Joint Informational Hearing

Assembly Committee on Business and Professions- Chair, Rudy Salas
Assembly Committee on Health- Chair, Jim Wood
Assembly Committee on Agriculture- Chair, Anna M. Caballero

Cannabis Regulation: The Path Forward After Proposition 64

Tuesday, February 7, 2017
9:00-11:30a.m.
State Capitol, Room 4202

Background Paper

In 1996, California voters passed Proposition 215, legalizing the use of medical cannabis in the state. In October 2015, nearly 20 years after the authorization of the use of medical cannabis (MC), Governor Jerry Brown signed into law a trio of bills [AB 243 (Wood), Chapter 688, Statutes of 2015, AB 266 (Bonta, Cooley, Jones-Sawyer, Lackey, and Wood), Chapter 689, Statutes of 2015, and SB 643 (McGuire), Chapter 719, Statutes of 2015] collectively known as the Medical Cannabis Regulation and Safety Act (MCRSA). MCRSA established the state's first regulatory framework for MC. In 2016, the voters of California passed Proposition 64, the Adult Use of Marijuana Act (AUMA), to legalize the recreational use of cannabis in the state by 2018.

This background paper is intended to provide a brief overview of the history leading up to the hearing, the content of existing law, the landscape of the existing MC industry, and a prospective look at additional issues relating to the implementation of MCRSA and AUMA as the state moves toward the sale of recreational cannabis.

BACKGROUND

***Cannabis*.** The marijuana, or cannabis, plant produces a resin containing compounds called cannabinoids, which are the active ingredients that directly affect the central nervous and immune systems in the human body. Some cannabinoids are psychoactive, which act on the brain and have the potential to alter mood or consciousness. Two of the primary active cannabinoids within the cannabis plant are tetrahydrocannabinol (THC) and cannabidiol (CBD). Results from the limited research on the medicinal properties and adverse effects of cannabis suggest that cannabinoids are associated with improved symptoms of patients with a variety of clinical symptoms, though not all studies have yielded statistically significant results. For example, some studies provide limited evidence that cannabinoids may be beneficial for conditions such as spasticity resulting from multiple sclerosis, and pain due to chronic neuropathy and cancer (see the National Institutes of Health website for medical cannabis for more information: https://nccih.nih.gov/health/marijuana). However, clinical trials on the medical efficacy of cannabis are extremely limited because the federal government considers the cannabis plant a Schedule I drug, and therefore it is considered a dangerous controlled substance with no accepted medical benefits and a high potential for abuse.

The Compassionate Use Act (CUA) and Medical Marijuana Program (MMP). In 1996, California voters approved Proposition 215, otherwise known as the CUA, which protects qualified patients and primary caregivers from prosecution related to the possession and cultivation of cannabis for medical purposes, if recommended by a physician. The CUA also prohibits physicians from being punished or denied any right or privilege for making a MC recommendation to a patient. The CUA also makes findings and declarations, including encouragement of the federal and state government to implement a plan to provide for the safe and affordable distribution of cannabis to all in-need patients.

In an effort to increase access to MC by qualified patients and primary caregivers, and to provide protections to qualified patients and primary caregivers from prosecution for the possession and cultivation of MC, California enacted SB 420 (Vasconcellos), Chapter 85, Statutes of 2003, which established the MMP. The MMP created a MC card program for patients to use on a voluntary basis, which can be used to verify that a patient or caregiver has authorization to possess, grow, transport, or use MC in California. Under the MMP, a person is required to obtain a recommendation for MC from an attending physician; written documentation of this recommendation is required to be submitted to the county of residence of the applicant in order to receive a MC card. The MC identification cards are intended to help law enforcement officers identify and verify that cardholders are able to cultivate, possess, and/or transport limited amounts of cannabis without being subject to arrest. Lastly, the MMP created protections for qualified patients and primary caregivers from prosecution for the formation of collectives and cooperatives for MC cultivation.

Since the state had not adopted a framework to provide for appropriate licensure and regulation of MC until late 2015, there has been a proliferation of MC collectives and cooperatives that had been largely left to the enforcement of local governments. Consequently, a patchwork of local regulations has been created with little statewide involvement.

California Supreme Court Affirms Local Control Over Medical Cannabis. By exempting qualified patients and caregivers from prosecution for possessing, or from collectively or cooperatively cultivating MC, the CUA and the MMP essentially authorized the widespread cultivation and distribution of MC. These laws triggered the growth of MC dispensaries in many localities, and in response, local governments have sought to exercise their authority to regulate or ban activities relating to MC. After numerous court cases and years of uncertainty relating to the ability of local governments to control MC activities, particularly relating to the zoning and operation of MC dispensaries, the California Supreme Court, in *City of Riverside v. Inland Empire Patients* (2013) 56 Cal. 4th 729, held that California's MC statutes do not preempt a local ban on facilities that distribute MC. The Supreme Court held that nothing in the CUA or the MMP expressly or implicitly limited 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 MC be prohibited from operating within its borders.

Federal Controlled Substances Act. Despite the CUA and the MMP, cannabis is still illegal under federal law. Under the federal Controlled Substances Act, it is unlawful for any person to manufacture, distribute, dispense, or possess a controlled substance, including cannabis, whether or not it is for a medical purpose. As a result, patients, caregivers, and dispensary operators, who

engage in activities relating to both medical and recreational cannabis, could still be vulnerable to federal arrest and prosecution.

United States Department of Justice (USDOJ) Guidance Regarding Cannabis Enforcement. On August 29, 2013, USDOJ issued a memorandum, known commonly as the "Cole" memo, which updated its guidance to all United States Attorneys in light of state ballot initiatives to legalize the possession of small amounts of cannabis, and provide for the regulation of cannabis production, processing, and sale. While the memorandum notes that illegal distribution and sale of cannabis is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels, it also states that USDOJ is committed to using its limited investigative and prosecutorial resources to address the most significant threats, which include the prevention of: (1) distribution to minors; (2) revenue from cannabis from going to criminal enterprises; (3) diversion to other states where cannabis is not legal under state law; (4) state-authorized cannabis from being a cover for trafficking in other illegal drugs or illegal activity; (5) violence in cultivating and distributing cannabis; (6) drugged driving and other public health problems from cannabis use; and, (7) growing, possessing, or using cannabis on public lands or on federal property.

According to USDOJ, "In jurisdictions that have enacted laws legalizing cannabis in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of cannabis, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity." The memorandum suggests that the existence of a strong and effective state regulatory system, and a cannabis operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests, and encourages federal prosecutors to review cannabis cases on a case-by-case basis, and consider whether or not the operation is in compliance with a strong and effective state regulatory system prior to prosecution.

In December 2014, Congress passed, as part of an omnibus budget bill, language that prohibits the United States Department of Justice from spending funds to intercede in state efforts to implement medical cannabis. This amendment, known as the Rohrbacher-Farr amendment must be renewed annually in order to continue to constrain federal funding in this way. In December 2016, the Rohrbacher-Farr amendment was included as part of the continuing resolution on the budget which will expire on April 28, 2017.

On November 18, 2016 Senator Jeff Sessions was nominated to head the Department of Justice as United States Attorney General under President Trump. Senator Sessions has been a vocal opponent of cannabis use and as Alabama's attorney general, once supported legislation that would establish mandatory death sentences for drug dealers, including marijuana. When pressed on his historic opposition to cannabis use at his confirmation hearing, Senator Sessions did not commit to enforcing the federal law against states that have legalized cannabis use and did not discuss rescinding the "Cole Memo". As of February 02, 2017, the confirmation of Senator Sessions is pending consideration of the full Senate. It is unknown what, if any, impact the new

United States Attorney General will have on cannabis laws in those states which have legalized cannabis use.

Medical Cannabis Industry in California and the Motivation for Statewide Regulation. Although the CUA was passed in 1996, statewide regulation of MC, in the form of MCRSA, was not passed until 2015. Although the AUMA will alleviate some of the concerns with an unregulated market, there are still many unresolved issues surrounding the legitimate operations of a cannabis market. Currently, as a result of the lack of a regulatory framework, a number of participants in this industry are part of an unregulated, unlicensed, and untaxed, economy.

Because cannabis remains a Schedule I drug, no pharmacy may dispense cannabis, and federal and state food and drug laws do not apply. For both patients and recreational users, there is a critical need for meaningful regulatory standards to address testing, purity, potency, labeling, identification and elimination of contaminants, and secure protocols for processing and transport of the product. Without such regulation, harm to consumers is possible given that no health and safety standards exist for cannabis. The same is true in regard to requirements for packaging, labeling, and tracking of the product for the entirety of its life cycle. In addition to health and safety concerns, there has been public demand for cannabis cultivation standards that mirror established agricultural standards in order to alleviate the environmental degradation to watersheds, forests, and rivers across the state caused by illegal cannabis cultivation.

Consequently, with the passage of MCRSA in 2015 and AUMA in 2016, the combined regulatory efforts seeks to address numerous issues and protect consumers through regulation of MC activities by: (1) establishing oversight and accountability of operations; (2) providing enforcement funding and mechanisms; (3) instituting health, safety, and environmental standards and ensuring they are met; (4) preventing diversion; and, (5) maintaining local control.

The joint hearing on February 7, 2017 will receive testimony from the state departments charged with creating and monitoring these regulations including representatives from the California Department of Food and Agriculture (CDFA), Department of Consumer Affairs (DCA), and Department of Public Health (DPH).

Medical and Recreational Cannabis Frameworks in Other States and Increasing Support for Cannabis Use. As of last year, 28 states, the District of Columbia, and Guam allow MC programs. Even though California was the first to authorize the medical use of cannabis, it was the only state that allowed cannabis-use without a robust state regulatory framework until passage of MCRSA. States with MC laws generally have a form of patient registry, which may provide some protection against arrest for possession up to a certain amount of cannabis for personal medicinal use. A limited number of states restrict MC usage to products with low to zero THC and high CBD concentrations, in an effort to more strictly limit the use of THC due to its known psychoactive effects. To date, eight states, Alaska, Colorado, Oregon, Washington, California, Nevada, Massachusetts, Maine, and the District of Columbia have legalized recreational cannabis.

MCRSA

Prior to adoption of MCRSA, there had been many legislative attempts in recent legislative sessions to address issues relating to MC including attempts to establish comprehensive

regulatory frameworks. After the passage of MCRSA recognition of the need for statewide regulation persisted and grew stronger, especially in light of the increased environmental, health, and public safety concerns associated with MC. Prior to the passage of AUMA, stakeholders expressed the need for the state to have infrastructure and regulations in place to serve as a model for a recreational scheme. All these factors, along with the historic collaboration among members of the Legislature and stakeholders, led to the 2015 passage of MCRSA, which includes 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 MC to be administered by the newly established Bureau of Medical Cannabis Regulation (Bureau) within DCA, CDFA, and DPH, relying on each agency's area of expertise.

MCRSA vested in the:

- DCA and the Bureau the authority to issue licenses and regulate dispensaries, distributors, and transporters, and to provide oversight for the state's regulatory framework;
- DPH the responsibility to license and regulate laboratories and manufacturers; and,
- CDFA the responsibility to license and regulate cultivators.

To assist with the regulatory responsibilities, MCRSA allows and AUMA requires the Bureau to convene an advisory committee to make recommendations to the Bureau and licensing authorities on the development of standards and regulations, including best practices and guidelines, in order to ensure qualified patients and consumers have adequate access to cannabis and MC products. MCRSA phases out the collective model and its associated immunity, and replaces it with clear licensing requirements for licensees who engage in commercial cannabis activity and are licensed under MCRSA; those who operate unlawfully according to MCRSA are subject to prosecution. An important cornerstone of MCRSA is the preservation of local control through the requirement of dual authorization from both the state and local government in order to legally operate within the state.

Under both MCRSA and AUMA, local governments may establish their own ordinances to regulate MC activity, or choose to ban it altogether. For state licenses, entities may apply for a cultivation, manufacturing, dispensing, testing, distribution, or transport license and are prohibited from holding specific combinations of licenses. For example, testing licensees may not apply for any other license types, and distributors may only obtain an additional license to transport. However MCRSA does provide limited ability for operators to cultivate, manufacture, and dispense MC, also known as vertical integration, but limits cross licensure to two of three of those categories outside of this exception. To assure patient and consumer health and safety, MCRSA requires DPH to develop standards for the production and labeling of all cannabis products manufactured for human consumption. In addition, MCRSA and AUMA require licensed cultivators and manufacturers to package all cannabis products in tamper-evident packaging, use a unique identifier to distinguish and track the product, and follow specific labeling requirements; prior to sale at a licensed dispensary, these licensees are required to

ensure all cannabis and cannabis products are taken to a licensed distributor for quality assurance and inspection who will ensure that batch testing is completed by a licensed testing laboratory.

To ensure accountability and prevent diversion of cannabis and cannabis products, the CDFA is required, in consultation with the Bureau, to establish a track and trace program for reporting the movement of cannabis and cannabis products throughout the distribution chain. The track and trace program requires the use of a unique identifier and secure packaging that provides specified information, including the licensee receiving the product, the transaction date, and the cultivator from which the product originates. In order to track cannabis products, the CDFA is required to create a database containing electronic shipping manifests which are to include: To ensure adequate resources for this regulatory scheme, MCRSA provides for a General Fund (GF) or special fund loan, of up to $10 million from the GF, to the Bureau to support the initial regulatory activities authorized by MCRSA. The licensing fees established by the regulatory authorities are required to repay the loan, and then cover the cost of administering and enforcing the framework. To assist with enforcement efforts, MCRSA requires the Bureau to establish a grant program to fund activities by state and local law enforcement to remedy the environmental effects of cannabis cultivation.

AUMA

Under AUMA, cannabis was legalized for adult use in a private home or licensed business, allowed adults to possess and give away up to approximately one ounce of cannabis and up to eight ounces of concentrate, and permitted the personal cultivation of up to six plants. The law continues to prohibit smoking in or operating a vehicle while under the effects of cannabis, possessing marijuana at a school or other child oriented facility while kids are present, growing in an unlocked or public place, and providing cannabis to minors.

The authors of AUMA sought to make use of much of the regulatory structure and authorities set out by MCRSA while making a few notable changes to the structure being implemented. In addition, the AUMA approved by the voters adopted the January 1, 2018 deadline for state implementation of recreational cannabis in addition to the regulations required in MCRSA that are scheduled to take effect on the same date. The same agencies as under MCRSA remain responsible for implementing regulations for adult use.

Under AUMA, DCA continues to serve as the lead regulatory agency for all cannabis, both medical and non-medical, and renames the existing Bureau of Medical Cannabis Regulation as the Bureau of Marijuana Control. AUMA includes 19 different license types compared to the 17 in MCRSA and authorizes DCA (and the Bureau) the exclusive authority to create and regulate a license for transportation of cannabis. Additionally, while MCRSA requires both a state and local license to operate, AUMA only stipulates a state license; however, the state is also directed not to issue a license to an applicant if it would "violate the provisions of any local ordinance or regulation."

One particularly controversial and loosely regulated segment of industry is the emergence of cannabis delivery services, especially in light of local bans on cannabis businesses. While not explicitly in the language, AUMA implies that local jurisdictions may move to ban delivery services and the state would be compelled to follow by not issuing licenses under the above provision which prevents conflict at the state and local level.

Under AUMA the proposed system for tracking medical cannabis through the supply chain, commonly known as "track and trace," will be applied to adult-use cannabis.

While the language of AUMA allows for modifications to the law by majority vote of the legislature, any legislative changes inconsistent with the original intent of the law may require voter approval. If the state and its various agencies of jurisdiction have not finalized regulations, hired staff, and created technology solutions by January 1, 2018, it is unclear how wide-sweeping and detrimental the consequences may be.

PURPOSE OF THE HEARING

In light of the expected rollout of regulations related to MCRSA and the passage of AUMA, the committees are seeking an update on the status of cannabis licensure, regulation, and legalization. This is especially timely since many of the regulatory structures of AUMA are designed to parallel the regulatory structure of MCRSA.

MCRSA and AUMA direct the state to begin issuing cannabis licenses for both medical and recreation beginning on January 1, 2018. Entities operating in accordance with other state and local laws are expected to continue to do so until such time as their licenses are approved or denied under the new licensing scheme.

MCRSA established a new comprehensive licensing and regulatory scheme for MC, and AUMA makes use of much of that structure. While the legislation itself established many requirements to comply with the law, even more is left to the implementing agencies, including CDFA, DPH, and the newly-established Bureau under DCA, which are tasked with administering MCRSA and AUMA. In addition to the challenges of creating a brand new regulatory body, other hurdles exist such as adopting regulations to address complex issues that cover a wide breadth of issues, including but not limited to, minimum potency for cannabis, pesticide regulation, child-proof packaging, labeling and advertising, and establishing requirements that licensees must meet in order to obtain licensure by January 1, 2018. Licensing authorities and other state and local boards and agencies will also be responsible for enforcing MCRSA and AUMA in order to ensure that participants are compliant and the public and the environment are protected.

The Governor's proposed Budget for 2017-18 includes a total of $52.2 million for the regulation of cannabis. As license fees will not be collected until January 2018, the General Fund provided loans to the Marijuana Control Fund for initial implementation and regulatory activities. Specifically, the Budget proposes the following:

- DCA: $22.5 million to enhance the Bureau of Medical Cannabis Regulation for its mission of regulating the transportation, storage, distribution, and sale of cannabis within California. The Bureau will also be responsible for associated licensing, investigation, enforcement, and coordination with local government;
- DPH: $1.4 million for the development of regulations and licensing for medical cannabis product manufacturing;
- CDFA: $23.4 million to provide oversight of Cannabis Cultivation Program, create regulations, issue licenses, and evaluate environmental impacts of cultivation. In addition, CDFA is responsible for establishing a track and trace program for medical cannabis;

- Board of Equalization: $5.3 million to notify businesses of new tax requirements and prepare to process tax returns from retail sales. AUMA requires the Board of Equalization to collect tax on cannabis sales and cultivation; and,
- Department of Health Care Services: $5 million for public education programs to cover health related topics related to cannabis and cannabis products.

As the state moves forward with the regulation of both medical cannabis and recreational cannabis, stakeholders are requesting a streamlined regulatory structure of cannabis activities across both recreational and medical cannabis. This hearing is intended to evaluate next steps the licensing authorities must take to implement MCRSA and AUMA, explore potential concerns and issues from local governments and stakeholders, and consider recommendations to assist the licensing authorities in their implementation of the law.