



December 4, 2017

Office of Administrative Law
OAL Reference Attorney
300 Capital Mall, Suite 1250
Sacramento, CA 95814

Bureau of Cannabis Control
1625 North Market Blvd., Suite S-202
Sacramento, CA 95834

Transmit Via E-Mail: staff@oal.ca.gov and BCC.comments@dca.ca.gov

**RE: Emergency Regulation Comments – Medicinal and Adult-Use Cannabis Regulations
OAL File No. 2017-1127-05E**

Dear Sir or Madam:

On behalf of the Rural County Representatives of California (RCRC), the Urban Counties of California (UCC), and the California State Association of Counties (CSAC), we offer our comments on the Bureau of Cannabis Control emergency regulations relating to medicinal and adult use cannabis, presently under review by OAL.

We have limited our current comments to matters considered by OAL under Government Code section 11349.1. These comments consequently do not represent the full range of policy concerns and recommendations that our organizations may have regarding these regulations. We look forward to working with the Bureau to addressing these remaining issues during the development of permanent medicinal and adult use cannabis regulations in 2018.

- **Section 5001, subdivision (c)(12) – Clarity and Consistency**

This section proposes to define the term "license, permit, or other authorization, issued by a local jurisdiction" in Business and Professions Code section 26050.1 to "include . . . a written statement or reference that clearly indicates the local jurisdiction intended to grant permission to the applicant entity to conduct commercial cannabis activity at the premises."

The proposed definition is unclear regarding the types of documentation that will qualify under this provision. (For example, what does a "written . . . reference" mean in this context?) Further, some plausible interpretations of this definition would impermissibly deviate from the plain meaning of the underlying statute. "License, permit, or other authorization" clearly connotes an *official* document duly issued by the local jurisdiction through appropriate process – not some nebulous "statement" or "reference" to the jurisdiction's "inten[t]." We consequently recommend the following revision to this subdivision:¹

¹ Compare the analogous former provision of the Medical Cannabis Regulation and Safety Act, Business and Professions Code section 19300.5, subdivision (a): "'Local license, permit', or other authorization" means an

- (6) *A copy of a valid license, permit, or other authorization, issued by a local jurisdiction, that enables the applicant entity to conduct commercial cannabis activity at the location requested for the temporary license. For the purposes of this section, “other authorizations” shall include, at a minimum, a written statement or reference that clearly indicates the local jurisdiction intended to grant permission to the applicant entity to conduct commercial cannabis activity at the premises mean an official document granted by a local jurisdiction that specifically authorizes a person to conduct commercial cannabis activity in the local jurisdiction.*

- **Sections 5002, subdivision (b)(28) and 5018 – Clarity**

The regulations propose to clarify the process applicable when an applicant "provides a license, permit, or other authorization from the local jurisdiction" - for which our organizations are deeply appreciative. For purposes of clarity, we believe that the regulations should additionally reference the process (set forth in statute) applicable when the applicant does not submit such local documentation.

In particular, consistent with BPC 26055, subdivision (g)(2)(B), the regulations should clarify that in the event a local jurisdiction notifies the Bureau that an applicant is not in compliance with a local ordinance or regulation, the application "shall" be denied, and such local determination will not be second-guessed or countermanded by the Bureau. (The applicant's remedy to review or challenge the local jurisdiction's determination of compliance, whether administrative or judicial, lies at the local level alone.²)

Additionally, the regulations propose to require that local jurisdictions “respond” within 10 days of a licensing authority’s request to verify whether a license, permit, or other authorization provided by an applicant is valid. The regulations should clarify the type of response that local jurisdictions are required to provide.

For these reasons, we recommend the following revision to Sections 5002(b)(28) and 5018:

§ 5002. Annual License Application Requirements

(28) When an applicant provides a license, permit, or other authorization from the local jurisdiction where the licensed premises will be or is located, the Bureau will notify the applicable local jurisdiction to confirm the validity of the authorization. If the local

official document granted by a local jurisdiction that specifically authorizes a person to conduct commercial cannabis activity in the local jurisdiction."

² While an applicant denied a state license for this reason would appear entitled to hearing rights under Business and Professions Code section 26058, such a hearing (or subsequent appeal under Section 26040 et seq.) would encompass only whether the department properly performed *its own functions* under Business and Professions Code section 26055, *not* factual or legal review of the local jurisdiction's determination.

jurisdiction does not respond in writing within 10 calendar days that the authorization is not valid, the Bureau shall ~~consider~~ presume the authorization valid. Notwithstanding a presumption by the Bureau that an authorization is valid pursuant to this subdivision, the Bureau shall deny an application if the local jurisdiction notifies the Bureau pursuant to subdivision (g)(1) or (g)(2)(B) of Section 26055 of the Business and Professions Code that the commercial cannabis activity proposed by the application is prohibited or the applicant is not in compliance with a local ordinance or regulation. If an applicant does not provide a license, permit, or other authorization from the local jurisdiction where the licensed premises will be or is located, the Bureau will follow the process and timelines set forth in subdivision (g)(2) of Section 26055 of Business and Professions Code.

§ 5018. Additional Grounds for Denial of a License

(h) The application is for a license for a commercial cannabis activity that the local jurisdiction has notified the Bureau is prohibited in accordance with subdivision (f) of Section 26055 of Business and Professions Code. In the event of a denial under this subparagraph, the Bureau shall notify the contact person for the local jurisdiction of such denial.

(i) The local jurisdiction has notified the Bureau in accordance with Section 5001 or 5002 that a local license, permit, or other authorization provided by the applicant is not valid, or that the applicant is not in compliance with a local ordinance or regulation. In the event of a denial under this subparagraph, the Bureau shall notify the applicant that the local jurisdiction's determination is not subject to review by the Bureau, and that any dispute regarding this determination must be submitted to the local jurisdiction.

- **Section 5029 – Clarity, Authority, and Consistency**

This section proposes a six-month transition period, during which licensees may conduct certain activities that would otherwise be prohibited by the regulations. In order to avoid inconsistency with Business and Professions Code section 26055, subdivision (d), this section should be revised to clarify that such activities are allowed *only if permitted under the applicable local ordinances* (and the licensees' local permits, if any). For example, an "M" retailer's local permit might strictly limit them to obtaining cannabis from a medicinal cultivator, and thus preclude them from conducting business with an "A" cultivator. The Bureau lacks statutory authority to override these local limitations.

Additionally, subdivision (b)(1) should be revised to clarify that this provision does not condone transactions and activities beyond the scope of the applicable license type(s) of the participants. For these reasons, we recommend the following revision to this section:

§ 5029. Transition to Regulated Commercial Cannabis Market

(b) Notwithstanding any other law, or regulation in this division, beginning January 1, 2018 and before July 1, 2018 licensees may do all of the following:

(1) Licensees may conduct business with other licensees acting within the scope of their license classification,³ irrespective of the M or A designation on their licenses.

(c) This section does not authorize any commercial cannabis activities in violation of any applicable local ordinance or otherwise contrary to the terms of any local license, permit, or other authorization issued to a licensee.

- **Section 5038 – Clarity, Authority, and Consistency**

This section proposes to authorize the Bureau to provide licensees affected by declared disasters with "temporary relief from specific licensing requirements." While the Bureau likely has the power to thus relieve obligations *imposed by these regulations*, it lacks the authority to waive requirements *specified by statute*. In particular, the Bureau lacks the authority to permit any commercial cannabis activity, temporary or otherwise, that would violate local ordinance. To the extent that Section 5038's reference to "licensing requirements" contemplates relief from any requirement to comply with local rules and regulations, or could be interpreted to permit any such actions, it is inconsistent with Business and Professions Code sections 26055, subdivision (d) and 26200.

The foregoing may not have been the intent of this section; however, it should be clarified to avoid both statutory inconsistency and the particular hazards that regulatory ambiguity poses for this emerging industry. We consequently recommend the following revision to this section:

§ 5038. Disaster Relief.

(b) The Bureau may exercise its discretion to provide temporary relief from specific licensing requirements set forth in this Chapter for licensees whose operations have been impacted by a disaster.

(e) A licensee shall not be subject to an enforcement action by the Bureau for a violation of a licensing requirement set forth in this Chapter in which the licensee has received temporary relief.

³ "Classification" is the term used in Business and Professions Code section 26050, subdivision (a) to describe the various license types and corresponding activities, as distinct from the "A" or "M" "designation" superimposed upon any such classification. (§ 26050, subd. (b).)

(h) Nothing in this section or any action taken by the Bureau hereunder shall be construed to relieve the licensee of any obligation to comply with applicable local ordinances and requirements.

- **Sections 5306 – Clarity and Consistency**

Section 5306 governs what a distributor must do when a batch fails laboratory testing and cannot be remediated. We believe Section 5306, subdivision(e), inadvertently prohibits a distributor from destroying a batch that failed laboratory testing and cannot be remediated, rather than mandating that the distributor destroy the batch. We consequently recommend the following revision to this section:

§ 5306. *Laboratory Testing Results*

(e) A distributor shall ~~not~~ destroy a batch that failed laboratory testing and cannot be remediated pursuant to section 5727 of this division.

- **Sections 5311 and 5417 – Clarity and Consistency**

The foregoing sections provide that cannabis goods may not be visible to the public when being either transported or delivered. However, it is not clear whether the transport/delivery vehicle may otherwise be marked in a manner that communicates to the public that cannabis goods are present. To avoid this uncertainty, avoid potential inconsistency with Business and Professions Code sections 26150 et seq. (limiting cannabis advertising), and above all ensure the protection of the public (Bus. & Prof. Code, § 26011.5), the regulations should clearly provide that cannabis transport and delivery vehicles must be unmarked. We consequently recommend the following revisions to these sections:

§ 5311. *Requirements for the Transportation of Cannabis Goods*

(m) The transport vehicle shall not be marked and shall not display advertising of any nature.

§ 5417. *Methods of Delivery*

(f) The delivery vehicle shall not be marked and shall not display advertising of any nature.

- **Sections 5409, subdivision (b) – Clarity and Consistency**

The regulations propose to allow a "medicinal cannabis customer" (and otherwise undefined term) to "purchase an amount of medicinal cannabis consistent with the patient's needs as recommended by a physician." It is unclear how this provision applies to a primary caregiver who may be purchasing cannabis for multiple patients. To clarify this provision *in a manner consistent with Business and Professions Code section 26033, subdivision (b)*, we recommend the following revision to this section:

§ 5409. Daily Limits

(b) A retailer shall not sell more than the following amounts to a medicinal cannabis customer:

(3) For purposes of this section, a primary caregiver may not be authorized, and a retailer may not treat a primary caregiver as authorized, to purchase medicinal cannabis for more than five qualified patients.

- **Section 5416 – Clarity, Authority, and Consistency**

The delivery regulations should be clarified in two respects, to ensure consistency with Business and Professions Code sections 26090, subdivision (e) and 26200. First, these statutes authorize local jurisdictions to regulate or prohibit any commercial cannabis activities within their boundaries, including consummation of delivery transactions, and provide that licensees making deliveries shall "act[] in compliance with . . . local law as adopted under Section 26200." To avoid misunderstanding by licensees, confusion, and dispute, Section 5416 should be revised to specifically prohibit cannabis deliveries to a "physical address" located within a local jurisdiction that prohibits such deliveries.

Second, the foregoing statutes further provide that local jurisdictions may not "prevent delivery of cannabis or cannabis products on public roads by a licensee acting in compliance with this division and local law . . ." As with the parallel provision for transportation (Bus. & Prof. Code, § 26080, subd. (b)), this clearly prohibits local governments from interdicting otherwise compliant cannabis licensees *moving through* their jurisdiction on the public roads. However, absent explicit statement in these regulations, some licensees may believe that they are permitted to *consummate* delivery transactions "on public roads" (i.e., within public road rights-of-way), notwithstanding any local ordinances to the contrary. To avoid this misunderstanding, Section 5416 should clarify that the prohibition upon delivering to addresses "located on publicly owned land" includes public rights-of-way.

For these reasons, we recommend the following revisions to this section:

§ 5416. *Delivery to a Physical Address*

(c) A retailer shall not deliver cannabis goods to an address located on publicly owned land or right-of-way or any address on land or in a building leased by a public agency. This prohibition applies to land held in trust by the United States for a tribe or an individual tribal member unless the delivery is authorized by and consistent with applicable tribal law.

(d) A retailer shall not deliver cannabis goods to an address located within in a city, county, or city and county that prohibits deliveries by local ordinance.

- **Sections 5601, subdivision (d)(8), and 5018, subdivision(e) – Clarity and Consistency**

For purposes of clarity, and to ensure consistency with Business and Professions Code sections 26055, subdivision (f) and 26200, subdivision (e), the "[w]ritten approval from the local jurisdiction" for a temporary cannabis event should be verified in the same manner as a local permit under Section 5002, subdivision (b)(28).

Additionally, the timelines set forth in Section 5061 do not appear to conform with the provisions of Business and Professions Code section 26055 designed to ensure that only locally compliant cannabis operators receive state licenses. Like conventional fixed-site retail applicants, temporary cannabis event are required to present "written approval from the local jurisdiction"; however, unlike conventional applicants, those seeking temporary cannabis event license are more likely to be unfamiliar and have little track-record with the local jurisdiction in which the event is held. Further, temporary cannabis events are inherently complex, involving multiple retailers, onsite consumption, as well as full range of potential impacts attendant upon any public assembly (which tend to concentrate more people in one place, at one time than a conventional retail premises). To ensure consistency with the governing statutory provisions, and avoid unmitigated local impacts, local jurisdictions should be given the full amount of notice prescribed in Subdivision (g)(2)(D) of Section 26055 (60 business days) prior to holding a temporary cannabis event. However, to provide certainty to applicants about whether their temporary event license has been granted or denied before significant expenses are incurred and arrangements made, we recommend that an applicant for a temporary event file at least **90 business days** before the event.

Finally, the regulations do not clearly specify the grounds for denying a temporary event license. The reasons to deny a temporary event license should be the same as the grounds for denying an annual license.

We thus recommend the following revisions to the following sections:

§ 5018. *Additional Grounds for Denial of a License*

(e) The applicant did not correct the deficiencies within the application in accordance with section 5002, ~~and 5012, 5600 or 5601~~ of this division.

§ 5601. Temporary Cannabis Event License

(d) An application for a temporary cannabis event license shall be submitted to the Bureau no less than 90 business ~~60~~ days before the first day of the cannabis event. An application for a temporary cannabis event license shall include the following:

(8) Written approval from the local jurisdiction authorizing the applicant to engage in onsite cannabis sales to, and onsite consumption by, persons 21 years of age or older at the event. The Bureau will notify the applicable local jurisdiction to confirm the validity of the approval. If the local jurisdiction does not respond in writing within 10 calendar days that the approval is not valid, the Bureau shall presume the approval valid. If the local jurisdiction notifies the Bureau that the approval is not valid, or if the local jurisdiction notifies the Bureau pursuant to subdivision (g)(1) or (g)(2)(B) of the Business and Professions Code that the commercial cannabis activity proposed by the application is prohibited or the applicant is not in compliance with a local ordinance or regulation, the temporary cannabis event license shall be denied.

- **Section 5800, subdivision (a) – Consistency**

Section 5800(a) grants the Bureau and “its authorized representatives” full access to inspect a licensee’s premises, vehicles, and records, among other things. This section should expressly reference a local jurisdiction’s rights to conduct the same inspections, which are granted to local authorities pursuant to Section 26160, subdivision (c) of the Business and Professions Code. We therefore recommend the following revisions to this section:

§ 5800. Right of Access

(a) The Bureau, ~~and its authorized representatives~~, and state and local agencies shall have full access to inspect and:

We appreciate the opportunity to provide these comments on the emergency regulations. If you have any questions, please contact Paul A. Smith at psmith@rcrcnet.org, Jolena Voorhis at jolena@urbancounties.com or Cara Martinson at cmartinson@counties.org.

Sincerely,



PAUL A. SMITH
Senior Legislative Advocate
RCRC



CARA MARTINSON
Legislative Representative
CSAC



JOLENA L. VOORHIS
Executive Director
UCC