SILBERMAN PLC
ATTORNEYS • MIDDLEBURY
GOOD ADVICE

15 SOUTH STREET
MIDDLEBURY, VT 05753
(802) 349-1999

February 18, 2022

Vermont General Assembly
Legislative Committee on Administrative Rules
Vermont State House
115 State Street
Montpelier, VT 05633

Via email to charlene@leg.state.vt.us

Re: Proposed CCB Rules 1 and 2

Dear Chair MacDonald and Honorable Members of the Committee:

Kindly accept this letter as written testimony with respect to proposed Rule 1 (Licensing of Cannabis Establishments) and Rule 2 (Regulation of Cannabis Establishment) promulgated by the Cannabis Control Board (the "**Board**") pursuant to 7 V.S.A. Chapter 33.

I represent multiple clients intending to apply for cultivation, manufacturing, wholesale, retail, and testing laboratory licenses pursuant to 7 V.S.A. Chapter 33. While this letter is informed by conversations with these clients as to their needs, plans, and concerns, it does not represent the views of, and is not being provided on behalf of, any particular client, and I do not engage in lobbying on behalf of any person or entity.

As a preliminary matter, I wish to commend the Board for its work in producing proposed Rules 1 and 2, particularly with respect to the openness to stakeholder feedback that the Board displayed throughout its rulemaking process thus far. Because of the Board's thoughtful and inclusive approach, the proposal before you is, generally, a good one, and I write to raise only a few important issues.

1. Warning Label (Rule 2, §2.2.10):

The proposed Rules require that all product packaging, and all marketing materials, contain a standard "black box" warning label that cannot be modified even where the required language is inapplicable to the product being marketed. Providing consumers with arbitrary,

irrelevant, and extraneous warnings is likely to lead to confusion, and habituate consumers to ignore the warning label instead of heeding it.

Specifically, the Board proposes to require that all cannabis packaging and marketing materials warn that "the effects of edible cannabis may be delayed by two hours or more" – *including packaging and marketing of non-edible products whose intoxicating effects are felt immediately*. This could have negative consumer and/or public safety impacts, as novice consumers may inadvertently be educated to expect a delayed reaction from, for example, a vape pen, when in reality the effects will be felt within seconds or minutes rather than hours.

The Board further proposes mandating the use of the words "this product" (including in **BOLD ALL CAPS**) in each advertisement -- even if an advertisement is not directed towards any specific product (e.g., an advertisement of a storewide sale). Requiring a warning to "this product" when the advertisement does not contain an actual product is nonsensical and confusing.

Finally, the proposed warning label is quite large, and may not reasonably fit on smaller packages such as pre-rolls or single gram flower packages. As proposed, the Rule may inadvertently force licensees to use packaging that is larger than is necessary to contain the item being sold, which would be wasteful and environmentally destructive.

Recommendations:

a) The Rule should be revised such that the portion of the warning label regarding the delayed onset of edible products is only required to be affixed to packaging and advertisements for edible products;
b) The Rule should allow advertisements that are not product-specific to refer to cannabis generally, rather than "this product" (e.g., "*cannabis* has not been analyzed or approved by the FDA", "keep *cannabis* away from children and pets", etc.); and
c) Permit licensees to use a smaller font size for the warnings required by subparts (c) and (d) where the packaging size cannot reasonably accommodate a 10-point font as otherwise required.

2. Online Advertising & Age-Gating (§2.2.11)

The Board proposed to effectively bar licensees from using social media to advertise products. Licensees are barred from using any product images, and any text referring to a product, via social media, except for text links to the licensee's age-gated website[1]. This prohibition applies even if the licensee's social media account is, itself, age-gated (several popular social media platforms, including Instagram, provide age-gating options).

[1] Age-gating refers to a process by which users of websites are required to certify that they meet the minimum age requirements set by the website's operator.

As written, this prohibition is an overbroad infringement of licensee's protected commercial free speech rights. Additionally, allowing the use of product images and descriptive text on the licensee's age-gated website, but not on the licensee's age-gated social media account, is arbitrary, given that social media platforms are, of course, a type of website, and that it is no harder for an underage consumer to evade a static website's age-gate than a social media website's age-gate.

Recommendation: Subpart (e) of Section 2.2.11 should be revised to permit product-specific marketing on social media platforms if such platforms enable, and the licensee implements, age-gating, to the same extent and subject to the same restrictions, as such marketing is permissible on all other websites.

3. Prohibition of Plastic Packaging (§2.2.9):

The Board proposes to ban any use of retail packaging containing plastic. While reducing single-use plastics is an important priority, an outright ban on any use of plastic in packaging is unduly burdensome on licensed cannabis establishments, as the only remaining viable option that meets the legal requirement for child-resistance is metal packaging. In addition to causing supply chain uncertainties, the proposed plastics ban will artificially inflate consumer pricing as producers pass on the additional cost of glass and metal packaging. This would serve to undermine the regulated market by driving some consumers, especially price-sensitive consumers, to the parallel illicit market, where sellers will not experience this added regulatory cost.

Recommendation: Remove the requirement in §2.2.9(b) that packaging "not be plastic", while retaining the requirement that retail packaging be reusable, which would prohibit single-use plastic packaging while allowing producers and retailers greater choice of packaging solutions.

4. Criminal Records and Overcoming Presumptive Disqualifications (§§1.11.2 and 1.11.3)

7 V.S.A. §883 strictly limits the Board's discretion to deny license applications based on an applicant's criminal history to where the record reveals "factors that demonstrate whether the applicant presently poses a threat to public safety or the proper function of the regulated market". The Board has done an admirable job of creating a list of presumptively disqualifying violations that attempts to focus narrowly on those factors, and has been responsive to public comment in this regard.

Despite the narrowing of the disqualification criteria, I remain concerned that the presumptive disqualification process may not give applicants sufficient opportunity to overcome an initial denial, particularly if an applicant is not notified of their disqualification with sufficient time to provide additional mitigative evidence while the license application window is still open.

Recommendation: Whenever an applicant has been disqualified under §1.11.2, the Board should be required to place the application in pending status for at least 30 days following notice to the applicant, in order to give the applicant a meaningful opportunity to respond with additional evidence of mitigation even when the application window would otherwise have closed.

5. Retailer and Wholesaler Employee and Vendor Samples (presently not permitted)

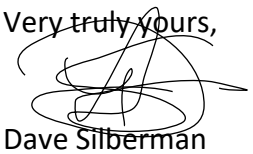
While §2.3.9 and §2.6.6 permit cultivators and manufacturers to give samples of cannabis and cannabis products to their employees and to other licensed establishments, there is no analogous rule permitting retailers and wholesalers to do so. While arguably retailers and wholesalers who receive samples from cultivators or manufacturers could provide those samples to their own employees, they would need additional rulemaking clarity in order to be able to create samples from their own inventory, or, in the case of wholesalers, to give samples (regardless of whether acquired or self-produced) to other licensees in the supply chain.

Recommendation: New rules should be written to expressly permit retailers and wholesalers to produce and provide samples to their employees from their own inventories, and to expressly permit wholesalers to provide samples to other licensees within the supply chain, subject to the same limitations as applicable to cultivators and manufacturers in §2.3.9 and §2.6.6.

* * *

Thank you for your consideration of these comments. I am available at your convenience to discuss these matters in greater detail or answer any questions you may have.

Very truly yours,



Dave Silberman
Founding Attorney
Silberman PLC