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# REPORT AND RECOMMENDATIONS TO THE NEW JERSEY CANNABIS REGULATORY COMMISSION

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A Report of the New Jersey State Bar Association's Cannabis Law Committee

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## **I. Introduction**

The New Jersey State Bar Association (“NJSBA”) serves as the voice of New Jersey attorneys to other organizations, governmental entities, and the public at large with regard to the law, the legal profession, and the legal system. As of January 18, 2010, with the passage of the Compassionate Use Medical Marijuana Act (now known as the “Jake Honig Law”), cannabis and the legal considerations stemming from its use, cultivation, sale, storage, transportation, manufacturing, and/or distribution quickly turned into a marketplace that required legal counsel from a wide array of legal practice areas. Similarly, with the passage of the New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (“CREAMMA”), the NJSBA attests that the same legal considerations exist with the creation of the recreational cannabis marketplace and that various aspects of a multitude of legal practice areas in which the members of the NJSBA practice are also affected, including, but not limited to, criminal law, employment law, real estate law, land use law, and administrative law.

Pursuant to N.J.S.A. 24:6I-35 of CREAMMA, the Cannabis Regulatory Commission (“CRC”) is empowered to “adopt rules and regulations . . . which shall be consistent with the intent of [CREAMMA]” to regulate the recreational cannabis marketplace and because CREAMMA touches on so many areas of law as referenced above, it may prove difficult for the members of the CRC to provide regulations that appropriately cover each topic. The NJSBA acknowledges this responsibility and the expansive scope of this empowerment and appreciates the opportunity to provide these comments and recommendations for the CRC’s consideration in promulgating its rules and regulations.

These comments and recommendations are presented with the intent to clarify apparent ambiguities; provide further transparency; and remedy apparent inconsistencies identified in CREAMMA. This Report identifies twelve (12) overarching topics on various issues of concern and provides a recommendation; these include: (i) lab testing, (ii) regulation of cannabis, (iii) marketplace regulations of recreational cannabis, (iv) marketplace regulation pertaining to hemp, (v) licensing, (vi) microbusiness and conditional licensing, (vii) municipal/land use, (viii) taxes, (ix) taxes, (x) impact zones, (xi) acute impairment considerations, (xii) expungement, and (xiii) family law considerations.

The NJSBA hopes that in identifying these issues, the CRC will be able to refine the rules and regulations being prepared for the New Jersey cannabis marketplace so as to avoid confusion and uncertainty among not only professional advisors involved in the cannabis marketplace, but also the entrepreneurs looking to enter the cannabis marketplace in New Jersey.

## II. Marketplace Regulations (N.J.S.A. 24:6I-46b(3))

**The CRC should clarify and add certainty regarding the 24-month moratorium on the ability of a licensee to hold more than one class of license.**

N.J.S.A. 24:6I-46b(3) states that a license holder may submit an application for a license of any type that the license holder does not currently hold prior to the expiration of the 24-month moratorium period. The regulated community and municipalities would benefit from clarification on whether these various license class applications should be made together or individually, when, and how they will be considered.

**Recommendation:** While the statute says that the CRC may accept applications prior to expiration of the 24-month period, the CRC should clarify whether applications will be accepted on a rolling basis or only pursuant to a Request for Applications solicited by the CRC during the 24-month period.

**The CRC should consider adopting regulations that will determine how many recreational licenses from each class of license will be issued, and how the licenses will be distributed across the State. (N.J.S.A. 24:6I-35a(14)(a)(i))**

CREAMMA does not place any caps on any class of license, except for cultivation licenses, which are capped at 37:

N.J.S.A. 24:6I-35a(14) states: “(i) Assuming there are sufficient qualified applicants for licensure, the commission shall, subject to periodic evaluation as described in paragraph (1) of this subsection, issue a sufficient number of Class 5 Retailer licenses to meet the market demands of the State, giving regard to geographical and population distribution throughout the State; and (ii) the provision of adequate access to licensed sources of cannabis items to discourage purchases from the illegal market . . .”

**Recommendation:** The CRC should consider making the criteria by which they use to determine the number of each class of license public information and should consider outlining a maximum number of licenses for each region (North, Central, and South), with the ability for the CRC to increase the number as the market grows. This would (1) increase transparency of process, and (2) assist businesses that may be looking to enter the industry within the State.

**Prior to issuing the next Request For Application (RFA), the CRC should consider evaluating the cap on cultivation permits pursuant to its statutory authority.**

While CREAMMA statutorily limits the number of cultivation permits in the first 24-months to 37, CREAMMA also gives the CRC flexibility to adjust or eliminate that cap. *See* N.J.S.A. 24:6I-46b(1)(b)(2) which states that pursuant to the Commission’s authority to periodically evaluate whether the number of

licenses “is sufficient to meet market demands of the State” and if there are qualified applicants, the Commission may accept new applications above the cap listed in this section.

**Recommendation:** The CRC should consider using its statutory authority to accept applications above the cap because: (1) the cap is statutorily reduced by the number of ATCs that will be deemed to be licensed as cannabis cultivators (if any); and (2) the State is severely undersupplied and by increasing the cap, new recreational licensees would be able to enter that market at a time when the existing ATCs may not be able to certify for adult use. And even if an existing ATCs can provide certification, the supply it has must first go to meet the anticipated treatment needs of registered qualifying patients before meeting the recreational requests of cannabis consumers. Additionally, existing ATCs are not permitted to make operational changes to their business that reduce access to medical cannabis for registered qualifying patients.

**The CRC should clarify whether the number of cultivation licenses will be capped past the initial 24 months. (N.J.S.A. 24:6I-46a(1)(b))**

The regulated community and municipalities would benefit from clarification on whether the cap on the number of cultivation licenses will continue beyond the initial 24-month period under CREAMMA, and what factors may influence that decision.

**Recommendation:** The CRC should consider promulgating criteria by which it determines the number of each class of license and make it publicly available in order to: (1) increase transparency of process, and (2) assist businesses that may be looking to enter the industry within the State. The regulated community and municipalities are preparing now for a future RFA. The likelihood of securing a license severely decreases if the cap remains in place past the initial 24 months.

**Recommendation:** The CRC should state whether it intends for the cultivation cap to remain in place after the 24-month period, or whether this cap will be removed or increased.

**The CRC should clarify the *exceptions* to the 24-month moratorium on holding multiple classes of licenses. (N.J.S.A. 24:6I-46a(3)(a)(i)).**

The above referenced section states that the 24-month moratorium on vertically integrated operators does not apply to:

- i. Those issued permits prior to the effective date of Jake Honig’s Law.
- ii. Those that *will be* issued permits pursuant to RFA published prior to the effective date of the Jake Honig’s Law (the 2018 and 2019 RFAs), or

iii. Those ATCs issued a permit subsequent to the effective date of the Jake Honig's Law pursuant to an application submitted prior to that effective date.

**Recommendation:** The CRC should clarify whether these exceptions to vertical integration apply to stand alone dispensaries and cultivators that will be awarded permits as a result of the 2019 RFA. The prohibition on vertical integration applies to the six classes of cannabis licenses and the ATCs do not fall within those classes of licenses unless and until they provide certification to the CRC and obtain municipal approval to operate a desired recreational license.

**Recommendation:** The CRC should clarify whether medical dispensaries and medical cultivators licensed pursuant to the 2019 RFA are exempted from the prohibition on vertical integration.

**The CRC should clarify whether medical cannabis dispensaries and medical cannabis cultivators licensed pursuant to the 2019 RFA will be able to apply to the Commission for approval to operate as adult use cannabis operators with the corresponding permit class, once they apply to the Commission for approval.**

**Recommendation:** In order to meet demand, all medical licensees should be permitted to apply to operate as adult-use facilities as well.

**The CRC should clarify what ATCs were issued permits after July 2, 2019 pursuant to an application submitted prior to July 2, 2019. N.J.S.A. 24:6I-7a(2)(c)(i)-(ii)**

**Recommendation:** As above, any permit awarded pursuant to an RFA issued prior to July 2, 2019 should be excepted.

### III. Marketplace Regulation Pertaining to Hemp and Permissive Licensing Under The New Jersey Hemp Program. (N.J.S.A. §§ 24:6I-35 AND 24:6I-46)

**Recommendation:** The CRC should clarify that persons and entities licensed by the CRC to operate as a cannabis establishment, distributor, or delivery service (“Cannabis Businesses”) shall be permitted, if desired, to apply to the New Jersey Hemp Program to operate under a license or licenses to handle, process, transport, and sell hemp and hemp products.

The New Jersey Department of Agriculture (“Department”), through its Division of Plant Industry, administers the New Jersey Hemp Farming Act (the “Hemp Act”), authorized by P.L. 2019 c.238, as amended and supplemented. *See*, N.J.S.A. 4:28-6, *et seq.*; *see*, also, N.J.S.A. 4:28-7 (“The Legislature finds and declares that hemp is a viable agricultural crop and a potentially valuable agricultural commodity in the State, and that hemp should be cultivated, handled, processed, transported, and sold in the State to the maximum extent permitted by federal law.”). The Department has adopted rules, at N.J.A.C. 2:25-1, *et seq.*, in order to provide approved persons and entities with licenses for the cultivation, processing, and handling of hemp materials pursuant to the Hemp Act. These rules establish the New Jersey Hemp Program (the “Hemp Program”). Under CREAMMA, “‘cannabis’ does not include ... hemp or a hemp product cultivated, handled, processed, transported, or sold pursuant to the ‘New Jersey Hemp Farming Act,’ P.L.2019, c. 238 (C.4:28-6, *et al.*).” N.J.S.A. 24:6I-33.

The CRC should clarify that licensed cannabis businesses may apply for and, to the extent permitted by the Hemp Program, operate under licenses to cultivate, process, and handle hemp and hemp products as an integral part of their business operations, including, but not limited to, the cultivation, processing, and handling of hemp cannabinoid products such as cannabidiol (CBD). Permitting licensed cannabis establishments, distributors, and delivery services to obtain, when and where necessary, licenses under the Hemp Program is consistent with the intent of CREAMMA, which states, in pertinent part, that the statute intends to “... enhance State-supported programming that provides appropriate, evidence-based treatment for those who suffer from the illness of drug addiction ...” and to design “[a] controlled system of cannabis manufacturing, distribution, and sales ... that enhances public health and minimizes harm to New Jersey communities and families.” *See*, N.J.S.A. § 24:6I-32(j) and (l).

#### **IV. Licensing (Non-Microbusiness And Non-Conditional Licenses)**

**In future RFAs, the CRC should issue disqualification letters at the same time as permit award letters.**

Section 36 states that, “not more than 90 days after the receipt of an application, [the CRC] shall make a determination as to whether the application is approved or denied, or that the commission requires more time . . .” N.J.S.A. 24:6I-36b(1)(c); *see also* N.J.S.A. 24:6I-36a.

**Recommendation:** Issuing disqualification letters ensures that the review process is completed, before any decisions are made, and affords the process greater integrity.

**The CRC should consider defining “Bona Fide Relationship” and including in this definition a contractual relationship. N.J.S.A. 24:6I-7.2f**

“In reviewing an initial permit application, unless the information is otherwise solicited by the commission in a specific application question, the commissions evaluation of the application shall be limited to . . . current or prospective employees of the applicant’s organization who have a bona fide relationship with the applicant’s organization.” N.J.S.A. 24:6I-7.2f

**Recommendation:** The regulations should contain a definition of a “bona fide relationship” so that applicants have guidelines to follow.

**The CRC should staff the Office of Minority, Disabled Veterans and Women Cannabis Business Development before issuing any future RFAs. (N.J.S.A. 25:6I-25b(1))**

Part of the purpose of the Office of Minority, Disabled Veterans and Women Cannabis Business Development will be to certify cannabis companies that meet the requirements of the certifications listed above. N.J.S.A. 25:6I-25b(1) states, “these unified practices and procedures shall include the certification and subsequent recertification at regular intervals of a business as a . . . .”

**Recommendation:** Therefore, the Office should be up and running, and should be in a position to issue certifications, prior to issuing any RFA. Otherwise, there will be confusion among applicants, as to where and how to qualify for one of the certifications listed above.

**The Office of Minority, Disabled Veterans and Women Cannabis Business Development should immediately begin a process by which to certify applicants that are preparing to apply in future RFAs.**

Currently, to become certified as a Woman, Minority or Disabled Veteran owned business, you must apply online through the New Jersey Department of the

Treasury, Division of Revenue and Enterprise Services. Historically, companies have to show proof of income in order to be eligible to register. However, applicants likely will not have any income rendering them unable to satisfy this requirement.

**Recommendation:** Eliminate the requirement that the above certifications require proof of income.

**Recommendation:** Start certifying these companies now, otherwise it could slow the RFA process.

**The CRC should indicate what kind of preferences will be given to integrated curriculum applicants; clarify the definition of an integrated curriculum; and include non-credit bearing certificate programs as integrated curriculums. (N.J.S.A. 24:6I-7.2h)**

#### *Preferences to integrated curriculum applicants*

The relevant section states: “The commission shall give special consideration to any applicant that has entered into an agreement with an institution of higher education to create an integrated curriculum involving the cultivation, manufacturing, dispensing or delivery of medical cannabis, provided that the curriculum is approved by both the commission and the Office of the Secretary of Higher Education.” N.J.S.A. 24:6I-7.2h. As with other provisions of CREAMMA which provide for preferences, CREAMMA does not state how those preferences will actually work in scoring applications.

**Recommendation:** In order to promote transparency, the CRC should make public how the scoring preference with integrated curriculum permits will work; as well as all other scoring preferences.

#### *Definition of Integrated Curriculum*

“Integrated Curriculum Permit” is defined as “a permit issued to a medical cannabis cultivator, medical cannabis manufacturer, or medical cannabis dispensary that includes an integrated curriculum approved by the commission and the Office of the Secretary of Higher Education.” N.J.S.A. 24:6I-3.

The Office of the Secretary of Higher Education (“OSHE”) is governed by Title 9 of the Administrative Code, which may be found [here](#).

Title 9 states, “An institution seeking to offer academic degree programs and/or college credit-bearing courses with a physical presence in New Jersey shall first provide evidence of incorporation and petition to the Secretary for licensure. No institution shall offer or advertise the availability of college credit-bearing course(s) or academic degree program(s) with a physical presence in New Jersey

before receiving formal approval of its petition. Licensure shall require the institution to meet all the standards set forth in this chapter. N.J.A.C. 9A:1-1.3(a).

**Recommendation:** Based on the above, the OSHE only licenses and approves *credit bearing* institutions. However, almost all entry level plant touching jobs in the New Jersey cannabis industry do not require a college degree and these entry level jobs pay minimum wage. Therefore, certificate programs, that are open to the public, but offered by an accredited institution of higher education, should also be considered for integrated curriculum permits.

#### *Non Credit Bearing Certificate Programs*

The last sentence of N.J.S.A. 24:6I-7.2h states, “the commission may revise the application and permit fees *or other conditions* for an IC permit as may be necessary to encourage applications for IC permits.” (emphasis added). Since the OSHE has no mechanism by which to approve non-credit bearing curriculum, the CRC should allow non-credit bearing certificate programs to apply for integrated curriculum permits by approval from the CRC alone.

**Recommendation:** In order to expand access to job training which appears to be the underlying purpose of the integrated curriculum permits, the CRC should invoke its authority under subsection h. to allow non-credit bearing certificate programs, that are offered by OSHE approved institutions of higher education, apply for integrated curriculum permits by obtaining approval of such curriculum by the CRC.

### **The CRC should ensure transparency in its review of applications and clarity regarding why applications are either approved or denied.**

Previous RFAs have given rise to litigation due to a lack of transparency in the evaluation of applications and a lack of clarity as to why applications were denied. In Matter of the Application for Medical Marijuana Alternative Treatment Ctr. for Pangaea Health & Wellness, LLC, 465 N.J. Super. 343 (App. Div. 2020), regarding the 2018 RFA for medical marijuana applications, the Appellate Division has since found “unsettling” the number of scoring inconsistencies from the first-round review without justification or explanation. Pangaea, 465 N.J. Super. at 371.

**Recommendation:** Applicants should receive reviewer explanations from the first round of scoring which are essential to deciding whether an applicant desires to challenge a license denial; and applicants should have the opportunity to challenge any scoring discrepancies as a preliminary option before taking an appeal to the Appellate Division.

**Recommendation:** Applicants should be privy to any quality control review process and the general qualifications of any reviewer involved in the evaluation

of their application. Reviewers evaluating materials outside their area of expertise should either be excluded from the scoring of that material, or their score given less weight than qualified reviewers. Additionally, all training materials provided to the evaluators as to the scoring process should be disclosed to ensure a fair and consistent evaluation of scoring criteria.

**Recommendation:** Any final Commission decision should set forth basic findings of fact and cite specific evidence to justify in writing the ultimate conclusions and final determinations of the Commission so that the Appellate Court reviewing any decision may determine whether the result is sufficiently grounded or based on arbitrary considerations.

**V. Conditional Licenses (N.J.S.A. 24:6I-36); Microbusiness Licenses (as defined at N.J.S.A. 24:6I-33 (see also C.24:6I-36f(2)(c)(ii)))**

**The CRC should clarify whether microbusinesses applicants must meet the requirements of conditional license applicants. (N.J.S.A. 24:6I-36f(1))**

It appears that microbusiness applicants do not have to meet the requirements of conditional license applicants based on the interpretation of N.J.S.A. 24:6I-36f(1) (“The determination of the percentage for each class of license issued to microbusinesses shall include the number of conditional licenses issued to microbusinesses for each class, as the percentage of conditional licenses issued for each class pursuant to subparagraph (a) of paragraph (2) of subsection b. . . . shall not be mutually exclusive of the percentage of licenses issued to microbusinesses.”)

**Recommendation:** Confirm that some conditional licenses might also be microbusiness licenses, but not all microbusiness licenses are conditional licenses.

**The CRC should address the limitations imposed on microbusinesses as a result of the definition of “cannabis distributor” limiting transporting cannabis to those holding a Class 4 cannabis distributor license. (N.J.S.A. 24:6I-33; N.J.S.A. 24:6I-35; N.J.S.A. 24:6I-46; C.24:6I-36)**

“Cannabis distributor” means any licensed person or entity that transports cannabis in bulk intrastate from one licensed cannabis cultivator to another licensed cannabis cultivator, or transports cannabis items in bulk intrastate from any one class of licensed cannabis establishment to another class of licensed cannabis establishment, and may engage in the temporary storage of cannabis or cannabis items as necessary to carry out transportation activities. This person or entity shall hold a Class 4 Cannabis Distributor license. N.J.S.A. 24:6I-33. This definition makes clear that any licensed entity that transports cannabis in bulk from one licensed cannabis establishment to another shall hold a Class 4 cannabis distributor license. There is no exception for transporting one’s own cannabis items.

**Recommendation:** The CRC should consider alternatives for microbusiness licensees who do not hold Class 4 delivery licenses. This is because the limitation to Class 4 cannabis distributors for transporting cannabis intrastate could pose a serious problem for microbusiness licensees of all classes except for Class 6 delivery licenses. Microbusinesses will be forced to rely on those who hold Class 4 licenses in order to abide by CREAMMA.

**The CRC should clarify how to calculate square footage of proposed cannabis establishments; and should clarify the definition of the term “occupying”, as that term is used both in the statutory definition of “microbusiness” and in the statutory requirements to apply for a microbusiness license.**

“Microbusiness” is defined, in pertinent part, as “... a person or entity ... that may only, with respect to its business operations, ... **operate a cannabis establishment occupying an area of no more than 2,500 square feet ... .**” N.J.S.A. 24:6I-33; *see, also*, N.J.S.A. 24:6I-36f(2)(c)(ii) (emphasis added). “Cannabis establishment”, in turn, is defined as either “a cannabis cultivator, a cannabis manufacturer, a cannabis wholesaler, or a cannabis retailer.” *Id.* The terms “business operations” and “occupying” are not defined in CREAMMA. However, by contrast, “premises” and “licensed premises” are both broadly defined to encompass:

... all public and private enclosed areas at the location that are used in the business operated at the location, including offices, kitchens, rest rooms, and storerooms; all areas outside a building that the Cannabis Regulatory Commission has specifically licensed for the production, manufacturing, wholesaling, distributing, retail sale, or delivery of cannabis items; and, for a location that the commission has specifically licensed for the production of cannabis outside a building, the entire lot or parcel that the licensee owns, leases, or has a right to occupy.

N.J.S.A. § 24:6I-33.

As CREAMMA does not define the term “occupying,” there is ambiguity as to how microbusiness license applicants must calculate the 2,500 square foot limit on the area in which their prospective “cannabis establishment” may operate its business. By way of example, in the case of an applicant which has secured a lease of commercial space which includes a 500 square foot basement that the applicant would not be using for its business operations, the applicant would not be required to add that 500 square feet towards its 2,500 square foot limit. An applicant’s calculation should not include square footage available to an applicant, rather it should only apply to the production area of a facility. 2,500 square feet cannot adequately provide enough space for production *and* the free flow of employees with the production of product, and the need to comply with State and local fire and health codes as well as spatial concerns related to COVID-19.

**Recommendation:** The CRC should utilize a liberal approach to calculating the 2,500 square foot limit applied to cannabis establishments seeking a microbusiness license, which would require applicants to include in their calculations only that square footage actually used for the day-to-day operation of their prospective cannabis establishments.

## VI. Municipal/Land Use

**The CRC should consider allowing municipalities to request additional time to study the rules and regulations of the CRC.**

**Recommendation:** Provide municipalities an effective extension of their ordinance creation, by and through resolution. Much has been discussed about the limited and concurrent timeframe for promulgating rules and regulations by the CRC and banning ordinances by a municipality. Municipalities should have the opportunity to review the rules and regulations as guidelines by the CRC to determine whether they want to permit these heavily regulated businesses in their municipality and under what circumstances.

There has been an obvious chilling effect by the speed at which -- and uncertainty under which -- municipalities are asked to consider and adopt ordinances, and the way that the issue has been framed, such as by industry groups as described above and by the NJ League of Municipalities through the template opt-out ordinance that it recently issued. Many municipalities are under the impression that there is no benefit and only a potential hindrance if they do not enact a banning ordinance by August 21, 2021.

**The CRC should clarify CREAMMA's Default Land Use Provisions. (N.J.S.A. 24:6I-45)**

The 180-day municipal opt-out deadline in CREAMMA explicitly applies only to the timeframe within which municipalities must adopt prohibiting ordinances, if they would like to prohibit the operation of one or more types of cannabis business within their borders. Otherwise, CREAMMA's default land use framework applies. However, some industry groups are inaccurately advising municipalities that the 180 day opt-out deadline (which runs as of August 21, 2021) applies to a municipality's authority to *limit the number of cannabis establishments* and adopt *time, place, and manner restrictions*. This uncertainty is causing concern among municipalities because they do not want to rush the adoption of haphazard ordinances that could potentially be in place for five years without the opportunity for amendment. The limited and concurrent timeframe for promulgating rules and regulations by the CRC and banning ordinances by a municipality has resulted in angst and uncertainty in many municipalities. Municipalities should have the opportunity to review the rules and regulations as guidelines by the CRC to determine whether they want to permit these heavily regulated businesses in their municipality and under what circumstances.

CREAMMA provides: "The failure of a municipality to enact an ordinance prohibiting the operation of one or more classes of cannabis establishment, or cannabis distributors or cannabis delivery services within 180 days after the effective date of P.L.2021, c.16 (C.24:6I-31 et al.), shall result in any class of cannabis establishment, or a cannabis distributor or cannabis delivery service that is not prohibited from operating within the municipality as being permitted to

operate therein as follows: the growing, cultivating, manufacturing, and selling and reselling of cannabis and cannabis items, and operations to transport in bulk cannabis items by a cannabis cultivator, cannabis manufacturer, cannabis wholesaler, or as a cannabis distributor or cannabis delivery service shall be permitted uses in all industrial zones of the municipality; and the selling of cannabis items to consumers from a retail store by a cannabis retailer shall be a conditional use in all commercial zones or retail zones, subject to meeting the conditions set forth in any applicable zoning ordinance or receiving a variance from one or more of those conditions in accordance with the ‘Municipal Land Use Law.’” N.J.S.A. 24:6I-45b.

The statute does not explicitly provide for what happens if a municipality does not adopt a prohibiting ordinance and instead adopts a permitting ordinance. The general understanding among the members reviewing this is that municipalities may adopt their own land use framework because CREAMMA explicitly states that a “municipality may enact ordinances or regulations, not in conflict with the provisions of P.L.2021, c.16...governing the number of cannabis establishments, distributors, or delivery services, *as well as the location, manner, and times of operation of establishments and distributors...*” N.J.S.A. 24:6I-45(a) (emphasis added). Municipalities would likely benefit from regulations that confirm that they may create their own land use parameters that are not inconsistent with CREAMMA’s default land use provisions.

**Recommendation:** The CRC should consider a clarification that a municipality may, at any time within or outside of the 180-day opt-out window, prospectively limit the number of cannabis businesses, impose municipal user/transfer taxes, and impose time, place and manner restrictions.

### **The CRC should clarify when the 5-year period, for municipalities that failed to enact an ordinance, runs.**

CREAMMA provides: “[A]t the end of a five year period following the initial failure of a municipality to enact an ordinance prohibiting the operation of one or more classes of cannabis establishment or cannabis distributors or cannabis delivery services, and every five year period thereafter following a failure to prohibit the future operation of any one or more classes of cannabis establishment, or cannabis distributors or cannabis delivery services through the enactment of an ordinance during a new 180 day period.” N.J.S.A. 24:6I-45b.

**Recommendation:** The CRC should clarify whether this five-year period will be the same for every municipality that does not act. For example, will the five-year period run on the same date for every municipality that does not adopt an opt-out ordinance? If so, the CRC may provide the date on which this period ends through regulation. If not, the CRC may provide clarification of this section through regulation.

**The CRC should consider a clarification of the interplay between municipal ordinances and the Medical Cannabis Program. (N.J.S.A. 24:6I-45b)**

CREAMMA provides: “[A]ny ordinance enacted by a municipality prior to the effective date of this section addressing the issue of prohibiting one or more types of cannabis-related activities within the jurisdiction of the municipality is null and void, and that entity may only prohibit the operation of one or more classes of cannabis establishment, or cannabis distributors or cannabis delivery services by enactment of a new ordinance based upon the specific authority to do so by this section.” N.J.S.A. 24:6I-45b.

**Recommendation:** The CRC should clarify that ordinances pertaining to medical cannabis related activities are not null and void under this provision.

**The CRC should clarify that State Authorities, Commissions, and Instrumentalities have the authority to enact time, place, manner restrictions. (N.J.S.A. 24:6I-45b)**

CREAMMA provides that a municipality may enact a prohibiting ordinance “even if that municipality or parts thereof fall within any district, area, or other geographical jurisdiction for which land use planning, site planning, zoning requirements or other development authority is exercised by an independent State authority, commission, instrumentality, or agency pursuant to the enabling legislation that governs its duties, functions, and powers even if this development authority is expressly stated or interpreted to be exclusive thereunder; the local prohibiting ordinance applies, notwithstanding the provisions of any independent State authority law to the contrary.” N.J.S.A. 24:6I-45b.

**Recommendation:** The CRC should confirm that independent authorities, commissions, and instrumentalities have the authority to enact time, place, and manner restrictions, as well as caps on the number of cannabis businesses.

**Recommendation:** The CRC should further confirm that municipalities have the sole authority to impose municipal transfer/user taxes.

**Recommendation:** The CRC should require municipalities to respond within a certain amount of time or request additional time. N.J.S.A. 24:6I-45c(1). Specifically, the local jurisdiction should inform the CRC within seven days whether the application complies with local restrictions on times of operation, location, manner, and the number of cannabis businesses.

**The CRC should clarify whether it will support the use of Host Community Agreements (See In Re Medicinal Marijuana Alt. Ctrs. for Pangea Health & Wellness, LLC, 465 N.J. Super. 343, 396 (App. Div. 2020))**

In the context of the State’s medical cannabis program, the Appellate Division took no issue with community host agreements between municipalities and alternative treatment center applicants. The Appellate Division explicitly noted

that Massachusetts requires applicants for medical marijuana permits to enter into host community agreements, which may include a community impact fee for the host community. In re Medicinal Marijuana Alt. Treatment Ctrs. for Pangea Health. & Wellness, LLC, 465 N.J. Super. 343, 396 (App. Div. 2020).

**Recommendation:** The CRC should clarify whether it will support the use of host community agreements for adult-use applicants, and provide guidance on framing and structuring such agreements appropriately.

**The CRC should clarify whether municipalities may regulate forms of public cannabis consumption that do not involve smoking, vaping, or aerosolizing. (N.J.S.A. 24:6I-33)**

CREAMMA addresses consumption of cannabis in public places in the context of smoking, vaping or aerosolizing, but does not explicitly address other forms of consumption, such as ingesting an edible, in public places. The “clean-up” bill to CREAMMA removed the explicit municipal authority to enact ordinances with a civil penalty for the non-smoking consumption of a cannabis item in public by a person who is of legal age. CREAMMA is now silent on the matter, causing ambiguity.

Within CREAMMA, the provision pertaining to personal use of cannabis provides, “nothing in this section shall permit a person to smoke, vape, or aerosolize any cannabis item in a public place. This prohibition includes the smoking, vaping, or aerosolizing of a cannabis item in any public place pursuant to law that prohibits the smoking of tobacco, including N.J.S.2C:33-13 and the ‘New Jersey Smoke-Free Air Act,’ P.L.2005, c.383 (C.26:3D-55 et seq.), and any indoor public place, as that term is defined in section 3 of P.L.2005, c.383 (C.26:3D-57), or portion thereof, even if the smoking of tobacco is otherwise permitted in that place or portion thereof pursuant to the ‘New Jersey Smoke-Free Air Act’...” N.J.S.A. 2C:35-10a(c).

Under CREAMMA, “public place” means any place to which the public has access that is not privately owned; or any place to which the public has access where alcohol consumption is not allowed, including, but not limited to, a public street, road, thoroughfare, sidewalk, bridge, alley, plaza, park, playground, swimming pool, shopping area, public transportation facility, vehicle used for public transportation, parking lot, public library, or any other public building, structure, or area. N.J.S.A. 24:6I-33.

The “clean up” bill to CREAMMA *removed* language, which stated that a “municipality may enact an ordinance making it an unlawful act for any person 21 years of age or older to consume, other than by smoking, vaping, or aerosolizing, any cannabis item in a public place, including any indoor public place as that term is defined in section 3 of P.L.2005, c.383 (C.26:3D-57), or portion thereof, and providing a civil penalty for a violation in accordance with section 77 of P.L.2021, c.16 (C.40:48-1.2b).” CREAMMA did not substitute this language with

any language to explicitly prohibit municipalities from enacting such an ordinance; instead, CREAMMA is now silent on the matter.

**Recommendation:** The CRC should clarify whether municipalities may regulate forms of public cannabis consumption that do not involve smoking, vaping, or aerosolizing.

## VII. Taxes

**The CRC should clarify how and when the social equity excise fee will be imposed and enforced. (N.J.S.A. 54:47F-1)**

Funding, or lack thereof, generated from the social equity excise fee will be a determining factor for many potential microbusiness license applicants' abilities to successfully apply for and operate licenses once applications become available. Direct grants and funding for qualified individuals would promote a healthy microbusiness environment in New Jersey.

It is not currently clear how CREAMMA's taxation methodology will be implemented for partially and/or fully integrated entities. For example:

ATC goes from seed to sale in a municipality that has a 1% excise tax each on Cultivation, processing, distribution and retail transaction. It sells 1/8th oz. to a customer for \$100. That \$100 would include a ~6% sales tax rendered to the state (\$6) and a \$1 excise. To get that 1/8th oz. to sale, though, there had to be a distribution, a process, and a cultivation. Will the 1% be on the \$100 at the end x 3 (meaning the municipality would get an excise fee of \$4) or is the 1% calculated against some OTHER number up the supply chain? If those numbers are \$0, because of the vertical integration, how do you impute a number there?

**Recommendation:** The cannabis industry would benefit from the CRC prioritizing the selection of seed-to-sale tracking system for licensees. This would permit licensees to clearly indicate when product is transferring from one license class and activity to another. This would also permit licensees to clearly delineate their adult use and medical cannabis supply chains.

## VIII. “Impact Zones” (as defined at N.J.S.A. 24:6I-33)

**The CRC should clarify how impact zones are determined.**

CREAMMA defines “Impact Zones” and the definition includes two variables that are undefined publicly: i) Crime Index of a municipality under the Uniform Crimes Report (UCR), and ii) Cannabis Possession arrests in a municipality under the UCR. These terms are undefined because the UCR does not delineate by municipality, but by law enforcement agency.

“Impact Zones” include municipalities to which CREAMMA provides that funding should be directed and license preferences should be given.

**Recommendation:** The CRC should provide regulatory guidance as to the definition of “Impact Zones” and should identify “Impact Zones” and the values attributed to “Impact Zones.”

## **IX. Lab Testing**

**The CRC should issue regulations for provisional approval for private labs to conduct testing prior to final ISO 17025 certification.**

There is only one state lab, which offers about twenty spots per month for testing. Right now it takes 4-6 weeks to get samples taken / results received where other state medical cannabis programs can be as fast about two days. In addition to the state lab, there is only one other lab operators can use.

Decreasing backlogs and allowing additional labs to participate will increase patient access to medication. It will also provide added employment benefits for the NJ population as it would create an additional line of business and revenue for new labs.

**Recommendation:** A provisional approval from the CRC would help alleviate the backlog. Maryland regulations provide a good example to follow. Maryland allows labs that are applying for their ISO 17025 certification to secure a provisional approval. The CRC should consider taking a similar approach. The procedure in Maryland, allows a lab applying for ISO certification to forward their application materials (or a subset of them) to the state in order to get an interim provisional approval to conduct cannabis testing while they wait for ISO Certification. Adopting the same or similar approach in NJ would allow multiple labs to come online right away, rather than waiting the 3-6 months it takes for ISO certification. Also related to this is that if the CRC plans to require batch testing, the batch size should be 50-100 pounds to prevent the labs from being overwhelmed with testing samples.

## **X. Regulation of Cannabis**

**The CRC should consider issuing regulations that streamlines the background check process for new hires at ATCs.**

Currently it takes 3-4 weeks or more to get employees through the background check process.

**Recommendation:** The CRC should allow ATCs to self-certify that the designated individuals are cleared for work. If operators had the ability to pay for private background checks and then submit a certification that the individual in question is qualified, it would allow operators to fill open positions much more quickly. The CRC can waive the current background check requirements and create new guidance pursuant to N.J.A.C. 8:64-7.11. Alternatively, the CRC could provide a list of state approved background check companies that it has vetted and allow ATCs to use those entities and bypass the process.

**Recommendation:** The Personal Use Cannabis Handler Permit (N.J.S.A. 24:6I-44) should take the place of employer specific background checks. Individuals working for cannabis businesses licensed under CREAMMA are required to hold a Cannabis Handler Permit issued by the Commission. Those individuals will presumably undergo a background check when applying for the permit and renewing the permit. Cannabis businesses should be able to rely on the fact that an individual has a Personal Use Cannabis Handler Permit in good standing as evidence of their clean background.

## **XI. Statutory Task Force To Analyze Methods Of Determining Acute Impairment By Cannabis**

**The CRC should consider, as soon as practicable, staffing and charging the Statutory Task Force contemplated to analyze methods of determining acute impairment by cannabis.**

At N.J.S.A. 24:6I-35d(1), “[t]he commission shall examine available research, and may conduct or commission new research or convene an expert task force, to investigate the influence of cannabis and marijuana on the ability of a person to drive a vehicle, on methods for determining whether a person is under the influence of cannabis or marijuana, and on the concentration of active THC . . . in a person’s blood, in each case taking into account all relevant factors.”

CREAMMA also states at N.J.S.A. 24:6I-50b(1), the tax revenues from adult use sales are directly apportioned to reimburse training costs for police officers, including as “Drug Recognition Expert for detecting, identifying and apprehending drug-impaired motor vehicle operators. . .”

Currently pending, *State v. Olenowski* and the ongoing *Frye* hearing, assigned by the New Jersey Supreme Court to Special Master Hon. Joseph Lisa, J.A.D, is specifically charged with determining the scientific reliability process and procedures involved in the Drug Recognition Evaluator’s (DRE) protocol. That hearing is scheduled for 7 weeks of testimony by experts starting in September of 2021; experts will specifically be opining on the methods by which determination of impairment/intoxication by different drugs can be determined.

As the statutory authority for the CRC directs, it shall conduct research and investigate methods of determining acute impairment by cannabis, and as at least two protocols overseen by the CRC (impairment by cannabis in vehicles and at the workplace) are impacted, the CRC should, at least, be an involved and interested party in this hearing.

**Recommendation:** As the utilization of DREs is contemplated in CREAMMA at C.24:6I-50b(1), and at C.24:6I-52a(2)(a) (“Workplace Impairment Recognition Experts”), the CRC should immediately form the Task Force and should task them with making recommendations, as informed by the testimony and judicial determinations in *State v. Olenowski*.

**Recommendation:** The CRC should state what types of tests are “scientifically reliable” in the employment context, as well as the criminal and quasi-criminal context.

**Recommendation:** The CRC should clarify whether employers are permitted to take adverse employment actions against employees without an impairment examination prior to the adoption of rules and regulations for workplace impairment experts. N.J.S.A. 24:6I-52a(2).

## **XII. Expungement**

**The CRC can promote the education of those who were affected by the war on drugs and not afforded an automatic expungement under CREAMMA regarding their ability to request and secure appropriate expungements.**

Several sections within CREAMMA and its appurtenant decriminalization legislation dealt with expungements in several different ways.

**Recommendation:** The CRC should fund an information campaign to employers to inform them of the prohibition (with limited exceptions) of using a former charge, conviction or adjudication of delinquency related to cannabis in employment decisions. Coupled with the newly enacted statutory impropriety to use convictions in housing and/or banking contexts, these “virtual” expungements may not extend to federal employers, and may only serve people who were victims of the drug war within the borders of our state, it is a beginning step toward reparative justice.

**Recommendation:** The CRC should serve as an air-gapped repository for people to determine whether they have charges that were automatically expunged.

**Recommendation:** The CRC should provide assistance, guidance and public awareness campaigns, with those required by the Administrative Office of the Courts to identify, rectify and expunge records of those who are eligible and wish to have them cleared.

**The automatic expungement process may hinder social equity applicants’ abilities to prove that they were personally impacted by the war on drugs when trying to apply for a cannabis license or permit.**

Some of our members have been in contact with the Administrative Office of the Courts (AOC) concerning potential applicants who may be harmed by the automatic nature and entry of an expungement.

Primarily, the two groups who stand the most to lose by having their records automatically expunged are foreign nationals and potential social equity applicants in this and other states’ cannabis industries.

As for foreign nationals, as the federal government still considers a cannabis charge to be equivalent to a conviction for immigration purposes, and the federal standards are different from NJ standards of guilt, once a case is expunged, there is no way for a foreign national to be able to prove to the federal government anything about their case. As such, they are denied the ability to present the best

defense in their immigration case and could be subject to removal because they cannot access records without an unsealing order.

As for social equity applicants, the CRC, in previous discussions during the public comments/hearings, has discussed the possibility of allowing or prioritizing applicants based on whether they and/or their families have been touched by the drug war. As the AOC is ordered to automatically embargo and seal certain of those records prior to the first application ever being filed, it begs the question: If an applicant was touched by the drug war, and the records of same were expunged, how can an applicant prove it?

**Recommendation:** To determine how to give those groups a chance to “opt out” of the automatic expungement process, the CRC and AOC should coordinate to create a procedure to effectuate the best methods to provide options before records are automatically purged to the detriment of some in the most vulnerable of circumstances.

### **XIII. Family Law**

N.J.S.A. 2C:35-18 and N.J.S.A. 24:6I-6f provides “anti-custody discrimination” protection for parties in Division of Child Protection and Permanency (DCPP) matters. In other words, broadly, there is no presumption of child endangerment simply because a party uses legal cannabis. It must be proven that the party’s behavior has a substantial adverse effect on the child. It takes more than just a party’s use of legal cannabis to impact those decisions; it is the effects of that use, and thus is one of the factors, but cannot be the sole determining factor. The Jake Honig Compassionate Use, N.J.S.A. 24:6I-6m, affords this protection to custody/parenting time litigants in Family Court who are medical marijuana patients.

**Recommendation:** The NJSBA would like the CRC to consider applying the above protection to litigants who use legal non-medical marijuana. N.J.S.A. 6I-51b(3) states, “provided, however, that nothing in this paragraph shall preclude any action or proceeding by the division based on harm or risk of harm to a child or the use of information on the presence of cannabinoid metabolites in the bodily fluids of any person in any action or proceeding.” In other words, DCPP personnel have the broadest discretion to impose restrictions and conditions on parties based on a urine test. The problem is that a person using legal cannabis will test positive for that use long after the effects have worn off. **There are no reliable means to determine through a urine test if a party’s use impacts their parenting abilities. DCPP should be required to publish their metrics for when they deem it appropriate to apply such restrictions and conditions on litigants.**

## **XIV. Recommendations for Partnerships**

**The CRC should work, as contemplated, with the Police Training Commission, in creating, approving and distributing training materials for law enforcement, parents, schools and consumers regarding rules, regulations, and expectations regarding cannabis.**

**Recommendation:** As indicated above, the determination of intoxication and as indicated elsewhere in CREAMMA, as social equity and justice are important aspects of this schema, the CRC work with the New Jersey State Police Training Commission to develop training materials for different entities regarding cannabis.

**Recommendation:** While there are some legitimate and practical concerns, legislatively, about the appurtenant policing issues, especially regarding those under 21 years of age, the NJSBA agrees with the CRC that such is a legislative function and therefore not subject to the CRC's regulatory powers.

**Recommendation:** The CRC has the ability, through its statutory authority in promoting social justice and equity through education and consultation in police training, to work toward a just and reasonable effort to coordinate the intended equity in cannabis policing policies.

**Recommendation:** A clear pathway from the legacy market to the regulated market will help those who may still suffer from the remainder of the war on drugs to develop within this new market.

**The CRC should consider including a representative of the NJSBA on the Juvenile Justice Task Force created under CREAMMA.**

The Task Force under the Department of Law and Public Safety, includes several appointees by the Governor. This Task Force is specifically established to review enforcement activities regarding juveniles and the consumption of alcohol, cannabis and/or other substances.

**Recommendation:** The CRC should consider having one of these members be designated as an NJSBA seat.

## **XV. General Recommendations**

The following are additional recommendations from individual members for your consideration.

**The CRC should consider limiting a current Alternative Treatment Center's (ATC) ability to sell retail products originating from outside their vertically integrated supply chain to protect smaller businesses.**

There is little incentive for the existing operators in New Jersey to sell product to stand alone dispensaries or manufacturers. While existing ATCs currently are conducting wholesale transactions among themselves, they all have something to offer each other – product. A stand-alone dispensary operator could be charged more for wholesale product, compared to vertically integrated companies selling between themselves; the same applies to stand alone manufacturers. Furthermore, stand-alone cultivators could have trouble finding an outlet for their product at a price that makes sense for them to sell.

**Recommendation:** Incentivize the existing vertically integrated companies to transact with the new stand-alone operators in order to assist the marketplace in the first years of existence. The CRC should require the existing vertically integrated ATCs to use best efforts to purchase a certain percentage of cannabis from microbusinesses within the first thirty-six (36) months of the date awards are first made in the recreational market.

**Recommendation:** As an alternative to the above recommendation, the CRC may consider prohibiting ATCs from selling retail cannabis and cannabis products from outside their vertically integrated supply chain. This prohibition could be temporary; perhaps forty-eight (48) or sixty (60) months. These times are based on the initial twenty-four (24) month restriction period in N.J.S.A. 24:6I-46. Based on that restriction, other licensees will be able to begin vertically integrating in February 2023. Those licensees could then have a window of time to get their bearings as a vertically integrated operation before ATCs get the greenlight to retail products cultivated or manufactured by other licensees.

**The CRC should incentivize manufacturers to produce extract that can be sold to microbusinesses to utilize in edible products.**

Many business that are interested in joining the cannabis space, and may qualify for a microbusiness permit, likely will not have the financial means, knowledge, or experience to produce extracts. Extracts are needed to make many forms of edibles, including chocolate and baked goods. To promote participation in the microbusiness industry, the CRC should incentivize large scale manufacturers to sell cannabis extract to microbusiness manufacturers.

**Recommendation:** The CRC should require an applicant applying for a Class 2 Manufacturer license to include a plan that it will use best efforts to sell cannabis extract to microbusiness manufacturers and include additional bonus points to the

extent the applicant applying for the Class 2 Manufacturer license will certify that it will sell a certain percentage of its cannabis extract to microbusiness manufacturers.

### **Delivery and Sale of Hemp and Hemp Products.**

**Recommendation:** Cannabis retailers and delivery services should be permitted to sell hemp and hemp products lawfully produced in and imported into the State of New Jersey, directly to consumers.

### **Production and Sale of Hemp-Derived Tetrahydrocannabinols.**

**Recommendation:** Cannabis manufacturers may, to the extent permitted and licensed by the Hemp Program, obtain hemp for use in manufacturing, preparing, and packaging hemp-derived tetrahydrocannabinol products (*i.e.*, delta-8-THC, delta-10-THC, *etc.*, “Hemp THC”) and, just as with “cannabis” under CREAMMA, sell, and optionally, transport those Hemp THC products to other cannabis manufacturers, cannabis wholesalers, or cannabis retailers.

**The CRC should coordinate with other State agencies to create a program, to be housed in the Office of Women Minority Disabled Veterans in Cannabis Business Development, that provides access to zero- or low-interest loans and/or simple grant opportunities to allow those who are usually excluded from market participation to have a financial means of getting in. (N.J.S.A. 24:6I-25)**

Cannabis businesses are typically excluded from small business loans and other forms of financial assistance programs due to the fact that cannabis is illegal federally and the applicability of 280(e). Therefore, the first part of the program would be to provide financial assistance to eligible businesses.

The program should provide hands-on assistance to these businesses: pairing them with an existing business in the industry that can both assist with the application process, and also provide them with the tools and ongoing assistance upon award of a license to make sure they are successful. Many entrepreneurs who want to get into this industry do not have the means to navigate this space but should not be excluded because of this.

Similar to the small business development centers that exist, this type of program needs to be developed directly by the CRC because of the ongoing inaccessibility to financial assistance to cannabis businesses.

**Recommendation:** Create a program that provides financial and hands on application and operation assistance to eligible cannabis businesses.

**Recommendation:** If the above is not feasible or possible, microbusiness applicants should receive technical help on applications and post application operations.

**The CRC should consider issuing regulations permitting additional forms of advertising by ATCs.**

Currently dispensaries are prohibited from advertising anything except certification events. This limits the ability to connect with and educate New Jersey residents, and it is limiting the scope of the program.

Allowing additional advertising would benefit the patient and potential patient population because it would permit additional information being exchanged. It would also benefit outreach opportunities in the community.

**Recommendation:** As the CRC has adopted Maryland's testing guidance while the adult-use regulations are written, the CRC should consider adopting Maryland's marketing and advertising guidance for both medical and adult-use marijuana.

**The CRC should consider, as soon as practicable, staffing and charging the Statutory Task Force contemplated to analyze methods of determining acute impairment by cannabis.**

**Recommendation:** Based on the integrated reliance upon the purported scientific reliability of the Drug Recognition Evaluator protocol, the CRC should consider petitioning the Supreme Court and Judge Lisa to get involved in *State v. Olenowski as amicus curiae*.

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