensure those lists are error free (nor can I ensure that those lists are comprehensive). Therefore, the fact that a section of EO 121 is not discussed in this memo should not be considered as an endorsement of that section by Legislative Legal Services. There are likely other errors and problems that will only become apparent during implementation of EO 121.

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