

Massachusetts Marijuana Regulatory Scheme Takes Shape

By **Robert J. Munnely, Jr. and Shawn M. McCormack**

January 2, 2018, 5:03 PM EST

Legalized marijuana, or cannabis, is a growth industry. Eight states currently permit development and/or retail sales of nonmedical (recreational) use and medical use, and 21 states permit medical use-only. One key development is a new and emerging Massachusetts regulatory scheme for both recreational and medical use. The Massachusetts requirements originated in a 2016 ballot initiative and were modified in July 2017 reform legislation. The Massachusetts program is a work in progress that will serve as a national model for cannabis consumers, retailers, wholesalers, cultivators, manufacturers and testing laboratories, as well as for state and local public safety, public health and municipal management officials.



Robert J. Munnely, Jr.

Overview of Massachusetts Scheme

In November 2016, Massachusetts voters approved Ballot Question 4, which allowed for the use, possession, home growing and retail sale of recreational use marijuana. After hearings, debate, and negotiations, in July 2017, the legislature passed a comprehensive marijuana law (the Act) that modified recreational use requirements, but also modified medical use provisions that had been in place for several years. The act maintained three key 2016 recreational use ballot question provisions, namely, (i) permission for recreational use by those 21 and older, (ii) rules enabling and limiting possession, and (iii) rules establishing and limiting home growing. The act also includes significant changes in other areas.



Shawn M. McCormack

Most importantly, the act established an expansive regulatory scheme modeled on regulations applicable to legalized casino gambling in the commonwealth. Key features include:

- Creation of a new five member independent Cannabis Control Commission (CCC), with a broad mandate to regulate virtually all aspects of the nascent medical use and adult use marijuana industries;
- Creation of a new 25-member Cannabis Advisory Board (CAB) comprised of individuals with statutorily enumerated expertise areas to assist the work of the CCC;
- Transfer by a statutory deadline of existing medical use licensing and regulatory functions currently within other agencies, notably the state Department of Public Health (DPH), over to direct control by the CCC; and
- Establishment of firm deadlines for the CCC to implement a new recreational use licensing process and begin issuing licenses.

Early Developments and Initial Direction of the Massachusetts Regulatory Scheme

The CCC Commissioners and Staffing

The act confers on the CCC broad discretion to adopt regulations in 30-plus specific subject areas, including:

- setting fees and fines;
- creating rules and regulations in line with minimum standards within the law;
- establishing policies to license, register, investigate, revoke, or suspend any marijuana establishment (both adult and medical use);
- auditing marijuana licensees;
- adopting diversity licensing goals, including those applicable to minority, women, and veteran business enterprises; and
- establishing energy and environmental standards.

The CCC chairman and individual commissioners were appointed in early September 2017. Except for one commissioner, each newly appointed person had previously taken public positions expressing concerns about legalization. Accordingly, one can expect the CCC to take a cautious and regulatory approach in exercising statutory duties.

The CCC held its kickoff meeting in September 2017. Since then, the CCC has moved quickly to secure a \$5 million budget for fiscal year 2018, obtain office space, hire an executive director (a former legal counsel in the treasurer's office), hire other professional staff and begin working on the time-sensitive regulatory matters required by the act.

The Cannabis Advisory Board

The act provides that the CAB will advise the CCC and the state Department of Revenue on the regulation and taxation of both medical and recreational use marijuana and is designed to include individuals with expertise in a variety of specialties, including criminal justice, social welfare, cultivation and farming, business development, laboratory science and toxicology, minority ownership and others areas.

Appointments were complete as of October 2017, and the CAB established the following subcommittees:

- Cannabis Industry;
- Market Participation;
- Public Health; and
- Public Safety and Community Mitigation.

Each subcommittee has a chair and assigned members, and each has started an ambitious schedule of public hearings aimed at developing recommendations for the CCC in identified areas.

Regulatory Consolidation of Medical and Recreational Marijuana

The medical use program has been regulated through a division of the DPH. The act requires a process to transfer control of all DPH regulation over medical and recreational use to the CCC. The transfer of personnel and authority from DPH to CCC will occur over time and must be completed by Dec. 31, 2018.

State and Local Taxation

The act's tax rate provisions were intended to balance state and local revenue needs without creating excessive market prices that would encourage illegal black market use. The act permits a local sales tax and requires host agreements between operators and the cities and towns in which they stipulate to all responsibilities between the host community and the marijuana establishment or treatment center. The breakdown is as follows:

- 10.75 percent state excise tax;
- 6.25 percent state sales tax;
- Up to 3 percent option local sales tax;
- Host agreement with a cap of 3 percent on gross revenue; and
- Importantly, medical use marijuana remains untaxed.

Municipal Response to Recreational Use Opportunity

The act provides that if a majority of the voters in a city or town voted in favor of Question 4 (in the 2016 election), then voters must approve, by ballot initiative, any bylaw or ordinance that prohibits or severely limits recreational marijuana retailers. Such voting requirement does not apply to cities and towns where Question 4 did not get a majority of votes.

So far, over 120 municipalities have imposed either a moratorium while studying the issue or an outright ban on marijuana facilities. In many cases, bans and moratoria go beyond dispensaries and also curtail cultivation centers and testing facilities.

This trend, however, appears to be subsiding. Proposed bans in at least three Massachusetts towns were defeated in November — including two towns where a majority of the residents had voted against Question 4.

Key Emerging Regulatory Issues for 2017-18 and Beyond

Recreational Use Licensing Requirements

The act imposed on the CCC deadlines for licensing recreational dispensaries. First among these is the requirement to issue regulations and guidelines for recreational licenses by March 15, 2018. In late November, the CCC announced an intent to file draft regulations by 2017-year end. On Dec. 21, 2017, the CCC announced that it had finalized 108 pages of draft regulations, but they are not available at press time. Under the act, the CCC may begin taking applications for recreational marijuana businesses on April 1, 2018. No license may issue prior to June 1, 2018, and sales are slated to start around July 1, 2018. Regulations and guidelines for marijuana testing facilities are to be in place by May 1, 2018, although the DPH regulations, which are currently in place, will remain operative in the interim.

The CCC will be the licensing authority for all marijuana dispensaries, including medical, as well as testing facilities, and cultivation centers. Based on public hearings held by the CCC, the upcoming CCC regulations will also address licenses for social consumption — either dedicated marijuana cafes or mixed use licenses that would permit on-site marijuana use in movie theaters, yoga establishments and similar venues — and for home delivery by vehicle. Regarding dispensary licensing, the CCC has stated publicly it will carry over elements of the DPH framework for vetting medical marijuana applications into the CCC scheme. The existing regulations dealing with background checks, security measures, and internal controls could easily apply to nonmedical use.

The act directs the CCC to give prioritized review to two groups: (1) currently operating registered medicinal marijuana dispensaries, and (2) those who “demonstrate experience in or business practices that promote economic empowerment in communities disproportionately impacted by high rates of arrest and incarceration” for drug offenses. Applicants entitled to prioritized review are to have their applications granted or denied by the CCC before “any other” applications are reviewed. Regarding the former, the CCC is directed to identify applicants who are holders of a provisional or final certificate of registration under the medical marijuana regime adopted in 2012 and establish an “expedited review process” that would involve submitting only application materials not previously required under the old process. Regarding the latter, the CCC is directed to study participation in the marijuana industry by women, minorities and veterans, and, depending on study results, develop programs to improve access by these groups.

Conversion from Existing Nonprofit Medical Use Organizations to For-Profit Businesses Serving Medical or Recreational Uses

The pre-existing medical use licensing provisions required that dispensaries be licensed and operated only by nonprofit entities. In contrast, Section 72 of the act provides that any person holding a provisional or final medical use certificate of registration as of July 1, 2017, or any application pending before the DPH, is entitled to convert from a nonprofit corporation into a domestic business corporation or other domestic entity. The entity conversion will not result in the imposition of any tax by the commonwealth. The DPH, still the licensing authority for medical use cannabis, has promulgated October 2017 guidance for the process nonprofits should follow in converting to for-profit status. This involves filling out conversion documents developed by the secretary of state’s office, filing a request with the DPH to certify that the applicant has an issued or pending certificate, filing the final conversion documents and the DPH certificate with the secretary of state’s office, and receiving a certificate of good standing. To the extent that the conversion process changes any aspects of the prior marijuana licensee’s information, the applicant must file the updated information with DPH.

Advertising and Marketing Requirements

The act creates minimum standards for advertising, marketing and branding for recreational use dispensaries, once licensed by the CCC. The basic advertising/marketing rules are as follows:

- no false, misleading or deceptive statements;
- no TV, radio, billboard, print or internet advertisements unless at least 85 percent of audience is over 21 years of age;
- cannot appeal to anyone less than 21 years of age or depict anyone less than 21 years of age;
- prohibitions on certain promotional items as determined by the CCC;
- prohibitions on statements that products are safe, other than using labeling as regulated by the act and the CCC;
- prohibitions on neon signs and reasonable limitations on externally illuminated signs for marijuana premises;
- no marketing using vehicles with radios or loud speakers;
- can sponsor charitable, sports or similar events, but must still meet the 85 percent threshold; websites shall verify user is 21 years of age or older; and
- must contain a standard health warning developed by DPH.

The CCC, the Massachusetts Attorney General or both, will likely develop regulations to clarify and enforce these minimum advertising and marketing requirements. As noted, several categories of required or prohibited conduct expressly require agency rulemaking from the CCC or DPH. Regarding the attorney general’s role, Massachusetts has a robust consumer protection statute empowering enforcement actions by the attorney general or consumers to challenge unfair and deceptive trade practices and the attorney

general has, in the past, promulgated regulations to clarify how state consumer protection obligations apply to new industries.

Packaging and Labeling

Once the CCC gets through its initial phase of developing rules for licensing and marketing rules, the CCC will focus on the elements required for long-term manufacturing businesses, including packaging and labeling requirements. Based on CCC public statements, at least some of these items are likely to be addressed in the upcoming initial regulations. The act provides general guidance to the CCC to seek to align, wherever possible, medical and recreational use laws applicable to packaging and labeling with existing medical standards for public health and product safety, including requirements of the federal Consumer Product Safety Commission. The act also includes detailed minimum standards for packaging and labeling.

Other Issues

The act is a large and complex legislation that addresses additional topics not detailed above, including:

- provisions regarding independent testing laboratories; and
- agricultural provisions applicable to hemp growing and the establishment of special “craft” cannabis establishments (modeled on craft beer breweries) that will furnish specialized cannabis products to cannabis licensees but not directly to consumers.

Conclusion

Massachusetts has established what is heading toward being a highly regulatory scheme for both recreational and medical use marijuana, supervised by the CCC, in municipalities that choose not to opt out of commercial activities. By mid-2018, the CCC should have completed its work in establishing dispensary licensing requirements, there should be a more complete list of cities and towns interested in pursuing marijuana businesses, and there should be greater clarity on the nonlicensing regulatory requirements being investigated and implemented by the CCC.

Robert J. Munnely, Jr. is a shareholder at Davis Malm & D'Agostine PC, practicing in the regulatory area.

Shawn M. McCormack is an associate at the firm, and practices in the litigation, real estate and environmental areas.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.