Medical Marijuana Working Group

February 24, 2010, 9:00 a.m. – 12:00 p.m.
CSAC First Floor Conference Room
1100 'K' Street, Sacramento, CA 95814
Conference Call Line: (916) 445-5476

DRAFT AGENDA

Supervisor, Mark Lovelace, Humboldt County, Co-Chair
Supervisor Susan Adams, Marin County, Co- Chair

I. Welcome and Introductions

Supervisor, Mark Lovelace, Humboldt County, Co-Chair
Supervisor Susan Adams, Marin County, Co- Chair

II. Purpose and Scope of Working Group

CSAC Staff

III. Overview: Background, Existing Statutory & Case Law

Jeanine Nadel, Mendocino County Counsel
Peter Krause, Deputy Attorney General, Office of the Attorney General
ATTACHMENT ONE: CSAC Medical Marijuana Memo
ATTACHMENT TWO: LAO Analysis of Proposed Ballot Measure
ATTACHMENT THREE: MMP Guidelines

- *What is the current status of the law?*
  - *Impact of People v Kelly decision*

IV. Work Group Roundtable Discussion

- *What efforts have been tried in other counties and cities?*
  - *How are they working?*
- *What possible changes are on the horizon?*
- *Current legalization efforts*
  - *Tax, Regulate and Control Cannabis Act*

V. Information Needs & Next Steps

- *What other information is needed*
- *Who else needs to be at the table*
- *Future Meetings*
- *Speakers and/or Presentations*

VI. Other Items and Adjournment

Attachment One

CSAC Medical Marijuana Background Memo

1100 K Street
Suite 101
Sacramento
California
95814

Telephone
916.327-7500
Facsimile
916.441.5507

February 17, 2009

To: CSAC Medical Marijuana Working Group
From: Karen Keene, CSAC Senior Legislative Representative
Cara Martinson, CSAC Legislative Analyst

RE: Medical Marijuana Background Information

The CSAC Rural Caucus voted on November 18, 2009 to initiate a forum to discuss county issues related to medical marijuana. CSAC President Tony Oliveira has since created a CSAC Medical Marijuana Work Group to serve as a venue for research and information sharing to help counties navigate the maze of local, state and federal laws and regulations related to medical marijuana.

The Work Group's scope will encompass the legal, social, public safety, public health, and environmental impacts of the medical marijuana issue. This subject spans the entire policy committee framework of CSAC, including revenue and taxation, land use, administration of justice, health and human services, and agriculture and natural resources.

The ultimate goal of the work group would be to enhance and provide "best practices" information about our counties' responsibilities in the regulation of medical marijuana and the location of medical marijuana dispensaries. It is not CSAC's goal to develop policy in this area but simply to help provide resources and create a forum for counties to share information.

I. COUNTY ISSUES

Proposition 215, the Compassionate Use Act of 1996, provides certain legal protections for qualified patients and caregivers that cultivate and use marijuana. Almost immediately following the passage of the ballot measure, local governments faced various legal uncertainties with implementation and regulation related to the legal and illegal usage of medical marijuana. Issues have risen regarding land use and zoning, environmental problems and public safety and law enforcement issues, to name a few.

Nearly all counties have passed local ordinances related to medical marijuana. The majority of these counties have adopted the state limits, set forth in the Medical Marijuana Program Act (SB 420, Chapter 875 of 2003), which state that "a qualified patient or primary caregiver may possess no more than eight ounces of dried marijuana per qualified patient. In addition, a qualified patient or primary caregiver may also maintain no more than six mature or 12 immature marijuana plants per qualified patient."

Despite the direction provided by the Medical Marijuana Program Act, local governments still face the same uncertainties. Issues with medical marijuana dispensaries and collectives remain at the forefront of the issue. Several local governments have begun to impose limits on the total number of dispensaries and collectives that are allowed to operate within their respective jurisdictional limits. In addition, local governments in source areas of the state are facing environmental issues related to the illegal cultivation and production of marijuana, as well as law enforcement issues.

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Suite 101
Sacramento
California
95814

Telephone
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Facsimile
916.441.5507

II. SUMMARY OF APPLICABLE LAW

The following is a brief background summary of applicable state law according to the California Attorney General's Office.

A. Proposition 215 - The Compassionate Use Act of 1996.

Proposition 215 was passed by the voters on November 5, 1996. The initiative decriminalized the cultivation and use of marijuana by seriously ill individuals upon a physician's recommendation.

Specifically, Proposition 215 amended state law to allow persons to grow or possess marijuana for medical use when recommended by a physician. Proposition 215 provides for the use of marijuana when a physician has determined that the person's health would benefit from its use in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or "any other illness for which marijuana provides relief." The measure also allows caregivers to grow and possess marijuana for a person for whom the marijuana is recommended.

Proposition 215 also allows caregivers to grow and possess marijuana for a person for whom the marijuana is recommended.

The measure also states that no physician shall be punished for having recommended marijuana for medical purposes. Furthermore, the measure specifies that it is not intended to overrule any law that prohibits the use of marijuana for nonmedical purposes.

B. Senate Bill 420 - The Medical Marijuana Program Act.

Senate Bill 420 (Chapter 875 of 2003), established the Medical Marijuana Program Act (MMP). The MMP, among other things, requires the California Department of Public Health (DPH) to establish and maintain a program for the voluntary registration of qualified medical marijuana patients and their primary caregivers through a statewide identification card system.

According to the California Attorney General Jerry Brown, medical marijuana identification cards are intended to help law enforcement officers identify and verify that cardholders are able to cultivate, possess, and transport certain amounts of marijuana without being subject to arrest under specific conditions. SB 420 requires that all counties participate in the identification card program by (a) providing applications upon request to individuals seeking to join the identification card program; (b) processing completed applications; (c) maintaining certain records; (d) following state implementation protocols; and (e) issuing DPH identification cards to approved applicants and designated primary caregivers.

Participation by patients and primary caregivers in the identification card program is voluntary. In addition to establishing the identification card program, the MMP also defines certain terms, sets possession guidelines for cardholders, and recognizes a qualified right to collective and cooperative. Specifically, SB 420 states that qualified patients and primary caregivers who possess a state issued identification card may possess 8 oz. of dried marijuana, and may maintain no more than 6 mature or 12 immature plants per qualified

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patient. In addition, the law allows counties and cities to adopt regulations that allow qualified patients or primary caregivers to possess medical marijuana in amounts that exceed the MMP's possession guidelines.

IV. PROPOSED BALLOT INITIATIVE

The Regulate, Control and Tax Cannabis Act of 2010

The Regulate, Control and Tax Cannabis Act of 2010 (Act) would legalize various marijuana activities, including the personal consumption, up to a specified amount for persons age 21 or older. The Act states that persons "generally may possess process or transport up to one ounce of marijuana; cultivate marijuana on private property in an area up to 25 square feet and posses harvested and living marijuana plants; and possess any items or equipment associated with the above activities."

The Act would allow cities and counties to regulate such activities and impose and collect marijuana-related fees and taxes. Specifically, the Act would allow local governments to adopt ordinances and regulations regarding the cultivation, processing, distribution, transportation, sale or possession for sale of marijuana. The Act also permits local governments to impose general, excise, or transfer taxes as well as benefit assessments and fees.

Proponents of the Tax Cannabis Act recently turned in 700,000 signatures, which upon verification of the California Secretary of State will most certainly qualify the initiative to go on the November 2010 ballot. See Attached LAO Analysis for more information.

Attachment Two

LAO Analysis of Proposed Ballot Measure

LAO

65 YEARS OF SERVICE

September 9, 2009

Hon. Edmund G. Brown Jr.
Attorney General
1300 I Street, 17th Floor
Sacramento, California 95814

Attention: Ms. Krystal Paris
Initiative Coordinator

Dear Attorney General Brown:

Pursuant to Elections Code Section 9005, we have reviewed the proposed statutory initiative related to the use, possession, and sale of marijuana (A.G. File No. 09-0024, Amdt. #1-S).

Background

Federal Law. Federal law classifies marijuana as an illegal substance. The Federal Controlled Substances Abuse Act provides criminal sanctions for various activities relating to marijuana. Federal laws are enforced by federal law enforcement agencies that may act independently or in conjunction with state and local law enforcement agencies.

State Law and Proposition 215. Under current state law, the possession, use, transportation, or cultivation of marijuana is generally illegal in California. Penalties for marijuana-related activities vary depending on the offense. For example, under the state Penal Code, possession of less than one ounce of marijuana is a misdemeanor punishable by a fine, while selling marijuana is a felony and may result in a prison sanction.

In November 1996, voters approved Proposition 215, which legalized the cultivation and possession of marijuana in California for medicinal purposes. Notwithstanding this initiative, the U.S. Supreme Court ruled in 2005 that federal authorities could continue to prosecute California patients and providers engaged in the medicinal cultivation and use of marijuana for violations of federal law. However, the U.S. Department of Justice announced in March 2009 that it would no longer prosecute marijuana patients and providers whose actions are consistent with state medical marijuana laws.

Proposal

This measure (1) legalizes various marijuana-related activities, (2) allows local governments to regulate these activities, (3) permits local governments to impose and col-

lect marijuana-related fees and taxes, and (4) authorizes various criminal and civil penalties.

Legalization of Marijuana-Related Activities. Under the measure, persons age 21 or older could engage in "personal consumption" of marijuana. Specifically, personal consumption of marijuana would be permitted in a "non-public place," defined as including a residence or a public establishment licensed for on-site marijuana consumption. The measure states that persons generally may (1) possess, process, or transport up to one ounce of marijuana; (2) cultivate marijuana on private property in an area up to 25 square feet; (3) possess harvested and living marijuana plants cultivated in such an area; and (4) possess any items or equipment associated with the above activities. However, the measure permits local authorities to authorize the possession and cultivation, including commercial production, of larger amounts of marijuana. Under the terms of this measure, the state could also enact laws to allow larger amounts of marijuana, as well as to enact new laws to regulate the commercial production of marijuana. The measure prohibits state and local law enforcement agencies from seizing or destroying marijuana that was possessed, used, or sold in accordance with this measure.

This measure sets forth some limits on marijuana-related activities. It states, for example, that possession of marijuana must be solely for an individual's personal consumption and not for sale, although sales are permitted to individuals in public establishments licensed for marijuana consumption. The measure specifies that smoking of marijuana in the presence of minors or the consumption of marijuana by the operator of a motor vehicle is prohibited. In addition, the measure states that it does not amend various existing statutes related to marijuana, including laws that prohibit driving under the influence of drugs or that prohibit possessing marijuana on the grounds of elementary, middle, and high schools.

Local Government Regulation of Commercial Production and Sale. The measure allows local governments to adopt ordinances and regulations regarding the cultivation, processing, distribution, transportation, sale, or possession for sale of marijuana. For example, local governments would be permitted to license establishments that could sell up to one ounce of marijuana per transaction to persons 21 and older. The measure also authorizes local governments to regulate the location, size, hours of operation, and signs and displays of such establishments.

Individuals could transport marijuana from a licensed marijuana establishment in one locality to a licensed establishment in another locality, regardless of whether any localities in between permitted the commercial production and sale of marijuana. However, the measure does not permit the interstate or international transportation of marijuana.

Imposition and Collection of Taxes and Fees. The measure permits local governments to impose general, excise, or transfer taxes, as well as benefit assessments and

fees, on authorized marijuana-related activities. It specifies that the purpose of such taxes, assessments, and fees is to allow local governments to raise revenue or to offset any costs associated with marijuana regulation. The measure requires that licensed marijuana establishments pay all applicable federal, state, and local taxes and fees currently imposed on other similar businesses.

Authorization of Criminal and Civil Penalties. Under the measure, any individual licensed to engage in an authorized marijuana activity who negligently gives or sells (or offers to give or sell) marijuana to a person under 21 would be banned from owning, operating, or being employed by a licensed marijuana establishment for one year. In addition, the measure specifies that persons age 21 or older who knowingly give (or offer to give) marijuana to persons age 18 through 20 could be sent to county jail for up to six months and fined up to $1,000 per offense. The measure does not change existing criminal statutes involving penalties for furnishing marijuana to minors under the age of 18. Local governments could impose additional penalties or civil fines on certain marijuana activities that were inconsistent with the terms of this measure.

The measure states that no individual could be punished, fined, or discriminated against for engaging in any conduct permitted by the measure. However, it does specify that employers would retain existing rights to address on-the-job consumption of marijuana that affects an employee's job performance.

Fiscal Effects

Although the federal government recently announced that it would no longer prosecute medical marijuana patients and providers whose actions are consistent with Proposition 215, it has continued to enforce its prohibitions on non-medical marijuana activities. To the extent that the federal government continued to enforce existing federal marijuana laws, it would generally have the effect of impeding or eliminating the cultivation, possession, transportation, sale, or use of marijuana permitted by this measure under state law.

Thus, the revenues or expenditures resulting from this measure would be subject to significant uncertainty. The measure could have the following fiscal effects discussed below.

Reduction in State and Local Correctional Costs. The measure could result in significant savings to state and local governments, potentially up to several tens of millions of dollars annually, by reducing the number of marijuana offenders incarcerated in state prisons and county jails. It could also reduce the number of persons placed on county probation or state parole. The county jail savings would be offset to the extent that jail beds no longer needed for marijuana offenders were used for other criminals who are now being released early because of a lack of jail space.

Redirection of Court and Law Enforcement Resources. The measure could result in a major reduction in state and local costs for enforcement of marijuana-related offenses and the handling of related criminal cases in the court system. However, it is likely that state and local governments would redirect some or all of their resources to other law enforcement and court activities, reducing or perhaps eliminating the savings that could otherwise be realized.

Potential Effects on Substance Abuse Program Costs. The measure could result in an increase in the consumption of marijuana, potentially resulting in an unknown increase in the number of individuals seeking publicly funded substance abuse treatment services. For example, the state Drug Medi-Cal Program could incur increased costs of a few million dollars annually. This measure could also have fiscal effects on state- and locally funded drug treatment programs for criminal offenders, such as drug courts. For example, the measure might reduce spending on mandatory treatment for some criminal offenders, or result in the redirection of these funds for other offenders.

Potential Reduction in Medical Marijuana Program. The measure could potentially reduce both the costs and offsetting revenues of the state's Medical Marijuana Program, a patient registry that identifies those individuals eligible under state law to legally purchase and consume marijuana for medical purposes. That is because some adults 21 and over would likely no longer participate in the program to obtain marijuana.

Potential New Revenues From the Legalization of Marijuana. State and local governments could realize additional revenues from sales taxes generated by commercial producers of marijuana. The state could also realize additional income tax revenues from the production and sale of marijuana. In addition, local governments could realize additional revenue from various types of taxes, benefit assessments, and fees on marijuana. The actual level of revenues generated would depend upon the rate of such levies and how the measure changed the consumption and sales price of marijuana. Moreover, the amount of all of the various revenues that could be generated under this measure would depend considerably on the extent to which the federal government enforces its laws against marijuana in California.

Effects on State and Local Fine Revenues. The measure could reduce state and local revenues from the collection of the fines established in current law for marijuana criminal offenders. However, there could be additional fine revenue generated from the new civil and criminal penalties for violators of the measure, such as for selling marijuana commercially without authorization. The net fiscal effect of these changes in fine revenues is unknown.

Summary of Fiscal Effects

Given that the federal government continues to enforce federal marijuana laws that do not conflict with state medical marijuana laws, the revenues and expenditures result-

ing from this measure would be subject to significant uncertainty. We estimate that this measure would have the following major fiscal effects:

- Savings of up to several tens of millions of dollars annually to state and local governments on the costs of incarcerating and supervising certain marijuana offenders.
- Unknown but potentially major tax, fee, and benefit assessment revenues to state and local government related to the production and sale of marijuana products.

Sincerely,

Mac Taylor
Legislative Analyst

Michael C. Genest
Director of Finance

Attachment Three

California Attorney General Medical Marijuana Program Guidelines

EDMUND G. BROWN JR.
Attorney General

DEPARTMENT OF JUSTICE
State of California

GUIDELINES FOR THE SECURITY AND NON-DIVERSION OF MARIJUANA GROWN FOR MEDICAL USE

August 2008

In 1996, California voters approved an initiative that exempted certain patients and their primary caregivers from criminal liability under state law for the possession and cultivation of marijuana. In 2003, the Legislature enacted additional legislation relating to medical marijuana. One of those statutes requires the Attorney General to adopt "guidelines to ensure the security and nondiversion of marijuana grown for medical use." (Health & Saf. Code, § 11362.81(d).[1]) To fulfill this mandate, this Office is issuing the following guidelines to (1) ensure that marijuana grown for medical 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, possess, and use medical marijuana under California law.

I. SUMMARY OF APPLICABLE LAW

A. California Penal Provisions Relating to Marijuana.

The possession, sale, cultivation, or transportation of marijuana is ordinarily a crime under California law. (See, e.g., § 11357 [possession of marijuana is a misdemeanor]; § 11358 [cultivation of marijuana is a felony]; Veh. Code, § 23222 [possession of less than 1 oz. of marijuana while driving is a misdemeanor]; § 11359 [possession with intent to sell any amount of marijuana is a felony]; § 11360 [transporting, selling, or giving away marijuana in California is a felony; under 28.5 grams is a misdemeanor]; § 11361 [selling or distributing marijuana to minors, or using a minor to transport, sell, or give away marijuana, is a felony].)

B. Proposition 215 - The Compassionate Use Act of 1996.

On November 5, 1996, California voters passed Proposition 215, which decriminalized the cultivation and use of marijuana by seriously ill individuals upon a physician's recommendation. (§ 11362.5.) Proposition 215 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," and to "ensure that patients and their primary caregivers who obtain and use marijuana for

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

medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction." (§ 11362.5(b)(1)(A)-(B).)

The Act further 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 verbal recommendation or approval of a physician." (§ 11362.5(d).) Courts have found an implied defense to the transportation of medical marijuana when the "quantity transported and the method, timing and distance of the transportation are reasonably related to the patient's current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1551.)

C. Senate Bill 420 - The Medical Marijuana Program Act.

On January 1, 2004, Senate Bill 420, the Medical Marijuana Program Act (MMP), became law. (§§ 11362.7-11362.83.) The MMP, among other things, requires the California Department of Public Health (DPH) to establish and maintain a program for the voluntary registration of qualified medical marijuana patients and their primary caregivers through a statewide identification card system. Medical marijuana identification cards are intended to help law enforcement officers identify and verify that cardholders are able to cultivate, possess, and transport certain amounts of marijuana without being subject to arrest under specific conditions. (§§ 11362.71(e), 11362.78.)

It is mandatory that all counties participate in the identification card program by (a) providing applications upon request to individuals seeking to join the identification card program; (b) processing completed applications; (c) maintaining certain records; (d) following state implementation protocols; and (e) issuing DPH identification cards to approved applicants and designated primary caregivers. (§ 11362.71(b).)

Participation by patients and primary caregivers in the identification card program is voluntary. However, because identification cards offer the holder protection from arrest, are issued only after verification of the cardholder's status as a qualified patient or primary caregiver, and are immediately verifiable online or via telephone, they represent one of the best ways to ensure the security and non-diversion of marijuana grown for medical use.

In addition to establishing the identification card program, the MMP also defines certain terms, sets possession guidelines for cardholders, and recognizes a qualified right to collective and cooperative cultivation of medical marijuana. (§§ 11362.7, 11362.77, 11362.775.)

D. Taxability of Medical Marijuana Transactions.

In February 2007, the California State Board of Equalization (BOE) 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. BOE 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.)

E. Medical Board of California.

The Medical Board of California licenses, investigates, and disciplines California physicians. (Bus. & Prof. Code, § 2000, et seq.) Although state law prohibits punishing a physician simply for recommending marijuana for treatment of a serious medical condition (§ 11362.5(c)), the Medical Board can and does take disciplinary action against physicians who fail to comply with accepted medical standards when recommending marijuana. In a May 13, 2004 press release, the Medical Board clarified that these accepted standards are the same ones that a reasonable and prudent physician would follow when recommending or approving any medication. They include the following:

1. Taking a history and conducting a good faith examination of the patient;
2. Developing a treatment plan with objectives;
3. Providing informed consent, including discussion of side effects;
4. Periodically reviewing the treatment's efficacy;
5. Consultations, as necessary; and
6. Keeping proper records supporting the decision to recommend the use of medical marijuana.

(http://www.mbc.ca.gov/board/media/releases_2004_05-13_marijuana.html.)

Complaints about physicians should be addressed to the Medical Board (1-800-633-2322 or www.mbc.ca.gov), which investigates and prosecutes alleged licensing violations in conjunction with the Attorney General's Office.

F. The Federal Controlled Substances Act.

Adopted in 1970, the Controlled Substances Act (CSA) established a federal regulatory system designed to combat recreational drug abuse by making it unlawful to manufacture, distribute, dispense, or possess any controlled substance. (21 U.S.C. § 801, et seq.; *Gonzales v. Oregon* (2006) 546 U.S. 243, 271-273.) The CSA reflects the federal government's view that marijuana is a drug with "no currently accepted medical use." (21 U.S.C. § 812(b)(1).) Accordingly, the manufacture, distribution, or possession of marijuana is a federal criminal offense. (*Id.* at §§ 841(a)(1), 844(a).)

The incongruity between federal and state law has given rise to understandable confusion, but no legal conflict exists merely because state law and federal law treat marijuana differently. Indeed, California's medical marijuana laws have been challenged unsuccessfully in court on the ground that they are preempted by the CSA. (*County of San Diego v. San Diego NORML* (July 31, 2008) --- Cal.Rptr.3d ---, 2008 WL 2930117.) Congress has provided that states are free to regulate in the area of controlled substances, including marijuana, provided that state law does not positively conflict with the CSA. (21 U.S.C. § 903.) Neither Proposition 215, nor the MMP, conflict with the CSA because, in adopting these laws, California did not "legalize" medical marijuana, but instead exercised the state's reserved powers to not punish certain marijuana 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.)

In light of California's decision to remove the use and cultivation of physician-recommended marijuana from the scope of the state's drug laws, this Office recommends that state and local law enforcement officers not arrest individuals or seize marijuana under federal law when the officer determines from the facts available that the cultivation, possession, or transportation is permitted under California's medical marijuana laws.

II. DEFINITIONS

A. **Physician's Recommendation:** Physicians may not prescribe marijuana because the federal Food and Drug Administration regulates prescription drugs and, under the CSA, marijuana is a Schedule I drug, meaning that it has no recognized medical use. Physicians may, however, lawfully issue a verbal or written recommendation under California law indicating that marijuana would be a beneficial treatment for a serious medical condition. (§ 11362.5(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(e).) California courts have emphasized the consistency element 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 marijuana does not automatically become the party "who has consistently assumed responsibility for the housing, health, or safety" of that purchaser. (*People ex rel. Lungren v. Peron* (1997) 59 Cal.App.4th 1383, 1390, 1400.) A person may serve as primary caregiver to "more than one" patient, provided that the patients and caregiver all reside in the same city or county. (§ 11362.7(d)(2).) Primary caregivers also may receive certain compensation for their services. (§ 11362.765(c) ["A primary caregiver who receives compensation for actual expenses, including reasonable compensation incurred for services provided . . . to enable [a patient] to use marijuana under this article, or for payment for out-of-pocket expenses incurred in providing those services, or both, . . . shall not, on the sole basis of that fact, be subject to prosecution" for possessing or transporting marijuana].)

C. **Qualified Patient:** A qualified patient is a person whose physician has recommended the use of marijuana to treat a serious illness, including cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief. (§ 11362.5(b)(1)(A).)

D. **Recommending Physician:** A recommending 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 May 13, 2004 press release) that a reasonable and prudent physician would follow when recommending or approving medical marijuana for the treatment of his or her patient.

III. GUIDELINES REGARDING INDIVIDUAL QUALIFIED PATIENTS AND PRIMARY CAREGIVERS

A. State Law Compliance Guidelines.

1. **Physician Recommendation**: Patients must have a written or verbal recommendation for medical marijuana from a licensed physician. (§ 11362.5(d).)

2. **State of California Medical Marijuana Identification Card**: Under the MMP, qualified patients and their primary caregivers may voluntarily apply for a card issued by DPH identifying them as a person who is authorized to use, possess, or transport marijuana grown 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(a); 11362.735(a)(3)-(4); 11362.745.)

3. Proof of Qualified Patient Status: Although verbal recommendations are technically permitted under Proposition 215, patients should obtain and carry written proof of their physician recommendations to help them avoid arrest. A state identification card is the best form of proof, because it is easily verifiable and provides immunity from arrest 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) **MMP**:[2] Qualified patients and primary caregivers who possess a state-issued identification card may possess 8 oz. of dried marijuana, and may maintain no more than 6 mature or 12 immature plants per qualified patient. (§ 11362.77(a).) But, if "a qualified patient or primary caregiver has a doctor's recommendation that this quantity does not meet the qualified patient's medical needs, the qualified patient or primary caregiver may possess an amount of marijuana consistent with the patient's needs." (§ 11362.77(b).) Only the dried mature processed flowers or buds of the female cannabis plant should be considered when determining allowable quantities of medical marijuana for purposes of the MMP. (§ 11362.77(d).)

b) **Local Possession Guidelines:** Counties and cities may adopt regulations that allow qualified patients or primary caregivers to possess

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[2] On May 22, 2008, California's Second District Court of Appeal severed Health & Safety Code § 11362.77 from the MMP on the ground that the statute's possession guidelines were an unconstitutional amendment of Proposition 215, which does not quantify the marijuana a patient may possess. (See *People v. Kelly* (2008) 163 Cal.App.4th 124, 77 Cal.Rptr.3d 390.) The Third District Court of Appeal recently reached a similar conclusion in *People v. Phomphakdy* (July 31, 2008) --- Cal.Rptr.3d ---, 2008 WL 2931369. The California Supreme Court has granted review in *Kelly* and the Attorney General intends to seek review in *Phomphakdy*.

medical marijuana in amounts that exceed the MMP's possession guidelines. (§ 11362.77(c).)

c) **Proposition 215**: Qualified patients claiming protection under Proposition 215 may possess an amount of marijuana that is "reasonably related to [their] current medical needs." (*People v. Trippet* (1997) 56 Cal.App.4th 1532, 1549.)

B. **Enforcement Guidelines.**

1. **Location of Use**: Medical marijuana may not be smoked (a) where smoking is prohibited by law, (b) at or within 1000 feet of a school, recreation center, or youth center (unless the medical use occurs within a residence), (c) on a school bus, or (d) in a moving motor vehicle or boat. (§ 11362.79.)

2. **Use of Medical Marijuana in the Workplace or at Correctional Facilities:** The medical use of marijuana need not be accommodated in the workplace, during work hours, or at any jail, correctional facility, or other penal institution. (§ 11362.785(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 marijuana use].)

3. **Criminal Defendants, Probationers, and Parolees:** Criminal defendants and probationers may request court approval to use medical marijuana 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 medical marijuana 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 Proposition 215 or the MMP and he or she possesses a state medical marijuana 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 DPH'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 marijuana should not be seized. Under the MMP, "no person or designated primary caregiver in possession of a valid state medical marijuana identification card shall be subject to arrest for possession, transportation, delivery, or cultivation of medical marijuana." (§ 11362.71(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 claims protection under Proposition 215 or the MMP and only has a locally-issued (i.e., non-state) patient identification card, or a written (or verbal) recommendation from a licensed physician, officers should use their sound professional judgment to assess the validity of the person's medical-use claim:

a) Officers need not abandon their search or investigation. The standard search and seizure rules apply to the enforcement of marijuana-related violations. Reasonable suspicion is required for detention, while probable cause is required for search, seizure, and arrest.

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 medical-use claim is valid based upon the totality of the circumstances (including the quantity of marijuana, 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 marijuana should not be seized.

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

e) Officers are not obligated to accept a person's claim of having a verbal physician's 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 medical marijuana documentation, but exceeds the applicable possession guidelines identified above, all marijuana may be seized.

7. **Return of Seized Medical Marijuana:** If a person whose marijuana is seized by law enforcement successfully establishes a medical marijuana defense in court, or the case is not prosecuted, he or she may file a motion for return of the marijuana. If a court grants the motion and orders the return of marijuana seized incident to an arrest, the individual or entity subject to the order must return the property. State law enforcement officers who handle controlled substances in the course of their official duties are immune from liability under the CSA. (21 U.S.C. § 885(d).) Once the marijuana is returned, federal authorities are free to exercise jurisdiction over it. (21 U.S.C. §§ 812(c)(10), 844(a); *City of Garden Grove v. Superior Court* (*Kha*) (2007) 157 Cal.App.4th 355, 369, 386, 391.)

IV. GUIDELINES REGARDING COLLECTIVES AND COOPERATIVES

Under California law, medical marijuana patients and primary caregivers may "associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes." (§ 11362.775.) The following guidelines are meant to apply to qualified patients and primary caregivers who come together to collectively or cooperatively cultivate physician-recommended marijuana.

A. Business Forms: Any group that is collectively or cooperatively cultivating and distributing marijuana 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:** 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. (*Id.* at § 12311(b).) Cooperative corporations are "democratically controlled and are not organized to make a profit for themselves, as such, or for their members, as such, but primarily for their members as patrons." (*Id.* at § 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 & Agric. Code, § 54033.) Agricultural cooperatives share many characteristics with consumer cooperatives. (See, e.g., *id.* at § 54002, et seq.) Cooperatives should not purchase marijuana 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. © 2006.) Applying this definition, a collective should be an organization that merely 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 collective should not purchase marijuana 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:** Collectives and cooperatives should be organized with sufficient structure to ensure security, non-diversion of marijuana to illicit markets, and compliance with all state and local laws. The following are some suggested guidelines and practices for operating collective growing operations to help ensure lawful operation.

1. **Non-Profit Operation**: Nothing in Proposition 215 or the MMP authorizes collectives, cooperatives, or individuals to profit from the sale or distribution of marijuana. (See, e.g., § 11362.765(a) ["nothing in this section shall authorize . . . any individual or group to cultivate or distribute marijuana for profit"].

2. **Business Licenses, Sales Tax, and Seller's Permits**: The State Board of Equalization has determined that medical marijuana transactions are subject to sales tax, regardless of whether the individual or group makes a profit, and those engaging in transactions involving medical marijuana must obtain a Seller's Permit. Some cities and counties also require dispensing collectives and cooperatives to obtain business licenses.

3. **Membership Application and Verification**: When a patient or primary caregiver wishes to join a collective or cooperative, the group can help prevent the diversion of marijuana for non-medical use by having potential members complete a written membership application. The following application guidelines should be followed to help ensure that marijuana grown for medical use is not diverted to illicit markets:

a) Verify the individual's status as a qualified patient or primary caregiver. Unless he or she has a valid state medical marijuana identification card, this should involve personal contact with the recommending physician (or his or her agent), verification of the physician's identity, as well as his or her state licensing status. Verification of primary caregiver status should include contact with the qualified patient, as well as validation of the patient's recommendation. Copies should be made of the physician's recommendation or identification card, if any;

b) Have the individual agree not to distribute marijuana to non-members;

c) Have the individual agree not to use the marijuana for other than medical purposes;

d) Maintain membership records on-site or have them reasonably available;

e) Track when members' medical marijuana recommendation and/or identification cards expire; and

f) Enforce conditions of membership by excluding members whose identification card or physician recommendation are invalid or have expired, or who are caught diverting marijuana for non-medical use.

4. **Collectives Should Acquire, Possess, and Distribute Only Lawfully Cultivated Marijuana**: Collectives and cooperatives should acquire marijuana only from their constituent members, because only marijuana grown by a qualified patient or his or her primary caregiver may lawfully be transported by, or distributed to, other members of a collective or cooperative. (§§ 11362.765, 11362.775.) The collective or cooperative may then allocate it to other members of the group. Nothing allows marijuana to be purchased from outside the collective or cooperative for distribution to its members. Instead, the cycle should be a closed-circuit of marijuana cultivation and consumption with no purchases or sales to or from non-members. To help prevent diversion of medical marijuana to non-medical markets, collectives and cooperatives should document each member's contribution of labor, resources, or money to the enterprise. They also should track and record the source of their marijuana.

5. **Distribution and Sales to Non-Members are Prohibited**: State law allows primary caregivers to be reimbursed for certain services (including marijuana cultivation), but nothing allows individuals or groups to sell or distribute marijuana to non-members. Accordingly, a collective or cooperative may not distribute medical marijuana to any person who is not a member in good standing of the organization. A dispensing collective or cooperative may credit its members for marijuana they provide to the collective, which it may then allocate to other members. (§ 11362.765(c).) Members also may reimburse the collective or cooperative for marijuana that has been allocated to them. Any monetary reimbursement that members provide to the collective or cooperative should only be an amount necessary to cover overhead costs and operating expenses.

6. **Permissible Reimbursements and Allocations:** Marijuana grown at a collective or cooperative for medical purposes may be:

a) Provided free to qualified patients and primary caregivers who are members of the collective or cooperative;
b) Provided in exchange for services rendered to the entity;
c) Allocated based on fees that are reasonably calculated to cover overhead costs and operating expenses; or
d) Any combination of the above.

7. **Possession and Cultivation Guidelines**: If a person is acting as primary caregiver to more than one patient under section 11362.7(d)(2), he or she may aggregate the possession and cultivation limits for each patient. For example, applying the MMP's basic possession guidelines, if a caregiver is responsible for three patients, he or she may possess up to 24 oz. of marijuana (8 oz. per patient) and may grow 18 mature or 36 immature plants. Similarly, collectives and cooperatives may cultivate and transport marijuana in aggregate amounts tied to its membership numbers. Any patient or primary caregiver exceeding individual possession guidelines should have supporting records readily available when:

a) Operating a location for cultivation;
b) Transporting the group's medical marijuana; and
c) Operating a location for distribution to members of the collective or cooperative.

8. **Security**: Collectives and cooperatives should provide adequate security to ensure that patients are safe and that the surrounding homes or businesses are not negatively impacted by nuisance activity such as loitering or crime. Further, to maintain security, prevent fraud, and deter robberies, collectives and cooperatives should keep accurate records and follow accepted cash handling practices, including regular bank runs and cash drops, and maintain a general ledger of cash transactions.

C. **Enforcement Guidelines**: Depending upon the facts and circumstances, deviations from the guidelines outlined above, or other indicia that marijuana is not for medical use, may give rise to probable cause for arrest and seizure. The following are additional guidelines to help identify medical marijuana collectives and cooperatives that are operating outside of state law.

1. **Storefront Dispensaries:** Although medical marijuana "dispensaries" have been operating in California for years, dispensaries, as such, are not recognized under the law. As noted above, the only recognized group entities are cooperatives and collectives. (§ 11362.775.) It is the opinion of this Office that a properly organized and operated collective or cooperative that dispenses medical marijuana through a storefront may be lawful under California law, but that dispensaries that do not substantially comply with the guidelines set forth in sections IV(A) and (B), above, are likely operating outside the protections of Proposition 215 and the MMP, and that the individuals operating such entities may be subject to arrest and criminal prosecution under California law. For example, dispensaries that merely require patients to complete a form summarily designating the business owner as their primary caregiver – and then offering marijuana in exchange for cash "donations" – are likely unlawful. (*Peron*, *supra*, 59 Cal.App.4th at p. 1400 [cannabis club owner was not the primary caregiver to thousands of patients where he did not consistently assume responsibility for their housing, health, or safety].)

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 marijuana, (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.