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February 28, 2023

The House Committee on Government
Operations & Military Affairs
Hon. Michael McCarthy, Chair
Vermont General Assembly
115 State Street
Montpelier, VT 05633

Re: H.270 (Cannabis Amendments)

Honorable Members of the House Committee on Government Operations & Military Affairs:

I am an attorney who represents dozens of licensed cannabis establishment, and entrepreneurs seeking additional licenses, across all segments of Vermont's cannabis industry[1]. I am also Co-Founder of FLŌRA Cannabis, Vermont's first licensed retailer, located in beautiful downtown Middlebury. This combination of roles, and my history advocating in the Statehouse for cannabis law reform since 2015, has afforded me a unique perspective on the regulated market's initial roll-out, what's working well, and what needs to be fixed.

A lot is working well. The commissioners and staff at the Cannabis Control Board deserve our praise for launching the market on time, notwithstanding both their late appointment and the continuing underfunding of the Board's staff needs. Our market is the most welcoming one in the nation to small businesses. The CCB's rules are clear and concise, and the commissioners and staff are available and responsive to stakeholder feedback.

But there are also some significant roadblocks to success. And while H.270 proposes several sensible reforms aimed at removing some of them, several important ones would remain if the bill passed as presented. I do support the bill, and will suggest several additional key reforms for your consideration.

[1] I represent my clients as an attorney, not as a lobbyist. My testimony represents my own views, and is submitted solely on my own behalf. I have not accepted any compensation from any person or entity with respect to any political advocacy work, whether past or present.

Packaging

50 mg per Package Limit

Vermont is an extreme outlier in restricting edible cannabis products to 50mg of THC per package – only Virginia, which is still years from launching its regulated market, imposes such a low limit. Every other state with a regulated retail market allows a total of 100mg of THC per package, except Michigan, whose limit is 200mg. Only Massachusetts and Connecticut join Vermont in restricting edibles to 5mg per serving, but they still allow 100mg per package.

Our 50mg limit imposes a significant financial strain on Vermont's fledgling cannabis industry, a strain that is exacerbated by the CCB's only-in-the-nation rule prohibiting the use of plastic packaging, and the need to achieve child-resistance for safety reasons. Plastic-free child resistant packaging is far scarcer, and much more expensive, than plastic packaging. Very few licensees have the financial resources to purchase in large enough bulk quantities to significantly reduce that cost.

By cutting in half the amount of product we can put in a single package in comparison to every other state, the Legislature has doubled the cost of packaging on a per-serving basis. I estimate that roughly 10% of the retail price of edibles in Vermont is attributable to packaging costs.

All responsible cannabis businesses acknowledge the unique risk that accidental ingestion of cannabis edibles poses, especially to young children. However, this risk is neither mitigated by the current 50mg limit, nor made worse by joining every other state at 100mg instead. As this committee heard last year from Dr. Kalev Freeman, an emergency medicine physician and Director of Emergency Medicine Research at the University of Vermont, there is no meaningful difference in expected medical outcomes between even a very small child ingesting 50mg of THC versus 100mg: in either case, that child would have a very unpleasant experience, but would be extremely unlikely to suffer long-term harms.

According to Dr. Freeman's testimony, it would take an extremely large dosage, in the order of *tens of thousands* of milligrams of THC, for accidental THC ingestion to become life-threatening. When you cut through the fear, and focus on the medical science, it is clear that the 50mg restriction simply has no public safety benefit to outweigh the costs it imposes.

Child Resistance and Child Deterrence

Requiring child resistant packaging is an important public safety tool, one that is appropriate for products that that are either psychoactive or toxic when ingested orally. It is reasonable to require licensed cannabis establishments to use such packaging, despite the

added cost, in order to prevent harm from accidental ingestion. However, as the Legislature recognized last year, this is not a helpful tool with respect to cannabis flower, which is neither psychoactive nor toxic when swallowed. Instead, Vermont law requires cannabis flower be sold in "child deterrent" packaging, an only-in-Vermont term that means "tear-resistant" and "sealed in a manner that would deter children under five years … from easily accessing the contents… within a reasonable time".

I urge the Committee to now expand the child resistance exemption beyond flower, to *all* products that, like flower, are neither toxic nor psychoactive when consumed orally, such as topical creams, solid concentrates, vape cartridges, and infused pre-rolls. Products like edibles, beverages, capsules, and tinctures, should continue to be in child-resistant packaging.

Additionally, I urge the Committee to dispense with the "child deterrent" standard entirely. Unlike child resistance, which is a standard packaging industry term nationwide, this odd standard has created significant confusion while imposing significant cost on the cannabis industry, without a logical countervailing public safety rationale.

Propagation Licenses

The proposed new propagation license fills an important gap in the current supply chain. Current law wisely limits the size and scope of any single licensed grower, in order to prevent monopolization of the market by a handful of large corporations, as has happened in most other states and Canada.

This was accomplished in large part by capping the size of a licensee's plant canopy. However, current law does not distinguish between *vegetative* canopy (immature plants containing almost no THC) and *flowering* canopy (plants bearing the flower that will be harvested, cured, and sold). Because the canopy limits are quite low, every square foot that a licensed grower devotes to breeding stock threatens the grower's profitability by reducing the number of (profitable) mature plants they can grow.

Unfortunately, as presently drafted, I believe this proposal will have only a minimal impact on the market, because 7 V.S.A. § 901(d) only allows a person to own or control one cultivation license, and so a grower would have to choose between a (likely less profitable) propagation license and a (likely more profitable) cultivation license. Allowing a person to have both a propagation license and a "regular" cultivation license would make the propagation license more attractive to Vermont's skilled cultivators, and foster a more efficient supply chain, while preserving the small business protections afforded by §901(d).

Advertising

Current law requires a licensed cannabis establishment to seek the CCB's prior approval of "advertisements", a term that is defined extremely broadly to include not only what is traditionally considered advertising (television, radio, newspaper, etc.) but also *non-paid* social media posts, licensees' websites, in-store signage, and even *in-person verbal communication between customers and retail staff*. Worse yet, the CCB typically takes <u>two to four weeks</u> to review proposed "advertisements", even basic social media posts.

This broad prior restraint on commercial speech, and the *content-based* approval process, likely violates licensees' First Amendment free speech rights. And because the CCB is insufficiently staffed to review submissions in a timely fashion, it is a *de facto* gag rule. No such pre-approval system exists for any other industry, including legal vice industries such as tobacco and alcohol, and I note also that no such pre-approval system is proposed for Vermont's erstwhile sports wagering industry in a separate bill before this committee.

I urge the committee to eliminate prior approval of advertisements. Rather, using its existing enforcement authority, the CCB should continue offering clear guidance, and review advertisements once made, and, where the CCB determines such advertisements violate appropriate legal restrictions (e.g., they are especially appealing to teenagers, they make false claims about supposed curative effects of cannabis, etc.), it could take appropriate action including fines and even revoking licenses, while continuing to educate licensees who make inadvertent errors while attempting to comply in good faith.

Product Registration

Another significant pain point for the industry is the unprecedented requirement that all products, including every strain of cannabis flower, receive a "product registration license" from the CCB prior to sale. At $50 per application, this system is extremely expensive, with approximately 2,000 applications having been submitted in just the past two months. This massive tax on the cannabis industry is unfair, unnecessary, and artificially inflates prices, thus unintentionally supporting the parallel unregulated market.

Worse yet, because this system is styled as a "license" rather than a simple "registration", cannabis businesses are required to wait at least several weeks, and frequently months, for the CCB to approve their applications before they can sell their *highly perishable* product. The backlog, driven by understaffing at the CCB, is has created a serious supply chokepoint, while potentially costing cultivators dearly in spoilage.

As with advertisements, the CCB as sufficient enforcement authority with respect to product testing, packaging, and label compliance, without this burdensome pre-approval

process. Reforming this system to require a simple *registration* (one that does not require approval) would eliminate the supply chokepoint and bureaucratic busy-work that presently does next to nothing to promote consumer safety. Beyond that, reforming the system so that cultivators could register flower strains without accompanying packaging and labeling, and so that wholesalers and retailers could register packaging and labels without accompanying flower, would eliminate significant industry confusion, and allow for far more efficient wholesale transfers.

Paraphernalia Licensing

I strongly support the intent behind Section 12 of the bill, which confirms that licensed cannabis retailers are not required to obtain a tobacco license from the Department of Liquor & Lottery in order to sell paraphernalia such as pipes, bongs, and rolling paper[2]. This has been an area of significant concern among licensed retailers, with DLL recently conducting an undercover "sting" operation of a retailer (that does not sell any tobacco products) – an action that I believe to be beyond DLL's legal authority. Clearing up this confusion would be of great benefit not only to licensees, but also to the two state agencies that seem to disagree on each other's scopes of authority.

However, I urge the committee adopt a slightly different solution, one that does not equate cannabis paraphernalia with tobacco paraphernalia, and does not resurrect a legal fiction that the Legislature already dispensed with it passed Act 86 in 2018.

Along with legalizing possession and personal cultivation of cannabis, Act 86 legalized the possession and sale of cannabis *paraphernalia*, which was previously a crime. Prior to that, sellers of cannabis paraphernalia (often referred to as "head shops") would publicly claim that the bongs and pipes they were selling were actually (*wink wink*) "for tobacco use only", despite the fact that those devices were not at all suitable for tobacco use, in order to avoid the threat of criminal sanctions. With Act 86's passage, they did not need to pretend anymore. Act 186 did *not,* however, give DLL any regulatory authority whatsoever over cannabis paraphernalia, and did revise the legal definition of tobacco paraphernalia to include formerly illegal cannabis paraphernalia.

Rather than clarifying that cannabis retailers are not required to obtain a DLL license for the sale of tobacco paraphernalia, I urge you to amend 7 V.S.A. §1001 to exclude "any device sold by licensed cannabis retailers and used, intended for use, or designed for use in the consumption of cannabis" from the definition of Tobacco Paraphernalia, as well as from the

[2] That anyone needs a license to sell tobacco paraphernalia is another issue that would benefit from a legislative re-visit. Vermont does not require, for example, a housewares retailer to obtain a license to sell "alcohol paraphernalia" (i.e., wine glasses), and for good reason. However, this issue is beyond the scope of H.270.

definition of Tobacco Substitutes. This would not only resolve the DLL jurisdictional dispute, but would clarify that such devices are not subject to the 92% tobacco substitute tax, which, if applied to dry herb vaporizers would make those devices impossible to sell in Vermont (despite them being readily available for purchase online by Vermont residents, without tax or restrictions on shipping by mail).

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Thank you for your continued efforts to ensure a an equitable, well-regulated, and safe cannabis market for our state. I am available to the Committee and each of its members to answer any questions regarding the above.

Very truly yours,

Dave Silberman