2016 House Bill 4014

Legislative Report

December 30, 2016

Oregon Liquor Control Commission shall report to the interim legislative committees related to business, and any interim legislative committee specifically related to businesses that produce marijuana, on rules adopted by the commission under ORS 475B.070 (3)(d) related to assisting the viability of marijuana producers that are independently owned and operated and are limited in size and revenue with respect to other marijuana producers.

OREGON LIQUOR CONTROL COMMISSION
OLCC

Executive Summary

The Oregon Liquor Control Commission (OLCC or the Commission) spent 2016 issuing the first licenses for recreational marijuana businesses in Oregon; many of the more than 700 licenses issued to date to producers, wholesalers, processors, retailers and testing laboratories are smaller businesses. This report will focus on the OLCC's administrative rules established for the micro canopy producer licenses, with the assumption these licensed businesses are independently owned and operated with limited size and anticipated revenue from marijuana production and sales.

In the first quarter of 2015, the OLCC began the administrative rulemaking process for recreational marijuana licenses. The Commission quickly recognized that each license type would have unique characteristics and functions within the overall recreational market, and the Commission appointed at least one separate rules advisory committee for each license type to evaluate the specific policy, process, public health and safety issues involved with each type. The Commission also appointed a larger Rules Advisory Committee to formulate comprehensive administrative rules that aligned with the agency's statutory directives, local government interests and the needs of businesses seeking to enter the recreational marijuana market. From May to August of 2015, ten different committees met more than 40 times. OLCC staff and the Commissioners used the input from the various rules advisory committees and public responses to create a set of comprehensive temporary rules that were adopted in October 2015.

In response to 2016 legislative directive, the OLCC added two producer "micro" tiers, each with a smaller size of allowable canopy and reduced licensing fees. At present a Tier 1 micro producer allows for 625 sq. feet indoor or 1,250 sq. feet outdoor (or a mixture of the two based on the 4:1 ratio) with an annual licensing fee of $1,000. A Tier II micro producer can produce up to 1,250 square feet indoor or 5,000 square feet outdoor, with an annual licensing fee of $2,000. This is a substantial reduction in licensing fee compared to Tier I and Tier II producers, which pay annual licensing fees of $4,750 or $5,750 respectively. To assist micro producers bringing their product to market, the OLCC also established a micro wholesaler license. The micro wholesaler has a license fee of $1,000, compared to a regular wholesaler with a fee of $4,750.

The OLCC administrative rules are written for scalability, other rule areas highlighted in this report include: vertical integration, allowing multiple licenses at one location, packaging rules, family farm model, security rules, inventory transfer, flower testing and the upcoming medical bump up canopy. The OLCC recognizes that these administrative rules are a starting point, and the agency anticipates that continuous modifications will be needed to adapt to the needs of all businesses as the market grows and matures. The OLCC plans to continue its proven process for ensuring that adopted rules meet these needs in a timely, efficient and economic manner by listening to stakeholders and keeping the process transparent and collaborative.

To obtain a paper copy of this report please contact the OLCC at marijuana@oregon.gov.

Overview

The Oregon Liquor Control Commission (OLCC or the Commission) spent 2016 issuing the first licenses for recreational marijuana businesses in Oregon, and many of the more than 700 licenses issued to date to producers, wholesalers, processors, retailers and testing laboratories are smaller businesses. The OLCC anticipates that as the market expands and matures in the coming year, some smaller businesses may either grow in size or be acquired by larger entities. However, due to continued federal prohibition against marijuana sales in interstate commerce, all Oregon marijuana businesses will be constrained by the size of the marijuana market within state lines. This report will focus on the OLCC's administrative rules established for the micro canopy producer licenses, with the assumption they are independently owned and operated with limited size and anticipated revenue from marijuana production and sales.

In the first quarter of 2015, the OLCC began the administrative rulemaking process for recreational marijuana licenses, based at the time on the mandates of Measure 91 (and later based on HB 3400 and other applicable statutes passed by the Oregon Legislature in the second quarter of 2015), that directed the Commission to adopt administrative rules to regulate the following license types: producers (which grow marijuana); processors (which create other cannabinoid products from marijuana items); wholesalers (which purchase and sell marijuana items between other license types); laboratories (which conduct essential testing of marijuana items); and retailers (which sell marijuana items to consumers).

The Commission quickly recognized that each of these license types would have unique characteristics and functions within the overall recreational market, and the Commission appointed at least one separate rules advisory committee for each license type to evaluate the specific policy, process, public health and safety issues involved with each type. The Commission also appointed a larger Rules Advisory Committee, made up of government officials, law enforcement, and industry representatives to evaluate the recommendations from each committee and formulate comprehensive administrative rules that aligned with the agency's statutory directives, local government interests and the needs of the businesses seeking to enter the recreational marijuana market.

The Commission engaged in an open and transparent selection process to fill each of these committees, and received hundreds of requests to participate from individuals in official capacities, experts in public health and safety fields, and members of the general public. From May to August of 2015, ten different committees met more than 40 times. All meetings were open to the public and recorded. Audio recordings and meeting materials were posted on the OLCC website following each session. The OLCC also sought public feedback on the proposed administrative rules, receiving hundreds of written comments and testimony from dozens of interested individuals during public hearings. OLCC staff and the Commissioners used the input from the various rules advisory committees and public responses to create a set of comprehensive temporary rules that were adopted in October 2015.

The Commission then went through a permanent rulemaking process to finalize the rules, making adjustments based on statutory changes and feedback from OLCC staff and market participants, as the agency began applying the rules during 2016. The Commission reconvened the original Rules Advisory Committee to assist in developing these changes, as well as focus on the rules' effect on small businesses. The Rules Advisory Committee worked with OLCC staff to prepare a fiscal impact statement that assessed the effect the rules may have on recreational marijuana businesses and the agency regulating it.

In addition to the standard processes for receiving public input during the administrative rulemaking processes, the OLCC sought to cast an even wider net to ensure that any affected individuals or businesses had easy access to the latest information on the agency's regulatory scheme, as well as an avenue to provide comments on an ongoing basis. The Commission established a marijuana-specific email address (marijuana@oregon.gov) to continually receive feedback and answer questions, and established a listserv for sending out important information and updates regarding the rules and licensing processes. The Commission created marijuana-specific pages to its website (1.3 million visits to date) with a comprehensive Frequently Asked Questions (FAQs) section, and links to information from other state agencies regarding recreational marijuana regulation. The Commission, in conjunction with the Governor's office, state and local agencies, and industry partners created a "Business Readiness Guidebook," with informative resources on ancillary requirements for establishing a recreational marijuana business in Oregon.

OLCC's administrative rules were adopted with the goal of supporting businesses of all sizes, but because the Legislature directed the Commission to provide this report on the agency's efforts to support businesses of more limited size and revenue, the remainder of this report will focus on several of the Commission's rules that have had or are anticipated to have a positive impact on those smaller scale operations.

Production Size Tiers and Micro Tiers

The Oregon Legislature, through a variety of statutory amendments passed in the 2015 and 2016 sessions, directed the OLCC to regulate the size of cannabis production by establishing canopy limits for marijuana producers, based on the total square foot area of mature marijuana plants being cultivated. The Legislature also directed the OLCC to adopt rules designed to produce equivalent yields for outdoor and indoor producer licensees. The Commission enlisted the advisory committees and public comments to evaluate the various cultivation techniques involved in growing marijuana, the characteristics of "indoor" versus "outdoor" cultivation, and other factors to develop a formula to meet this legislative directive. Ultimately the Commission determined that in order to produce roughly the same amount of marijuana on an annual basis, outdoor producers need four times the amount of canopy space as indoor producers. The rational for this determination was that outdoor producers typically harvest one crop per year, while indoor producers can harvest multiple times per year. In addition to establishing this 4:1

ratio, the Commission defined “indoor” production as any method of production that enlists artificial lighting in the cultivation of mature plants, and “outdoor” production as any method that does not enlist artificial lighting. This definition was intended to be broad enough to encompass the most cultivation methods, including production in a greenhouse (which through the advisory committees the Commission learned is an extremely common method of production in Oregon). By rule the OLCC also allows for “mixed” cultivation, i.e. production indoor and outdoor, and created a formula for determining the maximum canopy size allowable for each cultivation method that fits within the 4:1 ratio.

In the temporary rules adopted in 2015, the Commission established two tiers for production, based on the size of proposed operation. In 2016 the Legislature directed the OLCC to also develop rules designed to “assist the viability of marijuana producers that are independently owned and operated and that are limited in size and revenue with respect to other marijuana producers, by minimizing barriers to entry into the regulated system and by expanding, to the extent practicable, transportation options that will support their access to the retail market.” ORS 475B.070(3)(d). To respond to this new directive, the OLCC added two additional “micro” tiers, each with a smaller size of allowable canopy and reduced licensing fees.

At present a Tier 1 micro producer allows for 625 sq. feet indoor or 1,250 sq. feet outdoor (or a mixture of the two based on the 4:1 ratio) with an annual licensing fee of $1,000. A Tier II micro producer can produce up to 1,250 square feet indoor or 5,000 square feet outdoor, with an annual licensing fee of $2,000. This is substantial reduction in licensing fee as compared to Tier I and Tier II producers, which pay annual licensing fees of $4,750 or $5,750 respectively. Micro tier producers have the same license privileges, requirements and prohibitions as larger scale Tier I and Tier II production licenses, although the relatively smaller size of the operation often results in a reduced financial burden to meet the Commission’s security requirements. Additionally, by statute and administrative rules, micro tier producers that were existing growers in the medical market for certain periods of time may be eligible for a waiver of the Land Use Compatibility Statement (LUCS) requirement, meaning there are less local government hurdles to clear in order to secure a license.

Micro Wholesalers

To assist micro producers in bringing their product to market, the OLCC also established a micro wholesaler license. The micro wholesaler has a license fee of $1,000, compared to a regular wholesaler with a fee of $4,750. A micro wholesaler also has the same privileges, requirements and prohibitions as a regular wholesale license, except that they may only receive product from micro tier producers. The privileges include the ability to purchase product from micro tier producers, store product on behalf of micro producer licensees, trim and dry product on behalf of micro tier producers, transport on behalf of micro producer licensees, auctions to and for micro licensees, and selling product to other licensees. A micro tier producer has the option of utilizing the services of a regular wholesale licensee well.

Vertical Integration Allowed

In addition to providing specific licenses for smaller-scale production and wholesale operations, the Commission adopted rules designed to allow businesses to hold multiple licenses, even at one location. Allowing vertical integration is beneficial for businesses of all sizes, but the reduction in overhead and other associated costs (particularly security compliance) is anticipated to be very helpful for businesses with limited income streams due to their smaller size.

Multiple Producer Licenses Allowed at the Same Location

The Commission allows multiple producer licenses (of any tier) to be held on a single lot if there is no common ownership between them (due to the need to control the allowable canopy sizes of each producer). This rule can assist small-scale producers in several ways. For example, it allows a property owner to maximize their property space by leasing it to multiple growers. It can allow for some cost savings among the producers located on a single piece of property (although each producer is independently responsible for providing all security for their individual licensed premises).

Packaging and Labeling

All OLCC license types can package their own products and make pre-rolls for distribution at a retail location. This rule allows a business to produce a product and have it prepared for final sale to a recreational store without transferring to a third licensee.

Packages and labels that will ultimately be sold to a consumer are approved by the OLCC before use. There is a $100 fee for each package and label application, but a business can avoid this process by opting to use a generic label and pre-approved package. Using a generic label and pre-approved package allows small businesses to avoid the cost of a packaging or labeling application fee and the time spent going through the approval process.

Supporting the Family Farm Model

One common theme heard from many of the OLCC advisory committee members was the desire for small, independent producers to retain the ability for their families to live a normal life on their farms while they produce marijuana. In response to this request the OLCC modified its original rules to allow a minor who lives on the lot or parcel of a producer license to be on the licensed premises, as long as they do not have access to areas that contains usable marijuana. By making this rule modification the OLCC was able to make it easier for small family farms to enter the regulated market.

Security Requirements to Scale of Operation

The security portion of the OLCC administrative rules are also an example of rules written for scalability. While all licensees are held to the same basic requirements, the volume of surveillance video required is typically far less for a micro producer than for a larger producer, simply because of the size of the operation. Compliance with the Commission's security requirements is likely one of the higher business costs the marijuana industry faces, and by providing various licensing tiers for selection, a business owner can decide how much investment in security equipment is financially feasible, allowing smaller operations to enter the market.

Additionally, due to feedback from public comments and advisory committees, the OLCC reduced its requirement for retention of off-site backup surveillance from 90 days to 30 days. This change will reduce data storage costs for all licensees.

Finally, OLCC continues to provide a mechanism for individual businesses to request modifications to their security requirements based on individual needs and circumstances. All licensees may request a waiver of any security rule, if they can show that they have an alternative means of meeting the goal of the rule that is as effective. Each security waiver is reviewed by the OLCC on a case-by-case basis.

Allowance of Inventory Transfers

Producer applicants that are transitioning from the medical market to the regulated recreational market are able to transfer product from their medical inventory to their recreational inventory at the time of licensure. This allows producers to easily transition between the programs without losing product, or revenue, as long as they have patient approval. OLCC rules allow a medical marijuana grower, with authorization from a patient, to transfer an unlimited number of immature plants or 6 mature plants per patient. Additionally, OLCC recently increased the amount of usable marijuana that a producer may transfer in from the medical market, currently allowing up to 6 pounds (indoor) 12 pounds (outdoor) per patient card.

Reduction in Required Flower Testing

The OLCC has responded to concerns regarding the limited number of labs available to test for pesticides by reducing the number of batches that must be tested for pesticides, until such time that lab capacity increases. At the present time by temporary order, the OLCC with rule authority from the Oregon Health Authority, is allowing a producer to test 1 in 3 batches from each harvest lot for pesticides instead of every batch, and will continue to allow this reduced testing until more labs are accredited and licensed or the existing lab capacity increases. To take advantage of this reduction in testing a producer provides up to three batches for sampling, and the lab takes a sample from each batch to use for the required tests, but only tests one of the three for pesticides. The Commission determined this reduction reduces the cost burden associated with testing and the wait time to get the marijuana product to a retail establishment, while still ensuring that pesticide testing is conducted on products entering the market.

Medical Bump-Up Canopy

The OLCC is currently in the rulemaking process for what has been called the "bump-up" canopy, which will allow OLCC licensed producers to grow an additional canopy area designated for medical patients. This canopy area can only be used for product that is transferred to patients, caregivers, dispensaries or medical processors. Once adopted these rules should benefit small-scale producers by still allowing them to directly service the medical market while they are part of the recreational market.

Conclusion

The administrative rules discussed above and the rulemaking process itself highlight the importance small businesses play in the OLCC licensing structure and to the Oregon recreational market in general. The OLCC recognizes these administrative rules are just a starting point, and the agency anticipates that continual modifications will be needed to adapt to the needs of all businesses as the market grows and matures. The OLCC plans to continue its proven process for ensuring that adopted rules meet these needs in a timely, efficient and economic manner by listening to stakeholders and keeping the process transparent and collaborative to ensure that the system remains strong for all participants, and that Oregon's recreational marijuana program stands out as a model of successful legalization for the rest of the nation.