



The Commonwealth of Massachusetts
Executive Office of Public Safety and
Security

One Ashburton Place, Room 2133
Boston, Massachusetts 02108

Tel: (617) 727-7775

TTY Tel: (617) 727-6618

Fax: (617) 727-4764

www.mass.gov/eops

CHARLES D. BAKER
Governor

KARYN E. POLITO
Lt. Governor

DANIEL BENNETT
Secretary

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

Dear Chairman Hoffman and Commissioners:

The Executive Office of Public Safety and Security is submitting this letter to express the public safety concerns raised by our review of the Commission's draft regulations for oversight of adult use marijuana in the Commonwealth.

The large-scale, commercial production and sale of marijuana is entirely new territory for the Commonwealth of Massachusetts. While the Commission is charged with a clear mandate from the voters and the Legislature to implement a lawful market for adult use marijuana, the project must be carried out with proper consideration of the increased risks that wide-scale production and consumption of marijuana present to public safety. It is incumbent upon all Commonwealth agencies charged with protecting the health, safety, and well-being of the public to proceed carefully and to minimize those risks where possible.

There are three primary public safety challenges raised by the expansion of legalized marijuana use.

- First, a likely surge in the number of motorists on public roadways driving while under the influence of marijuana due to the widespread availability and increased consumption of marijuana.
- Second, an increase in the use of marijuana by persons under 21 as a result of wider availability.
- Third, a risk of significant black market marijuana transactions arising from the combination of a dramatic increase in production, loosened controls, and increased opportunities for diversion.

We believe these are serious public safety concerns that the Commission and law enforcement agencies will unavoidably confront as a consequence of the legalization and commercial marketing of adult use marijuana. The challenges are likely to be most serious,

however, in the early days of this newly legalized market, when the agencies responsible for oversight and enforcement have no practical experience and few models to consult to carry out new responsibilities.

Accordingly, we are concerned that the Commission's proposed regulations take an aggressive approach that goes beyond what is required to implement the requirements of Chapter 94G, §§ 1-21. We believe that the difficulties of safely administering the adult use marijuana market in the near term will be multiplied by the proposed licensing of social consumption establishments, mixed-use social consumption establishments, and home delivery retail services. These license categories are not mandated by Chapter 94G, and their inclusion in the Commission's initial regulatory scheme increases the severity of the three primary risks to public safety that will attend the legalization of adult use marijuana in the Commonwealth. In addition, we believe that the suitability standards for Establishment Agents in the draft regulations unwisely disregard prior felony convictions for violent crimes and major drug trafficking offenses and that a proper consideration for public safety requires that these standards be reconsidered.

1. Impaired Operation of Motor Vehicles

We are concerned that the decision to authorize the operation of marijuana social consumption establishments increases the risks to the public posed by motorists intoxicated due to marijuana consumption. No other State has expanded adult use marijuana to license facilities that serve marijuana products for consumption on-site, so the Commission is staking out altogether new ground with this innovation. Our concerns are compounded by the Commission's proposal to authorize this license class at the very moment that public safety agencies will already be facing increased challenges from drivers operating while intoxicated due to the general increase in the availability of marijuana.

Colorado's experience with impaired motor vehicle operation—even without social consumption establishments—provides an instructive example. Adult use marijuana was legalized in Colorado in 2012. According to the National Highway Traffic Safety Administration's Fatality Analysis Reporting System, the number of fatal crashes in Colorado increased 25 percent from 2013 to 2016.¹ The number of drivers involved in fatal crashes who tested positive for marijuana jumped 145 percent during that same period.² The Colorado experience is borne out in a report published by the National Institutes of Health, which finds that the risk of being involved in a motor vehicle accident doubles when a driver has consumed marijuana.³

¹ National Highway Traffic Safety Administration's National Center for Statistics and Analysis Motor Vehicle Traffic Crash Data Resource Page: <https://crashstats.nhtsa.dot.gov/#/>

² David Migoya, *Exclusive: Traffic fatalities linked to marijuana are up sharply in Colorado. Is legalization to blame?*, The Denver Post, (August 25, 2017) <https://www.denverpost.com/2017/08/25/colorado-marijuana-traffic-fatalities/>

³ Rebecca Hartman and Marilyn Huestis, *Cannabis Effects on Driving Skills*, Clinical Chemistry, (February 2013) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3836260/>

The introduction of social consumption establishments will inevitably result in an increase in the incidence of persons operating motor vehicles while under the influence of marijuana. The sole purpose of social consumption establishments, after all, is to encourage out-of-home consumption of marijuana. Draft regulation 935 CMR 500.145(E)(2) removes any doubt on that point by requiring that a patron of a social consumption establishment actually consume any marijuana purchased on the premises or forfeit it upon leaving. Meanwhile, consumers have limited understanding about the risks of marijuana intoxication and impaired driving.

We do not believe that there are adequate safeguards in the regulations or available to law enforcement generally to address the increased danger of impaired operation that social consumption establishments raise. As the Commission is aware, there is currently no technology approved by the Massachusetts courts that, in a manner similar to an alcohol breathalyzer, would allow a police officer to measure a motorist's level of intoxication from the effects of marijuana. See Commonwealth v. Gerhardt, 477 Mass. 775 (2017).

Draft regulation 935 CMR 500.145 gestures toward addressing the problem of impaired driving by requiring social use establishments to develop written policies that will prevent patrons from being over-served and ensure that intoxicated patrons are connected to third-party transportation. This merely creates a set of obligations without identifying a meaningful response. The lack of any broad, public understanding of the nature of marijuana intoxication, once again, precludes reliance on the practices that bars and restaurants have long relied on to monitor alcohol intoxication in serving patrons. In any case, the Commission anticipates that mixed-use social consumption establishments will mostly involve small retail businesses—theaters, yoga studios, bakeries, cafes, and the like—with absolutely no experience in serving intoxicants of any kind. It is especially unreasonable to expect that these kinds of operators, with all the other difficulties involved with a determination of intoxication, will be able to recognize patrons who have been over-served and should not be operating a motor vehicle.

2. Access to Marijuana by Persons Under 21

Several elements of the draft regulations unnecessarily increase the likelihood that persons under age 21 will be exposed to and consume marijuana. The introduction of social consumption establishments, by advertising public consumption in marijuana bars and lounges, or in restaurants and cafes operating as mixed-use social consumption establishments, would by itself increase exposure of persons under 21 to marijuana use.

The draft regulations do not pretend otherwise. To the contrary, the draft regulations actually authorize persons under 21 to be present at mixed-use social consumption establishments, either as employees or as customers. See 935 CMR 500.50(E)(4)(c) & 500.145(E)(5). This allowance appears to disregard the clear directive of G. L. c. 94G, § 4(a½)(xxi), which requires the Commission to issue regulations to include “a prohibition on persons under 21 entering marijuana establishments.” We do not believe that the draft regulations resolve this conflict with the statute or eliminate the risks of underage marijuana use by admonishing mixed-use licensees to limit access to areas of on-site consumption. See 935 CMR 500.145(E)(5).

The licensing of marijuana retail delivery services, proposed in draft regulations 935 CMR 500.105(N) and 500.140, is another unnecessary expansion of the regulatory scheme that will increase the exposure of persons under 21 to marijuana products. Chapter 94G adopts clear and simple rules to avoid this risk: the statute prohibits advertising or marketing of marijuana products to persons under 21, it prohibits the sale or transfer of marijuana to a person under 21, and it prohibits a person under 21 from entering any place where marijuana is sold. See G. L. c. 94G, §§ 2(b) & 4(a½)(xxi), (xxix) & (xxxix). A common sense requirement that marijuana sales be conducted only from a known number of specific, licensed locations ensures a baseline ability to monitor compliance with these requirements including the obligation to verify that a purchaser is over the age of 21.

The proposed regulations authorizing retail home delivery of marijuana will not permit these sorts of assurances. A retail delivery transaction can be conducted at any residence located anywhere within the Commonwealth under the proposed regulations. See 935 CMR 500.105(N)(1)(c)&(h). This will make it difficult or impossible for any responsible agency to verify that delivery agents and purchasers are complying with a requirement to verify that a purchaser is over the age of 21. See 935 CMR 500.105(N)(2). The home delivery proposal also seems likely to increase the risk that marijuana products will be diverted from a purchaser over 21 to persons under 21. This concern is raised in particular by the proposal to allow retail home delivery transactions of up to \$3,000 worth of marijuana products per order, notwithstanding the limitation that in a standard, storefront retail transaction, a customer may not purchase more than one ounce of marijuana at a time. See 935 CMR 500.140(E) & 500.145(N)(1)(g).

3. Problems of Diversion from Licensed Distribution Channels

The licensing of large-scale marijuana cultivators and manufacturers operating properly licensed facilities will create a dramatic increase in overall marijuana supply in the Commonwealth. We are concerned that the sheer number and variety of marijuana distribution points envisioned in the draft regulations will make the licensed supply chain unnecessarily vulnerable to the diversion of marijuana products to illegal channels. The experiences of other States have shown that in the early stages of adult use marijuana, regulators face big challenges in accurately tracking marijuana production and sales and stopping black-market diversion.

The problems that the State of Oregon is experiencing with effectively overseeing its adult use market and preventing diversion highlight these challenges. As the Commission likely knows, a recent audit by the Oregon Secretary of State points to serious gaps in oversight by Oregon's marijuana regulatory authority due to a lack of on-site inspections and an overreliance on electronic self-reporting by marijuana businesses.⁴

In view of these risks, the regulatory scheme proposed in the draft regulations simply leaves too many points of supply and distribution for the Commission and other responsible agencies to monitor effectively. As proposed in the draft regulations, the wholesale supply of marijuana and marijuana products will flow first from manufacturers to an expansive and heterogeneous mix of retail outlets that may include, depending on the municipality, retail storefronts, movie theaters, restaurants, and yoga studios. Retail sales will then be transacted

⁴ Available at <http://sos.oregon.gov/audits/documents/2018-07.pdf>

from each of these varied distribution points and also from home delivery operators conducting transactions at homes located anywhere in the Commonwealth. The whole scheme disperses the distribution network so that regulators and law enforcement will be hard-pressed to monitor it effectively.

The Commission and the various other agencies charged with administering the civil and criminal marijuana laws will be challenged to cover this much ground. We urge the Commission to simplify its proposed licensing scheme for retail marijuana sales in order to focus its initial oversight efforts on straightforward, single-location, single-purpose retail storefront points of distribution.

4. Suitability Standards and Background Checks

We also have a number of concerns regarding the proposed treatment of suitability standards and background checks for prospective marijuana establishment employees applying for registration as Marijuana Establishment Agents. The proposed standards disregard or minimize criminal convictions for serious crimes such as armed robbery and felony drug trafficking that should render an applicant automatically unfit for involvement in this new industry at any level. We also note a number of conflicts or unresolved ambiguities in the various provisions addressing suitability and background checks generally.

Certainly, chapter 94G was clear that the Commission's policies should "promote and encourage full participation [in the adult use marijuana industry] by people from communities that have previously been disproportionately harmed by marijuana prohibition and enforcement." See G. L. c. 94G, § 4(a½)(iv). The statute also specified that a prior conviction for a marijuana-related offense or for a simple drug possession offense of any kind should not disqualify a person for employment unless the offense involved sale or distribution to a minor. See G. L. c. 94G, § 4(a½)(iii).

These provisions reflect a policy judgment by the Legislature that criminal charges for simple drug possession and most kinds of marijuana-related convictions must be disregarded in the suitability determination for Establishment Agents. The draft regulations, however, extend that policy well beyond the limits set in the statute. Under the draft regulations, the statutory dispensation for marijuana offenses instead becomes a complete dispensation for any kind of drug crime at all, provided the offense did not involve distribution to a minor. This means that a felony conviction—or multiple felony convictions—for cocaine or heroin distribution or trafficking does not disqualify an applicant for registration as an Establishment Agent. See 935 CMR 500.902 and accompanying tables B-D. As a result, an applicant with a criminal history of cocaine or heroin trafficking remains employable as a marijuana retail sales agent, a retail delivery agent, a transporter, or a manufacturing or cultivation agent.

The approach applies equally to other provisions. So, for instance, the draft regulations provide that the Commission may revoke the registration of an Establishment Agent who is convicted of "a felony drug offense involving distribution to a minor," but they do not appear to authorize revocation for any other category of felony drug conviction. See 935 CMR 500.0032(A)(8). Likewise, the draft regulations require a licensee to dismiss from employment an Establishment Agent who is convicted of "a felony drug offense involving distribution to a

minor,” but they do not require dismissal for other felony drug convictions such as distribution or trafficking in heroin or cocaine, so long as no minor was involved. See 935 CMR 500.105(A)(12). Under the Social Equity Program proposed in draft regulation 935 CMR 500.105(Q), a record of any sort of drug convictions—including felony distribution and trafficking convictions—may actually entitle an applicant to special benefits.

We acknowledge that the draft regulations do provide that the Commission may deny an applicant registration as an Establishment Agent based on “other grounds” than those explicitly identified in the regulations. See 935 CMR 500.031(F) & 935 CMR 500.902(B)(3). We question whether this general language may override the more specific provisions that identify disqualifying criminal offenses without any reference to drug distribution and trafficking convictions. See 935 CMR 500.902 and accompanying Tables B-C. The consistent disregard of felony drug convictions at every other point in the regulations would be another factor casting doubt on the Commission’s discretion to deny registration on these grounds. In any case, we see no justification for leaving felony drug distribution and drug trafficking offenses unaddressed in the suitability determination or for treating them as discretionary rather than mandatory disqualifiers.

The proposed suitability and background check standards appear equally dismissive of convictions for violent crime and fraud. Under draft regulation 935 CMR 500.902 and accompanying Tables B-C, felony convictions for violent crimes such as armed robbery, burglary, and home invasion do not provide grounds for automatic disqualification for employment as an Establishment Agent. These offenses are disqualifying only if the conviction falls within a five-year look-back period. An applicant convicted of armed robbery outside that look-back period could therefore be deemed suitable not only to work in a retail marijuana establishment but also to deliver marijuana to people’s homes. According to Tables B-C, crimes of dishonesty or fraud outside the five year look-back period are likewise excluded from consideration. This seems ill-advised in an industry that carries risks of black-market diversion and that will necessarily conduct much of its business in cash transactions.

We urge the Commission to carefully consider its responsibility to ensure public safety in administering the adult use marijuana market. Toward that end, we recommend that a revised set of suitability standards for marijuana Establishment Agents incorporate the following changes:

- Revise the suitability standards for Marijuana Establishment Agents appearing at 935 CMR 500.902 and in Tables A-D so that (a) felony convictions for distribution and trafficking of heroin, cocaine, and other dangerous drugs and felony convictions for violent crimes are treated as mandatory disqualifiers; and (b) felony convictions for crimes involving fraud and theft are treated as mandatory disqualifiers for a longer look-back period and treated thereafter as presumptive disqualifiers.
- Provide explicit language clarifying that the Commission retains discretion to deny an application for registration for any reason in the public interest and that the specific grounds identified in any applicable tables do not limit that discretion. Virtually all professional licensing boards in the Commonwealth incorporate this degree of discretion in their decision-making, either by requiring an applicant to demonstrate “good moral character” or by relying on other discretionary considerations relating to the public

interest. See, e.g., Board of Examiners of Sheet Metal Workers, 271 CMR 3.04; Board of Registration of Chiropractors, G. L. c. 112, § 93 & 233 CMR 2.04; Transportation Network Companies, 220 CMR 274.21.

- Revise 935 CMR 500.902(B)(1) to include consideration of youthful offender convictions for felony offenses in the suitability determination. An applicant's conviction for a serious and violent felony should remain a disqualifying condition even if committed before the age of 18.
- Resolve the apparent discrepancy between the statement that an Establishment Agent's "history of criminal conduct" may be adequate grounds to deny the employer Licensee's application for renewal of a Marijuana Establishment license, see 935 CMR 500.450(I), and the apparently more limited grounds for denying an Establishment Agent's own application for registration, which we have reviewed above.

Thank you for considering the public safety concerns we have called to your attention. Please do not hesitate to contact my office if we can provide any further information or be of any assistance as the Commission completes its regulatory process.

Sincerely,



Daniel Bennett
Secretary