

CANNABIS COMPLIANCE: REVIEWING DRAFT REGULATIONS ON HOST COMMUNITY AGREEMENTS AND SOCIAL EQUITY

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AN ACT RELATIVE TO EQUITY IN THE CANNABIS INDUSTRY

CHAPTER 180 OF THE ACTS OF 2022

The image shows the Massachusetts State Capitol building, a large, ornate structure with a prominent dome. The building is set against a clear blue sky with a few wispy clouds. The architecture features classical elements like columns and arches. A white banner with orange text is overlaid on the lower part of the image.

The Act makes numerous changes to Massachusetts' marijuana laws, including those governing:

- ❖ Host Community Agreements (“HCAs”)
- ❖ Community Impact Fees
- ❖ Social Consumption Establishments
- ❖ Social Equity Policies
- ❖ Taxation
- ❖ Role of Massachusetts Cannabis Control Commission (“CCC”)

LEGISLATIVE UPDATES

THE CANNABIS CONTROL COMMISSION

The Act provides the CCC with enhanced authority concerning HCAs

- ▶ The CCC has jurisdiction to adopt, amend or repeal **regulations** for the **implementation, administration and enforcement** of G.L. c. 94G.



The Role of the CCC

To review, regulate, enforce and approve host community agreements pursuant to of G.L. c. 94G, §3(d);

Establish procedures and policies for municipalities to promote and encourage full participation in the regulated marijuana industry during negotiations of host community agreements with social equity program businesses and economic empowerment priority applicants; and

Develop a model host community agreement, minimum acceptable standards and best practices for municipalities and prospective licensees during negotiations of host community agreements with social equity businesses



November 9, 2023

DRAFT REGULATIONS

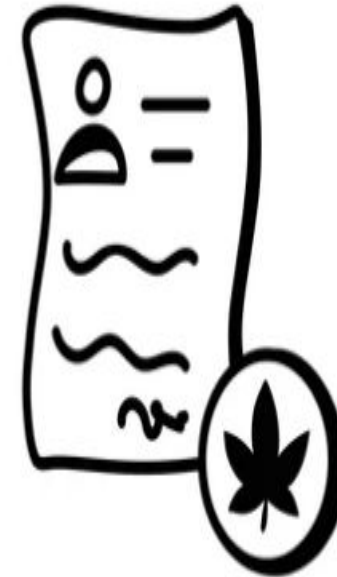
JULY 28, 2023 *4-0 VOTE*

- ▶ Prior to adopting final regulations, the draft regulations will be published, discussed at a public meeting of the CCC, and open for additional comment before they are finalized and promulgated by the Secretary of the Commonwealth in accordance with state law. G.L. c. 30A.



HOST COMMUNITY AGREEMENTS

- ▶ No later than May 1, 2024, CCC may require that license applicants and/or licensees and host communities reach and adhere to an HCA that complies with state law and new regulatory requirements (or agree to a “compliant” HCA waiver).
- ▶ CCC may deem an HCA provision invalid, unenforceable, or voidable.
- ▶ The CCC may also declare an HCA or a provision of an HCA voidable upon deeming the HCA as a contract of adhesion.
- ▶ CCC may issue sanctions against a host community that is “noncompliant” with HCA regulatory requirements, abstain from considering new license applications in that host community, or publish a list of communities that are out of compliance.





- ▶ No host community may impose an “unreasonable condition” or a term that is “unreasonably impracticable” in an HCA.

Unreasonably Impracticable means that the measures necessary to comply with the regulations, ordinances or bylaws subject licensees to unreasonable risk or require such a high investment of risk, money, time or any other resource or asset that a reasonably prudent businessperson would not operate a marijuana establishment.

- ▶ To be considered compliant, any conditions set in an HCA must be reasonable.

THE DRAFT
REGULATIONS
IDENTIFY THE
FOLLOWING
CONDITIONS THAT
ARE PRESUMED
REASONABLE:



- ▶ Required under a host community's local rules, regulations, ordinances, or bylaws;
- ▶ Deemed necessary to promote public safety by the host community's chief law enforcement authority in a host community;
- ▶ Deemed necessary to promote public health by the host community's chief public health authority in a host community;
- ▶ A local requirement customarily imposed by the host community on other, non-cannabis businesses operating in the municipality;
- ▶ Not in conflict with other laws; or
- ▶ Otherwise deemed reasonable by the CCC based on particular circumstances presented by an HCA or contracting parties.

PARTIES SHALL ENSURE THAT HCAS INCLUDE A STATEMENT OF ALL STIPULATED RESPONSIBILITIES INCLUDING, BUT NOT LIMITED TO, THE FOLLOWING:

- ▶ “**Clear, specific terms**” regarding a host community’s assessment of a community impact fee (CIF) if applicable
- ▶ A provision requiring a host community to **annually transmit** its invoice of **alleged** CIFs to a marijuana establishment **within one month of the anniversary** of the date a marijuana establishment received final licensure
- ▶ A provision **explicitly** identifying any generally occurring fees to be charged by a host community (i.e., fees customarily imposed on other non-cannabis businesses operating in a host community and shall not be considered a CIF (e.g., routine water, property tax, sewer, trash pickup etc.)

HCA RESTRICTIONS:



- ▶ Cannot include promise to make a future monetary payment, in-kind contribution, or charitable contributions - contractual financial obligations, other than a CIF, are unenforceable
- ▶ Cannot may mandate or otherwise require that the CIF be a certain percentage of total or gross sales or, demand a CIF exceeding 3 percent of the gross sales
- ▶ Cannot discourage any party from bringing a civil cause of action or other legal challenge relative to an HCA or to an individual term or provision of an HCA
- ▶ Cannot require upfront payments as a condition for operating in the host community
- ▶ Cannot afford a host community sole and absolute discretion on how a community will spend a CIF

- ▶ Cannot waive a marijuana establishment’s ability to dispute whether CIFs alleged by a host community are “reasonably related” and properly due and payable as a CIF
 - ▶ *Reasonably Related means a demonstrable nexus between the actual operations of a marijuana business and an enhanced need for a host community’s goods or services in order to offset the impact of operations.*
 - ▶ *Fees customarily imposed on other non-marijuana businesses operating in a host community shall not be considered Reasonably Related.*



- ▶ Cannot impose legal, overtime, or administrative costs or any costs other than a CIF on a marijuana establishment except for a marijuana establishment's tax obligations or its responsibility for paying routine, generally occurring municipal fees
- ▶ Cannot obligate a marijuana establishment to set aside money in an escrow, bond, or other similar account for a host community's use or purposes





HCA REVIEW BY THE CCC

- ▶ Approval of HCAs may be conditioned on a host community being in “good compliance standing” with the CCC relative to any HCA to which the host community is a contracting party.
- ▶ The CCC may decline to approve an HCA on the basis of “any other ground that serves the purposes of M.G.L. c. 94G, 935 CMR 500.000, or 935 CMR 501.000.”
- ▶ CCC is required to complete its review of an HCA within ninety (90) days after the HCA is received.
- ▶ It will provide written notice to the parties of any deficiencies identified by during its review of the HCA for compliance and may request additional information from the marijuana business and the host community.

HCA Review by the CCC



- ▶ If the CCC determines that the HCA does not comply with 935 CMR 500.180, then the HCA determination notice shall state the following:
 - ▶ The factual basis for the finding of noncompliance, including identification of the noncompliant term(s), condition(s), or provision(s) of the HCA, if applicable;
 - ▶ The parties' **option to correct** the noncompliance and submit an amended HCA;
 - ▶ The parties' option to submit an HCA Waiver that complies with 935 CMR 500.180(5); and
 - ▶ **Either party's option to discontinue relations as host community and license applicant.**
- ▶ Failure to submit a compliant HCA or a compliant HCA Waiver with an application for licensure may result in an application remaining incomplete or be grounds for denial.

Discontinuing Relations

If a host community discontinues relations with a marijuana establishment, then a marijuana establishment may submit a request for equitable relief to the CCC.

- ▶ A marijuana establishment shall ensure that the request for equitable relief includes a host community's notice.
- ▶ The CCC may exercise its discretion to grant one or more of the following equitable remedies to a marijuana establishment:
 - ▶ Extension of a license expiration date without incurring additional prorated fees;
 - ▶ Waiver of a Change of Location fee;
 - ▶ Other equitable relief as determined by the CCC.
- ▶ If the CCC grants or denies equitable relief to a marijuana establishment, it will provide notice of its decision to a marijuana establishment and a host community.





- A host community or a marijuana establishment may seek relief from a court of competent jurisdiction.
- Any action subsequently taken to deny a marijuana establishment's renewal application due to failure to produce a compliant HCA or a compliant HCA Waiver shall afford marijuana establishments a right to an administrative hearing
- A host community may seek intervention as a party to the hearing.

HCA WAIVER

- ▶ A host community may waive the regulatory requirement to have a compliant HCA by submitting an HCA Waiver, in the form and manner determined by the CCC, at any time.
- ▶ An HCA Waiver constitutes a total relinquishment of the requirement to enter into an HCA.
- ▶ No party to an HCA may use an HCA Waiver to waive individual provisions of an HCA. An HCA Waiver that sets an expiration date or any conditions is deemed noncompliant.
- ▶ An HCA Waiver may only be rescinded on CCC approval of an HCA subsequently executed and submitted by the parties.



COMPLAINTS ALLEGING HCA NONCOMPLIANCE



- ▶ If an allegation of noncompliance with HCA regulatory requirements is substantiated, CCC may take administrative or enforcement action against a host community including sending a notice of deficiency, requesting additional information, or “otherwise taking action”
- ▶ Failure by a host community to correct the noncompliant conduct may result in one or more of the following:
 - ▶ Issuance of sanctions pursuant to 935 CMR 500.360 (assessment of an administrative fine of up to \$50,000 per violation, with a right to an administrative hearing)
 - ▶ Loss of a host community’s good compliance standing;
 - ▶ Publication of a host community lack of good compliance standing in a form and manner determined by the CCC; or
 - ▶ Abstaining from consideration of any new license applications affiliated with a host community until a host community’s good compliance standing is restored.

COMMUNITY IMPACT FEES

- ▶ CCC is now “charged with establishing criteria for **reviewing, certifying, and approving CIFs**”
- ▶ To qualify as a CIF, an impact fee alleged by a host community must be “reasonably related” to costs imposed by the operation of the marijuana establishment



- ✓ A host community shall ensure that the initial invoice period of alleged CIF covers a one-year period that starts from the date the CCC grants a final license.
- ✓ A host community shall further ensure that all subsequent, one-year invoice periods are consistent with the anniversary of a final license date.
- ✓ The CCC will not certify any CIFs attributable to dates outside of the applicable invoice period.
- ✓ A host community shall transmit its CIF invoice no later than one month after the anniversary of the date the received a final license from the CCC.



- ✓ A host community seeking to assess a CIF shall transmit an itemized invoice in a form and manner determined by the CCC documenting alleged impact fees arising from the preceding year of operations.
- ✓ A host community shall ensure that CIF invoices include a specific description of how the alleged impact fees were spent, including each line item for each good or service charged stating its cost, purpose, and relation to operations.
- ✓ CIF shall not include any legal costs incurred by a host community to defend against a lawsuit brought by the marijuana establishment
- ✓ A host community's failure to transmit the CIF invoice within the prescribed time shall result in a forfeiture of any CIF for the applicable year of operations.
- ✓ A host community shall ensure that the CIF invoice is restricted to the license number(s) operating from the licensed premises alleged to have impacted the community.
- ✓ Within 30 calendar days of receiving a host community's invoice of alleged CIFs, the marijuana establishment shall submit the invoice and any supporting documentation, if applicable, to the CCC in a form and manner determined by the CCC.
- ✓ A marijuana establishment that has agreed to pay a CIF under its HCA shall annually pay any undisputed CIF no later than eight months from the date of receiving a host community's invoice of alleged CIFs.

**ON CERTIFICATION BY
THE CCC, A CIF
BECOMES PROPERLY
DUE AND PAYABLE
UNLESS DISPUTED**



The CCC shall make a determination certifying the CIF, in whole or in part, and notifying the parties of:

- ▶ The **marijuana establishment's option** to request an administrative hearing before an independent hearing officer of the CCC to challenge the findings of fact and conclusions of law.
 - ▶ The host community may seek intervention as a party to the hearing
- ▶ The marijuana establishment's option to seek court intervention to independently review the CIF by bringing a breach of contract action.
- ▶ The parties' election to bring a dispute between the parties before a private mediator at any time.

After a CIF dispute has resolved, a marijuana establishment must provide proof of payment of the certified CIF with its renewal application.

A host community shall donate, at minimum, 3% of each CIF it receives from a licensee to the Cannabis Social Equity Trust Fund



MINIMUM ACCEPTABLE EQUITY STANDARDS GOVERNING MUNICIPALITIES AND HOST COMMUNITIES

- ▶ CCC will establish procedures for municipalities to promote and encourage full participation in the regulated Marijuana industry during negotiations of HCAs with Social Equity Businesses and to develop minimum acceptable standards governing HCA negotiations with Social Equity Businesses.
- ▶ The CCC may also to develop best practices for HCA negotiations between municipalities and license applicants that have been designated as Social Equity Program Participants or Economic Empowerment Priority Applicant



**MANDATORY
TRANSPARENT
PRACTICES TO
PROMOTE AND
ENCOURAGE FULL
EQUITY PARTICIPATION**



A host community must publicize certain information in a conspicuous location at its offices and on its website which shall, at minimum, include:

- ▶ All required steps of a host community's local approval process, including, but not limited to, all associated fees, deadlines, and meeting schedules for local bodies involved in the local approval process
 - ▶ **Local Approval Process** means the steps involving a host community's cannabis licensing, including, but not limited to, zoning, all associated fees, deadlines, and meeting schedules for local bodies involved in such processes
- ▶ Identification of key individuals involved in a host community's local approval process, including, but not limited to, their name, title, business address, and business contact information such as email address or phone number

**MANDATORY
TRANSPARENT
PRACTICES TO
PROMOTE AND
ENCOURAGE FULL
EQUITY PARTICIPATION**

- ▶ A list of all documentation required by a host community's local approval process, in downloadable form and paper form
- ▶ Identification of application criteria for local approval to operate a marijuana establishment and scoring methodologies relied on by a host community
- ▶ General scoring information for all applicants and a host community's scoring of each individual applicant
- ▶ A host community's explanation, in narrative form, of its reasoning for the approval or denial of an application
- ▶ Any other information required by the CCC

- ▶ A host community must develop a plan to promote and encourage full participation that:
 - ▶ *Encourages applications* from Social Equity Businesses; and
 - ▶ Includes *goals, programs, and measurements* a host community will utilize to promote and encourage equity participation.
- ▶ A host community shall publish data regarding its total applicant pool, which shall identify each Social Equity Business and license applicant that has been designated as a Social Equity Program Participant or Economic Empowerment Priority Applicant.
- ▶ A host community shall adhere to best practices for HCA negotiations



CCC's BEST PRACTICES FOR HCA NEGOTIATIONS

- ▶ Develop a standard evaluation form that scores components of an application. The evaluation form shall include consideration of equity in the overall evaluation score, which must comprise not less than 25 percent of the total evaluation score.
- ▶ In circumstances where a host community imposes a cap on the number of businesses that may obtain local approval to operate, if a host community later decides to allow additional business, at least 50 percent of those licenses, but no less than 1 license, above the previously-established cap shall be reserved for Social Equity Businesses or license applicants that have been designated as Social Equity Participants or Economic Empowerment Priority Applicants.
- ▶ Prioritize negotiations of HCAs with equity parties.
- ▶ Engage in an ongoing dialogue by providing multiple opportunities for discussion and negotiation of HCA terms including, at minimum, two conferences with an equity party.



CCC's BEST PRACTICES FOR HCA NEGOTIATIONS

- ▶ Include any attorney, representative, or other advocate, if elected by an equity party, in all negotiation discussions and conferences.
- ▶ Promote language access by providing a certified interpreter or translator to assist an equity party during all negotiation discussions and conferences.
- ▶ Provide reasonable opportunities for an equity party to review a proposed HCA, HCA term or condition outside of a negotiation conference, or to seek review or input by a third party of their choice.
- ▶ Negotiate the terms of an HCA in good faith, including consideration of flexible terms that may mitigate particular challenges affecting an equity party, such as access to capital, with all terms and clauses conspicuously identified and openly discussed.
- ▶ Allow an equity party to propose an amendment to, or seek cancellation of, an HCA within thirty days from the date of execution of the HCA.

- ▶ Host Communities must adopt local rules or bylaws to comply with social equity requirements on or before May 1, 2024.
- ▶ A host community must submit an attestation in a form and manner determined by the CCC affirming that it has adopted local laws to effectuate compliance and identifying the specific laws passed.



COMPLAINTS ALLEGING SOCIAL EQUITY NONCOMPLIANCE



- ▶ Any “interested person” may file a complaint with the CCC
- ▶ If the CCC substantiates an allegation of noncompliance, a host community shall be fined after first receiving notice and opportunity for corrective.
- ▶ A host community shall be fined in an amount equal to the annual total of CIFs received from all marijuana businesses operating in the host community during the prior calendar year.
- ▶ The CCC shall afford a host community a right to an administrative hearing.
- ▶ The CCC may publish a list of any municipality or host community that has been assessed a fine for equity noncompliance.
- ▶ Fine assessments shall take effect no sooner than May 1, 2025.

PENDING LEGISLATION:



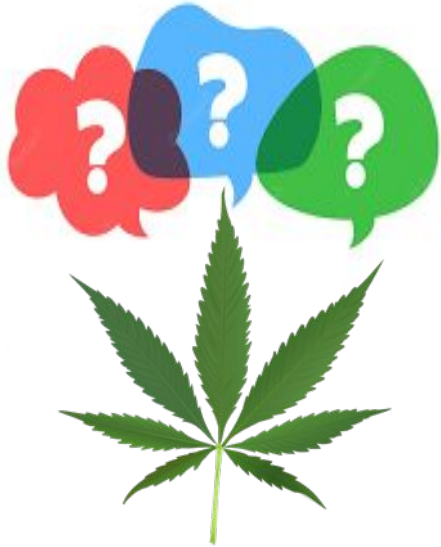
- ◆ **HB107** - An Act relative to host community impact fees

CIF shall be a standard 1 percent of gross sales if host community can not CIF document with certainty

- ◆ **HB108** - An Act relative to equity in the cannabis industry

HCA's entered into prior to August 11, 2022, shall not be reviewable or challenged if the CIFs do not exceed 3% of gross sales for the first 5 years of the HCA.

ANY FINAL QUESTIONS?



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