

CANNABIS LAW ALERT

Highlights of the New Massachusetts Cannabis Reform Act

September 2022

Massachusetts Governor Charlie Baker signed into law all but one section of Senate Bill S3096, “An Act Relative to Equity in the Cannabis Industry,” which took effect July 31, 2022 (the Act). The Act, as amended by the Governor, was enacted as Chapter 180 of the Acts of 2022.

As indicated by the title, a principal feature of the Act is to establish a new funding mechanism to support cannabis ventures led by social equity and economic empowerment program participants certified by the Cannabis Control Commission (Commission or CCC). The Act also implements various other enhancements and reforms to Massachusetts cannabis, including:

- confirming the costs potentially chargeable to cannabis licensees subject to the three percent (3%) state law cap;
- expressly granting the CCC authority to review Host Community Agreements (HCAs) between municipalities and cannabis applicants;
- extending the potential HCA payment period from five years to eight years;
- requiring municipalities to furnish documentation of costs being attributed to cannabis licensees as a required condition for requesting HCA payments from the licensee;
- establishing a process for municipalities to authorize social consumption establishments (so-called cannabis cafes); and
- reversing the former application of U.S. tax code Section 280E for Massachusetts state tax purposes that had previously substantially limited the ability of Massachusetts cannabis ventures to claim ordinary business deductions on state tax returns.

NEW SOCIAL EQUITY TRUST FUND

The Cannabis Social Equity Trust Fund (Fund) will receive initial funding of 15% of the current balance of the marijuana regulation fund and be funded by certain payments thereafter. The purpose of the Fund is to make grants and loans (including no-interest and forgivable loans) to social equity program participants and economic empowerment priority applicants. The Massachusetts Executive Office of Housing and Economic Development (EOHED) and the newly created Cannabis Social Equity Advisory Board (Advisory Board) will jointly administer the Fund and issue regulations concerning Fund application and selection processes. One element of the regulations will prohibit social equity/economic empowerment businesses from transferring, selling or pledging any asset or interest to a non-social equity/non-economic empowerment business or individual within a certain period after the business is authorized to commence operations. Should a licensed social equity/economic empowerment business engage in this prohibited behavior, any monies it receives from the Fund will be subject to clawback.

The Fund Advisory Board will consist of five appointees, each with five-year terms. One board member is appointed by the Governor, one by the Treasurer and Receiver General, and one by the Attorney General. Those three then appoint the remaining two board members by majority vote. Board members must be appointed within 60 days of the effective date (September 30, 2022).

EOHED and the Fund Advisory Board will jointly determine the recipients of any loans or grants paid out of the Fund, the values of those loans/grants, and any conditions attached. If recipients violate any grant or loan condition, they will face a fine for each violation of up to 50% of the amount received. An annual public report detailing expenditures made from the Fund will be filed with the Massachusetts Legislature.

The Commission will administer a social equity program that offers, in part, guidance on how eligible recipients can access monies available through the Fund.

HOST COMMUNITY AGREEMENT REFORM

Host Community Agreement Reform. The Act makes several changes that affect HCAs. As noted above, the CCC is given new authority to review and approve HCAs at the initial application stage and upon each license renewal. The CCC will notify the licensee and municipality of any deficiencies and require those deficiencies to be corrected. This authority will impact new HCAs, which the CCC must review within 90

days, and subject existing HCAs to CCC scrutiny to ensure compliance with the new law. Important changes in the law relative to the HCA process include:

- increasing the period during which community impact fees can be assessed from five to eight years;
- capping community impact fees no more than 3% of gross revenue of the sales of the marijuana establishment;
- requiring the community impact fee to encompass all payments and obligations imposed by the municipality, and excluding any additional monetary payments, in-kind contributions and charitable contributions by the marijuana establishment; and
- eliminating the ability of HCAs to mandate a certain percentage of total or gross sales as the community impact fee.

Significantly, municipalities are now required to document any cost imposed by the operation of a marijuana establishment and provide that information to the licensee no later than one month after the annual renewal date. If a licensee thinks the information provided by the host community is unreasonably related to the actual operation costs imposed upon the municipality in the preceding year, then the licensee may bring a breach of contract action against the host community to recover damages, attorneys' fees and other costs not reasonably related to the actual costs incurred. A host community can also waive the HCA requirement by submitting a written waiver executed by the municipality and the licensee.

NEW AUTHORIZATION PROCESS FOR SOCIAL CONSUMPTION ESTABLISHMENTS

The Act also clarifies and provides two mechanisms for municipalities to approve social consumption sites – a required precondition for moving forward with CCC licensing for such establishments.

Under the first method, Section 9 requires a social consumer advocate in the host community to file a petition with the city or town clerk, in a form prepared by the state secretary. The petition must be signed by at least 10% of the voters supporting social consumption, which would trigger a city or town-wide vote on whether or not to allow the sale of marijuana and marijuana products for consumption on the premises where products are sold. If the majority in the ensuing municipal election votes to allow social consumption, then the municipality is authorized to permit consumption of marijuana or marijuana products where products were purchased. Alternatively, a city or town may allow for social consumption by ordinance or bylaw, omitting the need for a voter process.

In connection with approving social consumption establishments, the Act amends G.L. c. 270, § 22 (“Smoking in public places”) to allow smoking marijuana in licensed marijuana social consumption establishments, in designated consumption areas.

REVERSAL OF RELIANCE ON IRS CODE SECTION 280E FOR MASSACHUSETTS STATE TAX PURPOSES

In a breakthrough that should benefit owners of cannabis establishments, the Act implemented a state tax law change substantially increasing the deductibility of business expenses. Prior to this change, Massachusetts cannabis business owners had to follow federal IRS Code 280E for both federal and state tax law purposes, which precluded them from deducting most expenses that would be fully deductible for non-cannabis businesses. Under the Act, cannabis businesses can fully deduct any lawful business expenses paid or incurred in a given taxable year on their Massachusetts state tax returns without consideration of IRS Code 280E limitations. Limited disallowances apply for items such as dividends received, losses sustained in other taxable years, and taxes on or measured by income. This change is retroactive to January 1, 2022, so businesses can track their relevant deductible business expenses now and deduct them on their calendar 2022 tax forms.

ADDITIONAL REVENUE SUPPORT FOR MUNICIPALITIES HOSTING SOCIAL EQUITY LICENSEES

The Act provides a new source of financial support for municipalities where at least one marijuana retailer is a “social equity business.” Specifically, Section 5 amends G.L. c. 64N § 2 to allow cities and towns with social equity businesses operating in their host community to receive a sum equal to 1% of the current 10.75% excise tax collected on cannabis sales. This payment shall be distributed quarterly to host communities with at least one social equity business and will be paid by the state Treasurer after the Treasurer has certified the presence of a social equity business in the city or town. Additionally, the Act amends the cannabis statute and tax statute to add definitions for the aforementioned “Social Equity Business” category for this new funding mechanism and other statutory purposes.

OTHER PROVISIONS

- **Strengthening Provisions Encouraging Full Participation by Individuals from Disproportionately Affected Municipalities and Supporting Participants in Social Equity Programs.** Section 11 amends G.L. c. 94G, § 3 to expressly require municipalities to adhere to CCC regulations relative to encouraging full participation in the regulated industry by individuals from disproportionately affected municipalities and imposing substantial penalties for failing to implement such policies. Similarly, Section 25 of the Act requires municipalities to establish social equity support procedures and policies by July 1, 2023, or be subject to substantial fines.
- **Expanding Licensure Suitability/Non-Disqualification Standards for Most Cannabis Criminal Convictions.** Sections 11 and 12 of the Act amend G.L. c. 94G, § 4(a1/2) to preclude disqualification for most criminal convictions except for distributing controlled substances to minors.
- **Establishing Strengthened New Criminal Offense Record Expungement Process.** Section 23 of the Act adds a new section, G.L. c. 276, § 100K1/4 establishing an expedited expungement process, with specified procedural protections, for certain cannabis-related crimes.
- **Requiring New Public Education Campaign.** Section 24 of the Act mandates a campaign to educate the public on risks from cannabis use as potentially affecting mental health, use during pregnancy, use of high potency products, and home extraction of marijuana concentrates.

ACT IMPLEMENTATION PROVISIONS

The Commission must promulgate or amend regulations to be consistent with the Act no later than one year from the effective date of the Act (July 2023). As the Act is already effective, the Commission, licensees, municipalities, and other individuals or entities affected by the Act must comply with the Act's provisions, subject to future clarification upon the Commission's promulgation of the required implementation regulations.

CONTACT

If you have any questions regarding information contained in this alert or the cannabis laws in Massachusetts, please contact an attorney in our [Cannabis Law Practice](#).

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