THE WEEK IN MARIJUANA (MAY 22-26, 2017)

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Just when we thought the medical marijuana furor had quelled while the Legislature mulled a special session to address the implementation of Amendment 2, the "Week of May 22" resurrected what is sure to be a great deal of lively debate in Florida amongst several groups both for and against the implementation of Amendment 2.

First, an Administrative Law Judge paved the way for two additional licensees to operate in the state as Medical Marijuana Treatment Centers ("MMTC's"). It is not so clear, however, that there will be two additional licensees for certain. In Plants of Ruskin, Inc. and Tornello Landscape Corp., d/b/a 3 Boys Farm v. Department of Health, DOAH Case Nos. 17-0116 and 17-0117, the ALJ recommended as follows:

…it is RECOMMENDED that:

1. The Department of Health consider whether, in the exercise of newly acquired constitutional authority, it may license both Plants of Ruskin, Inc., and Tornello Landscape Corp., d/b/a 3 Boys Farm, as MMTC's; and then consider exercising such authority, if thought to exist, because there is no meaningful qualitative difference between these applicants, as a matter of ultimate fact.
2. If the Department chooses not to license both applicants as MMTC's, then a final order should be entered approving the application of Tornello Landscape Corp., d/b/a 3 Boys Farm, whose score of 96.12is the highest, if only by a mathematically insignificant margin.

So while it may appear that there will be two additional licensees, there may be only one, because the Department of Health ("Department")has to render the final order in this matter, and under the former scoring rubric would be bound to license only one. If on the other hand the Department decides it has authority under Amendment 2 to license both, then there will be two additional licensees with the ability to provide medical marijuana to the public.

The second matter which flows from the first issue above, should be "how will the new licensee(s) and the existing ones provide the services outlined in Amendment 2?" The Department is using a tactic that was an option from the date of passage of Amendment 2, and one that I thought would have been the route taken. The most prevalent form of agency rulemaking can be found in Ch. 120, Florida Statutes, and is very rigid and formulaic. There are deadlines, commentary periods, and challenge procedures, all of which add a degree of predictability and transparency. There is however, a more arcane form of agency rulemaking that is derived from Constitutional authority. This form is typically not as transparent nor does it require much public participation. The difference lies in the grant of authority. Here, Amendment 2 granted the Department authority to promulgate regulations for implementation of the Constitutional Amendment. There is precedent for this in case law however. So while the Department waited for the legislature to enact a statute to implement Amendment 2, it was poised to engage in the more traditional Ch. 120 rulemaking. Upon the legislature's failure to enact that statute, the Department was left with no other choice but to engage in "Constitutional Rulemaking." In furtherance of this, the Department took the additional step of informing the public of the procedure it intends to utilize in this Constitutional rulemaking. It is important to note that these rules may begin from the Amendment language and not simply pick up from the where the legislature left off. In other words,

the 90-day waiting period may still be a possibility as is vertical integration, limited dispensary facilities and where the Board of Medicine decides what may constitute a “related illness” to those listed in the Amendment.

The third development indicates what may be an upcoming trend. DFMMJ Investment LLC, an entity owned by Liberty Health Sciences and whose major investor is Aphria Inc., will now operate and manage all aspects of Chestnut Hill Tree Farm’s medical marijuana business. Chestnut Hill is a current Florida licensee. Aphria is a major marijuana grower and processor based in Ontario, Canada. DFMMJ intends to invest an additional $20million within the next year on infrastructure and additional dispensaries. This burgeoning industry is already attracting many investors, some in the hope of obtaining a license with others exploring the possibility of purchasing existing licensed operations and still others willing to infuse the existing licenses with additional capital to help expand their business.

And finally, as a side note, John Morgan is rumored to be willing to invest $100 million into a “medical marijuana business.”

Stay tuned…

For more information on this topic, please contact the author, Colin Roopnarine, on the firm’s Government and Regulatory team.

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