

Colorado's Cannabis Industry Open to Publicly-Traded Companies and Investors

May 30, 2019

Colorado Governor Jared Polis signed House Bill 1090 (the “Bill”) on Wednesday May 29, 2019, which opened up Colorado’s cannabis industry to outside investors for the first time.

The Bill only requires a person intending to apply to become a “controlling beneficial owner” (see below) or “passive beneficial owner” (see below) to receive a finding of suitability or an exemption from the state licensing authority prior to submitting a marijuana business application. The Bill also requires a marijuana business or controlling beneficial owner that is a publicly-traded corporation to comply with various notification, disclosure, notice, and suitability requirements. The Bill limits the types of publicly-traded corporations that can be marijuana businesses or controlling beneficial owners.

The Bill creates 3 new ownership concepts: “controlling beneficial owners”, “indirect financial interest holders” and “passive beneficial owners”. Further, the Bill gives the licensing authority the power to regulate the parameters of, qualifications of, disclosure of, requirements for, and suitability for the new ownership concepts.

A “controlling beneficial owner” is limited to: a natural person, an entity that is organized under the laws of one of the states or District of Columbia, a publicly-traded corporation, or a qualified private fund that is not a qualified institutional investor that satisfies one or more of the following criteria:

- acting alone or in concert, owns or acquires beneficial ownership of ten percent or more of the securities of a medical marijuana business;
- is an affiliate that controls a medical marijuana business and includes, without limitations, any manager; or
- is otherwise in a position to exercise control of the medical marijuana business.

A qualified institutional investor may be a “controlling beneficial owner” if, acting alone or in concert, it owns or acquires beneficial ownership of more than thirty percent of the owner’s interest of a medical marijuana business.

An “indirect financial interest holder” is a person that is not an affiliate, a “controlling beneficial owner” (see above), or a “passive beneficial owner” (see below) of a medical marijuana business. An indirect financial interest holder must also meet one of the following criteria:

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- holds a commercially reasonable royalty interest in exchange for a medical marijuana business's use of the person's intellectual property;
- holds a permitted economic interest that was issued prior to January 1, 2020, and that has not been converted into an ownership interest;
- is a contract counterparty with a medical marijuana business, other than a customary employment agreement, that has a direct nexus to the cultivation, manufacture, or sale of medical marijuana, including, but not limited to, a lease of real property on which the medical marijuana business operates, a lease of equipment used in the cultivation of medical marijuana, a secured or unsecured financing agreement with the medical marijuana business, a security contract with the medical marijuana business, or a management agreement with the medical marijuana business, provided that no such contract compensates the contract counterparty with a percentage of revenue for profits of the medical marijuana business; or
- is identified by rule by the state licensing authority as an indirect financial interest holder.

Finally, a “passive beneficial owner” means any person acquiring any interest in a medical marijuana business that is not otherwise a “controlling beneficial owner” (see above) or in control of the business.

While Cassels does not advise on U.S. federal or state regulatory affairs, the signing of House Bill 1090 marks a positive development for publicly-traded cannabis companies looking to expand into Colorado or Colorado cannabis companies looking to access the capital markets in Canada. This shift in Colorado's regulatory matters will likely require an update to your company's public disclosure documents if you are contemplating expanding into Colorado. Whether your cannabis business operates in Colorado or not, our Cannabis Group can assist you with Canadian regulatory concerns and public disclosure considerations. For more information, please contact a member of our firm's cross-disciplinary **Cannabis Group**.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.