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CANNABIS
LEGAL GROUP

To: Marijuana Regulatory Agency

From: Nickolas Galendez, on behalf of Cannabis Legal Group

Date: February 17, 2020

Re: Public Comment on Proposed Combined Topic-Based Rule Sets

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Dear Marijuana Regulatory Agency,

After reviewing the proposed combined topic-based rule sets for the Medical Marihuana Facilities Licensing Act ("MMFLA") and Michigan Regulation and Taxation of Marihuana Act ("MRTMA"), please see below for public comment on behalf of Cannabis Legal Group.

Sincerely,

Nickolas Galendez, Esq.
Cannabis Legal Group

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Public Comment on Proposed Combined Topic-Based Rule Sets for the MMFLA and MRTMA

I. Definitions

It is clear that the Marijuana Regulatory Agency (MRA) has taken feedback from licensees, applicants, and other stakeholders in order to add new definitions to the proposed rules and clarify other existing terms and phrases. However, there are a couple of terms and phrases in the proposed rules that Cannabis Legal Group strongly urges the MRA to clarify so that licensees, applicants, and other stakeholders are able to better navigate the regulatory requirements:

Definition of "Applicant" and the phrase "exercise control over or participate in the management" of the partnership/company

R 420.1 Definitions[1]

(1)(c) "Applicant" means a person who applies for a marihuana license, subject to paragraphs (i) and (ii):

(i) For purposes of this definition, an applicant includes a managerial employee of the applicant, a person holding a direct or indirect ownership interest of more than 10% in the applicant, and the following for each type of applicant:

(C) For a limited partnership and limited liability limited partnership: all general and limited partners, not including a limited partner holding a direct or indirect ownership interest of 10% or less **who does not exercise control over or participate in the management** of the partnership, and their spouses.

(D) For a limited liability company: all members and managers, not including a member holding a direct or indirect ownership interest of 10% or less **who does not exercise control over or participate in the management of the company**, and their spouses.

- **ISSUE**
  - The phrase "exercise control over or participate in the management" as it applies to the definition of "applicant" is not 100% clear and contains no

[1] For ease of reference, this definition is contained in 2019-67 LR, but the definition also appears in other proposed rule sets. Any changes or revisions made by the MRA to this definition should be incorporated throughout all proposed rule sets.

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- guiding principle or clarification, which may result in both under- and over-disclosure of an "applicant."
- In other words, on the one hand there are likely individuals and entities who have an ownership interest of 10% or less who "exercise control over or participate in the management" that have not been characterized as an "applicant." Licensees and applicants may take a liberal approach with this phrase in order to prevent characterizing an individual or entity as an "applicant."
- On the other hand, there are likely individuals and entities with an ownership interest of 10% or less who have been identified as an "applicant" even though they do not "exercise control over or participate in the management." Licensees and applicants may take a conservative approach with this phrase which may result in the unnecessary submission of a Supplemental Application for an individual or entity who does not meet the definition of "applicant."

- **SUGGESTION** – The MRA should determine precisely what the phrase "exercise control over or participate in the management" means in terms of who should be disclosed as an "applicant" and provide additional clarification/guidance so that there is no under- or over-disclosure of "applicants" on a license or application.

Definition of "Managerial Employee"

R 420.1 Definitions[2]

(1)(q) "Managerial employee" means those employees who have **the ability to control and direct the affairs of the marihuana business or have the ability to make policy concerning the marihuana business,** or both

- **ISSUE**
  - Similar to the issue identified above, the definition of "managerial employee" and the phrase "the ability to control and direct the affairs of the marihuana business or have the ability to make policy concerning the marihuana business" are not 100% clear and contains no guiding principle or clarification, which may result in both under- and over-disclosure of an "applicant."

[2] Similar to the definition of "applicant," this definition of "managerial employee" is contained in 2019-67 LR, but the definition also appears in other proposed rule sets. Any changes or revisions made by the MRA to this definition should be incorporated throughout all proposed rule sets.

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- In other words, on the one hand there are likely individuals who are employed by a licensee or applicant that have not been characterized as a "managerial employee." Licensees and applicants may take a liberal approach with this phrase in order to prevent characterizing an individual or entity as a "managerial employee."
- On the other hand, there are likely individuals who have been identified as a "managerial employee" even though they do not actually "have the ability to control and direct the affairs of the marihuana business or have the ability to make policy concerning the marihuana business." Licensees and applicants may take a conservative approach with this phrase which may result in the unnecessary submission of a Supplemental Application for an individual or entity who does not meet the definition of a "managerial employee."

- **SUGGESTION** – The MRA should determine precisely what the phrase "the ability to control and direct the affairs of the marihuana business or have the ability to make policy concerning the marihuana business" means in terms of who should be disclosed as an "applicant" and provide additional clarification/guidance so that there is no under- or over-disclosure of "applicants" on a license or application.

Definition of "Applicant" re: Spouses and Criminal History

The definition of "Applicant" generally requires that an individual's spouse submit a Supplemental Application.

- **ISSUE**
  - There are certain instances where an individual's spouse has a disqualifying felony within the past ten (10) years or a disqualifying misdemeanor conviction within the past five (5) years which prohibits the individual from being an "Applicant."
  - Cannabis Legal Group supports this requirement overall and agrees that spouses should be vetted.
  - However, we believe that the automatic disqualification of an individual based on his or her spouse's felony or misdemeanor conviction is discriminatory and would be better decided on a case-by-case basis.

- **SUGGESTION**
  - We strongly urge the MRA to implement a policy that does not punish an individual for his or her spouse's conviction.

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- While we understand that the primary purpose behind this requirement may be to prevent an ineligible individual from "swapping" ownership with his or her spouse, it also has the undesired effect of preventing otherwise eligible and suitable individuals from applying and obtaining a license.
- If an otherwise eligible and suitable individual has a spouse that has a disqualifying felony or misdemeanor conviction, the individual should be permitted to petition to the MRA to allow his or her ownership of the applicant company notwithstanding the spouse's disqualifying conviction.

Definition of "Commercial License or Certificate"

R 420.4 Application requirements; financial and criminal background

(9) Each applicant shall disclose any application or issuance of **any commercial license or certificate** issued in this state or any other jurisdiction that meets the requirements under the acts and these rules.

- **ISSUE**
  - There is no definition of what constitutes "any commercial license or certificate."
  - This results in under- and over-disclosure of licenses, permits, etc.
    - For example, in certain instances Cannabis Legal Group has assisted applicants who are a registered primary caregiver. This is not, by definition, a "commercial license or certificate" yet the applicant has been asked to include this information on Disclosure 6.

- **SUGGESTION**
  - Add language to the administrative rules, include more examples in the instruction book, or issue an advisory bulletin regarding what qualifies as "any commercial license or certificate" so that licensees and applicants are able to identify and correctly disclose any commercial licenses and certificates.

II. Calendar Days vs. Business Days

The MRA should insert language in the proposed rules to clarify the method upon which to calculate "days" (calendar vs. business). For example, R 420.24 specifically indicates that a temporary marihuana event application must be submitted not less than 90 calendar

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days before the first day of the temporary marihuana event. Additionally, R 420.305(11) provides that a laboratory must enter in test results within 3 business days of test completion.

However, the majority of instances where "days" are mentioned does not include whether they should be counted as "calendar" days or "business" days. This proposed change should be implemented in order to ensure that licensees and applicants are on the same page with the MRA regarding when application items, fees, etc. are due.

R 420.3

(3) The agency may request additional disclosures and documentation to be furnished to the agency. The applicant shall submit the information requested by the agency **within 5 days** pursuant to R. 420.5 or the application may be denied.

R 420.5

(4) If the agency identifies a deficiency in an application, the agency shall notify the applicant and the applicant shall submit the missing information or proof that the deficiency has been corrected to the agency **within 5 days** of the date the applicant received the deficiency notice.

(5) The failure of an applicant to correct a deficiency **within 5 days** of notification by the agency may result in the denial of the application. An applicant denied under this subrule is not barred from reapplying by submitting a new application and application fee.

R 420.6

(1) The agency shall issue a state license under the Michigan regulation and taxation of marihuana act to a qualified applicant whose application has been approved for issuance and who pays the required licensure or excess background investigation fees **within 10 days** of the state license being approved for issuance. Failure to pay the fees required under R 420.7 may result in a denial of state license.

R 420.7

(12) The agency shall not issue a marihuana license until a complete application is submitted, the fees required under these rules are paid, and the agency determines that the applicant is qualified to receive a marihuana license under the acts and these rules. An applicant must pay initial licensure fees **within 10 days** of approval of the marihuana license or **within 90 days** of a complete application being submitted, whichever date is first. An applicant must pay renewal fees upon submission of the application for renewal. Failure to pay the required fee may be grounds for the denial of a marihuana license in accordance with Rule 420.12.

R 420.12

(2)(e) The applicant failed to correct a deficiency **within 5 days** of notification by the agency in accordance with the acts and these rules.

R 420.13

(5) If a license renewal application for a license under the medical marihuana facilities licensing act is not submitted by the license expiration date, the license may be renewed **within 60 days** after its expiration date upon submission of the required application, payment of the required fees, and satisfaction of any renewal requirements. The licensee may continue to operate during the **60 days** after the license expiration date if the licensee submits the renewal application to the agency and complies with the other requirements for renewal.

(8) If the licensee does not request a hearing in writing **within 21 days** after service of the notice of nonrenewal, the notice of nonrenewal becomes the final order of the agency.

R 420.22

(11) An applicant shall pay the initial licensure fee for an excess grower license **within 10 days** of approval or **within 90 days** of a complete application being submitted, whichever date is first.

R 420.809

(3) The licensee must request a compliance conference or contested case hearing, or both, **within 21 days** of receipt of the formal

complaint. If the licensee does not respond, the agency shall request a contested case hearing.

III. Labor Peace Agreement Application Requirement

R 420.5

(6) The applicant shall attest, on a form provided by the agency and signed by a bona fide labor organization, that the applicant has entered into a labor peace agreement and will abide by the terms of the agreement. Copies of the labor peace agreements must be maintained and made available to the agency upon request

- **ISSUE**
  - While Cannabis Legal Group favors unions, this application requirement is too restrictive and prohibitive in the sense that it may allow bona fide labor organizations to wrongfully and unreasonably withhold entering into a labor peace agreement with an applicant.

- **SUGGESTION**
  - 1) Eliminate the labor peace agreement application requirement entirely
  - 2) Allow an application to be submitted and move forward in the application process without a signed labor peace agreement

IV. Testing for Mycotoxins

R 420.305

(3)(h) Under the medical marihuana facilities licensing act, mycotoxin screening if requested by the agency.

(19) Under the medical marihuana facilities licensing act, the agency may request mycotoxin testing. A marihuana sample with a value that exceeds the published acceptable level is considered to be a failed sample. A marihuana sample that is below the acceptable value is considered to be a passing sample.

- **ISSUE -** Mycotoxin screening should be required for both MMFLA/MRTMA.
- **SUGGESTION –** Add language requiring mycotoxin screening for MRTMA in addition to MMFLA

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V. Clarification on R 420.306

R 420.306

(3) A marihuana product is prohibited from being retested if a final test for chemical residue failed pursuant to these rules. If the amount of chemical residue found is not permissible by the agency, the marihuana product is ineligible for retesting and remediation, and the product must be destroyed. This subrule does not apply to marihuana product that has been obtained under a Resolution on Marijuana Product Access for Patients adopted by the medical marihuana licensing board.

- **ISSUE –** R 420.306 refers to the Resolution passed by the MMLB, but does not mention the new Advisory Bulletin promulgated by the MRA effective 3/1/2020. It is unclear whether this proposed rule would apply to the Advisory Bulletin.

- **SUGGESTION –** Add language to clarify whether the new Advisory Bulletin for caregiver sourcing of product is affected by this proposed rule

VI. Warnings and Citations

R 420.807 and R 420.808

- **ISSUE/SUGGESTION**
  - The proposed rules regarding warnings and citations are vague.
    - At a minimum, the proposed rules should indicate more precisely the definition of a "warning" and "citation" and its consequences, as well as a minimum burden of proof that must be satisfied in order for the MRA to issue a "warning" or a "citation" to a licensee.
  - R 420.808(7)'s 1-page response limit is too restrictive and does not afford licensees due process.
    - The page limit should be eliminated.

VII. Conclusion

Thank you for your consideration of these proposed rule changes and clarifications.

POLLICELLA TOMPKINS, PLLC

COMMENTS TO PROPOSED JOINT PERMANENT RULES FOR MEDICAL AND RECREATIONAL ADULT USE MARIJUANA FACILITIES

Delivery Business License

We oppose the addition of the Delivery Business License on numerous grounds:

Problems:

1. The Delivery Business License will be an unmanageable and unenforceable vehicle for the black market marijuana trade. There is no amount of verification, compliance or enforcement that can prevent, among other things, home delivery to minors, diversion, operation out of residential areas, and counterfeit and unsafe products being sold to unwitting consumers. It is not the answer to the social equity owner problem. The only successful cannabis delivery business is an App created by a California billionaire, which will create a lot of pizza-cannabis-fast food delivery drivers, not business owners.

Proposed Solution:

Do not adopt this rule.

Warnings, Citations, and Formal Complaints

Section: Disciplinary Proceedings, Rule 420.807-809

Problems:

1. There is no distinction between when a warning is issued and when a citation is issued. The rules use identical language for both.

There is no distinction between when a "warning" is issued and when a "citation" is issued with the way the rules are drafted right now. This is significant because a warning does not have a fine associated with it, is not made available to the public, and remains in the licensee's file for only 1 year, whereas a citation, as it is written now (which is quite different from how citations have been issued over the past year) has a fine associated with it, is made available to the public, and remains in the licensee's file for 5 years.

2. Citations can no longer be negotiated or settled. If they are not accepted, they will become a formal complaint.

It appears that the ability to negotiate citations has been removed from the rules. Under the proposed rules, if a licensee is issued a citation and MRA does not accept the citation as is, a formal complaint "**must**" be issued. The rules do not provide any avenue to request a compliance conference or negotiate a settlement for citations, which is the common practice in place right now when they are issued. For a "formal complaint," the rules expressly allow for negotiating a settlement with the agency or requesting a compliance conference. That language is omitted from the citation rule (Rule 420.808).

The way it is drafted right now leaves the MRA with significant discretion as to what violations should receive warnings as opposed to citations, and to which licensees should receive warnings as opposed to citations. Warnings and citations can be issued and applied inconsistently across the state and across licensees. Assuming the MRA does issue both warnings and citations, there is nothing in the current rules to establish when each is appropriate. One licensee may simply receive a warning for something that a different licensee, who has an identical violation, receives a citation that is also accompanied by a substantial fine and will put that licensee in a more serious position to potentially lose its license. This creates, at the very least, the potential for the appearance of favoritism and retaliation, and could allow the MRA to effectively remove whomever it pleases from the industry through using the excuse of numerous citations to revoke a license, or to drown a licensee in fines. While the statutes do cap the maximum fines that can be imposed for license violations, it is a per day cap, and the case law in other regulated industries suggests that the courts will support an agency fining a licensee the maximum fine per day, for each day the licensee is out of compliance.

Further, there is nothing preventing the MRA from skipping over the issuance of a warning entirely and going directly to issuing citations, which are accompanied by a fine that is now seemingly non-negotiable.

Proposed Changes:

1. The first time something is found to be out of compliance, a warning is issued. The second time the same issue is found to be out of compliance at a subsequent inspection, it is a citation that is issued, etc.
2. Create a list of serious offense as opposed to minor errors or oversights (for example: having large jars of distillate not logged in Metrc being a serious offense, having a safety compliance employee not date the visitors log when she signs in a minor offense). Minor offenses receive warnings where it is clear it was an oversight or an error and as a first-time offense. (see below)
3. Place some kind of limitation on double jeopardy. Right now, licensees are receiving numerous citations for one single violation because the rules are very repetitive. (Example – having several large jars of distillate not logged in Metrc was citated as 4 separate violations because there are 4 separate places where the rules prohibit it) If the rules are repetitive, a licensee can only be fined once per instance.

Proposed new definitions:

"Violation" means a single event or occurrence which violates one or more of the rules. In situations where numbers rules relate to a single event or occurrence, only one single violation shall be issued per occurrence.

"Violation Affecting Safety or Health" means a violation that generally has an immediate impact on the health, safety and welfare of the public at large. This category of violations are the most severe, and may include: selling to person under the age of 21; medical marihuana sales to a non-patient; advertising to a minor; marihuana purchased from an unauthorized source; marihuana sold to an unauthorized source; refusal to allow an inspection and/or obstructing a law enforcement officer from performing their official duties; or failure to track marihuana in METRC.

Rule 420.807 Warning.
Rule 7. (1) The agency may issue a warning to a licensee if the agency determines through an investigation that the licensee violated the acts, these rules, or an order.
(2) The agency shall issue a warning to a licensee who has violated the act, rules, or an order, provided it is the first offense of and is not classified as a violation affecting safety or health.
(3) A warning must be served on a licensee by certified mail, return receipt requested, or served in person by a representative of the agency.
(4) A warning must remain in the licensee's file for one year from the date of service.
(5) A warning may be considered in future licensing actions. Continued or repeated non-compliance or repeated warnings for the same violation may result in further action, including the imposition of fines or other sanctions against a licensee, or both.

Rule 420.808 Citation.
Rule 8. (1) The agency may issue a citation to a licensee if the agency determines through an investigation that the licensee violated the acts, these rules, or an order, and the licensee has already received a warning for the violation, when applicable.
(2) A citation must be served on a licensee by certified mail, return receipt requested, or served in person by a representative of the agency.
(3) A citation must contain all of the following:
(a) The date of the citation.
(b) The name and title of the individual issuing the citation.
(c) The name and license number of the licensee.

(d) A brief description of the conduct or conditions that are considered violations of the acts, these rules, or orders.

(e) A reference to the section of the acts, these rules, or orders that the licensee has allegedly violated.

(f) The penalties or actions required for compliance.

(g) A signature line for the licensee to agree and accept the terms and conditions.

(h) A timeframe to agree and accept the terms and conditions.

(4) A licensee shall have a specified time in which to notify the agency in writing that the licensee accepts the conditions set forth in the citation.

(5) If the licensee accepts the conditions set forth in the citation, the licensee, within the listed time frame after receiving the citation, shall sign the citation and return it to the agency along with any fine or other material required to be submitted by the terms of the citation. The citation and accompanying material must be placed in the licensee's file for 5 calendar years.

(6) A citation issued under this section will be published to the public.

(7) A licensee may provide a 1-page response to the citation. This response must be placed in the licensee's file and published.

(8) If the licensee does not accept the citation a formal complaint must be issued.

Rule 420.809 Formal complaint.

Rule 9. (1) After an investigation has been conducted, the agency shall serve the formal complaint on the licensee by certified mail, return receipt requested, or in person by a representative of the agency.

(2) The licensee may do either of the following:

(a) Meet with the agency to negotiate a settlement of the matter, or demonstrate compliance prior to holding a contested case hearing, as required by section 92 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.292.

(b) Proceed to a contested case hearing as set forth in these rules and section 71 of the administrative procedures act of 1969, 1969 PA 306, MCL 24.271.

(3) The licensee must request a compliance conference or contested case hearing, or both, within 21 days of receipt of the formal complaint. If the licensee does not respond, the agency shall request a contested case hearing.

(4) If the licensee agrees and accepts the terms negotiated at the compliance conference, the licensee and the agency shall execute a stipulation.

(5) An executed stipulation is subject to review and approval by the executive director of the agency. If the stipulation is approved, the agency shall issue a consent order. If the stipulation is not approved, a compliance conference or a contested case hearing shall be scheduled. The consent order shall be published.

(6) If a licensee does not comply with the terms of a signed and fully executed stipulation and consent order within the time frame listed in the consent order, the licensee's license is suspended until full compliance is demonstrated.

(7) If a compliance conference is not held or does not result in a settlement of a compliance action, a contested case hearing shall be held, pursuant to these rules and the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to MCL 24.328.

Notes:

In creating the definition for "Violation Affecting Safety or Health" we used several other states as a guide to determine what violates are the most severe. Almost all of them cited the same violations, so there do appear to be pretty standard violations other states agree are the most severe and relate to public health, safety, and welfare. Because of the way the MMFLA, MRTMA, and the APA are written, the agency does need to have some authority over when the

public health, safety, and welfare are at risk. However, other states also have similar constraints. By creating a definition with specific examples of situations in which there a public health, safety, and welfare concern, it does place some restrictions on inequitable enforcement, and provides the industry businesses with some predictability.

We also attached Washington's statute and Colorado's statute as examples for reference.

Language omitted "at the time of application" and additional supporting invalid rules.

Sections: Licenses, Rule 420.6(2)(g)

Problem:

The MRA eliminated the phrase "at the time of application" in its rule to deny an application due to a municipal ordinance. They also included the phrase "The agency determines…" which appears to add discretion for the agency and effectively alters the meaning of the statute in its application of the rule.

MCL 333.27959(3) "[T]he department **shall approve** a state license application and issue a state license **if** . . . the municipality . . . does not notify the department that the proposed marihuana establishment is not in compliance with an ordinance. . . in effect at the time of application."

Proposed Rule R420.6(2)(g)

"An applicant is **ineligible** to receive a state license **if** . . . the agency determines the municipality in which the applicant's proposed marihuana establishment will operate has adopted an ordinance. . ."

The way the rule was drafted has effectively subverted the meaning of the statute, and conflicts with the statutory language. In the statute, the burden is on the municipality to reach out to the MRA if they have an ordinance that was in effect at the time of application. It is not written to be a qualification for licensure, but rather something that can stop a license from being issued.

The way the rules are written place the burden on the MRA to determine whether or not the municipality has enacted an ordinance. In this context, it is written as a qualification for licensure that requires affirmative action on the part of the MRA and the municipality. Because MRTMA is an opt-out statute, the presumption for the MRA should be that every municipality is opted in until they are told otherwise. Therefore, there is no statutory authority for the MRA to be confirming the status or existence of an ordinance relating to marihuana in each municipality.

Proposed change:

R 420.6(2)

(g) The agency is notified by municipality in which the applicant's proposed marihuana establishment will operate that: i) the municipality has adopted an ordinance that prohibits marihuana establishments that was in effect at the time of application; or ii) the proposed establishment is noncompliant with an ordinance adopted by the municipality under section 6 of the Michigan regulation and taxation of marihuana act, MCL 333.27956, and in effect at the time of application.

Reinsert language in rules that was removed, and remove all rules inconsistent with Section 9.3 of the MRTMA Statute.

Advertising and Marketing

R 420.507(4)

(4) Marihuana product must not be advertised or marketed to members of the public unless the person advertising the product has reliable evidence that no more than 30 percent of the audience or readership for the television program, radio program, internet website, or print publication, is reasonably expected to be under the age listed in subrules (7) and (8) of this rule. Any marihuana product advertised or marketed under this rule must include the warnings listed in R 420.504(1)(k).

Problem:

Provisioning centers have been getting in trouble for advertisements with brand logos and being told the brands are products. Many brands make multiple products, so punishing businesses for advertising the brands makes the term marijuana product too broad. Moreover, marijuana manufacturing and retail facilities often have no control over brand advertising, as they do now own the brand, but are merely licensees.

Proposed language:

This section needs an additional (i) that says,

“marihuana sales locations may advertise certain brands for sale available at their location and this will not be construed as advertising marihuana products.”

Or

(1) A marihuana product may only be advertised or marketed in a way that complies with all municipal ordinances, state law, and these rules that regulate signs and advertising.