PRINCE LOBEL

BY HAND

February 15, 2018

Cannabis Control Commission
Commonwealth of Massachusetts
Steven J. Hoffman, Chairman
101 Federal Street
13th Floor
Boston MA 02110

Re: Comments to the Cannabis Control Commission's draft regulations adopted for the purpose of implementing the adult use of marijuana in Massachusetts, filed with the Commonwealth of Massachusetts' Secretary of State's Office as 935 CMR 500.000, on December 21, 2017 (the "Proposed Regulations").

Dear Chairman Hoffman:

For ourselves and on behalf of our Cannabis clients, we want to thank you and your fellow members of the Commonwealth's Cannabis Control Commission (the "Commission") Commissioners for the thorough and careful efforts you have made in a short period time to fully implement G. L. c. 94G while listening to a great variety of constituencies.

After a detailed review of the Proposed Regulations, we welcome the opportunity to share the following comments from the Corporate, Permitting, Real Estate, Tax, Environmental, and Insurance specialists on our Cannabis Team. {Note, unless otherwise stated, all references to "Sections" are to the Sections of the Proposed Regulations, 935 CMR 500.000 et seq.).

I. APPLICATIONS AND APPROVALS FROM THE COMMISSION:

1. Zoning Certification. The opening language of each of Sections 500.101 (A)(1)(h) and B.(2)(g) requires, that the application "... "include but may not be limited to a [zoning] certification from the municipality in which the Marijuana Establishment will be located.

   *We believe that the phrase "but may not be limited to certification from the municipality in which the Marijuana Establishment will be located." should be replaced with "**certification submitted by the Applicant describing how the Applicant has ensured, or will ensure, that the proposed Marijuana Establishment is in compliance with local codes, ordinances, and bylaws**" accompanied by an associated attestation. This is the standard set forth in the Medical Marijuana Siting Profile Application and has been effective and efficient for that process.*

2. 60 Day Requirement. Sections 500.101 (A)(1)(h) and B.(2)(g) require:

   "(i) The Commission shall, as part of its review of the application, request that the municipality respond within 60 days of the date of correspondence from the Commission seeking confirmation that the applicant's proposed Marijuana Establishment complies with local bylaws or ordinance ..."

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"(ii) The Commission shall consider certification submitted by the applicant to be sufficient evidence of compliance with municipal bylaws or ordinances unless it receives a response in writing from the municipality within 60 days stating that the applicant is not in compliance with local law."

(A) We believe that the 60 day time period in both (i) and (ii) is unnecessarily long, and that there is no need for Applicants governed by 500.101(B)(2)(g) to be required to wait the 60 days, especially those that, as RMDs, have already provided zoning by-law compliance. To wait 60 days may delay RMD's and cause openings to occur past July 1, 2018.

(B) We also suggest that in all events, the requirement in each of 500.101(A)(1)(h)(ii) and (B)(2)(g)(ii) specify that the Applicant's certification *must only meet the standard recited at item 1 above.*

*(C) Finally, we suggest that the Applicants be allowed to demonstrate that the Marijuana Establishment is either in compliance with local zoning ordinances "**or will be in compliance with local zoning ordinances upon the issuance of appropriate approvals of the type required by the applicable zoning bylaw on terms consistent with the Statute and these Regulations**."*

3. Outreach Hearings. Sections 500.101(A)(1)(g) and (B)(2)(e) each require "Documentation that the applicant has conducted a community outreach hearing *consistent with the Commission's Guidance for License Applicants on Community Outreach* within the six months prior to the application."

The Commission should affirmatively provide that the required Community Outreach Hearings are allowed to commence as soon as the Proposed Regulations are in effect.

4. Transfers and Pledges Of Licenses. Section 500.103 (B)(2) provides "A provisional or final license may not be assigned or transferred without prior Commission approval." Similarly, Section 500.104(B) requires that where "an owner acquires or increases to 10% or more of the equity, the Marijuana Establishment shall submit a request for such change to the Commission and shall pay the appropriate fee, if any. No such change shall be permitted until approved by the Commission."

We suggest that a separate expedited process such as that described in 500.104(E) should be created and sufficient to permit a transfer of a license to a licensee's wholly owned subsidiary or another entity wholly owned by the same individuals or entities and in the same proportion as the licensee. This would render such clerical changes to be allowed upon notice to, not approval by, the Commission. These transfers are part of the ordinary and appropriate development of additional licenses by a licensee, but structured for appropriate limitations of liability.

We also suggest that the Commission formally confirm that that pledges of a license are permitted, and establish the process for recording a notice of pledges. The addition of secured party should be accomplished by notice (the secured party would be a "close associate"), but then subject

to the full approval process only if the license is to be taken or sold by the secured party.

5. Controlling Person. The use of "Controlling Person" is overly broad: Under the statute and these Proposed Regulations, "'Controlling Person' means an officer, board member or other individual who has a financial or voting interest of 10 per cent or greater in a Marijuana Establishment." However, in Section 500.050(A)(2), the Commission alters its own definition and declares "No individual ***or entity*** shall be a controlling person over more than 3 licenses in a particular class of license".

   We believe that the addition of the phrase "or entity" not only unreasonably expands the prohibition permitted by the statute, but it also will interfere with the growth of the industry. There are few sources of funding for Marijuana Establishments, and Marijuana Establishments with separate officers and directors are not always working in concert. At the least, the prohibition should only extend to the entities that have the right to control the decision-making of the Marijuana Establishment, either by possessing (i) actual control of more than 50% of the voting equity or the power to appoint more than 50% of the directors or (ii) contract rights to control or (iii) rights to veto significant events. Each of these circumstances more accurately captures the intent of the Commission and is the focus of the defined term "Close Associate".

6. Insurance and Escrows. Section 500.105(J) provides:

   "(1) A Marijuana Establishment shall obtain and maintain general liability insurance coverage ....

   (2) A Marijuana Establishment that documents an inability to obtain minimum liability insurance coverage as required by 935 CMR 500.105(J)(1) may place ***in escrow a sum of no less than $250,000*** or such other amount approved by the Commission, to be expended for coverage of liabilities."

   This requirement in clause (2) makes entry into Massachusetts' Marijuana Industry more costly and difficult, especially given that most insurance contracts are currently deficient or ineffective, and banking relationships are limited. Some or all of these may impact the options available in the future. We suggest that the requirement of escrow should be expanded to permit bonding, letters of credit, and pledges of real property or other assets.

7. Changes by Notice. Section 500.104(B) and (C) require notice to the Commission and Commission affirmative approval for:

   (A) ... any modification, remodeling, expansion, reduction, or other physical, non-cosmetic alteration of the Marijuana Establishments, ... ; and

   (B) ... changing the name, of the Marijuana Establishments

   We believe that the threat of abuse or violation is such that Notice to the Commission should be sufficient for each of these changes, provided each

is accomplished in accordance with relevant law (Building Codes, name changes filed with the Secretary of State's office, etc.), unless the Commission affirmatively requests delay within 10 days of the filing.

8. Dismantling Bond; Part 1. Section 500.101(A)(1)(c) requires "Documentation of a bond or other resources held in an escrow account in an amount sufficient to adequately support the dismantling and winding down of the Marijuana Establishment."

*This requirement is arbitrary as to amount and creates an unneeded drain on the limited resources of the Applicant. The Commission must make clear that the dismantling only refers to the disposal of inventory required by Section 500.105(P) (landlords likely will object to any further efforts). The phrase "**as required by 935 CMR 500.105(P).**" should be added to the end of the quoted sentence of Section 500.101(A)(1)(c).*

9. Dismantling Bond; Part 2. Section 500.105(P)(1) requires *that "*Prior to commencing operations, a Marijuana Establishment shall provide proof of having obtained a surety bond in an amount equal to its licensure fee payable to the Marijuana Regulation Fund to ensure payment of the cost incurred for the destruction of cannabis goods necessitated by a violation of the Act or 935 CMR 500.000 or the cessation of operation of the Marijuana Establishment." The license fees are a maximum of $5,000 (or more for Tier IV facilities). Conversely, Section 500.105(P)(3) requires that If the Marijuana Establishment is unable to secure a surety bond as required by Section 500.105(P) it must instead "place in escrow no less than $250,000 or such other amount approved by the Commission, to be expended for coverage of liabilities."

*A. In Section 500.105(P)(1), the phrase "equal to its license fee" should be amended by adding **"under Section 500.005(A)**.*

B. "Marijuana Regulation Fund" is not defined in these Regulations.

C. We believe that the amounts in Section 500.105(P)(1) and 500.105(P)(3) should both be $5,000: why must a bond only be for $5,000, but actual cash must be $250,000?

II. MUNICIPALITIES:

10. Host Community Agreement Timeline. Sections 500.101(A)(f) and 500.101(B)(2)(d) each require "Documentation in the form of a single-page certification signed by the contracting authorities for the municipality and applicant evidencing that the applicant for licensure and host municipality in which the address of the Adult Use Marijuana Establishment is located have executed a host community agreement".

We recommend that the Municipality and Applicant both be expected to have executed the host community agreement within 30 days of the later of (i) a formal request to commence the negotiations of such agreement by either party or (ii) the formal request by Applicant for siting in that Municipality.

11. Local Compliance. Section 500.170(A) requires "A Marijuana Establishment and other registered persons [to] comply with all local rules, regulations, ordinances, and bylaws."

    Based on the experience of this office, the provisions should assure that all such "local rules, regulations, ordinances, and bylaws that are not in conflict with the regulations herein."

12. Impact Fees. MGL Ch. 94G, Section 3(d) provides: "A marijuana establishment or a medical marijuana treatment center seeking to operate or continue to operate in a municipality which permits such operation shall execute an agreement with the host community setting forth the conditions to have a marijuana establishment or medical marijuana treatment center located within the host community which shall include, but not be limited to, all stipulations of responsibilities between the host community and the marijuana establishment or a medical marijuana treatment center. An agreement between a marijuana establishment or a medical marijuana treatment center and a host community may include a community impact fee for the host community; provided, however, that the community impact fee shall be reasonably related to the costs imposed upon the municipality by the operation of the marijuana establishment or medical marijuana treatment center and shall not amount to more than 3 per cent of the gross sales of the marijuana establishment or medical marijuana treatment center or be effective for longer than 5 years."

    A. The Commission must issue additional Regulations regarding the Host Community Agreement and the permitted impact fee and other fees (see 500.107(B)) to alleviate existing confusion.

    B. Some Municipalities with cultivation locations serving multiple retail locations in other Municipalities are attempting to extend the 3% fee to all sales by all of the retail Marijuana Establishments associated with that cultivation center. This results in the Marijuana Establishment paying 3% two or three times on the same sales: once in the municipality that is hosting the cultivation center, once to municipality that is hosting the production facility and once to the municipality that is hosting the dispensary. We believe that this practice should be forbidden. In an integrated environment, it is true that the cultivation center may have no sales, but the impact fee should be based on costs imposed on the municipality by the operation of the cultivation center – not the gross proceeds received in other locations for which the Marijuana Establishment must also pay that town.

III. OPERATIONAL ISSUES:

13. Growing Restrictions: Section 500.050(B)(2) requires that "If a marijuana cultivator is applying to expand production, it must demonstrate that it has sold 85% of its product consistently over the six months preceding the application for expanded production."

    We do not understand why this is a requirement, and do not believe it should be, as a new Applicant may start in any Tier. This also may slow and perhaps prevent a cultivator from agreeing to supply a new customer

because it is not yet at 85%, but is going to need 110%. We suggest that the Commission: (i) make clear that demonstration is only needed to change tiers; (ii) lower the percentage – if it is necessary at all – to account for seasonal and other variations that may artificially impact the market, (iii) reduce the six month period to the shorter of six months or the period that the marijuana cultivator has been fully operational.

14. Inventory Restrictions. Section 500.105(H)(1) provides "A Marijuana Establishment must limit its inventory of seeds, plants, and usable marijuana to reflect the projected needs of consumers in its market area."

    We believe this provision is arbitrary and is impossible to properly enforce, especially in the initial years. The definition of "market area" in a new industry is never well known. Certainly not for a cultivation center which will be impacted by where competitors and dispensaries are located. Is market area a geographic region, a customer list or an advertising radius? Must the market area be identified to the Commission, thus perhaps revealing marketing plans? In addition, the Proposed Regulation does not make clear how often must the limit be measured. Needs may differ by the day of the week. Finally, this provision may lead to unequal enforcement among retail sites in neighboring towns, as local police and building inspectors may have differing views as to the projected needs of consumers in the market area.

15. Transportation. Section 500.105(M)(4)(a) and (b) require that Marijuana and Marijuana Products be transported in a secure, locked storage compartment that is a part of the vehicle transporting the Marijuana or Marijuana Products, and that the storage compartment must be sufficiently secure that it cannot be easily removed.

    The industry will needs greater guidance regarding the types of efforts required to secure the compartment(s) to the vehicle.

16. Reporting In. Sections 500.105(M)(5)(g) and 500.105(N)(7)(g) each provide that: "The Marijuana Establishment Agents transporting marijuana or Marijuana Products shall contact the Marijuana Establishment when stopping at and leaving any scheduled location, and regularly throughout the trip, at least every 30 minutes."

    Given the other requirements of GPS and secure containment, the 30 minute check-in seems unnecessary and the Commission's Proposed Regulation leaves no room for human error. At most, the timing should be no more than once during each clock hour.

IV. VIRTUAL SEPARATION:

17. Tracking. Section 500.105(H)(6) provides that "A Marijuana Establishment that is cultivating, processing or selling marijuana and marijuana products for medical use as well as marijuana and marijuana products for adult use must create virtual separation of the products through tracking methodology approved by the Commission under 935 CMR 500."

A. *We believe that the Commission should make clear that the tracking is for security reasons only, and that vertically integrated or other Marijuana Establishments may change the designations from Medical to Adult Use and Adult Use to Medical as it deems necessary, as long as the conversion is apparent in the tracking system and all other requirements for the second use have been met prior to conversion.*

B. While the Commission has made clear that Cannabis must be virtually separated throughout the transportation and sale process, the Commission should allow locations licensed for both medical and Adult Use sales to use inventory interchangeably as long as the appropriate quality and other standards are met by the Products. To be clear, this is not to suggest that medical patients would receive anything other than dosages matching their prescriptions, nor would Adult Use purchasers receive anything other than what is permitted in a sale to them. This will require a note of the manner of sale in the record keeping, but that ministerial effort will help both those who are concerned about the "safety net" for prescription holders, and those that fear that there will be no Adult Use product on July 1st or from time to time thereafter. Adopting this approach may be the only way the Commission would be able to fulfill its mandate to have Adult Use Product available on July 1st.

18. Physical Separation. Section 500.140 (H) requires that "A marijuana retailer that is co-located with a medical marijuana treatment center ... physically separate marijuana and marijuana products for medical use from marijuana for adult use within the sales area. There shall be a physical barrier that, in the opinion of the Commission, adequately separates sales of marijuana and marijuana products for medical use from marijuana for adult use within the sales area."

The industry will require more specific regulations regarding the separation of sales. Please confirm that separate doors or other permanent separations are not required, but rather separated customer lines are sufficient. Single Point of Sales machines should be permitted as long as they have the ability to separate sets of records.

19. Data Privacy. Section 500.105(I)(5)(d) requires that "Sales records that indicate the name of the registered qualifying patient or personal caregiver to whom marijuana has been dispensed, including the quantity, form, and cost .."

A. The quoted language seems to conflict with MGL Ch. 94G, Section 4(c)(2): "Regulations made pursuant to this section shall not ... require a customer to provide a marijuana retailer with identifying information other than identification to determine the customer's age and shall not require the marijuana retailer to acquire or record personal information about customers other than information typically required in a retail transaction;"

*B. We also believe that even if this information may be properly recorded, federal and international Data Privacy laws, and especially HIPPA requirements, may require earlier destruction of this information than the Proposed Regulations allow. We suggest that the sentence be amended by adding, "**if and to the extent not prohibited by federal law.**"*

V. DEFINITIONS:

20. Existing Definition:

Marijuana Establishment is defined as "a marijuana cultivator, independent testing laboratory, marijuana product manufacturer, marijuana retailer or any other type of licensed marijuana-related business."

*This definition of Marijuana Establishment includes RMDs, but we believe that is not always the Commission's intent. In some instances, the particular regulation cannot or should not apply to RMDs. The definition should exclude RMDs, and the individual sections amended to refer to "**Marijuana Establishments and RMDs**" when appropriate.*

21. New Definitions Needed:

(A) "Ceases To Operate". Sections 500.501(B)(3) and 500.415 both use the phrase "ceases to operate."

The Commission should clarify at what point a Licensee has Ceased To Operate. We suggest that the Commission define the term as:

*"**Ceases to Operate means a permanent closure of a Marijuana Establishment for a period greater than 60 days, exclusive of closures for ordinary holidays, vacation periods, any period of alterations requiring the issuance of a building permit, or other closure with the intent to reopen.**"*

(B) "Transfer/Assign/Deliver/Sell". The phrases "Transfer" (used 20 times), "Deliver" (used 82 times), Assign (used 12 times) and Sale (used_66 times) are used throughout the Proposed Regulations.

A distinction should be made among the transfer of legal title between organizations, the physical act of delivery, and a "sale" which would be a transfer for consideration. Section 500.150 uses all three: "a marijuana retailer may not deliver, sell or otherwise transfer an Edible MIP." *Confusion is created. For example: in Section 500.415 (Void Marijuana Establishment License) the use of the word "transfer" makes it unclear whether the provision addresses a transfer to a new owner, a transfer to a new operator or a transfer to a new address:* "A Marijuana Establishment license is void if the Marijuana Establishment transfers its location without Commission approval ....". *Other provisions capture the same concept with word "assign" (See e.g., Section 500.450(E)).*

VI. OTHER COMMENTS:

22. Charter Documents. Sections 500.101 (A)(3) and (B)(5) both recite that "To be considered for licensure as an Adult Use Marijuana Establishment, each ... licensee applicant shall submit ... (a) Detailed information regarding its business registration with

the Commonwealth, including the legal name, a copy of the articles of organization and bylaws."

The provision should be supplemented by providing for the alternative forms of organization; for Limited Liability Companies: Certificate of Organization, Operating Agreements and/or Members' Agreements; for Limited Partnerships: the Limited Partnership Certificate and Partnership Agreements.

23. Radius. Sections 500.101 (A)(1)(h) and B.(2)(g) properly require a confirmation that the Applicant's 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 ...., but 500.110(C) provides that if no local requirements exist, then Marijuana Establishment shall not be sited within a radius of 500 feet of a public or private school, daycare center, or any facility in which children commonly congregate.

*(A) We believe that Section 500.110(C) must also be limited to "not within 500 feet of a pre-existing public or private school providing education in kindergarten or grades 1 through 12', DELETING the phrase "**..., daycare center, or any facility in which children commonly congregate**".*

(B) *We also believe that all of these sections should provide (as is adopted in Section 500.110(C)) that the "**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.**"*

(C) Finally, we note that 105 CMR 725.110(A)(14) also continues to use the now erroneous "daycare center, or any facility in which children commonly congregate" restriction without statutory mandate. Since there is no policy argument that suggests that the medical dispensaries should be more restricted than the Adult Use facilities, this regulation must also be amended to be:

> *"**is not within 500 feet of a pre-existing public or private school providing education in kindergarten or grades 1 through 12. The "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.**"*

24. In Section 500.105 (L)(3)(a): the word "Incineration" should be replaced with "Thermal destruction".

This amendment will leave open the possibility for waste to be diverted to a waste-to-energy facility, which can yield multiple benefits, including waste and reduction.

25. Cross References are wrong in the following (each should be to Section 500.105(J)):

500.101 (A)(3)(e) A description of the Marijuana Establishment's plan to obtain a liability insurance policy or otherwise meet the requirements of 935 CMR 500.105(I);

500.101 (B)(5)(f) A description of the Marijuana Establishment's plan to obtain a liability insurance policy or otherwise meet the requirements of 935 CMR 500.105(Q);

26. The multiple references to "RMD" in Section 500.105(K) should each be replaced with "**Marijuana Establishment.**"

At the hearings and in the press, two additional issues were discussed at length. Our thoughts on those are:

Delivery Only Licenses. The issue of deliveries from other than retail locations presents a significant disconnect from the model used in the statute and throughout the rest of the Proposed Regulations. It reduces the demand, and thus the viability of every "brick and mortar" retailer. Additionally there are many questions that must be addressed (e.g., how far must the delivery customer remain from the vehicle to avoid being a security risk?). Politically, the availability of delivery services will be another argument against approval in many Municipalities, as opponents will be able to point to the availability of "out of town" delivery services. In our view, if deliveries are to be made by organizations not under the common control of a "brick and mortar" location, then those deliveries must be limited to those communities that do not have any retail locations.

Environmental Concerns. The Commission is required to regulate the energy and environmental impacts of the state's cannabis sector. We have reviewed the comments of the Executive Office of Energy and Environmental Affairs concerning energy and environmental standards, and those of the Sustainable Cannabis Cultivation and Manufacturing Alliance. While we agree that standards concerning energy use in the cannabis sector should be implemented, we do not agree that these standards must be met prior to initial licensure, which only serves to put additional roadblocks in place to obtaining initial licenses. Instead, we suggest that licenses for cannabis facilities contain a certification by the operators that the facilities are or will be designed and equipped to comply with the Commission's energy and environmental standards.

We hope this is helpful and ask the Commission to strongly consider each of these comments.

Sincerely,

Prince Lobel Tye LP

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