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Re: Comments on Proposed Revisions to 16.8.2. NMAC

Dear Friends,

We write to offer public comment on the proposed revisions to regulation 16.8.2 NMAC on behalf of the wide variety of cannabis clients we serve across New Mexico. Our clients welcome the Cannabis Control Division's efforts to increase oversight and regulatory compliance in New Mexico's cannabis market, but some of the proposed changes, while well-intentioned, do not appear to be workable given the on-the-ground realities of many cannabis entities, and some appear to exceed CCD's rulemaking authority.

Employee Information

The proposed changes to NMAC 16.8.2.22(A)(1)(l), 16.8.2.30(A)(1)(l), and 16.8.2.36(A)(1)(m) would each require that applicants for an initial or a renewed license submit to the Cannabis Control Division the "applicant's employee information including, but not limited to names, identification photographs, employment history and demographic information." First, at multiple legislative interim committees since the last Legislative Session, CCD has asked lawmakers to amend the Cannabis Regulation Act ("CRA") to allow for the kind of employee tracking that this rule change seeks to adopt. CCD publically stating that amendment to the CRA is necessary to achieve this goal belies the fact that seeking to make this change via rule exceeds CCD's rulemaking authority.

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Second, there is frequent employee turnover at cannabis entities, and initial applicants often have not hired employees when applying for a license. Since these rule changes do not provide any mechanism for updating employee information outside of an initial application or renewal, the information that CCD would actually get pursuant to this rule change would quickly become incomplete, out of date, and unusable in any meaningful way. Will an entity who disclosed the two employees it had when applying later be cited when an inspector comes 6 months later and there are now 15 employees?

Third, given that CCD needs an application to be complete in order for it to be processed, how will CCD know if the application is in fact complete? What if a company submits its application, noting the two employees it had that day, but a week later they hire another employee – is their application now incomplete?

Fourth, what is the State's interest in knowing the employment history of cannabis entity employees? How far back does that history have to go? Looking at rulemaking throughout our state government, we cannot find any other regulation that would require employment history of employees of private businesses to be provided to the state as a condition of the employer's licensure.

Fifth, the language used is vague – what does "identification photographs" mean? What does "demographic information" include in this context?

Finally, CCD's regular, public disclaiming of responsibility for responding to criminal violations undermines any assumption that this proposed change will address human trafficking concerns.

Overall, we are unable to identify ANY regulation adopted by RLD that would require that employee information of the type described in this change be submitted as a condition of licensure in ANY other RLD-regulated industry. CCD is exceeding its rulemaking authority, and unreasonably overburdening cannabis entrepreneurs by singling them out in this way. From the start, we have appreciated CCD's helpful approach to the industry, in contrast to the tact taken by DOH. This change makes it appear that CCD is starting to follow DOH's bad example.

Front Loading Local Approvals

The proposed changes to NMAC 16.8.2.22(A)(3), 16.8.2.30(A)(3), 16.8.2.36(A)(3) would require that applicants for an initial or a renewed license submit to the Cannabis Control Division "proof the applicant has acquired all applicable documentation from the local jurisdiction in which the licensed premise will be located including proof of business registration, proof of zoning approval, and proof of completion of a fire inspection." This is problematic in multiple ways.

First, there are many local jurisdictions that will not give the approvals CCD is requiring until the entity is licensed by CCD, creating a chicken and egg problem. At a CLE presentation on November 9, Mr. Sachs stated that there is a mechanism to get around this problem. That "mechanism" is simply the addition of the word "applicable" in the proposed change. This approach impermissibly requires CCD to make highly discretionary decisions on a strictly ad hoc basis. "Ad hoc, standard-less regulation that

depends on no more than a zoning official's discretion would seriously erode basic freedoms..." *Smith v. Bernalillo County Bd. Of County Commissioners*, 2005-NMSC-012, ¶ 33. This approach would again lead CCD down the problematic road hewn by DOH, where applicants are not treated equally, and the regulator can pick favorites based entirely on the discretion of whoever happens to be doing the job that day.

It should also be noted that the claimed availability of this "mechanism" will be nullified by the software Mr. Stevens touted at the same CLE presentation on November 9. Mr. Stevens described a program that would not allow an applicant to submit their application until it is "complete." When asked how that will work for people who need to avail themselves of the "mechanism" to get around the fact that their local will not give an approval until the state issues a license, Mr. Stevens stated that a "licensing specialist would review." Even assuming that this software would know which local approvals needed to be uploaded to be "complete" (which, given the software abilities we see generally in state government, is unlikely), if an application never goes to a licensing specialist until the application is "complete" and it cannot be completed because of this local approval issue, how does it get to the licensing specialist for that review?

In this same presentation Mr. Stevens also claimed that this approach is necessary because, if a person who gets licensed cannot later get the local approvals needed, CCD did not know if they had to refund the license fees or not. CCD has already adopted rules stating that license fees are not refundable (*see* NMAC 16.8.11.10), so this quandary is not a justification for this very problematic proposal.

Finally, as CCD is aware, there are still local jurisdictions in New Mexico that are antagonistic towards cannabis. NMSA 26-2C-12(B)(2) states that locals cannot "completely prohibit the operation of a licensee." Right now, if I am a licensed cannabis entrepreneur, and my local government is effectively completely prohibiting me from operating my license, then I can seek redress with the Courts pursuant to NMSA 26-2C-12(B)(2). But if CCD's proposed change is adopted, and I cannot ever become licensed because my local will not give me any authorizations, I no longer have standing under NMSA 26-2C-12(B)(2) because I am not a licensee. The statutory language of the CRA demonstrates legislative intent that the issuance of a state license should not be dependent on local approval, and making this change would empower those local governments that are seeking to violate the CRA already. It would also effectively evade any sort of judicial review by preventing standing for those injured as a result of this misguided change.

48 Hour Summary Denials

The proposed changes to NMAC 16.8.2.22(C), 16.8.2.30(C), 16.8.2.36(C), 16.8.2.44(E) state, "[w]hen the division determines an application for licensure is incomplete, an applicant will have 48 hours to rectify any deficiencies before the division will reject the application." This does not account for holidays or weekends, or for the realities applicants will face when asked to obtain information that might be outside of their control (such as local approvals) on such a short timeframe.

Given that under the proposed changes to 16.8.2.22(10), 16.8.2.30(A)(9), 16.8.2.36(A)(8), and 16.8.2.44(A)(6), applicants will have to disclose prior denials of licensure, not only in New Mexico but very likely in other states they might operate in. Creating what looks like a pattern of license denials based solely on CCD's arbitrary and ill-defined 48-hour window will prejudice and unreasonably burden applicants who will now have to account for those denials. While a deadline could make sense, it needs to be reasonable and workable—and should account for the realities of how long processes related to licensure take.

No Moving Plants or Clones

The proposed changes to NMAC 16.8.2.27(A)(5) state that "cannabis plants that have germinated or cannabis clones that have been placed in growing mediums shall not be moved from any one licensed premise to another prior to the final harvest of the plant or the wastage of the plant." First, the proposed rule hampers the efficiency and growth of the cannabis industry, particularly for companies specializing in cloning and vegetative growth. It disrupts established and legal practices where companies transfer plants between facilities for various stages of cultivation, such as vegetative growth at one facility and flowering at another. The currently allowed transfer process allows businesses to optimize their resources, space, and expertise, resulting in cost-effective and efficient operations. Restricting these transfers could impede the expansion and innovation of the industry.

Second, the proposed rule lacks clarity in terms of what constitutes a "mature flowering plant" in contrast to clones and vegetative plants. This ambiguity will lead to confusion and inconsistencies in enforcement, making it difficult for both businesses and regulators to comply with the proposed rule. Clear definitions are necessary to ensure a fair and consistent application of the proposed rule. If the rule was intended to restrict movement of just mature plants—as presented by Mr. Sachs at the November 9 CLE—this needs to be clearly stated.

Third, there is already a robust tracking system in place to monitor the movement of cannabis plants between licensed premises. Biotrack should already be providing a level of oversight and transparency by forcing companies to manifest all plants from one facility to another. Adding additional restrictions on plant movement appears redundant and unnecessarily burdensome on businesses.

In sum, this proposed rule needs serious and thoughtful revisions so that it effects the changes it is intended to affect. If there are issues with illicit mature plants making their way into New Mexico, preventing the transfer of clones and germinated plants will not solve that issue. Therefore, unless and until more research and information occurs to account for the legal market this will impact, we strongly encourage CCD to delete this proposed rule from consideration.

Courier Security Plans

The proposed changes to NMAC 16.8.2.42(6) include a requirement that couriers submit their security plans to CCD. CCD already learned this lesson, as evidenced by the removal of the requirement to

submit information about security systems elsewhere in the rules, but creating records that bad actors can IPRA to obtain information that would help them evade security is not a good idea.

Persons Associated With Testing Labs

The proposed changes to NMAC 16.8.2.44(A)(5) would require that applicants for an initial or a renewed cannabis testing laboratory license provide to the Cannabis Control Division a "list of all natural persons who hold any financial or voting interest, including but not limited to natural persons associated with any businesses having a financial or voting interest in the cannabis testing laboratory to ensure compliance with NMSA 1978, 26-2C-6(G)." Again, this includes vague language that will lead to ad hoc rulemaking. What does "associated with any business" mean? What if there is a publically traded company with an interest in the applicant – under this, every person who owns stock in that company would have to be disclosed.

Why is the amount of the interest unlimited, when someone has to have at least a 10% interest to be disclosed as a controlling person of an entity? The breadth of this language appears to exceed the reasonable limits in the CRA.

NMSA 26-2C-6(G) says "[t]he division shall not allow a person that is licensed as any type of cannabis establishment other than a cannabis research laboratory to hold, directly or indirectly, a cannabis testing laboratory license." How does knowing EVERY investor in a company that IS NOT licensed and has a less than 10% interest in the applicant allow CCD to determine if the applicant itself can hold a testing laboratory license? If CCD had this information, how would CCD know if John Doe, who has a .0000067% financial interest in Company X, which itself has a 5% interest in the actual applicant, also has a 3% interest in Company Z, which has a production license?

This proposed change would unreasonably overburden applicants, goes beyond CCD's mandate in the statute, is vague, and is not going to provide CCD with information that it can realistically use.

New $75 Fee

The proposed changes to NMAC 16.8.11.10 include a new $75 fee for the licensee's "Designation of a non-controlling person as an agent." CCD does not have statutory authority to impose this fee. While NMSA 26-2C-6(A)(1) provides that CCD may collect fees in connection with the administration of commercial cannabis activity and licensing, NMSA 26-2C-9 lays out what those fees are, and does not include the fee proposed by this change. If CCD want to charge additional fees, it needs legislative approval to do so.

Conclusion

We recognize and appreciate the pressure that CCD is under, and are wholly supportive of attempts to create a culture of compliance, but that does not justify the adoption of vague rules that surpass CCD's authority, create endless opportunities for completely discretionary ad hoc rulemaking, and quite simply

will not work on the ground. We encourage CCD to contract with drafters contracted to Legislative Council Service, or some other professional who specializes in this kind of drafting, going forward, and urge CCD to rethink and retool the current proposed changes before adopting any final rules.

Very truly yours,

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