



To the Department of State Health Services (the "Department"):

My name is Mark Bordas, and I serve as the Executive Director of the Texas Hemp Business Council (THBC). I appreciate the opportunity to offer preliminary comments on the Department's proposed revisions to the Consumable Hemp Products rules (25 TAC Chapter 300), published in response to Governor Abbott's Executive Order GA-56, which directs state agencies to prioritize protection of minors, lawful alignment with federal law, and the preservation of adult liberties in hemp regulation.. Both the THBC and I reserve our right to submit additional formal comments in accordance with the deadlines and other requirements set by the Administrative Procedures Act.

These comments are offered constructively and in good faith, with full respect for the Department's public health mission and a shared commitment to protecting minors, ensuring product safety, and maintaining alignment with both state and federal law. While the THBC supports thoughtful regulation, several provisions of the proposed rules appear to exceed the Department's statutory authority and run afoul of both the Texas and United States Constitutions. These concerns are identified below.

1. Exceeding Statutory Authority: Risk of Ultra Vires Regulation

It is well-established under Texas law that agency actions taken in excess of or conflicting with the bounds of a legislative grant of authority are considered ultra vires and not protected by sovereign immunity. *See, e.g., Van Boven v. Freshour*, 659 S.W.3d 396, 402 (Tex. 2022); *Houston Belt & Terminal Ry. Co. v. City of Houston*, 487 S.W.3d 154, 164, 169 (Tex. 2016); *Railroad Comm'n of Tex. v. Lone Star Gas Co.*, 844 S.W.2d 679 (Tex. 1992). For example:

- **Section 300.101(20)** defines "hemp" using a "total" delta-9 THC measurement, contrary to the statutory definition in HSC § 481.002(26)(F), which incorporates the definition of "hemp" from Agriculture Code § 121.001, meaning "any part" of the *Cannabis sativa* L. plant "with a delta-9 [THC] concentration of not more than 0.3 percent on a dry weight basis."
- **Section 300.501(b)** deletes the limitation that retail registration applies only to products "containing CBD"; however, HSC § 443.2025(b) requires registration only for retail locations selling "consumable hemp products containing cannabidiol [CBD]," and the fee schedule authority in § 443.2025(f) is likewise tied to locations where "consumable hemp products containing cannabidiol [CBD] are sold."

- **Section 300.502(f)** sets a \$20,000 per location annual registration/renewal fee, but HSC § 443.2025(f) authorizes only a fee schedule establishing “reasonable fee amounts” for registration.
- **Section 300.601(b)** purports to count each day a violation continues as a separate violation; however, HSC § 443.201 requires the Department to provide fair notice of a potential violation and an opportunity to cure.

2. Constitutional Issues: Occupation Taxes, Excessive Fines, and Due Process

The Texas Constitution prohibits certain occupational taxes. *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997) (holding the primary distinction between a permissible regulatory fee and an unconstitutional occupation tax is whether or not the fee is assessed “only in an amount reasonably necessary to fund the State’s regulation of [the] industry.”) Further, both the Texas and U.S. Constitutions prohibit excessive fines and guarantee due process. These protections are implicated by the proposed:

- **Section 300.202(c)** increases initial and renewal license fees from \$250 to \$25,000 with no reasonable relationship to the costs of the State’s regulation of the industry.
- **Section 300.502(f)** likewise increases retail registration and renewal fees from \$150 to \$20,000, far exceeding the statutory authority for what is reasonably needed for regulation.
- **Section 300.601** purports to count each day a violation continues as a separate violation, which could result in disproportionate and unconstitutionally excessive fines and violations of due process.

3. Federal Preemption and Interstate Commerce

The 2018 Farm Bill (7 U.S.C. § 1639p(d)), signed by President Trump, expressly protects the interstate commerce of hemp and hemp products and forbids states from prohibiting the transportation or shipment of hemp or hemp products produced in accordance with federal law. Texas would be better served by anchoring regulation in durable statutory language and constitutional limitations rather than anticipated, ongoing federal shifts.

- **Section 300.206** provides that substances with “total” delta-9 THC above the “acceptable hemp THC level” may not be transported into Texas for further processing, possibly violating this federal protection.

In conclusion, I appreciate the Department’s efforts thus far and welcome the opportunity to collaborate on constructive revisions that ensure public access, safety, uphold the law, and ensure conformity with Chapter 443, Executive Order GA-56, in support a robust Texas economy in general and more specifically, the state’s growing hemp economy.

Respectfully Submitted,

Mark Bordas