



# LEGISLATIVE REPORT: FARMERS AND BUSINESSES OF ALL SIZES

Report to the Joint Committee on Marijuana Policy

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Massachusetts Cannabis Control Commission

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## **Legislative Report on Farmers and Businesses of All Sizes**

### **I. INTRODUCTION**

This report is submitted in accordance with Section 57 of Chapter 55 of the Acts of 2017, which requires that the Cannabis Control Commission (Commission), in consultation with the Department of Agricultural Resources (MDAR) “shall report” to the Joint Committee on Marijuana Policy and the House and Senate Committees on Ways and Means “on participation in the regulated marijuana industry by farmers and businesses of all sizes.” By law, this report “shall provide recommendations to ensure farmers’ access to marijuana licenses and to allow for the growth, cultivation, production and harvest of marijuana on farm or agricultural lands, including, to the extent permitted by state and federal law, lands protected under an agricultural preservation restriction and the possibility of including marijuana and industrial hemp as land in horticultural use for the purposes of assessment and taxation pursuant to chapter 61A.” It must also include drafts of legislation needed to realize these recommendations. Following this initial report, the Commission and Department will submit a second report, by or before December 31, 2018, which will describe the progress made to promote and encourage full participation in the regulated marijuana industry by farmers and businesses of all sizes.

### **II. BACKGROUND & HISTORY**

On November 8, 2016, Ballot Question 4 “Legalize Marijuana” passed with 53.6% of the vote. At that time, Massachusetts joined seven other states, in addition to the District of Columbia, which legalized marijuana for adult-use (a.k.a., recreational use). The resulting law, Chapter 334 of the Acts of 2016, The Regulation and Taxation of Marijuana Act, which was amended in Chapter 55 of the Acts of 2017, An Act to Ensure Safe Access to Marijuana, required the Commission to issue regulations. The Commissioners were appointed on September 1, 2017 and commenced work on September 11, 2017.

From October 2-13, 2017, the Commission conducted listening sessions, including a stakeholder listening session as well as public listening sessions, regarding issues and concerns to be addressed in draft regulations. The listening sessions were held in Downtown Boston, Roxbury, Holyoke, Pittsfield, Barnstable, Martha’s Vineyard and Worcester. The Massachusetts Farm Bureau and the Massachusetts Growers Advisory Council were among the invitees to the stakeholder listening sessions.

On October 3, 2017, the Commission convened the first meeting of the Cannabis Advisory Board, a twenty-five member board, which include Commissioner John Lebeaux of the Massachusetts Department of Agricultural Resources and Lydia Sisson, appointed by the Governor as an expert in farming or representing the interests of farmers. On that date, the subcommittees required under M.G.L. c.10 §77(c) were formed in the following areas:

- on public health to develop recommendations on products, labelling, marketing, advertising, related public health issues, potency, which may include a recommended maximum limit for individual servings of marijuana products, and packaging, which may include the development and implementation of a public health warning to appear on marijuana products;

- on public safety and community mitigation to develop recommendations on law enforcement, property, business and consumer issues;
- on the cannabis industry to develop recommendations on cultivation, processing, manufacturing, transportation, distribution, seed-to-sale tracking and market stability; and
- on market participation to develop recommendations on women, minority and veteran-owned businesses, local agriculture and growing cooperatives.

Each of the subcommittees conducted public meetings in October and November, 2017, and issued recommendations to the Commission at a public meeting on December 5, 2017.

The Commission engaged in a series of public meetings from December of 2017 to February of 2018 to create draft regulations for filing with the Secretary of State's office in March of 2018. The written comment period was opened through February 15, 2018. Public hearings were held in Downtown Boston, Roxbury, Holyoke, Greenfield, Pittsfield, Barnstable, Dartmouth, Martha's Vineyard, Danvers and Worcester from February 5-13, 2018. In addition to the listening sessions, the Commission received 41 pieces of written comment concerning farming and cultivation. After conducting additional policy discussions and voting to approve final regulations, 935 CMR 500.000, final regulations were filed and eventually published March 23, 2018.

Following the publication of the regulations, Commissioners engaged in an extended municipal outreach effort throughout the Commonwealth to discuss the regulations to regional planning commissions and municipal officials, including regulations addressing the needs of farmers and small business and the process for seeking municipal approvals. Commissioners visited numerous communities across the Commonwealth, including Dukes County, Pittsfield, Greenfield, Cambridge, Amesbury, Springfield, Taunton, Newburyport, Lowell, Lenox, Fitchburg, and others. Throughout its process, the Commission has actively sought the input of farmers and businesses of all sizes and will continue to do so.

### **III. OPPORTUNITIES FOR FARMERS AND BUSINESSES OF ALL SIZES IN ADULT USE REGULATIONS**

The final regulations include key features to enable Massachusetts farmers to access the adult use marijuana market, which include, but are not limited to the following:

- License types and limitations designed to provide opportunities for Massachusetts farmers, such as Marijuana Cultivator, Craft Marijuana Cooperative, and Microbusinesses.
- License types to make participation more affordable.
- Discounts of up to fifty percent for application and license for outdoor cultivation and incentives for cultivation with reduced energy impacts, which were in

response to a strong preference expressed for outdoor cultivation in the listening sessions and public hearings;

### *License Categories & Production Growth Controls*

There are three license classes of Marijuana Establishments that allow cultivation. The first is the general category of a Marijuana Cultivator, the broadest category for cultivation, under which a business may cultivate, process, package, and transfer marijuana for sale to other Marijuana Establishments. The second is a Craft Marijuana Cooperative, a subcategory of Marijuana Cultivator, that allows farmers to form an organizational structure that can share administrative costs while growing and processing in separate locations. The third is a Microbusiness, which can allow a small business to gain a foothold in the industry. Each license class is discussed in greater detail below.

A Marijuana Cultivator is an entity licensed to cultivate, process and package marijuana, and to transfer marijuana to other Marijuana Establishments, but not to consumers. In order to provide opportunities to applicants seeking to cultivate marijuana on a small and large scale, Marijuana Cultivators can select what “tier” they wish to operate under. The tiers are measured by square footage of “canopy.” Canopy is calculated in square feet using the clearly identifiable boundaries of all areas(s) that will contain mature plants and includes all of the space(s) within these boundaries. It may be noncontiguous, but each unique area included in the total canopy calculations shall be separated by an identifiable boundary which may include, but is not limited to interior walls, shelves, greenhouse walls, hoop house walls, garden benches, hedge rows, fencing, garden beds, or garden plots. If mature plants are cultivated using a shelving system, the surface area of each level is included in the total canopy calculation.

- Tier 1: up to 5,000 square feet
- Tier 2: 5,001 to 10,000 sq. ft.
- Tier 3: 10,001 to 20,000 sq. ft.
- Tier 4: 20,001 to 30,000 sq. ft.
- Tier 5: 30,001 to 40,000 sq. ft.
- Tier 6: 40,001 to 50,000 sq. ft.
- Tier 7: 50,001 to 60,000 sq. ft.
- Tier 8: 60,001 to 70,000 sq. ft.
- Tier 9: 70,001 to 80,000 sq. ft.
- Tier 10: 80,001 to 90,000 sq. ft.
- Tier 11: 90,001 to 100,000 sq. ft.

To protect small Massachusetts farmers from the overproduction issues experienced in other states, the Commission has also adopted production growth controls.

A Marijuana Cultivator may submit an application to change the tier in which it is classified. A Marijuana Cultivator may change tiers to either expand or reduce production. If a Marijuana Cultivator is applying to expand production, it must

demonstrate that while cultivating at the top of its production tier, it has sold 85% of its product consistently over the six months preceding the application to expand production.

In connection with the license renewal process for Marijuana Cultivators, the Commission will review the records of the Marijuana Cultivator during the six months prior to the application for renewal. The Commission may reduce the licensee's maximum canopy to a lower tier if the licensee sold less than 70% of what it produced during the six months prior to the application for renewal. When determining whether to relegate a licensee to a lower tier, the Commission may consider factors relevant to ensuring responsible cultivation, production, and inventory management, such as cultivation and production history including whether there was a catastrophic loss during the licensing period; transfer, sales, and excise tax payment history; existing inventory and inventory history; sales contracts; and any other relevant factors.

A Craft Marijuana Cooperative is a kind of Marijuana Cultivator comprised of residents of the Commonwealth and organized as a limited liability company, limited liability partnership, or cooperative corporation under the laws of the Commonwealth. A cooperative is licensed to cultivate, obtain, manufacture, process, package and brand cannabis or marijuana products to transport marijuana to Marijuana Establishments, but not to consumers. The members or shareholders of the cooperative must be residents of the Commonwealth for the 12 months immediately preceding the filing of an application for a license. To ensure participation by a farmer, at least one member of the cooperative shall have filed a Schedule F tax income form within the five years prior to application for licensure. The cooperative must operate consistently with the Seven Cooperative Principles established by the International Cooperative Alliance in 1995.

The cooperative is limited to one license, but may grow in an unlimited number of locations, so long as these locations do not exceed 100,000 square feet of canopy. The cooperative may also conduct activities authorized for Marijuana Product Manufacturers at up to three locations. To ensure that cooperatives remain in the hands of small business and farmers, members of a cooperative cannot have a controlling interest in any other Marijuana Establishment.

A Microbusiness means a Marijuana Establishment that can be either a Tier 1 Marijuana Cultivator or Product Manufacturer or both, in compliance with the operating procedures for each license. A Microbusiness that is a Marijuana Product Manufacturer is limited to purchasing 2,000 pounds of marijuana per year from other Marijuana Establishments. Similar to a Craft Marijuana Cooperative, a majority of its executives or members must have been residents of Massachusetts for no less than 12 months prior to application. The Microbusiness itself cannot have an ownership stake in any other Marijuana Establishment.

Massachusetts farmers expressed a desire to cultivate marijuana, but not to have to invest in the equipment necessary to conduct the transportation of marijuana in compliance with the Commission's stringent security regulations. The Commission therefore created Transportation license opportunities for Third Party Transporters and Existing Licensee

Transporters. A Third-party Transporter is an entity registered to do business in Massachusetts that does not hold another Marijuana Establishment license or registration from the Department of Public Health. The Third-party Transporter may contract with Marijuana Establishments to provide transportation services for them. This license category alone may generate opportunities for businesses who do not wish to engage in other licensed activities. An Existing Licensee Transporter is an entity already licensed as a Marijuana Establishment that wishes to transport its own marijuana and marijuana products, and to contract with other Marijuana Establishments to provide transportation services. By allowing transportation of marijuana by others, the farmers' cost of entry and doing business are meaningfully reduced.

### *Fee Structure & Costs*

To operate a Marijuana Establishment, applicants must pay application fees and after being approved for licensure, license fees. Application fees have been scaled to allow small businesses and farmers to enter the market. Application fees start at \$200 for Tier 1 and going up to \$600 for Tier 11 for an indoor grow facility. Similarly, annual license fees are significantly lower for smaller operations, starting at \$1,250 for Tier 1 and increasing up to \$25,000 for a Tier 11 indoor grow. To further benefit farmers, outdoor cultivation operations receive a 50% discount on application and license fees.

Application fees and license fees for Microbusinesses shall be set at 50% of the combined sum of the application fees and license fees for all the cultivation or manufacturing activities in which the licensee engages.

For the electronic seed-to-sale tracking system, a Craft Marijuana Cooperative that designates a system administrator will pay one licensing program fee on a monthly basis for seed-to-sale tracking software, whereas other establishments must pay a separate fee for each license.

### *Training through the Commission's Responsible Vendor Training Program & Social Equity Program*

The regulations require Marijuana Establishments to conduct eight hours of training per year, two of which must be from a Responsible Vendor Training ("RVT") Program. The RVT Program is another opportunity for businesses of all sizes who may not want to engage in licensed activities but are interested in providing services to that industry.

RVT providers must be registered by the Commission prior to providing training. RVT providers are required to be independent and its owners and employees cannot have an interest in a licensed Marijuana Establishment.

Owners, managers and employees of a Marijuana Establishment involved in the handling and sale of adult-use marijuana must attend and successfully complete a program to be designated a "responsible vendor." After a Marijuana Establishment is licensed and designated a "responsible vendor," all new employees that handle or sell marijuana must

successfully complete an RVT program within 90 days of hire. After initial successful completion of an RVT program, each owner, manager, and employee involved in the handling and sale of marijuana shall successfully complete the program once every year thereafter to maintain the “responsible vendor” designation. Employees who do not handle or sell marijuana, e.g., employees performing administrative duties, may participate in the RVT program on a voluntary basis. Marijuana Establishments must maintain records of the RVT program compliance for four years and make them available to inspection by the Commission’s licensing or investigatory staff.

Program providers shall submit their programs to the Commission every two years for approval. To be approved, the core curriculum must address marijuana’s effect on the human body based on type of marijuana product; diversion prevention and prevention of sales to minors, including best practices; compliance with all tracking requirements; and acceptable forms of identification, including how to check identification and spot false identification; and other key state laws and rules affecting owners, managers, and employees.

In addition to the RVT Program, the Commission has created the Social Equity Program. One goal of this program is to provide opportunities to businesses of all sizes to conduct the training and develop relationships with future participants in the industry, as well as creating a way for those who have been found to be disproportionately impacted by past drug enforcement policies to gain meaningful long-term employment in a lawful, highly regulated industry. To qualify, applicants must demonstrate that they have resided in an area of disproportionate impact and/or that they, or their family member, was convicted under M.G.L. c. 94C or of an equivalent crime. The program plans to provide training, technical assistance and mentoring in a variety of areas pertaining to the adult-use cannabis industry, including but not limited to management, recruitment and employee; accounting and sales forecasting; tax prediction and compliance; legal compliance; business plan creation and operational development; marijuana industry best practices; and assistance with identifying or raising funds or capital. The fund for this training is provided pursuant to M.G.L. c. 94G § 14(b)(v).

### *Operating Requirements*

The Commission has also considered the needs of farmers and small businesses in developing the operating requirements for Marijuana Establishments. Regulatory requirements may be waived pursuant to 935 CMR 500.700 upon a finding that compliance would cause undue hardship to the requestor; the requestor’s noncompliance will not jeopardize the health or safety of any patient or the public; the requestor has instituted compensating features that are acceptable to the Commission. The requestor must provide to the Commission written documentation supporting its request for a waiver and, where applicable, complete the form provided by the Commission.

The Commission acknowledges that the security requirements required under 935 CMR 500.110 are comprehensive and may present particular challenges for some farmers and small businesses. If the Marijuana Establishment proposes other specific safeguards that

may be regarded as an adequate substitute for the standards required under 935 CMR 500.110, such measures may be taken into account by the Commission in evaluating the overall required security measures. The Commission shall submit the request to the chief law enforcement officer in the municipality where the Marijuana Establishment is located or will be located. The chief can certify the sufficiency of the requested alternate security provision or provide the Commission with a statement of reasons why the alternative security provision is not sufficient in his or her opinion. The Commission hopes that allowing farmer to propose alternative security provisions and develop these alternatives in consultation with law enforcement familiar with local conditions, will lessen cost of entry and ongoing business expenses.

### **III. AGRICULTURAL PRESERVATION RESTRICTIONS AND M.G.L. c.61A LAND**

#### *Agricultural Preservation Restrictions*

Under M.G.L. c. 184, §31, state-held agricultural preservation restrictions (APR) in the Commonwealth are held by the Massachusetts Department of Agricultural Resources (MDAR). MDAR's APR program preserves and protects agricultural land, including designated farmland soils, from being built upon for non-agricultural purposes or used for any activity detrimental to agriculture. It is a voluntary program in which MDAR purchases the non-agricultural value of the farmland in exchange for a permanent deed restriction which prevents uses and activities that may impact the present or future agricultural use and viability of the property.

A majority of the APRs held by MDAR are purchased using federal funds or are federally co-held by the United States Department of Agriculture Natural Resources Conservation Service ("USDA NRCS") through its Farmland and Ranch Lands Protection Program ("FRPP"). As a result of the conditions of the funding and participation in FRPP, which may include the right of enforcement by USDA and express language in the recorded APR document requiring compliance with federal laws, MDAR cannot permit land under an APR through FRPP to be used for activities related to marijuana as long as such activities remain illegal under federal law.

A smaller number of APRs are not federally co-held or federally funded. MDAR continues to review the issues involved with allowing activities related to marijuana on these APRs on a case-by-case basis. Factors that impact approval of such activities on a specific APR would be the following: funding source, including whether federal money supports any portion of the APR or other grant funding provided to the landowner; whether there was a municipal co-holder; language in the APR restricting the proposed activity; and title insurance policy limitations on federally prohibited activity.

*Farmland Assessment Act (M.G.L. c. 61A)*

Pursuant to the Farmland Assessment Act, M.G.L. c. 61A § 2, “[l]and shall be considered to be in horticultural use when primarily and directly used in raising fruits, vegetables, berries, nuts and other foods for human consumption, feed for animals, tobacco, flower, sod, trees, nursery or greenhouse products, and ornamental plants and shrubs for the purpose of selling these products in the regular course of business; or when primarily and directly used in raising forest products under a certified forest management plan, approved by and subject to procedures established by the state forester, designed to improve the quantity and quality of a continuous crop for the purpose of selling these products in the regular course of business; or when primarily and directly used in a related manner which is incidental to those uses and represents a customary and necessary use in raising these products and preparing them for market.” In December 2016, the General Court expressly exempted the cultivation of marijuana from the protections conferred to agricultural and horticultural uses in M.G.L. c. 40A § 3, ¶1, but the language of M.G.L. c. 61A remained the same. Absent legislative intervention, the plain language of the statute appears to allow farmers eligible for M.G.L. c. 61A to continue to enjoy protection pursuant to M.G.L. c. 61A while cultivating marijuana or hemp, but the entities responsible for interpreting these provisions are the Board of Assessors in municipalities. The Department of Revenue has commented to the Commission that it would prefer that the Legislature clarify whether marijuana cultivation is to be protected or excluded from the benefits of M.G.L. c. 61A. Unless the Legislature provides such clarification, individual Boards of Assessors will be required to rule on the issue in each municipality. To prevent a patchwork of interpretations across the municipalities, the Legislature may wish to clarify of the status of cultivation of hemp or marijuana under M.G.L. c. 61A.

**IV. RECOMMENDATIONS FOR LEGISLATION**

In order to prevent exploitation and appropriately preserve trade secrets or other commercial or financial information of farmers and businesses of all sizes from being disclosed to competitors in response to a public records request, after such information has been provided to the Commission voluntarily or involuntarily, the Commission recommends amendment of Chapter 94G regarding its powers to limit the Commission’s ability to disclose such information where a business can show that such disclosure may unduly harm the business, result in a commercial disadvantage or competitive injury, or would not customarily be released to the public by the business itself. Such limits are similar to constraints placed upon federal Freedom of Information Act disclosures, 5 U.S.C. §552. The Commission therefore proposes the following:

Amend M.G.L. c. 94G § 4(a) by renumbering M.G.L. c.94G §4(a)(xxviii) as M.G.L. c.94G §4(a)(xxix) and inserting as M.G.L. c.94G §4(a)(xxviii), the following:

(xxviii) make or receive records to be maintained as public records which shall be available for disclosure on request pursuant to M.G.L. c. 66 §10 and as otherwise

permitted by law, except the following, which shall be exempt from disclosure to the extent permitted by law:

- Records exempt from disclosure by statute or regulations promulgated by the Commission to implement this chapter;
- Trade secrets and commercial or financial information obtained from a person, if such information is deemed by the Commission, in its discretion, to be privileged or confidential.

## **V. COMPLICATIONS UNDER FEDERAL LAW**

Farmers and small business will have to address the federal implications of growing marijuana. As marijuana remains a Schedule I substance under the Controlled Substances Act, 21 U.S.C. §812, farmers and small businesses may be unable to secure the loans and grants typically available to them, as banks regulated by federal law are reluctant to be involved with marijuana-related businesses. Furthermore, programs normally used to assist farmers in cultivation may not available to farmers if they cultivate marijuana. Federal support may also be terminated for non-marijuana crops if farmers use a portion of their property to cultivate marijuana, even if done in compliance with state law.

## **VI. CONCLUSION**

The Commission is pleased to provide this report, in consultation with the Department, on participation in the regulated marijuana industry by farmers and businesses of all sizes. The regulations put in place to date attempts to balance providing opportunities for farmers and small businesses, with the need to protect the public health, safety and welfare of citizens of the Commonwealth.

There is still work left to be done. The Legislature has established significant, ground-breaking protections for farmers and small-businesses. The Commission looks forward to continued collaboration addressing the federal and local constraints faced by farmers and small business owners to realize the recommendations contained in this report to fulfil the legislative mandate of supporting these constituencies in this emerging industry.