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Honorable MCB Board Members

Sent Via Electronic Mail

RE: Public Comment to *Proposed* changes regarding Enforcement Action Process

Dear Honorable MCB Members:

Thank you all for your hard work and dedication to the industry. As the industry matures and develops, the variety of issues the Board and AMCO team faces develops as well. Thank you for your consideration of my public comments for the below-referenced *Proposed* changes regarding the Enforcement Action Process regulation project:

3 AAC 306 is amended – proposed addition of a new section to read:

> 3 AAC 306.801(b). **Powers and duties.** (1) permitting entry upon and inspection of the licensed premises; and
> (b)(2) Providing access to business records at *reasonable times* when request by the director, an enforcement agent, an employee of the board, or a peace officer.

The proposed regulations do not define *reasonable times*. Business Records may even be under the supervision of the owners and not accessible to all employees. In fact, most business owners do not allow access to their sensitive financial records to any employees, therefore, in terms of reasonableness, the owner of the licensed establishment must be notified of this request, and AMCO Must understand that employees cannot, in most cases, satisfy record requests. Please revise "reasonable times" to require a certain time frame for a business order to provide records to Enforcement, a manner of which the record request will be made in writing to the licensee, and please make clear that it is not the intent of the MCB to allow for an enforcement agent to show up at a facility, with no notice, and gain access to the licensee's office where sensitive documents are kept. The term "provide access to" seems to make the need for any search warrants irrelevant and seems to imply that an enforcement agent has the right to show up, during business hours, and gain immediate access to all the records and books kept for the business – that would be a governmental overreach and does not require any scope for the request. This is too broad and could be misused and while I do not have any fears that our current Enforcement

staff would misuse the broadness of the wording of this regulation, we need to remember we might not always have Chief Hoelscher as our Enforcement leader, at some point he will retire and at some point other members of our AMCO Enforcement team will retire, and any new Enforcement investigators may use this broad wording as a mechanism to harass licensees and go beyond the scope of the intent of this regulation. We have to plan for the immediate future and distant future when formulating these regulations, and therefore we have to curtail the regulations and language to be interpreted narrowly and in the benefit of due process instead of broad sweeping terms as currently written. I would recommend the following language:

> *3 AAC 306.801(b).* ***Powers and duties.*** *(1) permitting entry upon and inspection of the licensed premises; and*
> *(b)(2) Produce within three (3) business days, after licensee receives a written request by the director, an enforcement agent, an employee of the board, or a peace officer which identifies the business records requested, produce the business and provide them in a format that is readily accessible.*

3 AAC 306 is amended – proposed addition of a new section to read:

> 3 AAC 306.806. **Verbal warning, inspection report, advisory notice, or notice of violation.** (a) The director, an enforcement agent, an employee of the board, or a peace officer acting in an official capacity, may issue a verbal warning, an inspection report, an advisory report, or a notice of violation upon a license, permit, or endorsement.

In the subsequent *proposed* amended sections that follow 3 AAC 306.806(a), there appears to be inconsistency as it relates to documenting the licensee's enforcement file maintained by the director.

> In section **3 AAC 306.806 (b)**, the last sentence states ***"A verbal warning must be documented in the licensee's enforcement file, maintained by the director."***
> In section **3 AAC 306.806 (c)**, there are no requirements, or even a mention of the inspection reports being documented in licensee enforcement files. The concern comes from the next section:
> In section **3 AAC 306.806 (d)**, it reads as follows: **"a written advisory notice documents an incident or defect that violates statute, regulation, or local law and the enforcement agent elects not to provide a verbal warning.** ***The advisory notice may be issued from information recorded on an inspection report or elsewhere."***

An advisory notice ***may be*** issued from information recorded on an inspection report, but 3AAC 306.806(c) refers to inspection report and it **lacks the requirement to include the inspection report in the license's file** – I believe this is an unintentional oversight. If nothing requires inspection reports to be documented in the license's enforcement files, it seems there could be potential questions as to the date the inspection report was actually created or made, or even to what establishment the report came from originally. Please amend the language of 3AAC 306.806(c) to require that inspection reports also go into the license's Enforcement file. Additionally, the use of the term "licensee's file" I believe is incorrect, it should be License's file, as the notices are required to be served on the licensed premises, and are in relation to the license, not the individual licensee (or in some cases licensees).

Because of the reasons described *supra* I recommend adding the following statement to **3 AAC 306.806 (c): *"An inspection report must be documented in the license's enforcement file, maintained by the director."*** And I also recommend that "licensee's file" should be "license's file".

3 AAC 306.809. **Notice of Violation. (New section created)**
3 AAC 306 is amended – proposed addition of a new section to read:

> 3 AAC 306.809. **Notice of Violation.** (a) A notice of violation must be in writing on a form approved by the board and it must detail:
>
> (1) a description of the circumstances of the violation or violations;
> (2) a description of applicable violated statutes, regulations, or local laws;
> (3) ***prior violations or criminal history of the licensee and licensed premises***;
> (4) recommendations of disciplinary actions, including fines, and probation; and
> (5) the signature of the investigating officer.

The requirement of number three to provide prior violations or criminal history of the licensee and licensed premises is not appropriate. Listing out criminal history convictions on an allegation of a violation would be more prejudicial and create bias against the licensee than it would serve for any probative evidential value. Moreover, the licensee's criminal history would like just be a history of non-disqualifying convictions or convictions that are so old that they do not disqualify the licensee from operating a marijuana establishment, and have zero relevance to the alleged violation – other than creating bias, embarrassment, and confusion, what probative evidential value would there be? There is no reason to require this information for the licensee unless the criminal conviction IS the reason for the violation – i.e. if a licensee recently got convicted and failed to disclose that conviction to AMCO timely.

3 AAC 306.809(e) requires the board to hear at its next regularly scheduled meeting any appeals of these new NOVs from licensees. I would recommend that the board consider amending this requirement to allow for a day (or maybe an extra half day after the regular scheduled meeting) to hear these appeals. Having the schedule of when to hear the appeals and the requirement that it be done at the next regularly scheduled MCB meeting

could interfere with getting regular business done for the public and for the industry. The MCB should have some discretion and flexibility as to when it is required to hear these appeals.

Lastly, 3AAC306.809(f) states that "the board shall determine whether there is substantial evidence to uphold the notice of violation…" I would recommend changing the evidential standard from *substantial evidence* to *preponderance of the evidence.* Preponderance of the evidence is what is used in civil court – essentially preponderance of the evidence is met when the party with the burden (i.e. in this case, Enforcement) convinces the fact finder (i.e. the MCB) that there is a greater than 50% chance that the claim is true[1]. Substantial evidence, on the other hand, is the standard of review used at the appellate level to review a trial court's decision where the court is asked whether there exists substantial evidence to support the findings of the court below.[2] The critical difference is burden of proof – if the MCB were to adopt the substantial evidence standard then it would be treating the NOV or Enforcement action as a trial court's decision and that would akin to not requiring Enforcement to bear the burden of proof to prove the violation more likely than not occurred– the MCB would not be requiring a burden of proof be met, it would only be reviewing the Enforcement's report and determining if it was supported by substantial evidence. Under substantial evidence standard, MCB would be deferring to Enforcement instead of requiring them to meet a burden of proof. Substantial evidence is also what is applied when reviewing a jury's decision – appellate courts generally do not overturn jury decisions unless the jury decision is found by the appellate court, after reviewing all the evidence in the light most favorable to the jury verdict, that no rational trier of fact would have come to the same verdict because the verdict is not supported by substantial evidence. Substantial evidence is a very weak review standard, it defers to the agency/jury verdict (in this case Enforcement's NOV and report of what it believes was violative of the regulations and statutes) and it does not place any burden of proof on Enforcement. It should not be used as the standard of review when reviewing Enforcement NOVs and recommended sanctions. Enforcement should prove its case by meeting the minimum burden of proof requirement of more likely than not (50.1%) which is preponderance of the evidence. Preponderance of the evidence is fair to the industry, the public and to enforcement.

Truly and Sincerely Yours,

Jana D. Weltzin, *Esq.*

[1] https://www.law.cornell.edu/wex/preponderance_of_the_evidence#:~:text=Preponderance%20of%20the%20evidence%20is,that%20the%20claim%20is%20true.

[2] https://www.law.cornell.edu/wex/substantial_evidence