

Recreation Marijuana Industry Forges Ahead Amid Enforcement Uncertainty

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The Cannabis Control Commission (CCC) voted in late December to approve draft regulations establishing the framework for the recreational marijuana industry of Massachusetts. Less than one week later, U.S. Attorney General Jeff Sessions announced a reversal in a previous federal policy that instructed U.S. Attorneys not to interfere with legal and regulated marijuana markets established by individual states. State regulators vowed to forge ahead with implementation of the state's voter-approved law despite the resulting disruption and anxiety the shift has sewn within the nascent industry. In response to the Sessions announcement, the CCC indicated that "the role of the Cannabis Control Commission remains the same—to fulfill the will of the voters of Massachusetts by implementing and administering a regulatory process that is safe, equitable and efficient." The CCC has scheduled 10 hearings around the state seeking public input on the proposed regulations.

U.S. Department of Justice Issues Memo on Marijuana Enforcement

On January 4, 2018, U.S. Attorney General Jeff Sessions issued a [memo](#) on federal marijuana enforcement policy announcing a return to the rule of law and the rescission of the Obama-era [Cole memo](#). Those guidelines were authored by former Deputy Attorney General James Cole in 2013 after Colorado and Washington voted to decriminalize marijuana for recreational use. The policy discouraged prosecutors in states where marijuana was legalized from bringing charges for marijuana-related crimes unless they involved distribution to minors, benefits to gangs or cartels, and other aggravating factors. The policy did not legalize marijuana at the federal level. In place of the previous hands-off policy, Sessions gave individual U.S. Attorneys general discretion, not guidance, to pursue marijuana-related prosecutions. Sessions's approach will highlight the ongoing legal battle over states' rights and when they properly supersede the power of the federal government.

Less than one month since his Senate confirmation, Massachusetts U.S. Attorney Andrew Lelling may now be the person with the greatest ability to influence how the legal marijuana industry will take shape in the Commonwealth. Immediately following the announcement Lelling indicated that he would "aggressively investigate and prosecute bulk cultivation and trafficking cases, and those who use the federal banking system illegally." Shortly thereafter, in response to calls for clarification and criticism that his statement of position offered insufficient guidance, Lelling elaborated with a response that struck a more aggressive tone than those issued by other federal prosecutors: "Congress has unambiguously made it a federal crime to cultivate, distribute and/or possess marijuana. As a law enforcement officer in the Executive branch, it is my sworn responsibility to enforce the law." He added "Deciding in advance to immunize a certain category of actors from federal prosecution would be to effectively amend the laws Congress has already passed, and that I will not do." Lelling also indicated that he would proceed on a case-by-case basis, taking into account limited federal resources.

Lelling's stance has miffed pro-cannabis advocates as well as a range of Massachusetts leaders who are in the process of implementing the law and regulating the industry safely and effectively. Governor Charlie Baker, Attorney General Maura Healey, and Treasurer Deb Goldberg, all of whom opposed the legalization of recreational marijuana use, have all voiced support for implementation of the voter-approved law. House and Senate leadership were also critical of the uncertainty and confusion generated by the federal announcement. CCC officials had not yet communicated directly with Lelling's office but they indicated that they were willing to work with him. Daniel Bennett, the Secretary of Public Safety, who oversees the State Police, and a spokesperson for the Boston Police both indicated that they will continue to enforce state law and will not actively enforce federal marijuana law at the local level.

There are currently 8 states that have legalized recreational marijuana programs and 30 states plus the District of Columbia that have medical marijuana programs. While consumers, businesses, entrepreneurs, and banking institutions may be more reluctant to engage in the marijuana industry, the states have a legal obligation to implement their respective laws.

The announcement has sparked fears that the new enforcement policy will sustain the black market at the expense of the entities who have already invested significant resources in the hope of acquiring a license to operate legally. Additionally the policy will chill investment opportunities. Most of the state's medical dispensaries have already reverted to cash-only operations, which put patients at risk. State authorized medical marijuana programs are protected by the Rohrabacher-Blumenauer amendment to the federal

spending bill; however, federal financial institutions are at risk. According to estimates by the Massachusetts Department of Revenue, the state is expected to collect between \$44 million and \$82 million in taxes if sales are allowed to proceed as planned in July 2018.

Sessions and Lelling have indicated that the only way to achieve certainty and security is through an act of Congress. Members of the all-Democratic Massachusetts congressional delegation have criticized the reversal in federal policy as reckless and disruptive. Nationally, opposition has arisen from all sides of the political spectrum galvanizing support for relief either in the form of legalization nationwide or exemptions from prosecution in states where recreational and/or medical marijuana use is currently legal.

CCC Draft Regulations and Public Process

Meanwhile, the CCC has released a wide-ranging set of draft rules for the recreational cannabis industry for public comment. The regulation will be the subject of multiple public hearings with the goal of finalization by March 15th. The draft details the different types of marijuana establishments and licenses that will be available and the rules governing the review and approval of applications. The regulation is perhaps more permissive than anticipated, allowing for cannabis cafes and home delivery, and striking a balance between public safety and free enterprise.

The full draft regulation is available [here](#). Highlights are included below.

Licensure and Application Process

The CCC has proposed 11 different licenses spanning eight class types, which offer many options for those interested in entering the market. These licenses include:

- *Marijuana Cultivator*: Allows for the cultivation, processing, packaging and delivery of marijuana to other licensed marijuana establishments, but not directly to consumers. This license type is split into 4 tiers based on square footage of the grow operation.
- *Craft Marijuana Cooperative*: Authorizes residents of the Commonwealth, organized as a formal business under state law, to cultivate, obtain, manufacture, process, package and brand marijuana and marijuana products for delivery to licensed marijuana establishments but not to consumers. A craft cooperative is limited to one license and may have up to 6 cultivation locations and 3 for manufacturing.
- *Marijuana Product Manufacturer*: Permits the license holder to obtain, manufacture, process and package marijuana and marijuana products for delivery to other licensed establishments but not directly to consumers.
- *Marijuana Retailer*: An entity that is licensed to purchase and deliver marijuana and marijuana products from marijuana establishments and deliver or sell such products to other licensed establishments or directly to consumers. This category of license includes storefront retailers, delivery-only retailers that strictly provide products to consumers at their primary addresses, and marijuana social consumption establishments which allow individuals over 21 to consume marijuana products at their locations.
- *Marijuana Research Facility*: Allows for the cultivation or purchase of marijuana and marijuana products for the purpose of conducting research.
- *Independent Testing Laboratory*: A facility that tests marijuana and marijuana products, is third-party accredited and is financially independent from any other marijuana establishment for which it tests product.
- *Marijuana Transporter*: Includes third party transporters, which are entities that do not hold any other marijuana establishment license and solely transport product between establishments, and existing license transporters which permit marijuana establishment license holders to contract to transport other license holders' product to other marijuana establishments.
- *Marijuana Microbusiness*: Offered to residents of Massachusetts for at least 12 months prior to application, this license is a co-located tier 1 or 2 cultivator, product manufacturer and delivery service establishment that holds no others marijuana licenses.

All licensees will be eligible to earn leadership ratings, issued by the CCC, in the areas of social justice, local employment, energy and environment, and compliance.

A surprise to many looking to enter the industry is the modest application fee structure, which marks a departure from the steep fees associated with medical marijuana operations. Fees to apply for an establishment in any of the license classes are low, with the majority of applications costing only \$300. This fee structure will ensure that small businesses are able to compete with larger corporations from other states with legal markets and encourage business development in areas disproportionately affected by marijuana enforcement. The application itself is a three part process which includes siting information, detailed criminal background checks, a management and operations profile, and a certification that any capital funds used as investment in or to finance the marijuana establishment are lawfully earned or obtained. Two categories of applicants – economic empowerment applicants and existing medical marijuana establishment applicants – will receive priority review between April 1st and April 15th of 2018. Thereafter, applications are reviewed on a rolling, first-come-first-serve basis.

Marijuana Products

Marijuana products are broadly defined as products that have been manufactured and contain marijuana or extract from marijuana, include edibles, beverages, topical products, ointments, oils and tinctures. The draft regulations set firm rules around the production and packaging of these products, particularly edible products, including:

- **Dosing Limits:** The draft regulations set firm dosing limits on all edible marijuana products, limiting single serving products to 5 milligrams of THC and multiple serving products to 20 servings or 100 milligrams of THC, and require multi-dose edibles to be easily divisible. Additionally, all products must ensure that THC content be distributed evenly. These limits seem to address the potential dangers of high potency edible marijuana products and concerns over access to such products by minors. The limit of 5 milligrams of THC per single use edible product is lower than in many other states with legalized adult use, which prohibit THC content over 10 milligrams.
- **Packaging Requirements:** All edible marijuana products, concentrates, extracts, tinctures and topicals must be wrapped in child resistant packaging, cannot be packaged in a way to attract minors and are prohibited from designs that resemble any non-cannabis consumer product.
- **Labeling Requirements:** Establish strict rules for the labeling of edible products that include warning labels, serving size and quantity of usable marijuana within the product as measured in ounces, a listing of all ingredients including the full cannabinoid profile of the marijuana contained in the product, and directions for use.

The draft regulations require that, prior to a marijuana product being sold, the CCC approve all packaging and labeling. The CCC will issue guidelines on the pre-approval review process but such guidelines will not supersede compliance with the final regulations.

Other Noteworthy Provisions

Security – The draft regulations require all marijuana establishments to adhere to sufficient safety measures to deter and prevent theft and unauthorized entrance into areas containing marijuana. These requirements include security systems that include alarms, video cameras, and 24 hour recording; limited access areas for authorized personnel only; storage of all finished marijuana and marijuana products in locked safes; and adoption of procedures to prevent loitering, amongst others. Additionally, licensed establishments must be sited outside a buffer zone of at least 500 feet from schools, daycare centers, or other facilities in which children commonly congregate.

Transportation – The CCC has set forth strict guidelines for the transportation of marijuana, including safety protocols for all vehicles, a requirement of at least two licensed marijuana agents in vehicles at all times, randomized routes and GPS monitoring. Under the regulations, licensed cultivators and manufacturers can contract with licensed third party transporters to move products between establishments, or they may opt to transport product to retail locations themselves. If a cultivator or manufacturer wants the ability to home deliver – which must occur during regular business hours and may only be delivered to a permanent home address – then that business must also apply for a delivery-only retail license.

Marketing and Advertising – The draft regulations restrict marijuana establishments from the use of many traditional forms of advertising, including TV, radio, internet, billboard or other similar outlet, unless at least 85% of the audience is expected to be over 21; the use of cartoons; the use of illuminated signage after sundown; the use of vehicles equipped with loudspeakers; and any marketing or branding of marijuana or marijuana products on clothing, cups, or other similar portable promotional items.

Social Equity Program – The establishment of a social equity program provides training and technical assistance to licensees on legal compliance, industry best practices, accounting and other business-related activities. Eligibility for the program requires residency in an area of disproportionate impact for at least 5 of the past 10 years, residency in Massachusetts for at least one year and a conviction for a controlled substance offense, or proof that the applicant is married to or the child of an individual convicted of such an offense.

Compliance – The Secret Shopper Program is established to ensure compliance with laboratory testing of all marijuana and marijuana products. The program allows employees or agents of the CCC to pose as customers to purchase marijuana or marijuana products and deliver them to an independent lab for testing. If any tested product under the program returns non-compliant, the CCC may take action on the establishment's license or may assess civil penalties.

Municipal Process – In January the CCC issued a [guidance document](#) for municipalities, separate from the draft regulations. This document contains information for cities and towns including the role municipalities play in regard to the CCC's licensing process, host community agreements, local taxation and zoning bylaw and ordinance compliance including the proper procedures for limiting or banning adult use establishments.

What's Next?

The Commission has scheduled 10 public hearings on their proposed regulations over six days and in multiple locations across the state in February. Those wishing to submit written comments to the CCC on the draft regulations must do so by February 15th either electronically or by mail. According to state law, final regulations must be issued by March 15th, followed by application review beginning on April 1st. Priority applications will be reviewed between April 1st and 15th, and thereafter on a rolling basis. Under state law, a single applicant may not hold more than three licenses in each license class.

ML Strategies will continue to monitor the regulatory process, any federal enforcement actions or updates, and will periodically provide updates on the new industry's development in the Commonwealth.

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