Guidelines for the Security and Non-Diversion of Cannabis Grown for Medical Use

In 1996, California voters approved Proposition 215, the Compassionate Use Act of 1996, which exempted certain patients and their primary caregivers from criminal liability under state law for the possession and cultivation of marijuana for medicinal use. (Health & Saf. Code, § 11362.5.[1]) In 2003, the California Legislature enacted Senate Bill 420, the Medical Marijuana Program Act, which clarified requirements related to medical marijuana. Pursuant to the legislation, the Office of the Attorney General is required to adopt "guidelines to ensure the security and non-diversion of cannabis grown for medical use." (§ 11362.81, subd. (d).) To fulfill this mandate, the Office of the Attorney General is re-issuing and updating these guidelines to (1) ensure that cannabis grown for medicinal purposes remains secure and does not find its way to non-patients or illicit markets; (2) help law enforcement agencies perform their duties effectively and in accordance with California law; and, (3) help patients and primary caregivers understand how they may cultivate, transport, deliver, possess, and use medicinal cannabis under California law.[2]

I. SUMMARY OF APPLICABLE LAW

A. Proposition 215 - The Compassionate Use Act of 1996

On November 5, 1996, California voters passed Proposition 215, the Compassionate Use Act (CUA), which decriminalized the cultivation, possession, and use of marijuana by seriously ill individuals upon a physician's recommendation. (§ 11362.5.) The CUA was enacted to "ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana," "ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction," and "encourage federal and state governments to implement a plan for the safe and affordable distribution of marijuana to all patients in medical need of marijuana." (§ 11362.5, subds. (b)(1)(A), (B) & (C).) The CUA is a narrowly drafted statute designed to allow a qualified medical patient and his or her primary caregiver to possess and cultivate marijuana for the patient's personal use. (*People v. London* (2014) 228 Cal.App.4th 544, 551-553.)

[1] Unless otherwise noted, all statutory references are to the Health and Safety Code.

[2] Effective January 1, 2018, pursuant to Proposition 64, the nonmedicinal adult-use of cannabis became legal in California for adults 21 years of age and older. (See § 11362.1 and Bus. & Prof. Code, § 26000 et al.) These guidelines are not intended to provide guidance on the nonmedicinal adult-use of cannabis.

The CUA states that "Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician." (§ 11362.5, subd. (d).) Accordingly, the CUA is designed to ensure that Californians who comply with the CUA are not subject to criminal sanctions. (*People ex rel. Feuer v. Progressive Horizon, Inc.* (2016) 248 Cal.App.4th 533.)

B. Senate Bill 420 - The Medical Marijuana Program Act

On January 1, 2004, Senate Bill 420, the Medical Marijuana Program Act (MMPA), became law. (§§ 11362.7-11362.85.) The MMPA does not amend the CUA, but is a separate legislative scheme that implements the CUA. (*People v. London, supra*, 228 Cal.App.4th 544.) The MMPA, among other things, requires the California Department of Public Health to establish and maintain a program for the voluntary registration of qualified medicinal cannabis patients and their primary caregivers through a statewide identification card system. (§§ 11362.71, subd. (e), 11362.78.) Medical cannabis identification cards are intended to help law enforcement officers identify and verify that cardholders are able to cultivate, deliver, transport, and possess certain amounts of medicinal cannabis (based on a physician's recommendation) without being subject to fines or arrest under specific conditions. (*Ibid.*)

Under the CUA, all county health departments shall participate in the identification card program by: (1) providing applications upon request to individuals seeking to join the identification card program; (2) processing completed applications; (3) maintaining certain records; (4) following state implementation protocols; and (5) issuing medical cannabis identification cards to approved applicants and designated primary caregivers. (§ 11362.71, subd. (b).)

Participation by patients and primary caregivers in the identification card program is voluntary. County health departments are required to verify the applicant's status as a qualified patient before the issuance of the identification card. (§ 11362.71.) State and local law enforcement shall have immediate access to information to verify the validity of the card. (§ 11362.735.)

In addition to establishing the identification card program, the MMPA also defines certain terms, and sets possession guidelines for cardholders. (§§ 11362.7, 11362.77.) In *People v. Mower*, the California Supreme Court held "section 11362.5(d) [of the CUA] does not grant any immunity from arrest." (*People v. Mower* (2002) 28 Cal. 4th 57, 468–69.) Thus, the California Legislature enacted the MMPA to clarify the scope of the CUA. (*People v. Kelly* (2010) 47 Cal. 4th 1008.) "At the heart of the MMP[A] is a voluntary 'identification card' scheme that, unlike the CUA—which ... provides only an affirmative defense to a charge of possession or cultivation—provides protection against arrest for those and related crimes." (*People v. Kelly*, *supra*, 47 Cal. 4th 1014.) A person who

suffers from a serious medical condition or a primary caregiver may receive an identification card that "can be shown to a law enforcement officer who otherwise might arrest the program participant or his or her primary caregiver." (*Id.*)

C. Medical Marijuana Regulation and Safety Act of 2016[3]

On October 11, 2015, Senate Bill 643, Assembly Bill 266, and Assembly Bill 243, collectively known as the Medical Marijuana Regulation and Safety Act (MMRSA), were signed into law. (Bus. & Prof. Code, §§ 19300-19360.) The MMRSA established a state regulatory and licensing system for the cultivation, manufacturing, delivery, and sale of medicinal cannabis as of January 1, 2016. In 2017, the MMRSA was repealed by Senate Bill 94, the Medicinal and Adult-Use Cannabis Regulation and Safety Act, which is discussed below.

D. Proposition 64 – The Control, Regulate and Tax Adult Use of Marijuana Act of 2016

On November 8, 2016, the voters of California passed Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA), which established a "comprehensive system to legalize, control, and regulate the cultivation, processing, manufacture, distribution, testing, and sale of nonmedical marijuana, including marijuana products, for use by adults 21 years and older." (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) text of Prop. 64, pp. 178-210.) The AUMA also provided for the taxation of the commercial growth and retail sale of marijuana. (*Ibid.*) The AUMA did not alter the CUA or MCRSA, but rather the AUMA added and amended sections to numerous California statutes, including, but not limited to, the Penal Code, Business and Professions Code, Health and Safety Code, the Food and Agricultural Code, and the Revenue and Taxation Code. (*Ibid.*) The intent behind the AUMA, in part, was to combat the illegal market by creating a regulatory structure to govern California's commercial cannabis activity, prevent access by minors, and protect public safety, public health, and the environment. (*Ibid.*)

E. Senate Bill 94 – Medicinal and Adult-Use Cannabis Regulation and Safety Act

On June 27, 2017, Senate Bill 94, the Medicinal and Adult-Use Cannabis Regulation and Safety Act (MAUCRSA)[4], was signed into law. (Bus. & Prof. Code, § 26000 et seq.) The MAUCRSA repealed the MCRSA and consolidated the state's medicinal and adult-

[3] On June 27, 2016, pursuant to Senate Bill 837, the Medical Marijuana Regulation and Safety Act was renamed the Medical Cannabis Regulation and Safety Act (MCRSA).

[4] MAUCRSA replaced all references to "marijuana" with "cannabis" within the Business and Professions Code and Health and Safety Code, division 10, chapter 6, article 2, as well as several other statutes. However, other statutes still use "marijuana" within the language of their texts.

use cannabis regulatory systems. (*Ibid*.) In general, the MAUCRSA imposed similar requirements on both commercial medicinal and adult-use cannabis activity.

1. California Penal Provisions Relating to Cannabis

The MAUCRSA reduced and eliminated certain criminal penalties related to cannabis and continued to exempt qualified patients and their primary caregivers from certain criminal penalties.[5] (See, e.g., § 11357 [unlawful possession of cannabis is an infraction]; § 11358 [unlawful cultivation of cannabis in excess of six plants is a misdemeanor]; Veh. Code, § 23222 [unlawful possession of less than 1 oz. of cannabis while driving is an infraction]; § 11359 [unlawful possession with intent to sell any amount of cannabis without a license is a misdemeanor]; § 11360 [unlawful transporting, selling, or giving away cannabis in California is a misdemeanor; under 28.5 grams is an infraction]; § 11361 [selling or distributing cannabis to minors, or using a minor to transport, sell, or give away cannabis, by a person 18 years of age or older is a felony].) Thus, under MAUCRSA, most criminal offenses related to cannabis for a person 18 years of age or older are punishable as an infraction or misdemeanor, although certain conditions may lead to a felony enhancement. (§§ 11357-11362.5.)

2. Taxability of Medicinal Cannabis

In February 2007, the California State Board of Equalization (Board of Equalization) issued a Special Notice confirming its policy of taxing medical marijuana transactions, as well as its requirement that businesses engaging in such transactions hold a seller's permit. (http://www.boe.ca.gov/news/pdf/medseller2007.pdf) According to the Notice, having a seller's permit does not allow individuals to make unlawful sales, but instead merely provides a way to remit any sales and use taxes due. The Board of Equalization further clarified its policy in a June 2007 Special Notice that addressed several frequently asked questions concerning taxation of medical marijuana transactions. (http://www.boe.ca.gov/news/pdf/173.pdf)

On June 15, 2017, the California Legislature passed the Taxpayer Transparency and Fairness Act (AB 102), which restructured the Board of Equalization into two new tax administrative agencies, one of which became the newly created California Department of Tax and Fee Administration. The California Department of Tax and Fee Administration is the state agency tasked with administering business permits and taxes, including those involving cannabis. Cannabis cultivators, processors, manufacturers, retailers, microbusinesses, and distributors making sales must now obtain a seller's permit from this agency. Similarly, distributors of cannabis and cannabis products must also register to obtain cannabis tax permits and to report and pay state cannabis taxes.

[5] Under the MAUCRSA (consistent with the CUA), pursuant to section 11362.5, subdivision (d), section 11357 related to possession of marijuana, and section 11358 related to cultivation of marijuana, do not apply to, "a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician."

Additional information regarding cannabis state taxes can be found on the California Department of Tax and Fee Administration website. (http://www.cdtfa.ca.gov/industry/cannabis.htm)

The enactment of MAUCRSA has partially exempted medicinal cannabis patients from certain taxes. Under Revenue and Taxation Code section 34011, subdivision (f), "sales and use taxes…shall not apply to retail sales of medicinal cannabis, medicinal cannabis concentrate, edible medicinal cannabis products, or topical cannabis …when a qualified patient or primary caregiver for a qualified patient provides his or her card issued under Section 11362.71 of the Health and Safety Code and a valid government-issued identification card." Medicinal cannabis and cannabis products, which include concentrates, edibles, and topicals, are subject to excise and local taxes, regardless of whether a qualified patient possesses a card issued under section 11362.71.

F. Medical Board of California, Osetoepathic Medical Board and Board of Podiatric Medicine

Medical professionals licensed by the Medical Board of California, the California Board of Podiatric Medicine, or the Osteopathic Medical Board of California cannot recommend medicinal cannabis unless certain conditions are met. In April 2018, the Medical Board issued its "Guidelines for the Recommendation of Cannabis for Medical Purposes."[6] The Medical Board clarified that the accepted standards of medical responsibility are the same ones that a reasonable and prudent physician would follow when recommending or approving any medication.[7] They include the following:

1. **Physician-Patient Relationship:** Documenting that an appropriate physician-patient relationship has been established before recommending cannabis use for medical purposes;

2. **Patient Evaluation:** Conducting and documenting an appropriate prior medical examination and collecting relevant clinical history;

3. **Informed and Shared Decision Making:** Providing informed consent, including discussion of side effects;

4. **Treatment Agreement:** Developing a treatment plan with objectives;

[6] (https://www.mbc.ca.gov/Publications/guidelines_cannabis_recommendation.pdf)

[7] The standards of medical responsibility outlined in the guidelines also apply to licensees of the Osteopathic Medical Board of California and the Board of Podiatric Medicine. (See Bus. & Prof. Code, § 2525.2.)

5. **Qualifying Conditions:** Determining appropriateness and safety of recommendation in accordance with current standards of practice and in compliance with state laws, rules, and regulations which specify qualifying conditions for which a patient may qualify for cannabis for medical purposes;

6. **Ongoing Monitoring and Adapting the Treatment Plan:** Periodically reviewing the treatment's efficacy;

7. **Consultation and Referral:** Consultations and referrals, as necessary;

8. **Medical Records:** Keeping proper records supporting the decision to recommend the use of medicinal cannabis; and

9. **Physician Conflicts of Interest:** Avoiding financial conflicts of interest.

Although state law prohibits punishing a physician simply for recommending cannabis for treatment of a serious medical condition (§ 11362.5, subd. (c)), the Medical Board, the Osteopathic Medical Board, and the Board of Podiatric Medicine can, and do, take disciplinary action against licensees who fail to comply with accepted medical standards when recommending cannabis. Physicians, Osteopaths, and Podiatrists who provide medicinal cannabis recommendations in violation of professional standards and/or legal requirements may be subject to license discipline and/or criminal prosecution. (Bus. & Prof. Code, §§ 2234 and 2525.2.)

Complaints about physicians should be addressed to the Medical Board (1-800-633-2322 or www.mbc.ca.gov), which investigates alleged licensing violations.

Complaints about osteopaths should be addressed to the Ostoepathic Medical Board (916 928-8390 or www.ombc.ca.gov)

Complaints about podiatrists should be addressed to the Board of Podiatric Medicine (916-263-2647 or www.bpm.ca.gov.)

The Federal Controlled Substances Act[8]

Adopted in 1970, the Controlled Substances Act established a federal regulatory system designed to combat drug abuse by regulating the manufacture, importation, distribution, use, or possession of any controlled substance. (21 U.S.C. § 801 et seq.; *Gonzales v. Oregon* (2006) 546 U.S. 243, 271-273.) The Controlled Substances Act reflects the federal government's view that marijuana is a drug with "no currently accepted medical use." (21 U.S.C. § 812, subd. (b)(1)(B).) Accordingly, the manufacture, distribution,

[8] Federal laws and regulations use the terms "marijuana" or "marihuana" and not cannabis.

dispensing, possession, or purchasing of marijuana is a federal criminal offense. (*Id.* at §§ 841, subd. (a)(1), 844, subd. (a).)

On August 29, 2013, the United States Department of Justice, under the leadership of United States Deputy Attorney General James Cole, issued a memorandum to all United States Attorneys governing the federal prosecution of marijuana related offenses. The Cole Memorandum (as it is commonly known) stated that the Justice Department would take into consideration regulatory and enforcement systems implemented in states that have legalized marijuana in some form, and that the presence of those systems would make it less likely that a substantial federal interest would be found warranting enforcement action. Former United States Attorney General Jeff Sessions issued a memorandum to all United States Attorneys on January 4, 2018, rescinding the Cole Memorandum. Finally, medicinal marijuana operators acting in compliance with state laws are protected from federal enforcement under the Joyce/Blumenauer Amendment[9] until its expiration on September 30, 2019.

On June 25, 2018, the Food and Drug Administration approved Epidiolex, a cannabidiol oral solution, for the treatment of epileptic seizures associated with Lennox-Gastaut syndrome and Dravet syndrome, in patients two years of age and older. On September 28, 2018, the Drug Enforcement Administration created a new classification in Schedule V of the Controlled Substances Act schedules for "*Approved cannabidiol drugs*," – "A drug product in finished dosage formulation that has been approved by the U.S. Food and Drug Administration that contains cannabidiol (2-[1R-3-methyl-6R-(1-methylethenyl)-2-cyclohexen-1-yl]-5-pentyl-1,3-benzenediol) derived from cannabis and no more than 0.1 percent (w/w) residual tetrahydrocannabinols." (21 C.F.R. § 1308.15, subd. (f).)

The Drug Enforcement Administration indicated in its Final Order:
"By virtue of this order, Epidiolex (and any generic versions of the same formulation that might be approved by the FDA in the future) will be a schedule V controlled substance. Thus, all persons in the distribution chain who handle Epidiolex in the United States (importers, manufacturers, distributors, and practitioners) must comply with the requirements of the CSA and DEA regulations relating to schedule V controlled substances. As further indicated, any material, compound, mixture, or preparation other than Epidiolex that falls within the CSA definition of marijuana set forth in 21 U.S.C. 802(16), including any non-FDA-approved CBD extract that falls within such definition, remains a schedule I controlled substance under the CSA."

[9] Initially adopted in 2014 as the Rohrabacher-Blumenauer Amendment, the Department of Justice is prohibited from allocating federal resources to interfere with the implementation of state medical cannabis laws. Since its enactment, the amendment has been approved or renewed by Congress 11 times. It was initially referred to as the Rohrabacher-Farr amendment as it was named after Reps. Dana Rohrabacher and Sam Farr, who co-sponsored the amendment. After Rep. Farr retired from Congress in 2017, Rep. Blumenauer replaced him as co-sponsor. This amendment was renamed again in 2018 to replace Rep. Rohrabacher as co-sponsor and is now referred to as the "Joyce/Blumenauer Amendment."

Food and Drug Administration-approved drugs with cannabidiol derived from cannabis and containing no more than 0.1 percent residual tetrahydrocannabinols have been moved to Schedule V.

Further, California's medicinal cannabis laws have not been successfully challenged in court on the ground that they are pre-empted by the Controlled Substances Act. (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798.) In fact, Congress has provided that states are free to regulate in the area of controlled substances, including cannabis, provided that state law does not positively conflict with the Controlled Substances Act. (21 U.S.C. § 903.) Indeed, neither the MAUCRSA, the CUA, nor the MMPA, conflict with the Controlled Substances Act because, in adopting these laws, California exercised the state's reserved powers to not punish certain cannabis-related offenses under state law when a physician has recommended its use to treat a serious medical condition. (See *City of Garden Grove v. Superior Court (Kha)* (2007) 157 Cal.App.4th 355, 371-373, 381-382.)

II. DEFINITIONS

A. Physician's Recommendation: Physicians may not prescribe cannabis because the federal Food and Drug Administration regulates prescription drugs and, under the Controlled Substances Act, marijuana is a Schedule I drug, meaning that it has no recognized medical use, with the exception noted above. Physicians may, however, lawfully issue a written or oral recommendation under California law indicating that cannabis would be a beneficial treatment for a serious medical condition. (§ 11362.5, subd. (d); *Conant v. Walters* (9th Cir. 2002) 309 F.3d 629, 632.)

B. Primary Caregiver: A primary caregiver is a person who is designated by a qualified patient and "has consistently assumed responsibility for the housing, health, or safety" of the patient. (§ 11362.5, subd. (e).) California courts have emphasized the "consistency" requirement of the patient-caregiver relationship. Although a "primary caregiver who consistently grows and supplies . . . medicinal marijuana for a section 11362.5 patient is serving a health need of the patient," someone who merely maintains a source of cannabis does not automatically become the party "who has consistently assumed responsibility for the housing, health, or safety" of that patient. (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1390, 1400.) A person may serve as a primary caregiver to "more than one" patient, provided that the patients and caregiver all reside in the same city or county. (§ 11362.7, subd. (d)(2).) Primary caregivers may also receive certain compensation (actual and/or out-of-pocket expenses) for their services without being subject to prosecution for possessing or transporting cannabis. (§ 11362.765, subd. (c).)

C. Qualified Patient: A qualified patient is a person whose physician has recommended the use of cannabis to treat a serious illness, which includes AIDS, anorexia, arthritis, cachexia, cancer, chronic pain, glaucoma, migraine, persistent muscle spasms, seizures, severe nausea, or any other chronic or persistent medical condition for which marijuana provides relief. (§§ 11362.5, subd. (b)(1)(A) and 11362.7, subd. (h).)

D. Attending Physician: An attending physician is a person who (1) possesses a license in good standing to practice medicine in California; (2) has taken responsibility for some aspect of the medical care, treatment, diagnosis, counseling, or referral of a patient; and (3) has complied with accepted medical standards (as described by the Medical Board of California in its April 2018 guidelines) that a reasonable and prudent physician would follow when recommending or approving medicinal cannabis for the treatment of a patient. (Bus. & Prof. Code, § 2525.2, citing §11362.7, subd. (a).)

III. GUIDELINES REGARDING INDIVIDUAL QUALIFIED PATIENTS AND PRIMARY CAREGIVERS

A. State Law Compliance Guidelines

1. Physician Recommendation: Patients must have a written or oral recommendation for cannabis from a licensed physician. (§ 11362.5, subd. (d).)

2. State of California Medical Marijuana Identification Card: Under the Medical Marijuana Program, qualified patients may voluntarily apply for a card issued by the county in which they reside, identifying them as a person who is authorized to use cannabis. The primary caregiver may obtain a card identifying them as a person authorized to cultivate, possess, transport, and/or deliver cannabis for medical purposes. To help law enforcement officers verify the cardholder's identity, each card bears a unique identification number, and a verification database is available online (www.calmmp.ca.gov). In addition, the cards contain the name of the county health department that approved the application, a 24-hour verification telephone number, and an expiration date. (§§ 11362.71, subd. (a), 11362.735, subd. (a)(3)-(4), 11362.745.)

3. Proof of Qualified Patient Status: Although oral recommendations are technically permitted under the CUA, patients should obtain and carry written proof of their physician recommendations to help them avoid fines or seizures of medicinal cannabis. A state identification card is the best form of proof, because it is easily verifiable and provides immunity from fine assessments if certain conditions are met (see section III.B.4, below). The next best forms of proof are a city- or county-issued patient identification card, or a written recommendation from a physician.

4. Possession Guidelines

a) Medical Marijuana Program (MMP): Qualified patients or primary caregivers who possess a state-issued identification card may possess no more than 8 ounces of dried cannabis per qualified patient, and may maintain no more than 6 mature or 12 immature plants per qualified patient. (§ 11362.77, subd. (a).) However, a qualified patient or primary caregiver with a doctor's recommendation may possess an amount of cannabis consistent with the patient's needs. (§ 11362.77, subd. (b).) Only the dried mature processed flowers or buds of the female cannabis plant should be considered when determining allowable quantities of medicinal cannabis. (§ 11362.77, subd. (d).) The MAUCRSA enabling regulations adopt these possession limits as daily limits for what a licensed retailer may sell to a medicinal cannabis patient or a primary caregiver. (See Cal. Code Regs., tit. 16, § 5409.)

b) Local Possession Guidelines: Counties and cities may adopt regulations that allow qualified patients or primary caregivers to possess medicinal cannabis in amounts that exceed the MMP's possession guidelines. (§ 11362.77, subd. (c).)

c) Compassionate Use: Qualified patients claiming protection under the CUA may possess an amount of cannabis that is "reasonably related to [their] current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549.)

B. Enforcement Guidelines: In light of California's legalization of recreational adult-use cannabis, as well as its decision to remove the use and cultivation of physician-recommended medicinal cannabis from the scope of the state's drug laws, it is recommended that state and local law enforcement officers not arrest individuals or seize cannabis under federal law when the officer determines, from the facts available, that the cultivation, transportation, delivery, and/or possession, is permitted under California's medicinal or adult use cannabis laws.

1. Location of Use: Cannabis may not be smoked (a) where smoking is prohibited by law, (b) at or within 1,000 feet of a school, recreation center, or youth center (unless the medicinal use occurs within a residence), (c) on a school bus, or (d) in a moving motor vehicle or boat. (§ 11362.79 and § 11362.3) In addition, state and local agencies may prohibit or restrict consumption of cannabis or cannabis products on state owned or leased property. (§ 11362.45, subd. (g).) Private property owners may also prohibit or restrict consumption of cannabis or cannabis products on their property. (§ 11362.45, subd. (h).) Finally, since cannabis and cannabis products are illegal under federal law, consumption of

cannabis or cannabis products on federal land, even if it is located in California, is not a protected activity.

2. Use of Medicinal Cannabis in the Workplace or at Correctional Facilities: The medicinal use of cannabis need not be accommodated in the workplace, during work hours, or at any jail, correctional facility, or other penal institution. (§ 11362.785, subd. (a); *Ross v. RagingWire Telecomms., Inc.* (2008) 42 Cal.4th 920, 933 [under the Fair Employment and Housing Act, an employer may terminate an employee who tests positive for cannabis use].)

3. Criminal Defendants, Probationers, and Parolees: Criminal defendants and probationers may request court approval to use medicinal cannabis while they are released on bail or probation. The court's decision and reasoning must be stated on the record and in the minutes of the court. Likewise, parolees who are eligible to use medicinal cannabis may request that they be allowed to continue such use during the period of parole. The written conditions of parole must reflect whether the request was granted or denied. (§ 11362.795.)

4. State of California Medical Marijuana Identification Cardholders: When a person invokes the protections of the CUA or the MMP and he or she possesses an identification card, officers should:

a) Review the identification card and verify its validity either by calling the telephone number printed on the card, or by accessing the Department of Public Health's card verification website (http://www.calmmp.ca.gov); and

b) If the card is valid and not being used fraudulently, there are no other indicia of illegal activity (weapons, illicit drugs, or excessive amounts of cash), and the person is within the state or local possession guidelines, the individual should be released and the cannabis should not be seized. Under the MMP, "no person or designated primary caregiver in possession of a valid identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medicinal cannabis . . ." (§ 11362.71, subd. (e).) Further, a "state or local law enforcement agency or officer shall not refuse to accept an identification card issued by the department unless the state or local law enforcement agency or officer has reasonable cause to believe that the information contained in the card is false or fraudulent, or the card is being used fraudulently." (§ 11362.78.)

5. Non-Cardholders: When a person in possession of medicinal cannabis, including medicinal cannabis products, or an excessive amount of cannabis plants claims protection under the CUA or the MMP and only has a locally-issued (i.e.,

non-state) patient identification card, or a written or oral recommendation from a licensed physician, officers should use their sound professional judgment to assess the validity of the person's medicinal claim:

a) Officers need not abandon their search or investigation to determine if the amount of cannabis being possessed or transported is within legal constraints and consistent with the qualified patient's physician's recommendation. (*People v. Wayman* (2010) 189 Cal.App.4th 215.) The enactment of the MAUCRSA has decriminalized the possession and transportation of limited amounts of cannabis, therefore the presence of a small quantity of cannabis is not considered contraband when possessed in compliance with state laws. Cannabis and cannabis products lawfully possessed are no longer subject to seizure. (§ 11362.1, subd. (c).) Reasonable suspicion is required for detention, while probable cause is required for search, seizure, and arrest; and the motor vehicle exception to a probable cause search still applies. (*People v. Waxler* (2014) 224 Cal.App.4th 712.)

b) Officers should review any written documentation for validity. It may contain the physician's name, telephone number, address, and license number.

c) If the officer reasonably believes that the medicinal claim is valid based upon the totality of the circumstances (including the quantity of cannabis, packaging for sale, the presence of weapons, illicit drugs, or large amounts of cash), and the person is within the state or local possession guidelines or has an amount consistent with their current medical needs, the person should be released and the cannabis should not be seized.

d) Alternatively, if the officer has probable cause to doubt the validity of a person's medicinal cannabis claim based upon the facts and circumstances, the person may be arrested and the cannabis may be seized. It will then be up to the person to establish his or her medicinal cannabis defense in court.

e) Officers are not obligated to accept a person's claim of having a physician's oral recommendation that cannot be readily verified with the physician at the time of detention.

6. Exceeding Possession Guidelines: If a person has what appears to be valid medicinal cannabis documentation, but exceeds the applicable possession

guidelines identified in section 5(a), above, all cannabis may be seized. (§§ 11362.1, subd. (c), 11471, subds. (c) and (d), § 11475.)

7. Return of Seized Medicinal Cannabis: If a person whose cannabis is seized by law enforcement successfully establishes a medicinal cannabis defense in court, or the case is not prosecuted, he or she may file a motion for return of the cannabis. If a court grants the motion and orders the return of cannabis seized incident to an arrest, the individual or entity subject to the order must return the property. (*City of Garden Grove v. Superior Court* (*Kha*) (2007) 157 Cal.App.4th 355, 369, 386, 391.) State law enforcement officers who handle controlled substances in the course of their official duties are immune from liability under the Controlled Substances Act. (21 U.S.C.§ 885, subd. (d).)

IV. GUIDELINES REGARDING COLLECTIVES AND COOPERATIVES

Under the MAUCRSA, medicinal cannabis cooperatives and collectives are required to obtain state licenses to operate as of January 10, 2019.[10] The exceptions to this requirement are: (a) individual patients; and (b) caregiver gardens serving no more than five patients. (Bus. & Prof. Code, § 26033, subd. (b).) Unlicensed cannabis cooperatives and collectives are subject to enforcement action, in addition to criminal sanctions for failure to comply with legal requirements. The following guidelines apply to qualified patients and primary caregivers who come together to collectively or cooperatively cultivate physician-recommended cannabis.

A. Business Forms: Any group that is collectively or cooperatively cultivating and distributing cannabis for medical purposes should be organized and operated in a manner that ensures the security of the crop and safeguards against diversion for non-medical purposes. The following are guidelines to help cooperatives and collectives operate within the law, and to help law enforcement determine whether they are doing so.

1. Statutory Cooperatives: Cannabis cooperatives are subject to the General Corporation Law. (Bus. & Prof. Code, § 26222.5.) A cooperative must file articles of incorporation with the state and conduct its business for the mutual benefit of its members. (Corp. Code, §§ 12201, 12300.) No business may call itself a "cooperative" (or "co- op") unless it is properly organized and registered as such a corporation under the Corporations or Food and Agricultural Code. (Corp. Code, § 12311, subd. (b); Food & Agr. Code, § 54036.) No business may call itself a "cannabis cooperative" unless it is in compliance with the MAUCRSA. (Bus. & Prof. Code, § 26222.2.) Cooperative corporations are "democratically controlled and are not organized to make a profit for themselves,

[10] Pursuant to the MAUCRSA, section 11362.775, which afforded protection to qualified patients and primary caregivers from criminal sanctions for associating with the collective or cooperative, was repealed effective January 9, 2019.

as such, or for their members, as such, but primarily for their members as patrons." (Corp. Code, § 12201.) The earnings and savings of the business must be used for the general welfare of its members or equitably distributed to members in the form of cash, property, credits, or services. (*Ibid.*) Cooperatives must follow strict rules on organization, articles, elections, and distribution of earnings, and must report individual transactions from individual members each year. (See *id.* at § 12200 et seq.) Agricultural cooperatives are likewise nonprofit corporate entities "since they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers." (Food & Agr. Code, § 54033.) Agricultural cooperatives share many characteristics with consumer cooperatives. (See, e.g., *id.* at § 54002 et seq.) Licensed cannabis cooperatives should not purchase cannabis from, or sell to, non-members; instead, they should only provide a means for facilitating or coordinating transactions between members.

2. **Collectives:** California law does not define collectives, but the dictionary defines them as "a business, farm, etc., jointly owned and operated by the members of a group." (*Random House Unabridged Dictionary*; Random House, Inc. © 2019.) Applying this definition, a collective is an organization that facilitates the collaborative efforts of patient and caregiver members– including the allocation of costs and revenues. As such, a collective is not a statutory entity, but as a practical matter it might have to organize as some form of business to carry out its activities. The licensed cannabis collective should not purchase cannabis from, or sell to, non-members; instead, it should only provide a means for facilitating or coordinating transactions between members.

B. Guidelines for the Lawful Operation of a Cooperative or Collective:

As noted above, the protection against criminal sanctions for cannabis collectives and cooperatives ended on January 9, 2019. After that date, any cannabis collectives and cooperatives that continue their operations must have state licenses and comply with any local requirements. (Bus. & Prof. Code, § 26223.) The Bureau of Cannabis Control has published a "Collectives and Cooperatives Fact Sheet" which outlines the legal requirements that must be met for existing collectives and cooperatives to continue to operate. (https://www.bcc.ca.gov/about_us/documents/18-006_collective_faq.pdf). Cannabis collectives or cooperatives must[11]:

1. Only acquire and provide cannabis to members and assure that no cannabis transactions occur with non-members (Bus. & Prof. Code, § 26053);

[11] See generally, Bus. & Prof. Code, §§ 26220-26231.2.

2. Only receive monetary reimbursement from members in an amount necessary to cover overhead costs and operating expenses (e.g., not operate on a for-profit basis) (Bus. & Prof. Code, § 26033, subd. (b));

3. Possess, cultivate, and transport amounts of cannabis that are consistent with the aggregate limits provided for member patients and may be required to produce documentation to support the amounts of cannabis possessed, cultivated, or transported. Specifically, consistent with section 11362.77, they may possess:

a) 8 ounces of dried cannabis per patient;

b) 6 mature plants per patient;

c) 12 immature plants per patient; or

d) An amount of cannabis consistent with the patient's needs as recommended by a physician;

4. Satisfy fire, safety, and building code requirements (Bus. & Prof. Code, §26055);

5. Obtain a seller's permit from the California Department of Tax and Fee Administration[12] (Bus. & Prof. Code, §26051.5, subd. (6); see, Rev. & Tax. Code §§ 6011.1 and 6012.1); and

6. Comply with all applicable local rules and ordinances for operating a cannabis collective or cooperative in that local jurisdiction (Bus. & Prof. Code, §§ 26051.5, 26054, and 26055).

C. Enforcement Guidelines: Depending upon the facts and circumstances, deviations from the guidelines outlined above may give rise to probable cause for arrest and seizure. The following are additional guidelines to help identify cannabis collectives and cooperatives that are operating outside of state law.

1. Storefront Dispensaries: Although medicinal cannabis "dispensaries" have been operating in California for years, dispensaries, as such, are not recognized as cannabis cooperatives or collectives under the law. As noted above, effective January 10, 2019, cannabis collectives and cooperatives engaged in commercial cannabis activity must have either a Type 1 or Type 2 cultivation license issued by the California Department of Food and

[12] Since collectives and cooperatives generally sell cannabis and cannabis products, they engage in retail cannabis sales, must be licensed as such and must collect and pay sales tax. The Cannabis Tax Law provides that any person required to be licensed as a cannabis retailer, cultivator, distributor, and/or manufacturer collect the excise or cultivation tax, and for a person required to be licensed as a distributor, to obtain a permit and pay the taxes to the California Department of Tax and Fee Administration.

Agriculture – CalCannabis Cultivation Licensing to operate in the State. (Bus. & Prof. Code § 26223, subd. (c).) Any unlicensed collective or cooperative engaging in commercial medicinal cannabis storefront activity is operating outside the protections of the MAUCRSA, the CUA, and the MMPA. Since the legalization of recreational adult-use cannabis in January 2018, licensed retail storefronts are permissible, so long as they are in compliance with applicable state and local laws.

2. Indicia of Unlawful Operation: When investigating collectives or cooperatives, law enforcement officers should be alert for signs of mass production or illegal sales, including (a) excessive amounts of cannabis, (b) excessive amounts of cash, (c) failure to follow local and state laws applicable to similar businesses, such as maintenance of any required licenses and payment of any required taxes, including sales taxes, (d) weapons, (e) illicit drugs, (f) purchases from, or sales or distribution to, non-members, or (g) distribution outside of California.