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TO: Commissioner Monica Bharel, MD, MPH and Members of the Public Health Council

FROM: Lynn Squillace, Esq., MPH
Deputy General Counsel

DATE: June 10, 2020

RE: Request of the Public Health Council to Approve Proposed Emergency Regulation 105 CMR 316.000, *Use of Face Masks or Coverings in Response to the COVID-19 Pandemic*

I. Introduction

On March 10, 2020, Governor Baker issued a Declaration of a State of Emergency made pursuant to M.G.L. c. 639, sections 6, 7, 8, and 8A and Emergency Detrimental to the Public Health made pursuant to M.G.L. c. 17, §2A (“the Declarations”), due to the effects of COVID-19's extreme risk of person-to-person transmission throughout the United States and the Commonwealth which significantly affect the life and health of the people of the Commonwealth, as well as the economy, and because COVID-19 is a disaster that impacts the health, security, and safety of the public.

These Declarations came after United States Health and Human Services Secretary Alex M. Azar II declared a public health emergency for the United States and upon the presence of 91 presumed positive cases of COVID-19 in the Commonwealth. Since March 10, 2020, the number of cases of and deaths due to COVID-19 has increased dramatically. As of June 4, 2020, there were 102,063 cases of COVID-19 in the Commonwealth, and 7,201 deaths of confirmed COVID-19 cases in Massachusetts.

Since the Declarations, both the Governor and Commissioner of Public Health have issued Orders to address the emergency in the Commonwealth due to the COVID-19 pandemic. These Orders include COVID-19 Order No. 31 issued by the Governor, which requires any person over the age of two who is in a place open to the public in the Commonwealth, whether indoor or outdoor, and who is unable to or does not maintain a distance of approximately six feet from every other person to wear a face mask or covering. The Order's requirement exempts any

person who is unable to wear a mask or face covering due to a medical condition or any other situation exempt from the requirement by Department of Public Health guidance issued May 1, 2020.

II. Department of Public Health Regulatory Authority Related to COVID-19

M.G.L. c. 111, section 6 authorizes the Department of Public Health to establish rules and regulations for the control and prevention of diseases deemed dangerous to the public health as the Department of Public Health deems advisable for the protection of the public health. Through its regulation 105 CMR 300.000, the Department of Public Health has deemed novel coronaviruses, which includes COVID-19, diseases dangerous to the public. Therefore, existing state law and regulation authorize the Department of Public Health to establish rules and regulations necessary for the control and prevention of COVID-19.

III. Proposed Emergency Regulation

The proposed emergency regulation adopts the requirements of COVID-19 Order No. 31 and the Department of Public Health guidance issued May 1, 2020 pursuant to the Order in an effort to control and prevent the spread of COVID-19.

The proposed regulation requires face masks or coverings be worn at all times in public where a person cannot social distance, except in the following instances:

1. The person is a child under the age of two. (*Note: the regulation indicates use of face masks or coverings by children between the ages of two and five years is at the discretion of the child's parent or guardian.*)
2. The face mask or covering affects the person's ability to breathe safely.
3. The person has a disability that prevents them from wearing a face mask or covering.
4. The person depends on supplemental oxygen to breathe.
5. The person is engaged in outdoor exercise and is fully able to do so in a manner that complies with social distancing requirements.

As proposed, the regulation stipulates any person who is not required to wear a face mask or covering due to one of the exceptions noted above, a medical condition, or disability will not be required to verify the condition or that the exception applies. The draft regulation also require businesses allow entry to any individual not wearing a face mask or covering due to one of the noted exceptions, but does allow a business to deny entry to any person who refuses to wear a face mask or covering and who does not cite one of the noted exceptions.

IV. Requested Action

It is respectfully requested that the Public Health Council vote to approve the proposed regulation, 105 CMR 316.000, on an emergency basis, which allows the regulation to take effect upon filing with the Secretary of State's office for a 90-day period while the regulatory process continues, as provided for in the state's administrative procedure laws outlined in M.G.L. c. 30A.