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February 15, 2018

VIA EMAIL ONLY (CannabisCommission@state.ma.us)

Cannabis Control Commission
101 Federal Street, 13th Floor
Boston, MA 02110

Re: Comments re Proposed Regulations for Adult Use of Marijuana (935 CMR 500.000)

Dear Commissioners:

Davis, Malm & D'Agostine, P.C. ("Davis Malm" or the "Firm") is a law firm established in 1979 in Boston, Massachusetts that provides services to clients in many areas such as business/corporate, civil litigation, real estate and environmental, lending, tax, regulatory, employment and intellectual property. Since 2012, when medical marijuana became legal in Massachusetts, Davis Malm attorneys have represented clients in the cannabis industry.

The Firm's experience with the cannabis industry includes:

- business formation and governance;
- converting non-profit to for-profit organizations;
- dispensary licensing, permitting, and regulatory compliance;
- debt and equity financing, including private equity and venture capital transactions and joint ventures;
- tax advice;
- real estate transactions;
- land use and environmental entitlements such as zoning;

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- employment issues, including executive compensation, employee contracts, non-competition agreements, and arrangements concerning trade secrets;

- intellectual property, including patent procurement; prosecuting and enforcing trademarks; defending against infringement claims; and counseling on proper brand management; and

- information privacy and data security planning.

Davis Malm submits the following targeted comments to the draft regulations for the purpose of implementing the adult use of marijuana in Massachusetts dated December 21, 2017 ("Proposed Regulations") and issued by the Cannabis Control Commission (the "Commission" or "CCC"). Davis Malm appreciates the Commission's hard work in developing the Proposed Regulations in a relatively short period of time following the Commission's creation in late 2017. Davis Malm has focused its comments on eight specific areas in the Proposed Regulations that merit clarification or additional consideration before the Commission promulgates final regulations.

COMMENTS

A. *Definitions (935 CMR 500.002).*

The Firm[1] appreciates the extensive work that the Commission has devoted to this section in particular, which includes eight-plus pages of defined terms. Nevertheless, several instances remain in the Proposed Regulations when capitalized terms or other important terms are used without a definition. The Firm supports adding at least these additional definitions to clarify and make more precise the requirements of the applicable regulations:

- "Conversion" (this term is mentioned once as requiring both a one-time and annual fee but not defined for purposes of the Proposed Regulations);

- "Cultivation," "Production" and "Packaging" (all of which are licensing options but not defined – definitions would be important to set forth the specific activities that are within the scope of the applicable license (*e.g.*, must a cultivator only sell raw plants to a production licensee or will it have the ability to process product at least to some extent?));

- "Diversion" and "Diverting" (these terms are used over 20 times but never defined);

[1] These comments are provided by the four attorneys set forth on the signature page of this comment letter. These comments are not intended to be attributed to the Firm at large, other members of the Firm, or clients of the Firm.

- "Edible MIPs" (which is referenced many times but not explained or defined, presumably a marijuana infused product that may be eaten);
- "Equity Applicants" (this term is mentioned in three places as being exempt from application fees but not defined).
- "Marijuana Concentrate" (this term is mentioned approximately ten times but not defined);
- "Marijuana Delivery Operator" (this term is mentioned twice but not defined);
- "Marijuana-Related Business Agent" (this term is mentioned in both the fees and hearings sections of the Proposed Regulations but not defined (and as contrasted to a Marijuana-Related Establishment Agent, which is defined));
- "Marijuana Research Facility" (the Proposed Regulations state what such a facility can do and a definition should provide that it is a facility that engages in those activities);
- "Open Cultivation Facility" (this term is mentioned once and with requirements imposed upon it but is undefined);
- "Storefront Marijuana Retailer" (this term is mentioned in the fees and hearings sections of the Proposed Regulations but not defined (and as contrasted to its counterpart, the "Delivery-only Marijuana Retailer," which is expressly defined)); and
- "Virtual Separation" of product (this term is mentioned once but not clearly defined).

B. *Fines (935 CMR 500.005(D)).*

The Firm recommends that the Proposed Regulations include additional guidance for determining the amount of a fine to be imposed in the case of a violation of the regulatory requirements. Under the Proposed Regulations, 935 CMR 500.005(D)(4) simply provides: "An administrative fine up to $25,000 may be assessed for each violation, but the decision to impose any fine shall include factors considered by the Commission in setting the amount of the fine." That general statement does not provide clear guidance to licensees or the Commission itself regarding the amount of sanctions. Even though Section 500.005(D)(5) sets forth mitigating circumstances for determining the amount of sanctions, the Firm suggests that the Commission set forth parameters for determining the amount of sanctions in the first place.

In particular, the Firm recommends that Proposed Regulations expressly provide that the amount of sanctions be based upon the severity of the violation. Section 500.005(D) would also benefit from violations being segregated into categories such as major violations, minor violations, and small infractions. Major violations would include those that affect public health and safety, such as below-age sales or use of unauthorized sources of product. Minor violations would include those without an immediate impact on health and safety, such as errors in inventory tracking. Small infractions would include less severe violations, such as failure to report a change in ownership that did not affect operations. Finally, the Proposed Regulations should expressly provide that the magnitude of deviation from the regulatory requirement should be a factor in determining the amount of sanctions.

Davis Malm is aware that the Commission, in the exercise of enforcement discretion, could choose to develop comprehensive enforcement guidance after enactment of the final regulations that would describe principles, policies and procedures for the Commission to exercise its enforcement authority and to determine appropriate enforcement responses. Nevertheless, such guidance documents are not considered final agency actions and do not constitute regulations. It is recommended that the final regulations themselves set forth a fuller penalty structure that will guide the Commission in the exercise of its enforcement powers.

C. *Marijuana Application Requirements – One Year Residency Requirement* for Micro Businesses and Craft Cooperatives *(935 CMR 500.101(A))*.

The Proposed Regulations at 935 CMR 500.101 (at p. 24 *et seq.*) have detailed application requirements for the various types of marijuana establishments that do not generally require a minimum Massachusetts residency requirement. In two instances, however, the Proposed Regulations do impose a lengthy residency requirement as follows: (1) applicants for a license to operate a Marijuana Establishment as a micro business (935 CMR 500.101(A)(4)(e)); and (2) applicants for a license to operate a Marijuana Establishment as a craft marijuana cooperative (935 CMR 500.101(A)(4)(f)). *See* Proposed Regulations, p. 30; *see also id.*, p. 7 (repeating the same residency requirements for another Application-related filing). In each case, the Proposed Regulations require as part of the application process "evidence of residency within the Commonwealth for a period of 12 consecutive months prior to the date of application." *Id.*[2]

The purpose for or policy reason behind the residency requirement for these two categories of Marijuana Establishments is unclear. Davis Malm assumes that the residency requirement reflects, at least in part, an intention to require some level of Massachusetts ownership in these smaller licensee categories. The Firm suggests that the Commission balance

[2] The Proposed Regulations also have extensive minimum residency requirements for licensed marijuana establishments to qualify for social equity programs. *See* 935 CMR 500.105(Q). Those present different policy issues than the residency requirements for enabling certain marijuana establishments to be licensed in the first place in § 500.105(A)(4).

this interest against the benefits to the Commonwealth of involving persons with expertise and ideas gained from the nearly 30 other states with lawful cannabis operations that do not meet the residency requirement. Therefore, the Firm recommends that the Proposed Regulations include either an exemption or an efficient waiver process from the residency requirement for individuals who have received cannabis licenses in other jurisdictions or who have demonstrated experience in the industry. Successful licensure in other jurisdictions provides an indicia of reliability that should help ensure that such individuals will be committed to successful operation in the Commonwealth, even if not yet meeting the residency requirement. This exemption or waiver process will have particular importance in the craft cooperative context. The craft cooperative classification seeks to foster the development of innovative products that can be sold on a wholesale basis to other Marijuana Establishments. *See generally* 935 CMR 500.002 (definition of craft marijuana cultivator cooperative). With that goal in mind, craft cooperative applicants may well seek to include an owner or have positions for individuals with ready-made experience in cannabis innovation gained from activities in the numerous other states that have approved medical or adult use cannabis. Without an exemption or waiver process, requiring an inflexible and lengthy one-year minimum before such individuals can bring their talents to the Commonwealth could unnecessarily deprive Massachusetts cannabis licensees and their end use consumers of new and innovative cannabis products and a pool of experienced retailers and cultivators.

In any event, the Firm recommends that the Commission clarify the scope of the residency requirement as applied to craft cooperative applicants. Specifically, the Proposed Regulations provide in pertinent part: "The members or shareholders of a Craft Marijuana Cultivator Cooperative must be residents of the Commonwealth of Massachusetts for the 12 months immediately preceding the filing of an application for a license. *See* 500.050(C)(2) (emphasis supplied). This regulation suggests that all of the individuals supporting the application, whether members or shareholders, must meet the one-year residency requirement. If that is correct, the Firm submits that this requirement is too restrictive and the regulation should be clarified so that only shareholders or members owning (separately or in the aggregate) a majority interest in the establishment must be Massachusetts residents for the minimum period. The Firm notes that Section 500.050(I)(c) of the Proposed Regulations includes a majority residency requirement on the part of licensed micro businesses as we are suggesting for a craft marijuana cultivator cooperative.

D. *Marijuana Establishments - Social Consumption* Requirements *(935 CMR 500.050(E), 500.145).*

Under the Proposed Regulations the purpose for having separate Primary Use and Mixed Use social consumption licenses is unclear. The Firm appreciates that there is a different fee structure depending on the extent of cannabis sales, and by necessity, some different operational requirements in the mixed use setting will be required. But if the purpose for a Mixed Use

license is to exempt such licensees from certain requirements of a Marijuana Establishment or require additional undertakings because of the mixed use character of the business, we suggest the Proposed Regulations should itemize those regulations that are or are not applicable. For example, can an employee under 21 years of age or someone who is not a Marijuana Establishment Agent work at a mixed use establishment, provided that such employee has no access or dealings with regulated products?

Davis Malm also anticipates that defining the difference between these two social consumption establishments based upon the amount of the percentage of gross revenue derived from the sale of marijuana products consumed on the premises is going to be unclear and challenging to enforce. What is the time period for testing the monthly average: the calendar year, the license year or some other period? Is a single instance of monthly sales over 50% disqualifying? What if non-compliance with the 50% threshold is the result of an aberrational month of sales that is not offset later in the year? Can there be a cure period after which re-testing the gross revenue share occurs? Perhaps the measure to distinguish between Primary Use and Mixed Use social consumption establishments is the square footage of the facility dedicated to marijuana products consumed on the premises versus non-marijuana products consumed rather than revenue.

Additionally, as a technical matter, the Proposed Regulations do not address what happens when the average monthly gross revenue derived from the sale of marijuana products consumed on the premises is greater than 50% but less than 51%. Based on the thresholds in the Proposed Regulations, a social consumption licensee in this range of sales would not qualify for either form of license. 935 CMR 500.050(E)(4)(b) and (c). This apparent typographical error should be fixed by reducing Primary Use to more than 50% or, alternatively, increasing the Mixed Use definition to 51% or less.

E. Application and Licensing Process Requirements (935 CMR 500.101 - 500.103).

The Firm recommends that the Commission clarify the time frame or time frames that are promulgated in the application and licensing process, starting at 935 CMR 500.101. The concern is that the timelines and deadlines are calculated based on a determination that an application is complete. Nevertheless, the Proposed Regulations include no provision for the Commission to make a determination of application completeness at any point in the process — either affirmative or negative. The Proposed Regulations should include deadlines for application completeness findings, and such amendments should include that if an application is determined to be incomplete, the Commission's determination should state with specificity the manner in which the application is incomplete. The Commission should also establish a time frame for inspections under 935 CMR 500.103(A)(a)(i).

F. Operational Requirements – Inventory (935 CMR 500.10(H)(1)).

The Firm requests that the Commission supply additional guidance regarding inventory limitations set forth in 935 CMR 500.105(H)(1). The Proposed Regulations provide that a "Marijuana Establishment must limit its inventory [of cannabis and constituents] to reflect the projected needs of consumers in its market area." *Id.* (emphasis added). Preventing accumulation of surplus marijuana products appears to be a reasonable regulatory goal, but the draft language is ambiguous in multiple respects and may lead to unintended violations and compliance issues. For example, Section 500.105 introduces the term "market area" which is not defined. Market area is a term subject to discretion and/or business judgment. Likewise, the "projected needs of consumers" is subject to discretion and/or business judgment. Additional guidance should be provided, particularly given that compliance is mandatory and violators are subject to penalty. Alternatively, the Commission could choose to delete this problematic and unclear requirement and rely on licensees to manage inventory appropriately as is the case in any industry.

G. *Operational Requirements – Transportation/Disposal (935 CMR 500.105).*

In several contexts, the Proposed Regulations require licensed Marijuana Establishments to devote two, and in some cases three, individually licensed Marijuana Establishment Agents to complete certain operational tasks relating to the handling of cannabis product and by-products. One example is in the 935 CMR 105(M)(1)(f) requirement that "[a]ll vehicles transporting Marijuana and Marijuana Products shall be staffed with a minimum of two Marijuana Establishment Agents [and at] least one Marijuana Establishment Agent shall remain with the vehicle at all times that the vehicle contains Marijuana or Marijuana Products." Coupled with the overlapping requirement in 935 CMR 105(M)(5)(h) that the home base must have a licensed Marijuana Establishment Agent monitoring the communications and GPS for the vehicle and actively logging official communications on a real time basis, the practical impact is that three licensed individuals must participate in each transport of cannabis. Another example is the 935 CMR 105(L)(3) requirements that two licensed Marijuana Establishment Agents witness and log each incineration and disposal of solid waste.

The Firm does not second guess the Commission's desire to use multiple individuals to ensure public safety, but the Firm does note that requiring fully licensed Marijuana Establishment Agents for each of the individuals involved in such activities is unduly burdensome. As an alternative, Davis Malm recommends that the Commission modify the Proposed Regulations to require the following: (1) at least one licensed Marijuana Establishment Agent must be engaged in each such transportation or disposal activity; (2) the other employee need not be a licensed agent but could be an unlicensed employee subject to ordinary wage and pay laws, but (3) the licensed Establishment Agent must be fully responsible for all cannabis product handling and have exclusive access to and control over the product and all product storage areas. In short, it is not apparent why a fully licensed Marijuana Establishment Agent is

merely required to sit in the car while the other agent takes the product out of storage containers and handles deliveries, or is required to walk with a licensed agent to a disposal facility in order to give a second attestation that product waste was in fact properly destroyed. Provided that the unlicensed employees have no access to the product, this alternative should provide cost savings to Massachusetts licensed operations without adversely impacting the public or public safety consideration.

H. *Security Requirements – Buffer Zone (935 CMR 500.110(C)).*

The Firm recommends that the Proposed Regulations should clarify the 935 CMR 500.110(C) "buffer zone" requirements in several respects. The Proposed Regulations should state with specific text whether the default 500 foot minimum buffer only applies in municipalities that have not adopted local requirements regarding siting, or if the 500 foot buffer required by the Proposed Regulations is a minimum requirement even if local regulations provide for a smaller buffer zone. The current language of the Buffer Zone requirement is potentially inconsistent with language in 935 CMR 500.101(A)(1)(h)(i) and (B)(2)(g)(i). Those sections require a confirmation that the proposed Marijuana Establishment "is not within 500 feet of a pre-existing public or private school providing education in kindergarten or grades 1 through 12, unless the municipality has adopted an ordinance or bylaw that reduces that distance." The Commission should reconcile the differences between the similar but different requirements in these several Proposed Regulations.

In addition, the Firm suggests that the Proposed Regulations clarify the meaning of "facility" as that term is used in the provision regarding measurement, i.e., that "[t]he 500-foot distance under this section shall be measured in a straight line from the nearest point of the facility in question to the nearest point of the proposed Marijuana Establishment" (emphasis added). Ambiguity exists as to whether a "facility" refers to the lot boundary line, or to the edge of physical improvements for a facility such as a parking area or to the front door or nearest door of the facility. The same is true for the "nearest point of the proposed Marijuana Establishment," and whether the distances are measured from the nearest property line or physical improvements or front or nearest doors. These distinctions have a significant potential impact on the size of the permissible areas for a Marijuana Establishment, and should be clarified.

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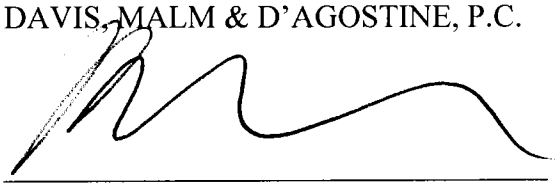
CONCLUSION

Davis Malm appreciates the opportunity to provide these comments that are offered to assist the Commission in finalizing the regulations for the adult use cannabis industry in the Commonwealth. Commission staff should contact any of the undersigned counsel if there are questions or issues regarding these Comments.

Respectfully submitted,

DAVIS, MALM & D'AGOSTINE, P.C.



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