



November 5, 2018

Via Email to bcc.comments@dca.ca.gov
Bureau of Cannabis Control
2920 Kilgore Road
Rancho Cordova, CA 95670

CC: Via Email to calcannabisregs@cdfa.ca.gov
California Department of Food and Agriculture
CalCannabis Cultivation Licensing Division
P.O. Box 942871
Sacramento, CA 94271

CC: regulations@cdph.ca.gov
California Department of Public Health
Manufactured Cannabis Safety Branch
1415 L Street, Suite 500
Sacramento CA 95814

RE: CDA COMMENT LETTER ON PROPOSED MODIFICATIONS TO REGULATIONS

Dear Regulators:

The Cannabis Distribution Association represents several dozen licensed cannabis distributors who have contributed to our collective comments enclosed. On behalf of our members, we appreciate your commitment to the successful implementation of cannabis licensing and regulation and to your consideration of our recommendations to overcome supply chain constraints and improve adherence to commercial cannabis regulatory policies.

Enclosed please find a summary of our feedback. Pages 1-4 include the top priority issues we have identified as problematic and which warrant further analysis and discussion than a 15-day comment period provides. The pages following include other recommendations and supporting narrative.

Thank you for your consideration. Please feel free to contact us with any questions.

Respectfully,

A handwritten signature in black ink, appearing to read "Lauren Fraser". The signature is fluid and cursive, with a prominent initial "L" and "F".

Lauren Fraser
Executive Director | Cannabis Distribution Association
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Key Priorities

New language presented in the following sections warrant concern and may also warrant more than a 15-day comment period to explore the potential impact and consider possible alternative language that can achieve the same objectives without placing undue burden on operators or restricting the normal course of business. Those sections include: § 5002(c)(18), § 5004, § 5032(b), § 5301(b), and § 5311(f).

§ 5002(c)(18) - Financial Assets Disclosures

While this language is not new since the last regulation draft, in light of § 5004 below, § 5002(c)(18) warrants further discussion. Particularly, there is a need to understand if these financial asset and financial interest disclosures will be available via public records requests, which would be very concerning. Given the unsteady banking environment and federal laws prohibiting commercial cannabis activity, as well as the general sensitivity for both licensees and investors as it pertains to access to banking, public record of these types of disclosures could expose and/or threaten banking and investment relationships that extend even beyond the commercial cannabis business, but to those persons' other businesses and assets as well.

***Recommendation:** Protect financial asset and interest disclosures from being available via public record requests or from being provided to Federal agencies.*

§ 5004 - Financial Interest Disclosures

New proposed language in § 5004 aims to identify any and all parties profiting from any contractual relationship with a licensee. While overall, we support the concept of financial interest disclosures, we feel that the current language is far too broad, to the extent that it requires a licensee to disclose strategic business relationships such as partner and key employee lists, potentially disclosing this information to competitors if they information becomes public record. The intent of the language seeks to provide transparency of those profiting or potentially exerting direct or indirect control over a licensee, but imposes administrative burden on the licensees as well as places potential exposure to interested parties who do not wish for their information to become public record. One extreme example of this is the threat to Canadian residents who may implicate themselves from entering the U.S. for life, based on [recent actions](#) by U.S. Customs and Border Protection.

***Recommendation:** 1) Consider a minimum dollar amount threshold above which the disclosure is required. 2) Provide examples and clear definition of where to draw the line between standard arm's length relationships versus truly interested parties. 3) Protect from public record requests, per recommendation above related to § 5002(c)(18).*

§ 5032(b) - New proposed restrictions on third party contracts with non-licensees

New proposed language in § 5032(b) is problematic for a vast number of licensed operators in that it expressly prohibits very common and necessary business activities, such as third-party contracts for consulting or management services as well as brand licensing agreements. While the new language is intended to protect against non-licensed businesses influencing or controlling licensees or the market, it inadvertently disrupts the normal course of business for a significant portion of operators, normal activities that are standard in many other industries as well.

Issues: Disclosure and Visibility

Regulators should be made aware of third-party (non-licensed) entities who have a contractual relationship with a licensee *to the extent that the third-party profits from the licensee and/or influences the licensee's business*. This disclosure and visibility may be achieved via new financial interest disclosures in § 5004 as well as brand name registrations for all SKUs produced or packaged by licensees.

Issues: Control and Liability

Licensed operators working with third-parties, either in the capacity of licensing a third-party's trademark and intellectual property (such as production methods) or in the capacity of receiving management and consulting services from a third-party, should be held accountable for all commercial cannabis activities and regulatory requirements which impact the licensee's business. New language should clarify that a licensee will be held accountable for a third-party's actions if that third-party is an interested party in the licensee's business and conducts activities that are inconsistent with regulations which the licensee is held to. Holding the licensee accountable for activities of those it contracts with will provide teeth to the regulatory authority as well as force licensed operators to maintain control and accountability to the regulations.

Recommendation: 1) Strike § 5032(b) until more extensive solutions are analyzed and considered. 2) Revise § 5030 so that the existing language becomes a subsection (a) and add a subsection (b) that reads: *In construing and enforcing the provisions of the Act and the regulations in this division, the act, omission, or failure of a non-licensed person who by contract or agreement provides to the licensee management, consulting or other services or licenses the rights to intellectual property not owned by the licensee, and any agent, officer, representative or other person acting for or employed by such non-licensed person, within the scope of his or her employment or office, shall in every case be deemed the act, omission, or failure of the licensee.* 3) Revise § 5003 so the word "individual" is replaced with "person" in every instance appearing at 5003(b)(5), (b)(6), and (c).

§ 5301(b) - Distributor Storage Services

New proposed language in § 5301(b) suggesting that licensed distributors may only provide storage services for cannabis goods “packaged as they will be sold at retail” is problematic. Storage services of (holding custody but not title to) bulk flower or bulk oil on behalf of another party is a common and necessary business model, whereby a distributor providing storage services can provide a safe, secure location for the goods to be held while the owner of the goods identifies a buyer, or whereby the storage distributor may also facilitate the co-packing of flower from bulk to packaged as part of a supply chain service. These aggregation centers are common and facilitate a need to individual producers who may not have the proper facilities to aggregate and package, but who want to maintain ownership of their product and dictate to whom the end product will be sold. Furthermore, this new proposed language contradicts § 5303(b) and § 5707.

Recommendation: This new language should be removed from § 5301(b) and the previous language reinstated.

§ 5311(f) - Enclosed box or cage within distribution vehicles

New proposed language in § 5311(f) is very problematic as it imposes significant additional costs on already overly secure vehicle requirements, a cost which does not produce any added protections or security. Two primary commercial manufacturers of secured transport vehicles in California, Quality Coachworks and NorCal Vans, use industry-standard armoring and additional security measures which utilize parts of the vehicle, like the walls, floor, and ceiling, as components of the secured area. The proposed language would disallow the use of walls, floors, and ceilings as part of the enclosed area. Not only is this new language unnecessary, it may also not be commercially viable given the additional expense and turn-around time. Additionally, this added requirement would take up usable space in each vehicle, reducing capacity per transport. Many operators have invested significant capital on their fleet, upwards of \$50,000-\$100,000 per vehicle, each of which takes several weeks to fabricate to the existing requirements. Distributors have an economic incentive to protect the assets in their vehicles; this new proposed language adds no additional security to protect the assets, rather it only adds cost while reducing capacity.

Recommendation: 1) This new language should be removed from § 5311(f) and the previous language reinstated. 2) Consider prohibiting windows in the secured storage area, or requiring bars on the window interior. 3) Increased standards, if required, should be phased in over time with a transition period to allow time for existing distributors to continue to serve the market. 4) Before instituting this requirement, we recommend an analysis of current vehicles which meet commercially reasonable security standards before imposing a possibly unnecessary expense on operators. Consider looking at Oregon’s requirements for transportation vehicles as well as the DEA’s specific measures required for the storage of controlled substances, which consider time required to breach and the gauge of steel.

Other Priorities

§ 5015 - 50% Penalty on Annual Fee Estimations

Recommendation: Remove the penalty for first-year revenue estimations and base future year estimates on past-year performance as a minimum. Allow for refunds or credits towards next year application if year-end revenues were overestimated.

§ 5040(b)(3) - Advertising placements on state highways

New proposed language in § 5040(b)(3) states that outdoor signs, including billboards, shall: *“Not be located within a 15-mile radius of the California border on an Interstate Highway or on a State Highway which crosses the California border.”* This language seems to restrict outdoor signage on any state highway, regardless of vicinity to the nearest border.

Recommendation: Modify this text to read, “Not be located within a 15-mile radius of the California border.”

§ 5052.1 - Allow retailers for reject partial shipments for additional reasons

New proposed language in § 5052.1 allows for partial rejections of shipments, but only for very limited purposes. This language is too restrictive and does not accommodate for other standard reasons why certain cannabis goods may be rejected at the time of delivery.

Recommendation: Allow cannabis goods to be rejected at the time of delivery, without restricting it to the stated and limited reasons provided in § 5052.1.

§ 5303(b) - Distributors rolling pre-rolls

New proposed language in § 5303(b) allowing distributors to roll pre-rolls “that consist exclusively of any combination of flower, shake, leaf, or kief” is a positive clarification. Further defining that, “Pre-rolls shall be rolled prior to regulatory compliance testing” is understandable.

Recommendation: To avoid massive batches of mixed pre-roll contents, regulation should further clarify that all pre-rolls be treated as cannabis (not a cannabis product) for the purposes of the batch sampling requirements, whereby a fifty-pound batch is the maximum batch size for pre-rolls versus 150,000 units, the maximum batch size for manufactured products.

§ 5303(c) - Distributors labeling and relabeling manufactured cannabis goods

New proposed language in § 5303(c) clarifying that distributors may label and re-label manufactured cannabis goods with amounts of cannabinoids and terpenes is a positive improvement and clarification.

Recommendation: 1) Clarify that distributors may also re-label for reasons such as missing or correcting certain label requirements to bring the label into compliance if a required data point was inadvertently missed or incorrectly displayed by the manufacturer, or if new regulatory guidance suggests additional information be placed on the primary or informational panel. As it stands, a distributor would only be able to correct the label for lab test result data. 2) Clarify that terpenes are not required on the final label.

§ 5303.1 - Weight variance

New language in § 5303.1 does allow for an increased variance from 2.5% to 3%, however this still does not allow for expected variances in small weight products, such as one-gram flower packages, whereby moisture loss could result in up to 10% weight variance.

Recommendation: Consider a higher weight variance allowance for lower weight products.

§ 5306(b) - Printed copies of Certificates of Analysis

New language in § 5306(b) requires COAs to be printed and accompanied with every transfer of cannabis goods. This requirement is incredibly environmentally wasteful, costly, burdensome, and unnecessary. Given that Metrc will require this data be transmitted digitally, the added requirement for a printed copy seems further redundant and unnecessary.

Recommendation: Require COAs to be transferred digitally to any party receiving the cannabis goods, always or upon request.

§ 5307 and § 5307.2 - COAs transferring between distributors for packaged product

We are supportive of new language in § 5307 and § 5307.2 whereby a certificate of analysis may only transfer between distributors for cannabis goods packaged goods "packaged as they will be sold at retail."

§ 5307(c)(1) and (2) - Licensed distributor labeling according to COA

Recommendation: Remove 'terpenoids' from the required language in this section, as these compounds are optional but not required on the labels.

§ 5315 - Exempt transport-only distributors from premises-based security requirements

Recommendation: Given transport-only distributors are not able to store products onsite, allow for the premises of a transport-only license to be a dedicated portion (such as an office) of the primary cultivation or manufacturing premise.

§ 5410(e) - Allow returns for cannabis, not only for cannabis products

Pre-packaged flower may pass compliance testing but is later found to contain a defect, for example mold or mildew, and be subsequently returned by the consumer and/or retailer.

Recommendation: 1) Replace “manufactured cannabis products” with “cannabis goods” to clarify that both manufactured cannabis products as well as cannabis flower may be returned. 2) Work with CDTFA to establish guidance for return or credit of excise taxes remitted for items that are subsequently returned.

§ 5413 - Tamper-evident and Child resistant packaging

Eliminating child-resistant primary packaging and focusing on child-resistant exit packaging both protects minors and reduces waste, improves accessibility for seniors, and avoids price increases that encourage the unregulated market.

Recommendation: Require that cannabis goods be in child resistant packaging at the time they leave the retail store. Exit bags are sufficient, and this requirements should be extended indefinitely, not only until January 2020. The state should encourage that exit packages be reusable and non-plastic by a certain date in the future, to be consistent with the goals provided in Proposition 64 to reduce plastic waste.

§ 5715(d) - Phase 3 Testing, issues with accessibility and capacity for heavy metals testing

Many retailers are already requiring Phase 3 testing as a precautionary measure, with the fear that products that are on the shelf come January 2019 will need to be destroyed, as was the case of untested product in the June 30/July 1 transition. As many producers and distributors aim to conduct research testing for Phase 3 tests, it has come to light that only three or so licensed testing labs in the state are currently equipped to conduct heavy metals tests. This poses significant concern regarding bottlenecks which will occur come January.

Recommendation: 1) While we believe the language is clear that Phase 3 is triggered by harvest or manufacture date, we encourage the Bureau to issue official guidance in the form of a memo that clearly outlines the requirements for phasing in the new testing requirements and that it does not apply to products that were harvested or manufactured prior to 2019. 2) Additionally, we encourage the Bureau to determine if there are a sufficient number of licensed laboratories who are equipped to conduct heavy metals testing and to consider pushing out the timeline for requiring heavy metals tests until the majority of licensed testing laboratories are equipped to provide these tests.

§ 5719(d)(1) - Need to establish action limits for Category I Pesticides

Recommendation: 1) Rather than read, "The presence of any residual pesticide listed in the following tables in Category I are **not detected**," replace § 5719(d)(1) to read similarly to 5719(d)(2) as follows, "The presence of any residual pesticide listed in the following tables in Category I **does not exceed the indicated action levels**" and 2) Establish 0.1ppm (100ppb) as the Action Level for all Category I pesticides versus non-detectable.

§ 5724(c) - Remove milligrams listing for inhalable products; define serving size

Recommendation: 1) Require that only percentage potency (and not milligrams) be required for inhalable (non-ingestible) cannabis goods, such as cannabis flower, concentrates, and vaporizer cartridges. 2) Provide guidance for serving size for various cannabis goods.

§ 5726 - Allow amendments to COAs for clerical or administrative errors

Recommendation: When supporting documentation exists, testing labs should be able to amend a COA to update missing or incorrect information. No amendments should be made without supporting documentation of an error in the data occurring on the original COA.

§ 5726 - Allow pathway for appeal of COA when reasonable doubt is provided

Recommendation: When a lab data package investigation implicates the lab data as invalid, inconsistent, failing to meet required standards, the agency should investigate the lab, allow for batch retests at the request of licensed operators whose batches were failed by the lab, and suspend or revoke lab licenses until their methods and data are proven to meet commercial standards.

Enforce BPC Chapter 4, Article 3 regarding unfair trade practices pertaining to § 17044

Unfair trade practices are occurring in the newly regulated market, mostly in the form of heavily discounted prices (below cost) on cannabis goods and long extended payment terms in exchange for retail shelf space. These activities undermine Business and Professions Code § 17044 which reads: "It is unlawful for any person engaged in business within this State to sell or use any article or product as a "loss leader" as defined in Section 17030 of this chapter." Whereby § 17030 defines 'Loss Leader' as "any article or product sold at less than cost: (a) Where the purpose is to induce, promote or encourage the purchase of other merchandise; or (b) Where the effect is a tendency or capacity to mislead or deceive purchasers or prospective purchasers; or (c) Where the effect is to divert trade from or otherwise injure competitors."

Recommendation: Hold commercial cannabis operators accountable to fair trade practices by investigating producer and distributor costs of goods sold from suppliers as well as terms with retailers, and by enforcing Business and Professions Code § 17044.

Clarify rules regarding samples, as recommended by the Cannabis Advisory Committee.

The ability for producers to provide samples to distributors and retailers is essential in any industry, and follows long-standing practice in the cannabis industry. Samples can help small producers gain a foothold in the marketplace and ensure that patients and customers have access to high-quality products. Our understanding is that providing samples is technically allowed under current regulation so long as samples are not given away for free, as would be prohibited under Business and Professions Code Section 26153. CDTFA also provides guidance to distributors on B2B handling of cannabis samples on its website below, under Sales of Samples or Promotional Items,” and requires these items to be labeled as “not for resale.”

<http://www.cdtfa.ca.gov/industry/cannabis.htm#Distributors> Regulations currently don't provide clear guidance on how samples can be entered into track and trace or recorded if they are not intended for final sale to the consumer. Regulations clarifying that samples may be provided between businesses in compliance with B+P Section 26153, must be labeled as “not for resale,” and may not be sold to a consumer, would help provide businesses with the clarity and confidence to use samples more consistently.

***Recommendation:** Accommodate for business-to-business sampling to be properly recorded in the track-and-trace system, including for the purposes of sales samples not for resale as well as for R&D test samples going to testing labs for non-official tests.*

Other Administrative Clarifications

§ 5002(c)(34) - State Employer Identification Number (if applicable)

***Recommendation:** Many cannabis businesses are owner-operated and do not take on additional employees. The words “if applicable” could be added to this provision to accommodate for sole proprietorships who may not have an EIN.*

§ 5027. - Physical Modification of Premises turnaround time for approval

***Recommendation:** Given that prior written approval is required, provide a required turnaround time for which the Bureau must review and approve (or deny) the modifications.*

§ 5042(c) - Employees and other authorized individuals able to escort

***Recommendation:** To be consistent with § 5042(a), add language so the provision reads as follows: “An individual who enters the limited-access area that is not employed or otherwise authorized by the licensee shall be escorted by an employee of the licensee at all times while within the limited-access area.”*

§ 5049, § 5054 - Addressing Cannabis Product Waste

***Recommendation:** Consider the impacts of waste generated by consumers of cannabis products, and examine the language in §5000 Definitions, §5049 Track and Trace Reporting, and §5054 Destruction of Cannabis Goods Prior to Disposal to allow for consumers to return products like empty cartridges to a retailer or directly to the manufacturer for recycling.*