

## MICIA COMMENTS ON DRAFT MARIHUANA RULES

(Rule sets # 2019-67 LR, 2019-68 LR, 2019-69 LR, 2019-70 LR, 2019-71 LR, 2019-72 LR, 2019-73 LR, 2019-74 LR, & 2019-75 LR.)

### INTRODUCTION

The Michigan Cannabis Industry Association (MICIA) is the leading voice for Michigan's legal cannabis businesses. The association advocates for a responsible and successful medical and adult-use cannabis industry by promoting sensible laws and regulations and industry best practices among members. MICIA seeks to create a thriving industry for cannabis businesses in Michigan by developing opportunities for industry collaboration and partnerships and sharing industry knowledge and best practices among its membership.

MICIA supports many elements of the proposed rules. But MICIA offers the following constructive comments with the hopes of developing policies that promote both the growth of the industry and the establishment of good business practices. Moreover, MICIA seeks to ensure that the Marijuana Regulatory Agency (MRA) receives adequate stakeholder input prior to the adoption of its generally applicable policies, standards, and enforcement procedures consistent with the rule of law and the Michigan Administrative Procedures Act, MCL 24.201 *et seq.* Lastly, MICIA notes that, though it has not exhaustively commented on all of the rules, its silence on some rules should not be understood as either approval or disapproval of those particular provisions.

### COMMENTS

#### **1. Licensing Rules (R 420.1 *et seq.* and R 420.101 *et seq.*)**

##### *Licensing Prequalification Application Procedures*

Proposed Rule 420.3(2) provides, in part, that prequalification status for a pending application is valid for 1 year after the agency issues a notice of prequalification status unless otherwise determined by the MRA. After 1 year has expired, the proposed Rule authorizes the MRA to require the applicant to submit a new application and pay a new nonrefundable application fee. While the permissive language of the proposed Rule provides that MRA with a great deal of flexibility, MICIA suggests that the MRA extend the period under which an incomplete, pending application may be held in prequalification status from a one-year or a two-year period. Oftentimes prequalified applicants who are actively under construction require more than one year to complete the final application due to circumstances beyond their control such as delay or inaction by contractors and/or local or county governments. To require those applicants to redo their

application and pay a new nonrefundable application fee under those circumstances can be unduly burdensome during the startup phase of a new business.

#### *Licensing Application Procedures – Control*

Proposed Rule 420.4(2)(iv)(B) requires applicants to disclose “any other person who . . . [i]s controlled, directly or indirectly, by the applicant or by a person who controls, directly or indirectly, the applicant.” This cumbersome requirement has been difficult to understand and could theoretically require disclosure of a string of persons far removed from the applicant. MICIA suggests that this language be removed, limited, or further clarified.

#### *Application Deficiencies – Opportunity to Cure*

Proposed Rule 420.5(4) and (5) provides an applicant 5 days to correct any deficiency in the application. Failure of an applicant to correct a deficiency within 5 days of notification by the agency may result in the denial of the application. MICIA suggests that this timeframe be extended to ten days or, at least, be revised to provide five “business days” excluding holidays to cure application deficiencies.

#### *Mandated Labor Peace Agreements*

MICIA is opposed to the rules’ mandate that licensees enter into and abide by labor peace agreements. R 420.5(6), R 420.13(1)(e), R 420.14(3)(h), & R 420.21(2)(m), R 420.801(1)(e), & R 420.802(3)(h). A legal mandate forcing a unionized workforce on applicants is both wholly unnecessary and unrelated to an applicants’ qualifications to operate a marijuana establishment. The mandate also raises a number of significant legal concerns, including but not limited to whether it conflicts with federal law governing private-sector labor relations and state law preventing forced unionization. MICIA further believes such requirements are beyond the agency’s delegated rulemaking authority under MCL 333.27206, MCL 333.27957, & MCL 333.27958. Additionally, the MRA has failed to engage in any cost-benefit analysis related to this requirement and its impact on the industry. See generally MCL 24.245(3).

#### *Civil Lawsuit Reporting Requirement*

Proposed Rule 420.14(5) requires applicants to notify the agency within 10 days of the initiation or conclusion of any new civil lawsuits or legal proceedings that involve the applicant. To the extent such actions are unrelated to any criminal or regulatory actions, this requirement is unnecessary and should be removed. The reporting requirement provides an incentive for third parties to target and seek to obtain leverage over licensees by threatening non-meritorious litigation. MICIA, however, continues to support reporting for civil judgments entered against licensees.

#### *Excess Marijuana Grower Licenses*

MICIA supports the MRA’s inclusion of excess marijuana grower licenses. R 420.20(1)(b); & R 420.22. MICIA views this license as a significant means of addressing a market shortage of available product by permitting larger scale cultivation.

### *Marihuana Event Organizer Licenses and Temporary Event Licenses*

MICIA supports the MRA's inclusion of marihuana event organizer licenses and temporary event licenses. R 420.20(1)(c), (1)(d), & (3); R 420.23; & R 420.24. MICIA sees both as a positive means of facilitating industry development and social consumption.

### *Marihuana Delivery Business License*

MICIA opposes the MRA's development of rules allowing the licensure of standalone delivery businesses permitted to operate without a secured transporter license and without obtaining local approval. See R 420.20(1)(e) & R 420.27. MICIA believes that these services are more effectively regulated and tracked at licensed marihuana retail locations or when directly consummated by licensed marihuana retailers.

### *Research and Development License*

MICIA proposes that the MRA develop and adopt rules to promote the growth of facilities specializing in genetic advancement of marihuana plant strains, seeds, and clones for sale via secured transporters to licensed growers.

### *Marihuana Plant Count – Female Flowering*

MICIA supports the clarification in proposed Rule 420.102 that only female marihuana plants that flower may be included in the plant count referenced in subrule (1) of this rule. This treatment more accurately reflects marihuana growth and harvest cycles and should help alleviate the current supply shortage. MICIA further suggests replacing the phrase "female marihuana plants that flower" with the phrase "flowering marihuana plant" and defining that term as "a marihuana plant that has visible calices, stigma, or preflowers located at the node or a stem or branch."

### *Marihuana Transfers*

MICIA supports the more flexible marihuana transfer provisions for licensed growers, processors, and retails in proposed Rule 420.102, 420.103, and 420.104.

## **2. Operations Rules (R 420.201 *et seq.*)**

### *Orders Limiting Sales from Cultivators and Producers to Retailers Under Common Ownership*

Proposed Rules 420.206(16)(a) & (16)(b) authorize the MRA to set orders limiting the sales from cultivators and producers to producers and marihuana sales locations under common ownership and establish sanctions and fines for violations of those orders. MICIA supports the concept of encouraging supply to licensed retailers who are not part of a vertically integrated operation and thus maintaining the value of separate license types. But MICIA believes that this issue can have a substantial impact on the industry and requires further study. Accordingly,

proposed rules should be withdrawn and a stakeholder workgroup should be established to provide more industry input on this issue before adoption of regulation on this topic.

Further, MICIA believes that, as part of that study, the MRA should identify either quantitative thresholds or qualitative standards for when the agency would exercise this authority. Although MICIA understands the MRA's position that these rules discourage stockpiling and promote adequate supply and distribution, MICIA requests that, to avoid inconsistent or arbitrary application of its authority, the MRA set standards to clarify the quantitative thresholds at which the agency may impose such an order or the limitations the agency intends to place on the amount of product that may be sold to entities under common ownership.

#### *Prohibition on Sale of Fresh Food and Beverages*

Proposed Rules 420.203(2)(b)(i) & (2)(b)(ii) prohibit marihuana businesses from allowing the onsite sale, consumption, or serving of food or alcohol unless designated as a consumption establishment and also prohibit the consumption, use, or inhalation of marihuana product without such license. See also R 420.201(1)(k) (defining "designated consumption lounge"). MICIA notes that MRA enforcement has interpreted this as prohibiting the sale or consumption of all kinds of beverages such as coffee, tea, or juice. MICIA recommends changing this rule to permit the sale of fresh food and non-alcoholic beverages at retail locations without additional approvals or licenses.

#### *Access to Licensee Records*

Proposed Rule 420.203(f) provides that "[l]icensee records must be maintained and made available to the agency upon request." MRA has taken the position that this language requires "immediate" access upon request. Many vertically integrated marihuana businesses maintain their records at a corporate headquarters and/or have security protocols that prevent immediate access to such records which presumably has a broad definition. MICIA recommends clarifying this language to provide access to records within 24 hours after a request.

#### *Waste Removal Requirements*

Proposed Rule 420.211(6) restricts a licensee's options for the disposal of marihuana product waste and marijuana plant waste to landfilling, composting, anaerobic digestion, and incinerator at a permitted, in-state municipal solid waste or hazardous waste incinerator. MICIA views these options for disposal as too restrictive. MICIA instead recommends that the MRA consider other innovative, sustainable, and/or environmentally responsible options for on-site disposal that may be more beneficial to the environment. MRA may thus amend the proposed rule to add the following language "or alternative method not listed with approval from the department." Along these same lines, MICIA further supports proposed Rule 420.211(13) which provides that "[n]othing in these rules prohibits a grower, with agency approval, from disposing of marihuana plant waste as compost feedstock or in another organic waste method at their marihuana business in compliance with part 111 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.11101 to 324.11153."

### *Generic Adoption of the NREPA and Failure to Promulgate Rules Regarding its Application*

Proposed Rule 420.203(3)(a) adopts entirely the application of the NREPA, MCL 324.101 to MCL 324.90106 to marihuana businesses without explaining which provision the MRA views as applying to particular circumstances and stating that “[t]he agency may publish guidance” to that effect at a later date.

MICIA and its members support good stewardship of the environment but oppose the imposition of new marihuana-specific environmental laws without the benefit of industry participation and other stakeholder’s feedback through rulemaking. To the extent the MRA intends to set generally applicable policy on the environmental obligations of marihuana businesses that either the MRA or EGLE intends to enforce, such “guidance” must be promulgated. MCL 24.207; MCL 24.226.

Alternatively, MICIA requests that this new requirement not go into effect until one year after promulgation.

### *Broad Assertion of Agency Authority Unrelated to any Express Statutory Grant*

Proposed Rule 420.203(3)(b) subtly assumes expansive authority to the MRA to require broad operational changes to marihuana businesses. The proposed rule states that “[a] marihuana business shall comply with . . . (b) *Any other operational measures requested by the agency that are not inconsistent with the acts and these rules.*” (Emphasis added.)

MICIA opposes this assumption of broad and undelegated authority by the MRA. The agency’s assertion of such broad power over marihuana businesses as to demand any operational changes “not inconsistent with” the law inverts the axiom that, as creatures of statute, administrative agencies can only assert the power expressly granted to them by law. See *York v City of Detroit*, 438 Mich 744, 767 (1991) (“While an administrative agency may make such rules and regulations as are necessary for the efficient exercise of its powers expressly granted, “an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute, the source of its power.”)

### *Equivalent Licenses Operating at Same Location*

MICIA supports the common-sense and efficient approach contained in proposed Rule 420.205 allowing equivalent licenses with common ownership to be operated at the same location.

## **3. Sampling and Testing Rules (R 420.301 *et seq.*)**

### *Homogenizing of Samples*

Proposed Rule 420.304(2)(b) requires the collection of samples of “not less than 0.5% of the weight of the harvest batch” and requires samples to be “homogenized for testing.” This language seems to allow for unlimited batch sizes and marks a drastic departure from existing standard of 15-lb batches. MICIA suggests that, because contamination can spread out in a heterogeneous manner, it would be more appropriate to split samples up across batches with some

form of weight-based limitation in order to obtain a more representative sample of harvests. For example, under the proposed language, a 1,500 lb. summer “harvest batch” would require 7.5 lbs. to be tested and 50% of that homogenized. But sorting that harvest batch into smaller batches would provide better data on the quality of the product.

#### *Scope of Laboratory Accreditation*

Proposed Rule 420.305(1)(a) requires laboratories to be accredited within 1 year of licensing but do not clarify whether specific assays or analytes must be included within its accreditation. MICIA recommends that the MRA modify this rule to allow the MRA to approve and validate a Safety Compliance Facility’s new method and to allow at least 6 months for a scope expansion within the Safety Compliance Facility’s regular ISO surveillance period.

#### *Good Manufacturing Practices Certification and Adoption*

MICIA strongly supports the provision of the rules allowing for good manufacturing practices certification and adoption as applied to marihuana businesses. R 420.301(1)(i); R 420.305(4); R 420.602(2)(h).

#### *Filing of Certificates of Analysis with the MRA for Failed Samples*

Proposed Rule 420.305(12) requires laboratories to “enter the results into the statewide system and file with the agency within 3 business days of test completion” each laboratory test result “for any batch that does not pass the required tests.” MICIA reads this requirement to unnecessarily mandate a duplicative “fil[ing]” of certificates of analysis with the agency after the results have already been entered into the statewide system. Because the laboratories will enter this information into the statewide system electronically, MRA should modify this requirement to clarify that it will not require a separate filing from laboratories. MICIA further seeks clarification regarding whether the language “test completion” refers to the completion of each individual test or when the full panel of tests per sample are completed.

#### *Encouragement of “Laboratory Shopping”*

Proposed Rule 420.306(2) prohibits laboratories that conduct an initial failed test of a sample from performing any retesting. The proposed rule has the perverse effect of encouraging laboratory shopping and discouraging the reporting of failed test results by laboratories. Rather than discourage accurate test reporting for failed samples, MICIA suggests that this language should be removed.

#### *Retesting and Remediation*

The MRA’s proposed limitations on retesting and remediation, R 420.306(2) & (3), are unduly restrictive. The agency should broaden these provisions to allow for more extensive retesting and remediation. MICIA, however, supports R 420.306(4) which appears to allow quarantined product to be transferred between licensed processors for purposes of remediation as not all processors own applicable remediation equipment.

### *Failure to Promulgate Action Limits and LOQs*

The rules require the agency to establish both action limits setting standards for “the permissible level of a contaminant in marihuana product” such as foreign matter, microbial screening, heavy metals, and residual solvents, R 420.301(1)(1)(a) and R 420.305(3)(b)–(3)(f), (6), & (9), and limits of quantification (LOQs) for chemical residue and target analytes. R 420.301(1)(n) and R 420.305(3)(i) & (10). Those action limits and LOQs are attended by significant consequences. Product failing to meet the standards “must be destroyed as provided in these rules or remediated” as permitted by the agency. R 420.306(2)–(4). The proposed action limits and LOQs thus set “agency regulation[s], . . . standard[s], . . . [and] polic[ies] . . . of general applicability that implement[t] or appl[y] law enforced or administered by the agency.” MCL 24.207. As such, the action limits and LOQs are “rules” requiring promulgation in order to be enforceable by the agency. MCL 24.207; see also MCL 24.226; & MCL 24.232(5).

MRA’s failure to include the proposed action limits and LOQs in the rules improperly circumvents the APA’s rulemaking requirements. *Delta Co v Dep’t of Natural Resources*, 118 Mich App 458, 468 (1982). Further, the failure to vet these standards through the rulemaking process and to allow the industry and other groups to have input into their development and their propriety for the purpose of establishing health-based standards will result in less technically accurate action limits and render them legally unenforceable.

### *Failure to Promulgate Remediation Protocol*

Similarly, the rules delay to a later time the publication of a “remediation protocol.” R 420.306(4). Like the action limits, this protocol sets “generally applicab[le]” agency policy “that implements or applies the law enforced or administered by the agency.” MCL 24.207. Consequently, the remediation protocol is also a rule that needs to be promulgated.

### *Failure to Promulgate Safety Test Requirements*

Additionally, the MRA has elsewhere circumvented the rulemaking process for safety test requirements, indicating that “the agency may publish a guide indicating which of the following tests are required based on product type when marihuana product has changed form.” R 420.305(3). As noted above, such a decision sets an agency policy of general applicability concerning the law it enforces. MCL 24.207. Deciding which tests will be required for sampling and analyses must be vetted through rulemaking and included in this set of rules rather than via a later “guide” or bulletin. MCL 24.226; *Detroit Base Coalition*, 431 Mich at 183–84.

### *Vape Cartridge Testing*

MICIA suggests the adoption of a rule to require vape cartridges to be tested for Vitamin E-acetate (ATA). Because of the recent outbreak of injuries associated with vape cartridges containing ATA, such a rule would promote the public health.

#### **4. Sales and Transfers (R 420.501 *et seq.*)**

##### *Internal Product Sampling by Employees*

Proposed Rule 420.509(5) permits cultivators to provide internal product samples to their employees but limits those samples to 2.5 ounces in a 30-day period. MICIA supports the rules' encouragement of employees' product sampling. Employee product sampling can foster familiarity with and develop their expertise concerning the product, which facilitates better operations and encourages sales. But the MRA's proposed limitation is too stringent and improperly sets a limitation that does not take into account the size of or number of employees at an operation. MICIA instead proposes that the MRA extend this provision to allow cultivators to provide internal product samples of up to 1 ounce per employee per month. MICIA further seeks clarification of what level of documentation will satisfy the requirement that "[t]he results of internal product sampling must be documented . . . ."

#### **5. Non-compliance with APA Procedures (all sets)**

MICIA also notes that the MRA has improperly failed to comply with APA procedural requirements for this set of rules in several respects. Per MCL 24.245(3)(l), (3)(m), & (3)(n) the MRA was required to include in its Regulatory Impact Statement and Cost Benefit Analysis (RIS-CBA) "an estimate of the actual statewide compliance costs of the propose rules on individuals" and "an estimate of the actual statewide compliance costs of the proposed rules on business and other groups" as well as "a demonstration that the proposed rule is necessary and suitable to achieve its purpose in proportion to the burdens it places on individuals." The RIS-CBAs in support of the rules do not engage in any significant substantive analysis of the economic impacts of the proposed rules on individuals and businesses nor include any numerical estimates of these impacts.

Additionally, MCL 24.245(3)(o)–(3)(s) require detailed analysis of and estimates of the financial impacts of the rules on small businesses. The RIS-CBAs do not provide any such estimates nor any substantive analysis and simply state that "[i]t is uncertain how many small businesses may be affected by the proposed rules" but that "the belief is that these proposed rules will make it easier for small businesses to enter the regulated market." The RIS-CBAs make such a statement without analyzing the barriers to entry imposed on small businesses as a result of the licensing and operational costs associated with the rules.

The rules also fail to estimate the impacts to state and local revenues as a result of the rules. MCL 24.245(3)(z) & (3)(dd). In response to question # 13 posed by the RIS-CBA requiring an "[e]stimate [of] any increase or decrease in revenues to other state or local governmental units . . . as a result of the rule," the agency merely states that "[t]here are no anticipated increases or decreases in revenues or costs to other state or local government units as a result of the proposed rules." This suggestion is not credible. Given the various direct compliance costs and other regulatory burdens imposed by the rules, the agency's failure to estimate the impacts of these burdens on marihuana businesses' sales and the resultant impact on state and local revenues through the State's corporate income tax, MCL 206.601 *et seq.*, local income tax paid by both the businesses and their employees, MCL 141.501 *et seq.*, sales tax, MCL 205.51 *et seq.*, use tax, MCL

205.91 *et seq*, the General Property Tax Act, MCL 211.1 *et seq*, and of course, the Michigan Regulation and Taxation of Marihuana Act, MCL 333.27951 *et seq.*, is unsupportable.

As one example, the testing and sampling rules' requirement to test "not less than 0.5% of the weight of the harvest batch," R 420.304(2)(b), means that at least 0.5% of such a harvest is not being sold. That cost has not been calculated and weighed against the alleged benefit of the sufficiency of that sample size to conduct required tests, the impact of sample size on sampling accuracy, and whether a smaller sample size would achieve the same goals. Nor has the agency calculated the impact of its proposal limiting the ability to remediate and retest (and ultimately requiring the destruction of) marihuana that does not meet action limits. See generally R 420.306. Recent market values of marihuana have averaged over \$500 per ounce through licensed operations. See <https://www.mlive.com/public-interest/2020/02/major-marijuana-website-bans-advertisements-from-black-market-companies-in-michigan.html>. Consequently, small alterations to the scope of such requirements can impose a substantial cost on large volumes of sales as well as attendant costs state and local revenues of a minimum of 16% in sales and marihuana excise taxes. MCL 205.52(1); MCL 333.27963(1).

These procedural defects deprive stakeholders, the Legislature, and the agency of a more substantive debate regarding the costs and benefits of individual proposed rules. Additionally, the defects can render the rules invalid through an APA procedural challenge. MRA should therefore resubmit the rules with these legislatively required analyses.

## CONCLUSION

MICIA appreciates the opportunity to comment on the MRA's proposed rules and the MRA's efforts to develop a sound regulatory structure for the cannabis industry. MICIA believes that, with the changes suggested above and with greater industry feedback and more thorough vetting of the costs and benefits of proposed regulations, Michigan can be a leader both economically and in its promotion of good business practices for the industry.

Respectfully submitted,

A handwritten signature in black ink, reading "Robin J. Schneider". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

Robin Schneider, Executive Director  
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