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Public Convenience and Advantage: Parts 118.1 and 119.4

Assessment of Public Comment, February 14, 2025

The Office of Cannabis Management (“OCM”) received 66 written comments in response to the proposed rulemaking on public convenience and advantage (“PCA”) requests, which proposed changes to sections 118.1 and 119.4 of Title 9 of the New York Code, Rules and Regulations. All comments were submitted electronically to OCM. Commenters included adult-use cannabis licensees; healthcare organizations; teachers or professors; elected officials; municipalities, community boards, and community associations; other business owners; and members of the public.

Consideration of PCA Factors

COMMENT: One commenter suggested that PCA requests allowing additional dispensaries into market areas violate the spirit of the Marihuana Regulation and Taxation Act (“MRTA”) and could potentially harm SEE and CAURD licensees that are still trying to gain their footing, and would increase risk of default and personal bankruptcies. Another commenter proposed that the PCA process should “exclude Conditional Adult-Use Retail Dispensaries (“CAURD”), Social and Economic Equity (“SEE”), and microbusinesses with retail from exemptions under the rule.”

RESPONSE: Changes have been made to section 119.4(b)(4). OCM notes the concern of the second commenter, and while the original proposed section 119.4(b)(4) arguably captured the presence of SEE licensees when considering PCA requests, the revised regulations have added “existing social and economic equity licensees within the applicable radius of the location” to the enumerated factors to be considered. It is unclear whether the first comment proposing the exclusion of CAURD and SEE applicants from PCA requests is suggesting preventing such

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requests if a CAURD or SEE dispensary is already operating within the regulated distances, or instead excluding those organizations from receiving PCA approvals altogether. If the commenter intended the former interpretation, that suggestion is addressed by the proposed changes. If the latter interpretation was intended, OCM rejects that suggestion as inconsistent with the Cannabis Law and the MRTA.

COMMENT: One commenter suggested limiting the consideration of PCA waivers to essentially the criteria proposed for section 119.4(b)(7), which calls for consideration of “any geographic, structural, or topographic barriers” between the waiver applicant’s proposed location and the existing licensee locations. The commenter wanted to see those criteria further limited to situations where such barriers impeded direct access, or where actual travel distance was over 150% of the straight-line distance between the locations.

RESPONSE: No changes will be made to the proposal. OCM does not see such a constriction of the elements for a waiver—which would eliminate other considerations, such as the economic considerations—as allowing the office to meet one of its statutory directives to ensure a strong legal cannabis market.

COMMENT: The office received several comments that suggested revisions to the elements that should be considered for PCA requests. Most of these comments were from current retail dispensary licensees and used the same template response. Some comments offered a general concern that the elements were vague, unspecific, or subjective. Other comments suggested specific elements for the regulations, including: require the Cannabis Control Board presumptively deny waivers, unless the applicant rebuts that presumption with specific evidence;

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consider of profitability of existing impacted licensee; limit the size of a store seeking waiver; prohibit waivers that result in a distance between stores that exceeds 5% of the current distance requirements; require OCM and the Cannabis Advisory Board (“CAB”) to establish baseline metrics on consumer demand, allowing CCB to objectively determine need for additional retail dispensaries in that area; reinstate the door-to-door linear method of measuring distance between locations; require waiver to include analysis regarding market demand, performance of existing licensees, impact on illicit market, and alignment with state goals of public safety.

RESPONSE: No changes will be made to the proposal. It is not necessary to amend the proposal to add that the CCB must presumptively deny waivers. The regulations are clear that the waiver may not be granted unless the applicant demonstrates public convenience and advantage. OCM also does not see the need to impose a specific limit on the size of a dispensary, as the applicant may not have control over the size of available commercial space. Likewise, OCM does not consider a limitation on distance of 5% of the minimum as having a meaningful difference on the existing proposal. Regarding the comment urging door-to-door distance measurement, it should be noted that the method of measuring the distance between the existing licensee or licensees remains the same for the purposes of determining whether a waiver of the proximity restrictions is available and/or required. The only difference is that the regulations permit the CCB to consider the actual distance a person must travel as part of its PCA waiver analysis. For the remaining comments in this section, OCM believes that the existing language in section 119.4(b)(4) would permit the CCB to consider the analyses the commenters proposed.

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COMMENT: One commenter suggested an alternative two-phase alternative to the proposal, which would limit consideration of waivers to areas surrounding the 30 busiest subway stations in New York City, and then further limit waivers to those areas which sales data indicates could support additional retail dispensaries.

RESPONSE: No changes will be made to the proposal. The current proposal already captures economic considerations and consumer demand. Limitations such as the one the commenter proposes would likely constrain waivers to Manhattan and foreclose opportunities in other boroughs.

COMMENT: One commenter suggested removing the prohibition of dispensaries located within 200 feet of a house of worship.

RESPONSE: No changes will be made to the proposal. The prohibition related to houses of worship is set by Cannabis Law § 77(6), and cannot be altered by regulation.

COMMENT: Some commenters requested that the cannabis PCA waiver process be amended to match processes utilized by the State Liquor Authority (“SLA”). One comment advocated that the CCB use similar elements the SLA uses to weigh public convenience and advantage. Other commenters recommended that CCB impose the same procedural steps used by SLA, such as requiring a public hearing overseen by an administrative law judge and requiring a written opinion.

RESPONSE: No changes will be made to the proposal. The SLA does not use a public hearing process run by an ALJ to determine public convenience and advantage. Under the Alcoholic Beverage Control Law, public convenience and advantage is a standard that applies to liquor and

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package stores. Although the SLA considers public convenience and advantage with respect to those license types, the law does not require the SLA Board to conduct an administrative hearing to make a public convenience and advantage finding.

. Although the regulatory proposal for a cannabis PCA request under section 119.4(b) does not include a hearing in front of an administrative law judge, the proposal does capture similar elements to what the SLA generally considers for public convenience and advantage, e.g., proximity to existing licensees and economic data. Furthermore, the procedural components of the proposal, which have been updated as described below, need not be changed; the revised proposal allows for other parties to be heard regarding the waiver request at a public meeting before the CCB publicly renders its decision on the waiver application, thus creating a public record of the decision.

COMMENT: Several commenters asked for a moratorium on the granting of PCA waivers to ensure existing retail dispensaries gain solid financial footing, or for OCM to gather more data to determine areas that could support additional locations. Other commentors proposed that a PCA waiver should automatically be rejected if the existing store within the prescribed radius had not been in operation for a minimum period, ranging from 1 to 3 years.

RESPONSE: OCM recognizes that a dispensary should be given an opportunity to reach full operation prior to granting PCA waivers for new dispensaries. OCM is, therefore, submitting a revised proposal that will amend section 119.4(a) to forbid the granting of PCA waivers if the existing dispensary has not been in operation for at least nine months. However, a complete moratorium on PCA waivers is not desirable and would improperly constrain the granting of licenses.

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COMMENT: Several commenters made suggestions about the distances set for PCA waivers, with some commenters suggesting that the distances within which a waiver would be required could be lowered in areas that data could demonstrate clear demand to open an additional location. Another commenter proposed that there should be a minimum distance within which no PCA waiver could be granted, suggesting that no waivers should be granted at all within 750 feet in municipalities that had a 1,000-foot proximity protection and 1,500 feet for municipalities subject to a 2,000-foot radius.

RESPONSE: OCM is revising its proposal to provide a minimum radius within which no PCA waiver may be granted. The proposal would amend sections 119.4(a)(1) and (2) to forbid the granting of a retail dispensary or microbusiness license within 500 feet of a registered organization, a registered organization adult-use dispensary, or a microbusiness license in a municipality having a population of 20,000 or more and 1,000 feet in a municipality with a population of less than 20,000.

COMMENT: One commenter suggested that dispensaries should be restricted from operating near treatment facilities, liquor stores, or in areas where children are known to travel, and suggested that the regulatory proposal should impose zoning restrictions on where dispensaries may be located.

RESPONSE: No changes will be made to the proposal. The commenter supplies no supporting evidence for the proposition that treatment facilities or businesses licensed by SLA should be specifically included in the types of facilities that cannabis licenses must maintain minimum distances from. Further, the Cannabis Law forbids cannabis dispensaries from being located

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within certain distances from schools, and section 119.2 of the regulations allow municipalities to require adult-use dispensaries and microbusiness to be a minimum of 500 feet away from an area designated as a public youth facility. It should be noted that municipalities may impose certain time, place, and manner restrictions on the operation of cannabis businesses, as long as those restrictions are consistent with section 131 of the Cannabis Law and section 119.2 of the regulations.

Impact on Illicit Shops and Cannabis Retail Market

COMMENT: Several comments addressed the potential impact the rulemaking would have on illicit shops. One commenter supported the proposal on the ground that it would support the legal industry while contributing to the State’s goal of shutting down illicit operators and moving consumer purchases to the legal market. The commenter highlighted that restrictive distance requirements would create an opportunity for illicit operators to occupy spaces that would otherwise support a legal dispensary, and cited research suggesting that proximity to regulated stores increases the percentage of consumers that source products from the legal market. Some commenters opposed additional density that they believed PCA would create because it would compound the struggle with shutting down illicit shops. Another commenter opposed the PCA regulations generally, arguing that OCM should focus its efforts on closing illicit shops.

RESPONSE: The support from commenters concerned about illicit shops is appreciated and OCM is aware of data indicating that a strong legal market reduces consumer purchases from illicit sources. OCM continues to maintain a strong enforcement effort against illicit shops. No changes will be made to the proposal.

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COMMENT: Other comments addressed whether the proposed regulations could expand the number of shops and impact current market participants. Some of these concerns were implicit in comments regarding the elements of PCA that are addressed earlier in this summary. Other commenters expressed concern that the proposed rulemaking would create an oversaturation of stores and lead to closures and instability of the cannabis marketplace. One commenter argued that the proposed rules would create an unfair advantage for foreign investors and pharmaceutical companies. Some commenters proposed a moratorium on PCA requests until concrete and predictable PCA standards could be imposed.

RESPONSE: OCM's goal in amending these regulations is to ensure that it continues to meet the statutory goals of having a robust legal market, and these regulations, which will add some restrictions to PCA requests, aim to ensure market stability and prevent oversaturation. In response to these concerns, the revised proposal includes the following additions to section 119.4(a) of the regulations: (1) a minimum distance within which no PCA requests will be granted; (2) a requirement that existing cannabis licensees within the applicable distance radius be operational for at least nine months before a PCA request may be granted; and (3) a prohibition on PCA request where two other licensees of the same category are already operating within the applicable distance radius. With respect to other market concerns, , no evidence was provided to suggest that adjustments to PCA criteria will give foreign investors or pharmaceutical companies an advantage, and this is already addressed by OCM's enforcement existing regulatory restrictions on ownership and changes in ownership.

PCA Waiver Procedure and Municipal Participation

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COMMENT: Several commenters suggested changes to the procedure that should be followed in order to assess PCA requests. Some comments argued the proposal did not allow an opportunity for existing licenses to receive adequate advance notice and the opportunity to make an argument against granting a PCA request within their presumed proximity protection. Other commenters argued that the process should require a public hearing overseen by an administrative law judge—at which affected licensees, municipalities, and members of the public would have an opportunity to be heard—with the decision on the request issued as public comment.

RESPONSE: OCM is revising its proposal in section 119.4(c) to require applicants for a PCA request to provide notice of its application to all affected licensees within the applicable restricted radius at the same time it provides a required notice to the applicable municipality. Section 119.4 is also revised to allow the licensee receiving notice to submit a response to the CCB and allow an opportunity to be heard at the CCB meeting when the request is considered. OCM is not revising the proposal based on the comments seeking a hearing conducted by an ALJ and resulting a written opinion for the same reasons as the calls to match the CCB process to the SLA process, discussed above.

COMMENT: One commenter proposed that, in the event of objections to a particular PCA request, the applicant be given an opportunity to reach stipulations regarding the operation of the establishment, such as opening and closing hours.

RESPONSE: No change will be made to the proposal. OCM believes that allowing stipulations that would restrict a licensee’s ability to operate under the Cannabis Law or the applicable municipality’s time, place, and manner restrictions is not consistent with the directives of the

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MRTA and could violate section 131 of the Cannabis Law governing the limits of municipal rulemaking.

COMMENT: One commenter argued that the PCA request process should require OCM and the municipality to issue opinions on whether the requested exemption should be issued or not.

RESPONSE: No change will be made to the proposal. The process currently allows for municipal responses to PCA requests.

COMMENT: Some commenters suggested that applicants seeking a PCA request be required to pay an additional fee to cover admin costs and discourage frivolous submissions.

RESPONSE: No change will be made to the proposal. OCM does not believe that charging additional fees to the applicant or licensee is necessary or proper for public convenience and advantage requests. The general costs of pursuing a license under the Cannabis Law should deter frivolous applications as the licensees would risk additional expenditures of money and potential sunk costs for pursuing locations that do not comply with proximity distances between dispensaries.

COMMENT: Some commenters made suggestions for the standard of review that the CCB should use to determine PCA requests. One commenter advocated using a clear and convincing evidence standard while maintaining public safety and public health, while another commenter argued that “specific need” must exist to grant a PCA request.

RESPONSE: No changes will be made to the proposal. The Cannabis Law imposes no such standards on the CCB’s review, and the commenters do not elucidate on how such standards of

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review would impact PCA requests. Given the participation of multiple stakeholders in the PCA process and the broad factors the CCB may consider, it is not necessary at this time to impose a specific standard of review.

COMMENT: Some commenters suggested that the opinion of the municipality in the consideration of PCA requests was not accorded enough weight or was minimized along with community participation. Some comments argued that the proposal should be amended to make the municipality or community board's determination on the PCA request binding, rather than advisory. Other comments suggested that the proposal should be amended to maximize municipality participation, as the SLA process does.

RESPONSE: No changes will be made to the proposal. Binding municipal opinions are not possible as allowing them would conflict with laws regarding municipal preemption in section 131 of the Cannabis Law. OCM also disagrees that municipal participation, and community participation by extension, has been limited. The proposal was amended by adding section 119.4(d) to reinforce that municipalities, including community boards where applicable, have the right to submit written responses and to be heard at the public meeting where the PCA requests are considered.

COMMENT: Some commenters suggested that 45-day time limit in section 119.4(c) for municipalities or community boards to respond to a PCA waiver request was not an adequate amount of time. Another comment suggested that municipal responses expire after one year.

RESPONSE: No changes will be made to the proposal. The time limit was calculated to allow for a municipality to address PCA requests at a regularly scheduled monthly meeting while

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balancing the need for a timely decision on the request, as applicants would still be incurring real estate costs while the PCA decisions are pending. OCM will review the operation of the PCA process to determine whether municipal responses should be renewed after a particular period of time has elapsed.

COMMENT: One comment was received from a municipality that was supportive of the cannabis market but expressed concern that amendments to the PCA request process may impact municipalities that relied upon various State imposed distancing requirements in drafting local regulations to ensure that cannabis facilities are distributed in different areas of the City.

RESPONSE: No changes will be made to the proposal. OCM appreciates the support of this municipality and its concern regarding potential amendments to the PCA process. However, the changes that are included in the proposed revision maintain the maximum distances of the original regulation and impose a minimum distance between under which no PCA request will be granted. The revised proposal also precludes PCA requests if there is more than one dispensary licensee within the applicable proximity restriction. It is also important to reiterate that Cannabis Law § 131 and section 119.2 of these regulations set forth requirements that municipalities must follow in the development of local laws, regulations, and rules.

COMMENT: One commenter requested that OCM develop and fund training programs for community boards to understand the PCA request process and public health implications.

RESPONSE: No changes will be made to the proposal. OCM appreciates this suggestion and will review whether to supplement its existing guidance or offer specific training.

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Concern of Impact on Public Health

COMMENT: Several comments opposed the proposed rule on the grounds that they believe it would increase the risk of harm to youth and adolescent populations through increased use of cannabis through increased retail density. Some of these commenters were concerned that increased density and visibility is contributing to a false perception that cannabis is safe to use, where school administrators are already fighting a perception among students that “everyone is already doing it.” Other commenters expressed concerns that increased access to cannabis products would contribute to increased accidental use and misuse; Studies showing negative impacts of cannabis use of adolescent relationships, mental health, and academic performance.

RESPONSE: No changes will be made to the proposal. It should be noted that other aspects of the Cannabis Law and regulations seek to protect youth from improper cannabis use. Regulations on packaging, labeling, marketing, and advertising have strong provisions that forbid appealing to youth, and the Cannabis Law requires licensees operate a minimum distance from schools that cannot be changed by a PCA request.

COMMENT: Some commenters opposed expanding the number of stores through the proposed rule on the grounds that additional stores would create a risk to public health. Some commenters claimed increased density of stores is frequently associated with increased use and negative impacts, including driving under the influence, increased alcohol use, higher rates of cannabis dependency, and increased avoidable hospital admissions. One commenter suggested that the PCA request process should require a Health Equity Impact Assessment to accompany each PCA application that is submitted to the CCB for approval. That assessment should thoroughly

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evaluate the potential health implications of increased retailer density, particularly in underserved communities, to ensure these populations are not disproportionately burdened.

RESPONSE: No changes will be made to the proposal. OCM’s current regulations fulfill its dual mandate to grow a strong legal market, reduce the illicit market, and protect public health. OCM’s regulations protect public health by forbidding access by minors, limiting potency of certain products, and requiring appropriate warning labels based on current scientific evidence. OCM will continue to monitor impacts on public health as the market matures.

Impact on Communities from increased density

COMMENT: One commenter argued that allowance for increased density is likely to disproportionately appear in low-income communities that are unlikely to profit from additional proliferation within their communities. Another comment suggested that increased density brings crime and negative impact on property values.

RESPONSE: No changes to the proposal will be made. The commenters did not supply evidence for these assertions. Furthermore, research is showing the increased availability of legal licensed dispensaries has a positive impact in reducing the illicit market and the ancillary crime that accompanies illegal markets.

Other Comments Not Addressing Proposed Rulemaking

COMMENT: Several comments did not address the proposed rulemaking at all. One commenter criticized OCM as an ineffective agency opposed granting OCM any additional enforcement or authoritative powers until it implements the recommendations of the Office of General Services that were issued in May 2024. Some commenters asked for a pause or

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moratorium in granting retail dispensary licenses entirely until the state assisted existing licensees to stabilize. Another comment opposed any proximity restriction on the ground that licensed dispensaries were opening second locations before all first-time applications were decided. There were also comments that OCM should use its existing grant programs to focus on current licensees.

RESPONSE: These comments address matters that are outside the scope of the proposed rulemaking. Although no response is required, it should be noted that these regulations are not unilaterally proposed by the Office of Cannabis Management. The Cannabis Control Board must ultimately authorize the proposal and, further, the Board retains the ultimate power to grant PCA requests. OCM's current enforcement of limitations on ownership addresses the commenter's unfounded concern on second locations. Furthermore, the grant programs that exist have specific requirements under regulation and statute that precludes the diversion of these resources to other uses.