

CALIFORNIA LEGISLATURE

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OVERSIGHT HEARING DEPARTMENT OF CANNABIS CONTROL

**Assembly Committee on Business and Professions
Tuesday, May 3, 2022 | 9:30 AM – 11:30 AM
1021 O Street, Room 1100**

BACKGROUND PAPER

Early History of Cannabis Regulation in California. Consumption of cannabis was first made lawful in California in 1996 when voters approved Proposition 215, or the Compassionate Use Act. Proposition 215 protected qualified patients and caregivers from prosecution relating to the possession and cultivation of cannabis for medicinal purposes, if recommended by a physician. The initiative prohibited physicians from being punished or denied any right or privilege for making a medicinal cannabis recommendation to a patient. Proposition 215 also included findings and declarations encouraging the federal and state governments to implement a plan to provide for the safe and affordable distribution of cannabis to patients with medical needs.

The regulatory scheme for medicinal cannabis was further refined by SB 420 (Vasconcellos) in 2003, which established the state's Medical Marijuana Program (MMP.) Under the MMP, qualified patients were eligible to obtain a voluntary medical marijuana patient card, which could be used to verify that the patient or a caregiver had authorization to cultivate, possess, transport, or use medicinal cannabis. The MMP's identification cards were intended to help law enforcement officers identify and verify that cardholders were allowed to cultivate, possess, or transport limited amounts of cannabis without being subject to arrest. The MMP also created protections for qualified patients and primary caregivers from prosecution for the formation of collectives and cooperatives for medicinal cannabis cultivation.

Without the adoption of a formal framework to provide for state licensure and regulation of medicinal cannabis, a proliferation of informally regulated cannabis collectives and cooperatives were largely left to the enforcement of local governments. As a result, a patchwork of local regulations was created with little statewide involvement. More restrictive laws and ordinances by cities and counties were ultimately upheld by the California Supreme Court in *City of Riverside v. Inland Empire Patients* (2013) 56 Cal. 4th 729, which held that state law did not expressly or implicitly limit the inherent authority of a local jurisdiction, by its own ordinances, to regulate the use of its land, including the authority to provide that facilities for the distribution of medicinal cannabis be prohibited from operating within its borders.

Even after several years of lawful cannabis cultivation and consumption under state law, a lack of a uniform regulatory framework led to persistent problems across the state. Cannabis's continued illegality under the federal Controlled Substances Act, which classifies cannabis as a Schedule I drug ineligible for prescription, generated periodic enforcement activities by the United States Department of Justice. The constant threat of action by the federal government created apprehension among California's cannabis community.

A document issued by the United States Attorney General in 2013 known as the "Cole Memorandum" indicated that the existence of a strong and effective state regulatory system, and a cannabis operation's compliance with such a system, could allay the threat of federal enforcement interests. Federal prosecutors were urged under the memo to review cannabis cases on a case-by-case basis and consider whether a cannabis operation was in compliance with a strong and effective state regulatory system prior to prosecution. The memo was followed by Congress's passage of the Rohrabacher-Farr amendment, which prohibits the United States Department of Justice from interceding in state efforts to implement medicinal cannabis.

Medical Cannabis Regulation and Safety Act. After several attempts to improve the state's regulation of cannabis, the Legislature passed the Medical Marijuana Regulation and Safety Act—subsequently retitled the Medical Cannabis Regulation and Safety Act (MCRSA)—in 2015. MCRSA consisted of a package of legislation: AB 243 (Wood); AB 266 (Bonta, Cooley, Jones-Sawyer, Lackey, and Wood); and SB 643 (McGuire). MCRSA established, for the first time, a comprehensive statewide licensing and regulatory framework for the cultivation, manufacture, transportation, testing, distribution, and sale of medicinal cannabis to be administered by a newly established Bureau of Cannabis Control (BCC) within the Department of Consumer Affairs, the California Department of Public Health (CDPH), and the California Department of Food and Agriculture (CDFA), with implementation relying on each agency's area of expertise.

MCRSA vested authority for:

- The BCC to license and regulate dispensaries, distributors, transporters, and (subsequently) testing laboratories, and to provide oversight for the state's regulatory framework;
- The CDPH to license and regulate manufacturers; and
- The CDFA to license and regulate cultivators.

While entrusting state agencies to promulgate extensive regulations governing the implementation of the state's cannabis laws, MCRSA fully preserved local control. Under MCRSA, local governments may establish their own ordinances to regulate medicinal cannabis activity. Local jurisdictions could also choose to ban cannabis establishments altogether.

Proposition 64. Not long after the Legislature enacted MCRSA, California voters passed the Adult Use of Marijuana Act (AUMA) through Proposition 64. The passage of the AUMA legalized cannabis for non-medicinal adult use in a private home or licensed business; allowed adults 21 and over to possess and give away up to approximately one ounce of cannabis and up to eight grams of concentrate; and permitted the personal cultivation of up to six plants. The law retained prohibitions against smoking in or operating a vehicle while under the effects of cannabis,

possessing cannabis at a school or other child oriented facility while minors are present, growing in an unlocked or public place, and providing cannabis to minors.

The proponents of the AUMA sought to make use of much of the regulatory framework and authorities set out by MCRSA while making a few notable changes to the structure still being implemented. In addition, the AUMA approved by the voters adopted the January 1, 2018 deadline for state implementation of non-medicinal cannabis in addition to the regulations required in MCRSA that were scheduled to take effect on the same date. The same agencies given authority under MCRSA remained responsible for implementing regulations for adult use.

Under the AUMA, the BCC within the Department of Consumer Affairs continued to serve as the lead regulatory agency for all cannabis, both medicinal and non-medicinal. The AUMA included 19 different license types compared to the original 17 in MCRSA, and provided the Department of Consumer Affairs (and the BCC) with exclusive authority to license and regulate the transportation of cannabis. The AUMA also authorized vertical integration models which allowed for the holding of multiple license types, as previously prohibited under MCRSA. Additionally, while MCRSA required both a state and local license to operate, the AUMA only required a state license; however, the state was also directed not to issue a license to an applicant if it would “violate the provisions of any local ordinance or regulation.”

The language of the AUMA allows for legislative modifications that “implement” or “give practical effect” to the law by a majority vote. However, what constitutes “implementing” has been interpreted to be limited. Consequently, proposed changes to the voters’ intent in the AUMA often require a two-thirds vote and of those, some may be deemed to require voter approval.

Reconciliation of Laws. In the spring of 2017, SB 94 (Committee on Budget and Fiscal Review) was introduced to reconcile the distinct systems for the regulation, licensing, and enforcement of legal cannabis that had been established under the respective authorities of MCRSA and the AUMA. The single consolidated system established by the bill—known as the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA)—created a unified series of cannabis laws and deleted redundant code sections no longer necessary due to the combination of the two systems. MAUCRSA also clarified a number of components, including but not limited to licensing, local control, taxation, testing, and edibles.

Implementing Regulations. On January 16, 2019, the state’s three cannabis licensing authorities—the BCC, the CDPH, and the CDFA—officially announced that the Office of Administrative Law had approved final cannabis regulations promulgated by the three agencies respectively to implement MAUCRSA. These final regulations replaced emergency regulations that had previously been in place, and made various changes to numerous requirements following the public rulemaking process. The adoption of final rules provided some sense of finality to the state’s long history in providing for the regulation of lawful cannabis sale and use.

Consolidation of Regulatory Entities. In early 2021, the Department of Finance released trailer bill language to create a new Department of Cannabis Control (DCC) with centralized authority for cannabis licensing and enforcement activities. This new department was created through a consolidation of the three prior licensing authorities’ cannabis programs. As of July 1, 2021, the DCC is the sole entity responsible for administering and enforcing the majority of MAUCRSA.

In September of 2021, the DCC underwent emergency rulemaking to effectuate the reorganization. The emergency regulations consolidated rules previously promulgated by the three prior licensing entities and made changes intended to clarify and make consistent licensing and enforcement requirements for all cannabis businesses. These regulations were subsequently readopted in March of 2022, allowing the rules to remain in place as the DCC continued to go through the regular rulemaking process to establish new permanent regulations.

Active Rulemaking and Current Proposed Regulations. The DCC formally issued its notice of proposed rulemaking for permanent regulations on March 4, 2022. The proposed regulation text includes language contained in the emergency regulations implementing the departmental reorganization. However, while the rulemaking action is nominally related to the consolidation, the proposed text includes substantially more new policy changes than are arguably necessary to simply effectuate the establishment of a single licensing entity. The DCC has characterized this rulemaking package as a “comprehensive regulatory proposal to make changes to streamline and simplify the cannabis regulations, enhance consumer protections and make permanent changes that are currently in effect as emergency regulations.”

The public comment period for the DCC’s proposed regulations ended on April 19, 2022. The DCC is now reviewing those comments and will consider whether to make any changes to its rulemaking prior to seeking final approval from the Office of Administrative Law. The following policy changes are among those currently included in the DCC’s regular rulemaking proposal.

- **Returns of Cannabis Products.** The BCC’s original regulations require a licensee to accept or reject, in whole, all shipments of cannabis goods. Those regulations also prohibit a licensee from returning cannabis goods purchased from another licensee. The only exception is where a manufactured cannabis good is defective, in which case it may be exchanged.

The DCC’s proposed regulations would allow returns of cannabis and cannabis products between licensees for any lawful business reason. However, licensees would be prohibited from reprocessing, rebranding, relabeling, repackaging, or otherwise modifying any returned products without the DCC’s approval. Returned cannabis would also have to be retested and the return would have to be recorded in the track and trace system.

- **Cannabis Delivery.** Under the BCC’s regulations, the maximum value amount of cannabis goods that a delivery employee is allowed to carry at any time is \$5,000. Of that, no more than \$3,000 can be carried that is not related to a delivery order that was not received and processed by the licensed retailer prior to the delivery employee departing from the licensed premises. The value of cannabis goods is determined using the current retail price of all cannabis goods carried by, or within the delivery vehicle of, the licensed retailer’s delivery employee.

If a licensed retailer’s delivery driver does not have any delivery requests to be performed for a 30-minute period, the licensed retailer’s delivery driver may not make any additional deliveries and must return to the licensed premises. This doesn’t include required meal breaks. Upon returning to the licensed premises, all undelivered cannabis goods must be returned to inventory and all necessary inventory and track-and-trace records shall be updated as appropriate that same day.

The DCC's proposed regulations would double the value of cannabis goods that may be carried during delivery from \$5,000 to \$10,000. Additionally, the proposed regulations would remove the current limit on carrying cannabis goods that have not yet been ordered. Delivery vehicle requirements would also be changed to allow the secure area to be comprised on three sides of any part of the body of the vehicle.

The DCC's proposed regulations would also allow for a cannabis retailer to provide curbside delivery, wherein cannabis goods may be delivered to the customer in a vehicle parked immediately outside the licensed retail premises under video surveillance.

- **Premises Requirements.** Under both MAUCRSA and the BCC's original regulations, cannabis license applicants are required to submit a detailed diagram of the premises on which they intend to do business. This includes "the boundaries of the property and the proposed premises to be licensed, showing all boundaries, dimensions, entrances and exits, interior partitions, walls, rooms, windows, doorways, and common or shared entryways." License applicants are also required to include "a brief statement or description of the principal activity to be conducted therein."

The DCC's proposed regulations would allow shipping containers to be used as part of a premises and would remove prior approval requirement for certain modifications to premises. The proposed regulations would also expressly prohibit the living areas of a private residence from being included in a licensed premises, except where required locally.

- **Temporary Events.** MAUCRSA authorizes the DCC to approve temporary event licenses to current cannabis licensees, which authorize onsite cannabis sales to, and consumption by, persons 21 years of age or older. These temporary events can take place at a county fair event, district agricultural association event, or at another venue expressly approved by a local jurisdiction for the purpose of holding temporary events of this nature. Local jurisdictions must authorize these events for them to be approved by the DCC.

The DCC's proposed regulations would allow all licensees to participate in cannabis events consistent with their license type. The proposed regulations would clarify participation in temporary events by non-retail licensees. Event organizers would be newly required to designate a limited-access area that can only be accessed by the licensee and DCC.

- **Application Requirements.** MAUCRSA and prior regulations require various information to be submitted as part of an application for a cannabis license. These regulations were originally separately established by the BCC, the CDPH, and the CDFA respectively. The emergency regulations consolidated these into a unified application process for all licenses now available through the DCC.

The DCC's proposed regulations would remove various information currently required to be submitted as part of an application. Certain information would only be required if requested by the DCC during the application process. The proposed regulations would also reincorporate a requirement to provide a copy of the signature page of the labor peace agreement if the cannabis business has entered into one.

- **License Denials.** AB 2138 (Chiu/Low) from 2018 made substantial reforms to the application process for individuals with criminal records seeking licensure from a board under the Department of Consumer Affairs. Under AB 2138, an application may only be denied on the basis of prior misconduct if the applicant was formally convicted of a substantially related crime or was subject to formal discipline by a licensing board. The bill further prohibited boards that already require fingerprint background checks from requiring self-disclosure of prior misconduct from the applicant.

The DCC's proposed regulations would bring the DCC's process for denying licenses to individuals with prior misconduct into conformity with AB 2138. The regulations would expressly provide that an applicant does not have to disclose prior convictions and that statements of rehabilitation are voluntary. The regulations would also provide that where an application is denied due to an owner's conviction history, the DCC will notify the applicant of this fact and provide information on how to request a copy of their conviction history and how to question the accuracy of the record.

- **Marketing and Advertising Restrictions.** Proposition 64 included a prohibition against advertisers publishing or disseminating "advertising or marketing containing symbols, language, music, gestures, cartoon characters or other content elements known to appeal primarily to persons below the legal age of consumption." This language was heavily simplified when MCRSA and the AUMA were reconciled through the enactment of SB 94. Under MAUCRSA, licensees are instead prohibited more generally from publishing or disseminating "advertising or marketing that is attractive to children." However, similar language was incorporated into the BCC's prior regulations governing advertisements placed in broadcast, cable, radio, print, and digital communications.

The DCC's proposed regulations would simplify language prohibiting advertising that is "attractive to children." The specific examples of "toys, inflatables, movie characters, [and] cartoon characters" would be replaced with a prohibition against cartoons or "any likeness to images, characters, or phrases that are popularly used to advertise to children." The proposed regulations would also incorporate other prohibition language currently applied to labeling requirements.

- **Giveaways and Free Products.** Prior regulations prohibited the advertisement of free cannabis goods or giveaways of any type of products, including any non-cannabis products. The DCC's proposed regulations would remove the prohibition on providing free non-cannabis products, except for cannabis accessories. Additionally, the regulations would specifically prohibit licensees from holding raffles and sweepstakes as part of a business promotion.
- **Trade Samples.** Statute enacted through the budget process in 2021 required the DCC to adopt regulations to establish a process authorizing cannabis licensees to designate cannabis or cannabis products as "trade samples." These trade samples may be provided for free as targeted advertising to licensees about either new or existing cannabis or cannabis products. The DCC's proposed regulations implement this requirement, clarify requirements for providing trade samples to a licensee's employees, and allow immature plants, seeds, and propagated material to be provided as trade samples by nurseries.

- **Consumption Lounges.** MAUCRSA generally prohibits consuming cannabis products in any public place, except on the premises of a licensed retailer under certain conditions. In November of 2017, the West Hollywood City Council adopted a Cannabis Ordinance providing local authorization for consumption lounges where customers would be able to consume cannabis and cannabis products in a “social lounge” setting. A recurring element in the consumption lounges proposed within the City of West Hollywood was that cannabis and cannabis products could be consumed alongside non-cannabis products. One proposal described itself as a “full service restaurant” offering meals “featuring local, organic ingredients with farm-to-table preparation.” Under the proposal as a consumption lounge, these meals could be optionally enhanced “with CBD and THC infused dressings and sauces, natural agave sweeteners, and wellness shots.”

However, the BCC’s prior final rules prohibited cannabis retailers from selling any products beyond cannabis goods, accessories, and branded merchandise. Multiple bills have been introduced to accommodate what that jurisdiction and others are aiming to do through local ordinances by allowing retailers to sell non-cannabis food products for service in their consumption lounges. To date, these bills have not been passed and signed by the Governor, leading to uncertainty around the lawfulness of consumption lounges featuring non-cannabis food products.

The DCC’s proposed regulations would resolve this uncertainty by allowing retailers operating a consumption area to sell prepackaged non-cannabis infused and non-alcoholic food and beverages, to the extent allowed by a local jurisdiction. The regulations would also clarify that consumers may bring or receive non-cannabis infused and non-alcoholic food and beverages for consumption in a designated consumption area.

The DCC has proposed a number of additional changes to the state’s regulations governing the cannabis industry in addition to those described above. It is not immediately clear that any of the DCC’s proposed regulations face significant opposition or could be considered controversial. However, the Legislature may wish to consider whether a rulemaking action that was nominally initiated to implement consolidation of the state’s regulatory authorities should contain the scope and substance of the policy changes currently planned for adoption. In particular, attention may be given to the fact that prior legislation has been introduced, but not yet signed, to address important topics now resolved by the regulations.