DAVIS MALM
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August 15, 2019

VIA EMAIL ONLY (CannabisCommission@state.ma.us)

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

Re: Public Comments of Davis, Malm & D'Agostine, P.C.
re: Proposed Regulations for Adult Use of Marijuana (935 CMR 500)

Dear Commissioners:

Davis, Malm & D'Agostine, P.C. ("Davis Malm" or the "Firm") is a Boston law firm that provides services to clients in many areas, such as business/corporate, civil litigation, real estate, environmental, lending, tax, regulatory, employment and intellectual property. We have represented clients in the cannabis industry since shortly after medical use marijuana (also referred to as cannabis) was legalized in Massachusetts.

The Firm's experience with the cannabis industry includes:

- business formation and operations;
- medical and recreational licensing and regulatory compliance;
- municipal approvals of host community agreements;
- local siting, zoning and permitting requirements;
- debt and equity financing and joint ventures;
- real estate acquisitions, sales and leasing;
- environmental issues affecting developers, landlords and tenants;
- employment issues, including executive employment contracts, drafting employee handbooks and training on workplace policies and procedures;
- tax matters;
- intellectual property protection; and
- information privacy and data security planning.

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Davis Malm submits the following comments to the draft revised 935 CMR 500 regulations for adult use of marijuana in Massachusetts released on July 2, 2019 ("Proposed Regulations") by the Cannabis Control Commission (the "Commission" or "CCC"). (Please note that Davis Malm prepared and filed targeted comments on February 15, 2018 in connection with the Commission's development of the original 935 CMR 500.) Davis Malm appreciates the Commission's hard work in developing the Proposed Regulations, as well as counterpart draft revised 935 CMR 501 regulations for medical use also released on July 2, 2019 ("Proposed Medical Use Regulations"). Davis Malm has focused its comments on five (5) specific areas in the Proposed Regulations that merit clarification or additional consideration before the Commission promulgates final regulations.

COMMENTS

I. SOCIAL CONSUMPTION REGULATIONS ARE A POSITIVE STEP, BUT REGULATORY SPECIFICS SHOULD BE CLARIFIED (935 CMR 500.141).

A. Introduction.

Davis Malm supports the Commission's decision to move forward with a Social Consumption Establishment license category, on a pilot basis. Cannabis cafés and mixed-use facilities that combine consumption of limited serving sizes of cannabis or manufactured cannabis products with other lawful activities present an exciting prospect for businesses seeking to develop emerging ventures that add value to Massachusetts consumers. The Firm shares the Commission's hope that the Social Consumption Establishment category will serve as an entry point for Economic Empowerment and Social Equity Applicants willing and able to offer beneficial consumer choice while, at the same time, improving the overall diversity pool of Massachusetts licensees.

Notwithstanding these positive developments, the Proposed Regulations include elements that need to be clarified or expanded in order to help the Social Consumption Establishment license category pilot become the success that is hoped for by the Commission and all stakeholders. The Firm's suggested changes are outlined below.

B. The Commission Should Clarify The Products Eligible For Sale In A Marijuana Social Consumption Establishment.

The Firm recommends that the Proposed Regulations include additional guidance for determining what marijuana products are eligible for sale at Social Consumption Establishments. Under the Proposed Regulations, Social Consumption Establishment licensees can sell single

servings of marijuana and, at 935 CMR 500.141(3)(c), marijuana products limited to "pre-packaged Shelf-stable items." The subsection also states that "[p]roducts that are perishable, or time and temperature controlled to prevent deterioration, shall not be allowed to be sold." Under 935 CMR 500.002, "Shelf-stable" is defined as "able to be safely stored at room temperature in a sealed container."

In particular, the Firm believes the term "Shelf-stable," as currently defined, does not clarify how long the product must be able to stay viable at room temperature in a sealed container. Many products come with varying shelf-lives, and all products are inherently perishable. A restrictive definition might limit a Social Consumption Establishment to sell only infused chocolate and candy products – hardly consistent with a robust set of products that will attract consumers to a café or casual lunch or dinner environment. A less restrictive definition could allow for separately packaged cannabis-infused brownies or cakes, or single-serving packages of infused dressings or toppings that could be poured over salads or entrees to create a compelling eating experience. In either event, the definition should make clear to Social Consumption Establishment licensees and suppliers the actual standard for "Shelf-stable" that can be used in developing products for this new industry segment. We recommend that the second sentence of Section 500.141(3)(c) be deleted and the term "Shelf-stable" be defined as "able to be safely stored in a pre-packaged container at room temperature for a minimum of one (1) week," or such other reasonable period to meet the "Shelf-stable" requirement. This will reduce confusion as to what marijuana products may be served while protecting consumers and furthering the goals of the Commission.

II. THE COMMISSION SHOULD CLARIFY AND MODIFY DELIVERY-ONLY LICENSE REQUIREMENTS (935 CMR 500.145).

A. Clarification Is Needed For The Residence Address Eligible For Receiving A Delivery.

Davis Malm recommends that the Proposed Regulations include additional guidance regarding where Delivery-Only Retailers can deliver cannabis or marijuana products. The current regulations state that delivery shall only be to "the Residence address provided." It is unclear whether this means the address stated on the government-issued identification given to the Marijuana Retailer when they pre-verify a consumer, or whether the consumer can give the Marijuana Retailer an alternate residence address and then receive the products upon showing of his or her identification. If it means the former, the Firm urges the Commission to permit the consumer to provide an alternate address once age and identification have been pre-verified and presented at the time of delivery. Not allowing the consumer to provide an alternate residential

address would hinder the ability of many individuals who no longer reside at the address listed on their identification from utilizing a Delivery-Only Retailer or seek to secure products while visiting families and friends. This would primarily and adversely affect renters, young adults, and low-income people without offering offsetting public safety benefits.

B. The Commission Should Clarify And Modify The Type Of Marijuana Products Eligible for Delivery.

Additionally, the Firm recommends that the Proposed Regulations include further guidance on what type of marijuana products can be delivered. They do provide some assistance by stating that the products must be "Shelf-stable," meaning that they can be safely stored at room temperature in a sealed container, and cannot be perishable, or time and temperature controlled. 935 CMR 500.145(2)(c). Nonetheless, it is unclear how long the product must be Shelf-stable in order to be deliverable. Certain marijuana products, such as edibles, are Shelf-stable, but also contain a recommended "use by" or expiration date. The Proposed Regulations as presently drafted do not provide clarity as to whether such edible products would be available for Delivery-Only Retailers. The Commission should adopt the same suggested clarifying language for "Shelf-stable" for Social Consumption Establishments in Section I.B supra.

C. Pre-Verification Of Consumers Should Apply To Multiple Retailers.

The Proposed Regulations also require any consumer making a purchase for delivery by a Delivery-Only Retailer to have his or her government-issued identification authenticated by a Marijuana Retailer prior to the first order. The pre-verification of the consumer's identification is performed in-person at the Marijuana Retailer's physical location. The Firm suggests that once a consumer goes through the pre-verification process at one Marijuana Retailer that has a Delivery Agreement with the Delivery-Only licensee, the consumer should be considered to be pre-verified at any other Marijuana Retailer with whom the Delivery-Only licensee in question has a contractual arrangement. It is an overly burdensome requirement for the consumer to have to go to each individual Marijuana Retailer in-person to pre-verify for delivery from the preferred Delivery-Only vendor from that establishment, particularly when each Marijuana Retailer examines and verifies the consumer's age and identification in the same manner. In addition, Delivery-Only Retailers will likely have Delivery Agreements with different Marijuana Retailers, making it difficult for consumers to utilize certain Delivery-Only Retailers who obtain their product from a Marijuana Retailer where the consumer has not been pre-verified. Smaller Delivery-Only Retailers may not be able to obtain Delivery Agreements with several Marijuana Retailers like larger retailers would. Permitting a consumer's pre-verification at one Marijuana Retailer to be applied to all Marijuana Retailers would enhance the Delivery-Only Retailers'

ability to reach more consumers and promote competition among the licensed delivery retailers. To further support this license category, the Commission should consider creating a database of pre-verified customers that would be effective for all establishments served by a Delivery-Only licensee.

D. The Role Of Third-Party Technology Platform Providers Should Be Clarified.

The Firm further advocates that the Commission clarify the role of Third-Party Technology Platform Providers in the delivery process. In delivering the product to the consumer, the Delivery-Only Retailer and Marijuana Retailer can use a Third-Party Technology Platform Provider to facilitate the ordering of cannabis or marijuana products by consumers. 935 CMR 145(1)(e). The Proposed Regulations do not state whether Third-Party Technology Platform Providers can enter into more than one agreement with different Delivery-Only Retailers, whether they can only use those retail locations where the Delivery-Only Retailers have a Delivery Agreement, and what role Third-Party Technology Platform Providers have, if any, in the verification of the consumer identified on the order. It seems that the use of technology platforms should allow consumer access to multiple retailers through the delivery licensee. Consumer access only to those retailers where the consumer has physically registered would limit the usefulness of the technology platforms. Therefore, we encourage the use of a registration verification system, so that once a consumer is registered, that consumer would have access to multiple retailers through a third-party technology platform, and the delivery licensee would be responsible to verify the age and identity of the consumer upon delivery.

E. Microbusinesses, Manufacturers And Cultivators Should Be Allowed To Contract With Delivery-Only Services.

Under the Proposed Regulations all cannabis and cannabis products delivered by a Delivery-Only Retailer "shall be obtained from a licensed Marijuana Retailer . . . with which the Delivery-Only Retailer licensee has a Delivery Agreement." 935 CMR 500.145(1)(d). Davis Malm assumes that this is a requirement because, under the current regulations, Marijuana Retailers are the only licensees permitted to transfer cannabis products to consumers. The Firm suggests that the Commission adopt regulations permitting Microbusinesses and other wholesale providers, including Manufacturing and Cultivation licensees, to also enter into Delivery Agreements with Delivery-Only Retailers.

While Microbusinesses and other wholesalers may not transfer cannabis or marijuana products to consumers, they may transfer those products to other Marijuana Establishments.

Insofar as a Delivery-Only licensee is a Marijuana Establishment, it should be permitted to choose counterparties that will provide compelling products for its customers. Permitting Microbusinesses and other wholesalers to participate in the Delivery-Only service would provide more options for Delivery-Only Retailer licensees to obtain cannabis and marijuana products, provide consumers with greater access to the market, and allow Microbusinesses and/or wholesale providers to participate in the retail business without directly selling the product to consumers. Furthermore, it would enable more Economic Empowerment Applicants and Social Equity Program Participants with Microbusiness licenses to enter into Delivery Agreements and participate in the delivery program. Like Marijuana Establishments, the Commission could enable Microbusiness licensees or other wholesale licensees to pre-verify the age and identity of consumers who intend to order products from them, or, if the customer has previously registered with another retailer and is in a registration verification system, as suggested in Comments II.C. and II.D., supra, then the customer would have access to products without independent registration by the particular Microbusiness or other wholesale establishment.

III. THE COMMISSION SHOULD MODIFY THE REVISED AND EXPANDED PROPOSED CULTIVATION RULES (935 CMR 500.002 AND 500.120).

A. Introduction

The Proposed Regulations include a wide variety of new or revised provisions applicable to Cultivation licensees, including new or substantially new definitions in 935 CMR 500.002 for "Horticultural Lighting Equipment (HLE)," "Horticulture Lighting Square Footage (HLSF)," ":Lighting Power Density (HLPD)," "Outdoor cultivation," "Pesticide" and "Processing"; substantially increased application and annual fees in 935 CMR 500.005 for both indoor and outdoor Cultivation licensees at Tier 4 and above; and extensive new or substantially revised Additional Operational Requirements for Cultivation licensees in 935 CMR 500.120. Davis Malm generally supports these new and refined provisions as providing beneficial clarity to obligations that were described only in general terms in the existing 2018 regulations. Nevertheless, several of the specific proposed changes raise issues that warrant additional review and modification before the Commission finalizes the Proposed Regulations.

B. The Commission Should Apply High-Intensity Lighting Restrictions To Canopy Areas Only.

The Proposed Regulations provide very substantial additional provisions to clarify the scope of energy efficient lighting obligations for Cultivation licensees introduced in the original 2018 regulations. Davis Malm would, however, request additional review and reconsideration of

a potentially important scope issue relative to how these requirements apply in practice to Cultivation licensees. Specifically, the existing 2018 regulations maintained a focus on "canopy" spaces in a cultivation operation as the areas for growing mature cannabis plants, including associated boundary structures for each such area. See 935 CMR 500.101 (definition of Canopy); compare Proposed Regulations at 935 CMR 500.101 (retaining definition of Canopy with only minor clarifying changes). Given that mature cannabis plants typically benefit from high-intensity lighting that can, unless modified, place burdens on the local electric grid, the 2018 regulations understandably require Cultivation licensees to meet "minimum energy efficiency and equipment standards established by the Commission" that included maximum lighting power density ("LPD") requirements of 36 watts per square foot for Tier 3 and above and of 50 watts per square foot of smaller-tiered cannabis operations. See 935 CMR 500.120(11).

The Proposed Regulations seek to modify the relationship between growing mature plants in canopy areas and LPD restrictions by adding a new category of "horticultural areas" – defined as canopy areas plus any other areas used for growing plants at any stage of growth (including but not limited to "germination, cloning/mother plants, propagation, [and] Vegetation....") – and applying LPD standards to these non-canopy areas as well. See Proposed Regulations at 935 CMR 500.101 (definitions of "Horticultural Lighting Equipment (HLE)," "Horticulture Lighting Square Footage (HLSF)," "Lighting Power Density (HLPD)," 935 CMR 120(11)). Davis Malm suggests that the expansion of full LPD requirements to non-canopy areas would be unnecessary, unwarranted and liable to impose unnecessary costs and regulatory complexity on Cultivation licensees and should be reconsidered.

The policies linking the use of high-intensity lighting to grow mature plants to a stage in which they can flower and be harvested with careful regulation of such lighting to avoid grid burdens does not apply to cannabis plants at earlier immature stages of growth in non-canopy areas. Seedlings and immature plans typically are not subject to maximum lighting conditions and are usually grown in lower light and protected from high-intensity lighting conditions. Thus, expanding lighting restrictions to all "horticultural" areas, including non-canopy areas, is unwarranted and unnecessary. Cultivators have every incentive to develop immature plants into mature plants that can be placed into canopy areas as quickly as possible, further diminishing the need to impose new regulations on such non-canopy areas.

Furthermore, the Firm is concerned about unanticipated excess costs and regulatory complexities that Cultivation licensees will bear if the Commission fails to reverse the decision to expand LPD requirements to all horticultural areas. First, compliance with LPD lighting requirements is measured based on average wattage per square foot. Given its critical

importance in determining tier space, canopy space is well defined, including mandatory boundary requirements, and is easy to measure accurately. This accuracy in canopy space facilitates accurate comparisons of canopy space to overall wattage to remain under the wattage per square foot requirements. This accuracy in measurement can no longer be assured if the calculation has to incorporate an ever-changing set of spaces devoted to short-term propagation and vegetation of immature plants that are transferred into canopy areas as promptly as possible.

Second, adding non-canopy growing areas into LPD obligations will complicate and impede efforts to exempt the Cultivation licensee from LPD requirements using on-site renewable or alternative generation sources. See 935 CMR 500.120.11. To the extent short-term non-canopy areas are included within the required calculation, it likely will become more difficult to measure total on-site energy use to apply either the original 100% factor or the new 80% factor that would permit exemption from LPD requirements.

C. The On-Site Exemption From LPD Requirement Should Be Met By Establishing An On-site Resource That Covers The LPD Lighting Load Rather Than The Entirety Of On-Site Load And Is Based On Actual Canopy Size.

As noted in the preceding section, Cultivation licensees can exempt themselves from burdensome LPD requirements intended to limit adverse impacts to the electrical grid by installing on-site renewable or alternative sources that meet applicable state energy regulatory requirements. See 935 CMR 500.120.11; compare Proposed Regulations, 935 CMR 500.120.11 (reducing eligibility for exemption to 80% of load). Davis Malm supports both the concept of an on-site renewable or alternative energy exemption and the CCC's decision to reduce eligibility for the exemption to 80% of load. Nevertheless, the Firm is concerned that meeting the exemption still will be uneconomical for most cultivators. The problem is that the cultivator will need to size any on-site generation facility to cover the high-capacity lighting for cannabis that impelled the Commission to impose LPD limits in the first place, but also to encompass the load attendant to the substantial non-LPD energy needs of the cultivation business. This expansion to cover all business load will significantly increase the size and cost of the on-site renewable or alternative generation unit. In many and perhaps most cases, the costs associated with on-site facility to meet all site energy needs will be more expensive than just accepting the yield decreases associated with limits on LPD lighting for growing mature cannabis plants. As such, the on-site solution – even though well-intentioned – may not be economically feasible.

To improve the workability of the on-site option, the Firm recommends that the on-site generation offset only the load associated with the high-capacity lights themselves, with no

requirement for the on-site generation to be sized to meet other Cultivation licensee business-related load. This specifically targets the exemption to the underlying policy issue requiring action and is likely to foster societally beneficial on-site solutions for Massachusetts cannabis businesses.

Additionally, as a separate recommendation, the Proposed Regulations applicable to LPD require lighting to be measured based on the Cultivation licensee's tier size. It should be based on tier size or actual canopy size, whichever is less. Especially as a licensee begins operation, it may plant a canopy size smaller than the full tier approved in the application. For example, a Tier 3 cultivator with an entitlement to plant up to 20,000 square feet could choose to plant 10,000 square feet in its initial rollout. As such, it should be able to use its actual canopy of 10,000 square feet for measuring lighting standard compliance. Requiring use of the full tier size will adversely affect the cost-effectiveness of the cultivation facility. As canopy size increases, the cultivator will need to make adjustments to lighting requirements to ensure compliance.

D. Adult Use Cultivators Should Be Permitted To Sell To Medical Use Facilities.

Under 935 CMR 500.002 of both the existing and proposed rules (definitions of "Marijuana Cultivator" and "Marijuana Establishment"), Cultivation licensees are only allowed to sell products to "Marijuana Establishments," a term which encompasses adult use license categories but expressly excludes "Medical Marijuana Treatment Centers" or "MTC" as separately defined in both the Proposed Regulations and the Proposed Medical Use Regulations. The exemption of MTCs from the parties to whom a Cultivation licensee may sell makes no apparent policy sense. An MTC is expressly defined in the Proposed Regulations as being able to acquire cannabis supplies from other sellers, as it may need to do so out of necessity (in the event of demand from medical consumers outstripping available home grown supply) or choice (in the event a cultivator sells high-quality cannabis that the MTC's medical use consumers may desire to purchase). Davis Malm sees no valid reason to empower MTCs to procure cannabis from other sellers and then preclude adult use licensees categorically from meeting such needs, provided that the sale meets medical use regulatory requirements.

IV. THE COMMISSION SHOULD LIMIT ITS NEW FEES (935 CMR 500.005(d) and (e))

The Proposed Regulations substantially increase fees for license applications, license renewals, and one-time requests for CCC action by anywhere from 200% to 1000% of the current fee amounts. In addition, the Proposed Regulations impose new fees on actions that are not presently assessed a fee. The Firm understands the Commission's desire to maintain

sufficient financial resources to fund its administrative and enforcement duties, and it does not second-guess the Commission's proposal to increase fees to reflect its year of implementing regulatory activities. Nonetheless, the Firm notes that the greatly increased fees are likely to impose an undue burden on licensees, particularly those licensees with small operations and limited funding.

The Firm requests the Commission reconsider the magnitude of the fee increases, and the imposition of new fees, in order to minimize the financial strain on licensees. The Firm is particularly concerned that the significant fee increases will stifle growth for smaller licensees, which are disproportionately affected by these fee changes. The Firm therefore recommends the Commission implement more modest fee changes.

V. ADDITIONAL GUIDANCE IS WARRANTED ON POTENTIAL FINES (935 CMR 500.560(3)(b))

The Firm appreciates that the Commission has included in the Proposed Regulations additional guidance for determining the fine amount to be imposed in the case of a regulatory violation, particularly with regard to the aggravating circumstances and mitigating circumstances set out in Sections 500.360(3)(a) and (b). Davis Malm's February 2018 comment letter recommended that precise step. However, the Firm notes that the Proposed Regulations do not expressly account for a licensee's business size or ability to pay in determining the amount of sanctions to be imposed. Especially where the maximum daily fine the Commission may impose against a licensee is increased to $50,000 from $25,000 in the Proposed Regulations, the imposition of fines will naturally have a disparate impact against smaller licensees when compared to larger and better funded licensees. Indeed, the Firm envisions circumstances in which the imposition of the maximum $50,000 fine for a single violation against a small or medium-sized licensee could deplete the licensee's financial resources to the point that the business would have to permanently cease operations. Such consequences are similarly foreseeable for many Economic Empowerment Priority Applicants or Social Equity Program Participants that may lack the financial resources available to other licensees.

The Firm therefore recommends that the Proposed Regulations expressly provide that a licensee's financial resources and status as an Economic Empowerment Priority Applicant or Social Equity Program Participant, where applicable, are factors that the Commission may consider when determining the amount of a fine to be imposed. Specifically, the Firm recommends that the Proposed Regulations provide that a licensee's (in)ability to pay a particular fine and its status as an Economic Empowerment Priority Applicant or Social Equity Program Participant are Mitigating Circumstances that may justify imposing a lesser fine.

CONCLUSION

Davis Malm appreciates the opportunity to provide these comments that are offered to assist the Commission in finalizing revised adult use regulations in the Commonwealth. Commission staff should contact any of the undersigned counsel if there are questions or issues regarding these Comments.

Respectfully submitted,

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