LOS ANGELES COUNTY BAR ASSOCIATION
200 South Spring Street | Los Angeles, CA 90012
Telephone: 213.627.2727 | www.lacba.org

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California Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814-4339
Email: staff@oal.ca.gov

California Department of Cannabis Control
2920 Kilgore Road
Rancho Cordova, CA 95670
publiccomment@cannabis.ca.gov

Re: Public Comment – Revised Proposed Consolidated Cannabis Regulations Filed on July 6, 2022

To Whom It May Concern:

We write on behalf of the Los Angeles County Bar Association ("LACBA") Cannabis Section concerning the revised proposed Cannabis Regulations (the "Proposed Regulations")[1] filed by the Department of Cannabis Control (the "Department") on July 6, 2022.

LACBA was founded in 1878 and is one of the largest voluntary metropolitan bar associations in the country, with more than 20,000 members. LACBA serves attorneys, judges, and other legal professionals through 28 sections, committees, networking events, live and on-demand CLE programs, and pro bono opportunities, as well as public service and informational resources.

LACBA formed its Cannabis Section in 2019, which is one of the newest among LACBA's many sections. LACBA formed its Cannabis Section out of an interest among its members and the foresight of its leadership. LACBA's Cannabis Section provides top-tier continuing legal education concerning the legal cannabis industry and its many complex issues, including: state and local regulatory compliance, corporate and tax structuring, banking, real estate, labor and employment, intellectual property, insurance, litigation, distribution, marketing, and ethics. The Cannabis Section serves as a source of expertise for other attorneys,

[1] Unless otherwise stated, all section references herein are to the Proposed Non-Emergency Regulations.

government bodies, and the news media on issues regarding cannabis laws, regulations and developments, and serves as a forum for the consideration of public policies dealing with or regarding cannabis generally.

The attorney members of LACBA's Cannabis Section represent clients throughout the State of California in all aspects of the cannabis industry, including retailers, cultivators, manufacturers, distributors, investment funds, landlords, brands, and suppliers of ancillary products and services. Our clients seek legal solutions to the full range of rulemaking, regulatory, transactional, legislative, and litigation challenges they confront, and our members seek to provide clear advice about the varying contours and conflicts within the law that must be navigated and respected. Many of our members have also assisted with creating policy and ordinances in various local municipalities throughout the State.

On behalf of LACBA's Cannabis Section, we wish to express our appreciation to the Department for its continued efforts to refine, streamline, and strengthen the existing regulatory framework for the State's cannabis industry. While we recognize that many of the Proposed Non-Emergency Regulations simply re-adopt the existing regulations that are currently in effect as emergency regulations, we have concerns that some of the proposed changes require further clarification and/or fail to address certain significant pain points for the industry's legal operators.

Branded Merchandise

Section 15041.1 provides that all "branded merchandise" must identify the "licensee responsible for its content" by displaying a "permanently affixed" license number for such licensee.

Comment: Compliance costs associated with the "permanently affixed" requirement will be costly and unduly burdensome to licensees. In addition, the language in Section 15041.1 lends itself to ambiguity and varying interpretations. For instance, if there are multiple license holders or affiliated licensees who are each involved with the production of branded merchandise, how will the Department determine which licensee is duly "responsible" for the content of the "branded merchandise"? Additionally, if a brand licenses its intellectual property to a cannabis licensee for commercial cannabis purposes while also licensing the same intellectual property to non-cannabis businesses for non-cannabis purposes (such as fashion or apparel), what "responsibility" (if any) will the cannabis licensee have for any merchandise being sold by the non-cannabis businesses? These types of questions illustrate our concern over the lack of clarity surrounding Section 15041.1. We note that white labeling arrangements are common in the cannabis industry, and many companies (licensed and unlicensed) hold intellectual property in a separate entity established solely for this purpose. Further guidance from the Department would allow industry stakeholders to make sure-footed disclosures as to the "responsible" party, and further would allow parties deploying valuable intellectual property to more easily negotiate risk allocation in the event of, for example, a white labeling or co-branding effort. Given that a violation of Section 15041.1 is considered a

serious Tier 1 violation[2], we recommend that the Department provide additional guidance regarding its interpretation of Section 10541.1 in order to prevent inadvertent violations by licensees.

Trade Samples

Section 15041.7(a)(1)-(3) provides the following quantity limits for the designation of trade samples in a calendar month period: (a) for dried flower, a total of 2 pounds; (b) for manufactured and non-manufactured cannabis products, a total of 900 individual units; and (c) for seeds, immature plants, and other propagated materials, 18 seeds, 12 seedlings, 8 cuttings, or tissue cultures per strain. Section 15041.7(b)(1)-(3) provides the following quantity limits for the provision of trade samples to each recipient licensee in a calendar month period: (x) for dried flower, 5 grams per strain and no more than 6 strains; (y) for manufactured and non-manufactured cannabis products, 5 individual units per SKU and no more than 6 SKUs; and (z) for seeds, immature plants, and other propagated materials, no more than 6 strains.

Comment: The addition of trade samples is certainly an improvement for the state's cannabis industry, but the "one-size-fits-all" approach under Section 15041.7(a) is, in many cases, unworkable and overly strict. By imposing a monthly weight or quantity limit on trade samples, both large-scale businesses and smaller businesses with numerous and rapidly developing product lines are unable to meaningfully avail themselves of the benefits conferred by trade samples. Accordingly, we recommend adjusting the trade sample limits under Section 15041.7(a) to allow for greater flexibility and scale. Specifically, instead of imposing uniform weight or quantity limits on a licensee's trade samples during any given calendar month period, we recommend that the Department impose (a) trade sample limits on a licensee based upon a certain volume percentage or unit count (as applicable) per production batch, or, alternatively, (b) uniform weight or quantity limits upon the number and amount of trade samples that may be provided *to any single recipient licensee* during a given time period.

Raffles and Sweepstakes

Section 15040(a)(4)(C) prohibits the advertisement of any "contests, sweepstakes or raffles" for free cannabis goods or cannabis accessories (underlined text proposed for addition). Correspondingly, Section 15040.2(a) prohibits a licensee from giving away "any amount of cannabis or cannabis products, or any cannabis accessory, as part of a business promotion." Section 15040.2(b) would extend restrictions on licensee business activities much further by stating that "[a] licensee shall not hold a raffle or sweepstakes as part of a business promotion."

Comment: A blanket prohibition on holding a raffle or sweepstakes on business promotions not involving cannabis products or cannabis accessories is an overly broad restraint on commerce and overly burdensome to cannabis licensees. Licensees, who already bear high regulatory costs, special taxes and restrictive operating conditions, often engage in business ventures outside of the sale of cannabis products and

[2] See DCC Disciplinary Guidelines, Amended July 2021 [violation of CCR § 10541 is considered a Tier 1 violation, with a minimum punishment of suspension and/or fine and a maximum punishment of revocation].

accessories and use promotional opportunities to distinguish their brands and marks amongst both licensees and non-licensees; in many instances, the non-cannabis business ventures of a company pre-date that company's involvement in licensed commercial cannabis activity. In offering promotions of goods or services other than cannabis products or cannabis accessories, licensees should be permitted to operate in the same manner as non-licensees, who already enjoy a significant competitive advantage in branding and marketing. Further, it is impractical for the state to regulate non-cannabis activities of licensees. Finally, the state of California already imposes and enforces robust regulations on the conduct of raffles and sweepstakes that are applicable to all California business ventures and safeguard the interests of California residents. We recommend that subsection (b) of Section 15040.2 be deleted accordingly.

Marketing Cannabis Goods as Alcoholic Products

Proposed revisions to Section 15040.1 would prohibit the marketing, advertising, selling, or transporting cannabis goods that are labeled as beer, wine, liquor, spirits, *or any other term used to describe a type of alcohol or alcoholic beverage* that may create a misleading impression that the product is an alcoholic beverage.

Comment: The prohibition of use of terms that may be used to describe a type of alcohol or alcoholic beverage on labels of cannabis goods incorrectly assumes that the use of these terms will result in a misleading impression that the product is an alcoholic beverage. Notably, a number of terms used to describe alcoholic beverages are also commonly used to describe non-alcoholic products. This includes but is not limited to terms such as distilled, full-bodied, and sparkling, which are commonly used to describe water and other non-alcoholic beverages. Prohibiting the use of these terms places unreasonable restrictions on advertising and marketing of cannabis products.

Licensees should be able to use common descriptive terms on labels of cannabis beverages as long as the label also clearly states that the beverage is "non-alcoholic." An express statement that the cannabis beverage is non-alcoholic will ensure that the cannabis product is not creating a misleading impression that the product is an alcoholic beverage regardless of the use of other descriptive terms. Further restricting the use of descriptive terms will result in additional expenses to licensees who may be forced to rebrand and/or overhaul all of their marketing, advertising and labeling materials because these materials contain a term that is also used to describe alcohol. Accordingly, we recommend that Section 15040.1 be amended as follows:

> "Licensees shall not market, advertise, sell or transport cannabis goods that are labeled as beer, wine, liquor, spirits, ~~or any other term used to describe a type of alcohol or alcoholic beverage~~ that may create a misleading impression that the product is an alcoholic beverage as defined in division 9 of the Business and Professions Code. Nothing in this section shall be interpreted as prohibiting a company or brand name associated with alcoholic beverages from appearing on cannabis goods or in marketing and advertisements for cannabis goods provided the cannabis goods do not create a misleading impression that the product is an alcoholic beverage."

Packaging and Labeling of Pre-Rolls

Section 15303(b) clarifies that pre-rolls shall be packaged and labeled prior to regulatory compliance testing.

Comment: We appreciate this clarification to the regulations, however, the Department should similarly clarify that cannabinoid content may be duly added to the label following regulatory compliance testing. Cannabinoid content is generally added to a product label after regulatory compliance testing to ensure that the cannabinoid content on the label accurately reflects the cannabinoid content on the applicable Certificate of Analysis. The proposed changes to Section 15303(b) require that cannabinoid content be added prior to regulatory compliance testing which will cause licensees to incur additional labeling costs when a licensee has to correct the label after testing to reflect the actual cannabinoid content. We recommend that the following language be added to Section 15303(b):

> "Notwithstanding the foregoing, a label may exclude labeling of cannabinoid content if the cannabinoid content is to be added to the label at the distribution premises after issuance of a Certificate of Analysis in accordance with section 17407."

Light Deprivation in Mixed Light and Outdoor Cultivation

The proposed revisions to § 15000(ss) and (xx) would prohibit the use of light deprivation for Mixed Light Licenses.

Comment: We are concerned about the confusion, and inconsistencies with established local laws and regulations that will likely result from this proposed change if accepted given that many jurisdictions have copied verbatim or incorporated by reference the definitions of mixed light and outdoor cultivation as defined by the Department. Moreover, additional safeguards are needed to ensure that licenses are not invalidated due to a mere change in definitions. Light Deprivation should be encouraged across the board to mitigate environmental impacts and encourage sustainability as well as reduction in energy resulting from cultivation activities.

Artificial lighting implies an ability to manipulate the delivery of light on a basis other than by the natural progressions of the sun and, as such, arguably includes artificially excluding light that would otherwise be present. The Department points to the absence of light deprivation in the definition of "mixed light cultivation" in Business and Professions Code 26061 in support of moving light deprivation from Mixed Light Cultivation license types to Outdoor Cultivation license types. However, that Code Section does not refer to light deprivation in defining any cultivation license type, and the mere absence of the term should not preclude the implementation of this ordinary and customary practice in either license category.

As the Department is aware, the applicable regulations have included light deprivation in the definition of Mixed Light cultivation license types since the first version of regulations were promulgated by the California Department of Food and Agriculture around 2017-2018. (See Section 8000(t)) It may be appropriate to include light deprivation in Outdoor Cultivation, but it would also be improper, following roughly 5 years of reliance by

thousands of licensees on state rules, and the implementation of countless local regulations, to expressly exclude light deprivation from the definition of Mixed Light Cultivation upon 15 days' notice.

Existing license holders may find themselves unable to continue operating in the zone in which they chose to locate based upon prior definitions if their location is suddenly not permitted to conduct light deprivation or if they are otherwise recategorized from one license type to another due to this change in definition at the state level. Additionally, while new applicants may be able to select one license type at the local level and another at the state level, there are several licenses that may be immediately affected by this prohibition. As of the date of drafting this comment, there are 2420 Small Mixed Light Tier 1 and 232 Medium Mixed Light Tier 1 licenses, 4548 Small Outdoor Cultivation, and 405 listed Medium Outdoor Cultivation licenses listed on the Department's website. Accordingly, the change is too substantive to be implemented in this manner without an additional comment period or sunset provision.

The Department should reinstate the original definition in subsection (ss) (the definition of mixed light cultivation) to permit the use of light deprivation for Mixed Light licensees, as well as keep the proposed change to subsection (xx) and allow Outdoor cultivation licensees to use light deprivation as well.

The Definition of Designated Responsible Party Should be Consistent Throughout The Regulations

Section 15000(t) defines the term "Designated Responsible Party" as "the individual identified by the commercial cannabis business who has legal authority to bind the commercial cannabis business and who is the primary contact for the application and license-related issues." Section 15002(b)(10) requires applicants to disclose the "contact information for the owner of the commercial cannabis business who will serve as the designated primary contact person *or* designated responsible party for the business.".

Comment: The language in Section 15002(b)(10) conflicts with the existing definition of Designated Responsible Party in Section 15000(t) in that it requires that the primary contact or designated responsible party for the business be an owner of the commercial cannabis business. Given that cannabis businesses frequently use consultants or attorneys to assist them with licensing, cannabis businesses should be allowed to designate a non-owner representative as a designated responsible party or a primary contact. We recommend that Section 15002(b)(10) be amended as follows:

> "Contact information for the ~~owner of the commercial cannabis business~~ individual who will serve as the designated primary contact person or designated responsible party for the business, including the name, title, phone number, and email address of the individual."

Notification of Local Permit Revocation

Proposed Section 15035(d) will require a licensee to notify the Department of the revocation of a local license, permit, or other authorization "held by the licensee or any owner in their individual capacity…"

Comment: Text that extends the disclosure requirement in proposed Section 15035(d) to "any owner in their individual capacity" should be deleted or clarified that such disclosure is only required when the revoked license, permit, or other authorization relates to the commercial cannabis activity of the licensed entity. Otherwise, the disclosure obligation will create an administrative burden that does not relate to the underlying commercial cannabis activity nor the Department's existing framework for reviewing ownership qualifications. The regulations already require individual owners to disclose certain criminal acts or civil penalties.

Additional Requirements for Cannabis and Cannabis Products

Sections 17300, *et seq*. create additional requirements for cannabis and cannabis products. For example:

- Section 17300 adds prohibitions on, among other things, inhalable cannabis goods that are delivered into the lungs through a metered-dose inhaler or dry-powder inhaler; cannabis goods in the shape, or imprinted with the shape, of a human being, animal, insect or fruit; and any products that are manufactured by application of cannabinoid concentrate or extract to commercially available candy or snack food items without further processing of the product. *See* § 17300(a)-(p).

- As further addressed below, Section 17302.1 adds additional requirements for tinctures including that they be no more than 2 fluid ounces and include a calibrated dropper or similar device. *See* § 17302.1(a).

- Section 17303.1 adds additional requirements for inhaled products including that they only contain cannabis, cannabis concentrate, terpenes, rolling paper, leaf, pre-roll filter tips; or ingredients permitted by the USFDA as inactive ingredients. *See* § 17301(a).

Comment: Changes that are geared towards ensuring consumer safety are welcomed, but the prohibitions in Section 17300, *et seq*. are not subject to an enforcement grace period, which is problematic. Enforcing significant new restrictions on cannabis goods without allowing the industry to transition will result in meaningful financial losses for licensees who currently have a large inventory of currently-compliant products (such products are referred to herein as "Legally Nonconforming Products"). Accordingly, it is recommended that all Legally Nonconforming Products be expressly excluded from the new requirements contained in Sections 17300, *et seq* until January 1, 2023. It is worth noting that, to the extent the Department determines that a licensee's continued sale of any Legally Nonconforming Products endangers public health, safety or welfare, the Department would still have the authority under Section 17810 to petition for an interim order to impose additional licensing restrictions on such licensee, such as restricting the licensee's sale and/or ordering the destruction of any Legally Nonconfoming Products which endanger public health, safety or welfare.

Additional Requirements for Tinctures

The proposed revision to Section 17302.1(a) would limit cannabis tinctures, including non-alcohol based glycerin tinctures, to no more than two fluid ounces.

Comment: Tinctures have a long history of usage in the medical community because they are safe, effective, and provide an alternate route of administration other than smoking or vaping. Since the first day of legal sales in California, tincture customers, including many medical patients, became accustomed to properly dosing the products in a safe manner. Many consumers of high-volume tinctures are medical patients who use these products to both infuse and flavor their own beverages and food items. Very small differences in consumption can translate into substantial differences in dose. Medical patients often favor a 1,000 mg tincture manufactured in an 8 oz. container. The proposed change to limit non-alcohol based glycerin tinctures to a 2 oz. container will create customer confusion and lead to patients taking a higher dosage, negatively impacting public health and safety. Forcing consumers to adapt their consumption and dosing methods by decreasing allowable volume in infused tinctures is more likely to result in dosing inaccuracies. It is not good public policy to eliminate or substantially alter products that largely serve the medical community.

If a change must be made to non-alcohol based tinctures, it is suggested that other regulatory options that preserve the integrity this product type, for example, limiting non-alcohol based tincture volume to a more reasonable 8 fluid ounces, requiring packaging to be opaque, and/or requiring tinctures to be sold with a delivery mechanism.

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The members of LACBA's Cannabis Section thank the Department for its ongoing efforts to consolidate and clarify regulations for California's regulated cannabis industry.

Sincerely,

Michelle Mabugat, LACBA Cannabis Section, Policy Subcommittee
Yelena Katchko, LACBA Cannabis Section, Policy Subcommittee
Katie Podein, LACBA Cannabis Section, Policy Subcommittee
Cassia Furman, LACBA Cannabis Section, Policy Subcommittee
Bryan Bergman, LACBA Cannabis Section, Policy Subcommittee
Steven Lubell, LACBA Cannabis Section, Policy Subcommittee
Lesa Slaughter, LACBA Cannabis Section, Policy Subcommittee
Meital Manzuri, LACBA Cannabis Section, Policy Subcommittee
Steve Baghoomian, LACBA Cannabis Section, Policy Subcommittee
Robert Baca, LACBA Cannabis Section, Policy Subcommittee
Jodi Green, LACBA Cannabis Section, Policy Subcommittee
Michael Chernis, LACBA Cannabis Section, Policy Subcommittee
Elizabeth Barket Kremser, LACBA Cannabis Section, Policy Subcommittee
Alexa Steinberg, LACBA Cannabis Section, Policy Subcommittee
Joshua Mandell, LACBA Cannabis Section, Policy Subcommittee
Yvette McDowell, LACBA Cannabis Section, Chair