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December 4, 2017

BY EMAIL
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Attention: OAL Reference Attorney
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With a copy to:
CalCannabis Cultivation Licensing
Department of Food & Agriculture
1220 N Street
Sacramento, CA 95814

Attention: Amanda Brown
Email: amanda.brown@cdfa.ca.gov
Email: CalCannabisRegs@cdfa.ca.gov

Re: **Comments to Licensing of Commercial Cannabis Cultivators Regulations (OAL File No. 2017-1127-02E)**

Dear Sir or Madam:

We are submitting for formal consideration these public comments to the above-referenced emergency regulations. In accordance with 1 CCR Section 55(b), these comments are submitted in writing, are provided before the deadline, identify the topic of the emergency regulations to which they relate, and are being provided simultaneously to the agency's contact person designated to receive them. Further, since these comments are unique to our law firm and have been specifically prepared to address material issues having economic impact to our clients, we respectfully request that these comments not be treated with other public comments from other sources as a single comment submission under 1 CCR Section 55(h), but rather that these comments be considered independently of such other public comments.

First and foremost, we commend the staff at CalCannabis for developing this set of regulations under extremely short time frames. In general the regulations seem to us to be fair, well balanced, clear, concise and will assist us greatly in advising and representing our Cannabis clients. We have endeavored to limit our public comments to those issues we feel are urgent and have the greatest economic impact on our Cannabis clients.

Comment 1:

Section 8000(y) provides the definition of "Pre-roll" "means nonmanufactured cannabis product(s) rolled in paper."

There are several products in the marketplace that are known as "Pre-rolls" but which are a compound and/or infusion cannabis product of dried flower, kief and cannabis concentrate rolled in paper. Since the Section 8000(y) definition "Pre-roll" only includes nonmanufactured cannabis, it would exclude the infused rolled cannabis products. Therefore, there could be confusion in the marketplace and the potential for misbranding.

Section 8000(y) should be slightly revised as follows (new text underlined):

> (y) "Pre-roll" "means (i) nonmanufactured cannabis product(s) rolled in paper; or (ii) cannabis products made from dried flower, kief and/or cannabis concentrate, rolled in paper."

Comment 2:

Section 8103(b)(1) defines "Owner" to include "[a] partner of a cannabis business that is organized as a partnership."

This makes sense for a general partnership but does not make sense for a limited partnership. We believe this was an unintentional oversight. Under limited partnership laws, only the general partner has management and control functions or powers.

Therefore, Section 8103(b)(1) should be revised as follows (new text underlined):

> "(1) (A) A partner of a cannabis business that is organized as a general partnership; and (B) A general partner of a cannabis business that is organized as a limited partnership."

Comment 3:

Section 8103(b)(2) defines "Owner" to include "[a] member of a limited liability company of a commercial cannabis business that is organized as a limited liability company."

This makes sense for a member-managed LLC but does not make sense for a manager-managed LLC. We believe this was an unintentional oversight. Under LLC laws, the non-managing members do not usually have management or control functions or powers. If in a particular case, the LLC operating agreement provides a particular member with management and/or control functions or powers, the general rule in Section 8103(a)(4) would clearly designate such person

as an "Owner" based on such management and/or control functions. As a result, there is no purpose served by imposing an overly broad definition on non-managing LLC members.

Therefore, Section 8103(b)(2) should be revised as follows (new text underlined):

> "(2) (A) A member of a limited liability company of a cannabis business that is organized as a member-managed limited liability company; and (B) A manager of a limited liability company of a cannabis business that is organized as a manager-managed limited liability company."

Comment 4:

Section 8111 provides for priority licensing if an applicant operated in compliance with the Compassionate Use Act of 1996 and its implementing laws before September 1, 2016. There are many applicants who were operating in the form of nonprofit mutual benefit corporations or cooperatives as of September 1, 2016 but who now wish to convert their form of entity to a for profit corporation or LLC. Under the MBC merger statute in CA Corp. Code Section 8010, an MBC can merge with a domestic corporation or other business entity. Under CA Corp. Code Section 8020(a), upon merger, the surviving party shall "succeed, without other transfer, to all rights and property" of the disappearing party. Similar rules apply to a merger involving a cooperative under CA Corp. Code Sections 12530 and 12550(a), respectively.

We believe that since the priority filing is mandated by CA Bus. & Prof. Code Section 26054.2(a), it should be treated as a statutory right and a surviving entity in a merger should succeed to such right as a matter of law. Therefore, an applicant that is a surviving entity in a merger where the disappearing entity was operating in compliance as of September 1, 2016 should also have the priority mandated by CA Bus. & Prof. Code Section 26054.2(a), as implemented by Section 8111.

Therefore, Section 8111 should be slightly revised as follows (new text underlined):

> (a) Priority review of annual license applications shall be given to applicants that can demonstrate the commercial cannabis business was in compliance with the Compassionate Use Act of 1996 before September 1, 2016. An applicant which is a surviving entity in a merger, where it can be demonstrated that the disappearing entity operated in such compliance as of September 1, 2016, shall also be eligible for such priority licensing.

Comment 5:

Section 8204 provides for notification of change to any item listed in the application and certain specified events. Section 8204(b) provides that "[a]ny change to the business entity type requires a new application and application fee."

It is grossly unfair to charge new application fees and to require a new application in the case of a mere change of type of entity without any other changes to the application. In the case of a medium indoor license, a mere change of type of entity would trigger additional fees equal to a $8,655 new application fee and a $77,905 new license fee. There is simply no justification for imposing such punitive costs on a licensee which seeks to change form of entity.

In the event that a licensee enters into a merger to effect a mere change of form of entity, without any change of ownership or of Owners, there would be a change to an item listed in the application, namely a change to the name and type of entity.

Significantly, BCC Section 5023 requires notice but does not require a new application fee or a new license fee in the case of a mere change of type of entity. DPH regulations are silent as to a mere change of type of entity.

CalCannabis should change Section 8204(b) so that a mere change in type of entity without any change in ownership does not require a new application or a new application fee.

Section 8204(b) should be revised to clarify that in the event of a mere change of form of entity, there shall be no additional fees, as follows (new text underlined):

> (b) Any change to the business entity type that results in a change of ownership requires a new application and application fee. A change in ownership does not occur due to a mere change of type of entity.

Comment 6:

Section 8205 provides that the department's prior written approval is required before a licensee makes certain physical modifications of the premises. Section 8204(a)(1) lists certain modifications that are deemed to require such prior written approval, as follows:

> (1) Modification to any area described in the licensee's cultivation plan including but not limited to the removal, creation, or relocation of canopy, processing, packaging, composting, harvest storage, and chemical storage areas;

We believe that modifications involving relocation of canopy, processing, packaging, composting, or harvest storage should be able to be done by a licensee without the department's prior written approval if such relocation does not increase the square footage of the area or space

being utilized for such activity. For example, if a new planter pot is installed to replace a damaged one, and they are the same size, there is no public purpose served to require the licensee to seek the prior written approval for such replacement. Likewise, if a licensee moves a composting pile to another part of the property, such move should not be deemed to be a material or substantial alteration of the premises that requires prior written approval. The same can be said for processing, packaging and harvest storage. We acknowledge that changes in the chemical storage areas do involve potential harms and so prior written approval of such changes would be appropriate.

Therefore, Section 8205(a)(1) should be revised as follows (new text underlined; deletions are ~~strikeout~~):

> (1) Modification to any area described in the licensee's cultivation plan including but not limited to the removal or creation~~, or relocation~~ of canopy, processing, packaging, composting, harvest storage, and removal, creation or relocation of chemical storage areas;

Comment 7:

Section 8304 contains general environmental protections. Section 8304(g) provides that:

> (g) Mixed-light license types of all tiers and sizes shall ensure that lights used for cultivation are shielded from sunset to sunrise to avoid nighttime glare.

It is very laborious and expensive to shield lights from sunset to sunrise to avoid nighttime glare. We suggest limiting this section to the larger operations, such as Medium Mixed Light, and exempting smaller operations. Likewise, we suggest exempting operations where the topography, trees, and/or other vegetation shield the lights to avoid nighttime glare.

Comment 8:

Statement of Rehabilitation

§ 8102 (G)(12)(F), "Annual License Application Requirements" requires that individual owners with criminal convictions dismissed pursuant "Section 1203.4 of Penal Code or equivalent non-California law shall be disclosed "as a criminal conviction." Then, for each "criminal conviction," the owner must further submit a "Statement of Rehabilitation" for each offense, which presumably applies to those who have had their cases dismissed pursuant to "Section 1203.4 of Penal Code or equivalent non-California law."

For those who have already earned an expungement or Certificate of Rehabilitation from a *Superior Court judge*, it is duplicative and overly burdensome to require a Statement of

Rehabilitation. First, if there has been a judicial determination under Penal Code § 1203.4, it seems arbitrary for the agency to review it again under § 8102, particularly as it does not track the language of B.P. § 26057 in any meaningful way.

Moreover, if someone who has received expungement from the Superior Court, and then also petitioned successfully for a Certificate of Rehabilitation (which is available only to those who have served time in prison and are difficult to obtain), requiring the owner to go through the entire process of gathering supporting letters from "employers, instructors, or professional counselors" is an undue burden, and likely embarrassing.

As it is undeniable that people of color and the poor have suffered the greatest criminal penalties for cannabis prohibition, the requirement to submit a Statement of Rehabilitation for those who worked hard to get their criminal histories expunged or obtain a Certificate of Rehabilitation will disadvantage these same people, due to the massive amount of extra work required and perhaps chagrin in gathering these documents for some.

We suggest the Statement of Rehabilitation be deleted as a requirement for those with a judicial determination of expungement or Certificate of Rehabilitation. At minimum, a Statement of Rehabilitation should be required only for those whose criminal histories match those set forth in B.P. § 26057.

Current language:

(F) A statement of rehabilitation for each conviction. The statement of rehabilitation is to be written by the owner and may contain evidence that the owner would like the department to consider that demonstrates the owner's fitness for licensure. Supporting evidence may be attached to the statement of rehabilitation and may include, but is not limited to, a certificate of rehabilitation under Section 4852.01 of Penal Code, dated letters of reference from employers, instructors, or professional counselors that contain valid contact information for the individual providing the reference."

Suggested changes:

(F) A statement of rehabilitation for each conviction. The statement of rehabilitation is to be written by the owner and may contain evidence that the owner would like the department to consider that demonstrates the owner's fitness for licensure. Supporting evidence may be attached to the statement of rehabilitation and may include, but is not limited to~~, a certificate of rehabilitation under Section 4852.01 of Penal Code,~~ dated letters of reference from employers, instructors, or professional counselors that contain valid contact information for the individual providing the reference. **A statement of rehabilitation is not required for criminal convictions that have been dismissed pursuant Section 1203.4 of Penal Code or equivalent non-California law.**

Thank you for the opportunity to submit these public comments for consideration.

Very truly yours,

GREENSPOON MARDER LLP

By: Heather Burke, Partner
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