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March 11, 2026

Massachusetts Commission Against Discrimination
1 Ashburton Place
Suite 601
Boston MA 02108
via email to MCADProRegs@mass.gov

RE: Proposed Amendments to the Procedural Regulations

Dear Commission Members,

On behalf of the Boston Bar Association (“BBA”), we thank you for the opportunity to comment on the proposed changes to the MCAD Regulations.

The invitation to comment was distributed to all of the BBA’s sections, and members of our Civil Rights and Civil Liberties section discussed the proposals and offer the attached comments. Please note that the attached document does not constitute a position of the BBA as a whole or even of the Section, but rather reflects the views of the individual members. We hope that these comments may be useful to your office as it considers the proposed amendments.

Thank you for providing members of the bar with an opportunity to weigh in on these proposed changes. Please feel free to contact us should you have any questions or concerns.

Sincerely,

A handwritten signature in blue ink, appearing to read "Suma V. Nair".

Suma V. Nair
President

Comments from Members of the Boston Bar Association's
Civil Rights & Civil Liberties Section
on MCAD's Draft Updated Procedural Regulations

In response to an invitation for comments from the Massachusetts Commission Against Discrimination (MCAD), members of the Boston Bar Association's Civil Rights & Civil Liberties Section reviewed and discussed the proposed changes updating MCAD's procedural regulations, *801 CMR 1.00: Rules of Procedure*.

Members of the section appreciate the opportunity to comment on this proposal and offer the following comments in the hope that the Commission will consider them before finalizing the relevant changes to MCAD regulations.

The members expressed concern that the proposed regulations will allow MCAD to screen out many more cases without investigation (pursuant to **proposed 804 CMR §1.05(2)(b)**), even where the complaint states a claim for discrimination. This will deprive litigants, particularly *pro se* litigants who might not be able to successfully navigate the court system, of the right to have their cases heard and the discrimination they have experienced redressed. In particular:

- **Dismissal based on “vagueness”:** Many *pro se* complainants lack legal training, so their complaints are often imprecise. The purpose of MCAD's investigation is to develop facts—not to dismiss claims because they are inartfully pleaded.
- **Dismissal based on allegations of harm being “*de minimis*”:** Discriminatory harm is substantive and dignitary, and therefore can be hard to quantify. However, this does not make discrimination any less unlawful. No court (as far as we are aware) has ever applied such a doctrine to discrimination claims. Additionally, the terms “moot” and “mitigated” are not well-defined.
- **Dismissal based on the “public interest” requiring Commission resources to be spent elsewhere:** This proposed criterion is undefined and would undermine transparency between the public and government institutions.
- **Dismissal based on allegations containing a “tenuous nexus between protected class and allegedly discriminatory conduct”:** The nexus between the protected class and the discriminatory conduct is something that should be fleshed out during MCAD's investigation. Discrimination is often proven through indirect evidence developed over time, including pretext, comparators, and inconsistent employer explanations—an analysis that cannot occur at a preliminary, pre-investigative stage.

Members noted as well that the expanded grounds for screening out cases based on discretionary, premature, or subjective criteria (pursuant to **proposed §1.05(2)(b)**) would undercut MCAD's statutory mandate to investigate and make a probable-cause determination as to each complaint. MCAD also **proposes changes to §1.04(2)** to require all complaints to be filed through MCAD's on-line portal. Currently, MCAD accepts complaints from in-person appointments, phone appointments, and by mail. In FY2025 36% of complaints came from in-person intake appointments, 26% from virtual intakes, and 7% by mail. Members believe that eliminating both

mail-in filing and intake options, and requiring that complainants have access to and facility with online forms, will remove critical access points and have a devastating impact on marginalized communities, including non-English speakers, immigrants, people with disabilities, unrepresented individuals, older adults, and communities of color.

Furthermore, members fear that the expanded process for screening out cases will likely lead to an even-longer initial screening process for complaints than the current 3+ months for employment cases. The proposed regulations would impose no time limit for this screening process. This significant delay between when complainants file complaints and when MCAD decides whether it will serve and investigate the complaint deprives victims of discrimination of effective redress, protection against retaliation, and the ability to move forward in court if MCAD is not going to pursue the case. A lengthy screening period also means that respondents are not timely notified of their obligation under §1.05(1) to preserve evidence. A lengthy screening process also means there is less time for the formal investigation of the complaint under §1.05(5), and makes it more likely that a complainant will have to file in court to preserve their claims before the running of the statute of limitations without first knowing if the case can be resolved at MCAD.

Another area of concern for members is that the proposed regulations require respondents to be served with the complaint only if MCAD decides to investigate the case (pursuant to **proposed §1.05(3)**). This means that for the cases MCAD screens out, the respondent is never formally notified of the complaint, and therefore many complainants will be deprived of the anti-retaliation protections that anti-discrimination laws are supposed to confer.

At the same time, members view the elimination of the ability of parties to obtain pre-determination discovery (pursuant to the **proposed elimination of §1.05(13)**) as depriving the parties of any information that might help them understand the strengths and weaknesses of their cases, and to resolve the matter. Because the MCAD regulations do not require that the information gathered by the investigator be shared with the parties, parties will be litigating these cases at MCAD entirely in the dark; without any knowledge or understanding of the information being considered by the investigator.

The proposed regulations would raise the standard for probable cause (pursuant to **proposed §1.08(1)(f)(1)**), allowing the MCAD Chair to decline to authorize a probable-cause finding even where the investigator has found probable cause to exist. This provision, like the expanded grounds for screening cases out, means that many more valid claims of discrimination will go unheard and unresolved.

Finally, members expressed the opinion that the removal of the appeal hearing (pursuant to **proposed §1.08(4)(b)**) will significantly disadvantage *pro se* litigants before MCAD. While those litigants who have counsel may be able to craft written appeals that adequately address all of the relevant legal criteria, *pro se* litigants generally benefit greatly from a live hearing where

they can answer the Commission's questions about their case or remedy deficiencies the Commission found in their complaint.