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# 2017 CANNABIS LICENSING & REGULATORY UPDATE

San Joaquin Valley Regional Association of California Counties  
November 2, 2017



# The Ogden & Cole Memos

Ogden Memo - Issued by the U.S Department of Justice, Obama Administration, October 19, 2009

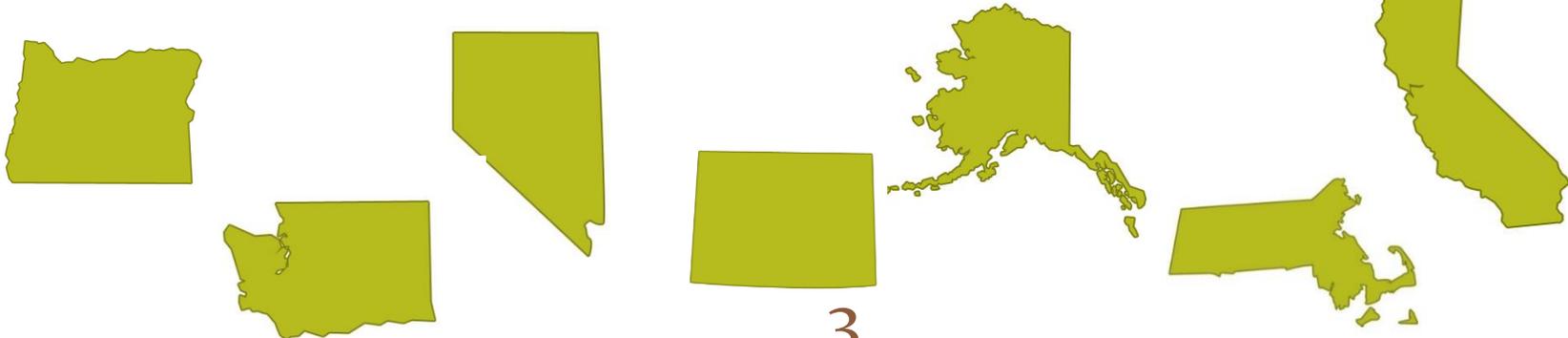
- “As a general matter, pursuit of these priorities [prosecuting illegal drug traffickers] should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”

Cole Memo - Issued by the U.S Department of Justice, Obama Administration, August 29, 2013

- Prompted by passage of Amendment 64 in Colorado and Initiative 205 in Washington
- Outlines U.S. Department of Justice criteria for state regulatory systems in order to receive low-priority status in federal marijuana enforcement – including preventing diversion of marijuana into the black market, distribution to minors, associated criminal activities, etc.

# There is a New Sheriff in Town

- President Trump's position? Attorney General Jeff Session's position?
  - Indications are that the Trump Administration will continue current federal policy with respect to "medical" cannabis.
  - Unclear on how federal enforcement would/could occur in states that have sanctioned "adult-use" cannabis
  - Rohrabacher Amendment (federal budget rider) prohibits the Department of Justice from spending federal dollars to prosecute individuals acting in compliance with state medical marijuana laws. (U.S v. McIntosh (9th Cir. 2016) 833 F.3d 1163.) Currently in force through December 8, 2017. Mr. Sessions has requested that this provision not be included in future budget bills.
  - Mr. Sessions recently sent letters to several Western state Governors indicating that he intends to strictly interpret the criteria outlined in the Cole memo.



# Proposition 64 (Adult Use of Marijuana Act)

- In November, the voters enacted Proposition 64 which:
  - Allows persons age 21 or older to possess, process, share or transport no more than one ounce of marijuana for personal consumption and not for sale
  - Allows persons to cultivate, on private property no more than 6 marijuana plants for personal consumption
  - Provides local governments the option and ability to regulate, control, permit, license, and tax activities surrounding the use, cultivation and sale of marijuana
  - Authorizes resentencing and destruction of records for prior cannabis convictions
  - Establishes packaging, labeling, advertising, and marketing standards and restrictions for cannabis products
  - Permits use in a private home or at a business licensed for on-site cannabis consumption
- **Proposition 64's proposed regulatory scheme is, for the most part, congruent with the Medical Cannabis Regulation and Safety Act enacted in 2015 by the Legislature**

# Proposition 64 (Adult Use of Marijuana Act)

- Personal Cultivation and Local Control
  - Permits an individual to grow up to 6 plants within a single private residence, or accessory structure to a private residence
  - Prohibits local governments from banning individuals from engaging in personal cultivation
- Defines “private residence” as a house, an apartment unit, a mobile home, and other similar dwelling



Health & Safety Code 11362.2

# Proposition 64 (Adult Use of Marijuana Act)

- However...
  - Proposition 64 authorizes local governments to ban outdoor personal cultivation and/or establish “**reasonable regulations**” for indoor personal cultivation
  - Scope of “reasonable” regulation (for six plant indoor cultivation) already subject to litigation. (*Harris v. City of Fontana*, San Bernardino County Superior Court Case No. CIVDS1710589, filed Jun. 5, 2017.) Challenged provisions include:
    - Permit requirement (and \$400+ fee)
    - Notarized landlord consent
    - Home inspection
    - Criminal background check
    - Persons with certain felony convictions prohibited from cultivating



Health & Safety Code 11362.2



# Key Local Control Provisions in SB 94

26055 (d) Licensing authorities shall not approve an application for a state license under this division if approval of the state license will violate the provisions of any local ordinance or regulation adopted in accordance with Section 26200.

Business & Professions Code 26055 (d)

# Key Local Control Provisions in SB 94

26200. (a)(1) This division shall not be interpreted to supersede or limit the authority of a local jurisdiction to adopt and enforce local ordinances to regulate businesses licensed under this division, including, but not limited to, local zoning and land use requirements, business license requirements, and requirements related to reducing exposure to secondhand smoke, or to completely prohibit the establishment or operation of one or more types of businesses licensed under this division within the local jurisdiction.

(2) This division shall not be interpreted to supersede or limit existing local authority for law enforcement activity, enforcement of local zoning requirements or local ordinances, or enforcement of local license, permit, or other authorization requirements.

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(e) This division does not prohibit the issuance of a state temporary event license to a licensee authorizing onsite cannabis sales to, and consumption by, persons 21 years of age or older at a county fair or district agricultural association event, provided that the activities, at a minimum, comply with the requirements of paragraphs (1) to (3), inclusive, of subdivision (g), that all participants are licensed under this division, and that the activities are otherwise consistent with regulations promulgated and adopted by the bureau governing state temporary event licenses. These temporary event licenses shall only be issued in local jurisdictions that authorize such events.

(f) This division, or any regulations promulgated thereunder, shall not be deemed to limit the authority or remedies of a city, county, or city and county under any provision of law, including, but not limited to, Section 7 of Article XI of the California Constitution.

# Key Aspects in SB 94

## Ending the Collective Model – Strict Licensing Scheme

- “All commercial cannabis activity shall be conducted between licensees, except as otherwise provided in this division.”
- Health and Safety Code 11362.775 (providing for marijuana collectives and cooperatives) is repealed, effective one year after state licensing authorities begin issuing commercial cannabis licenses.

Business & Professions Code 26053/Health & Safety Code 11362.775(e)

# Key Aspects of SB 94

## Temporary CEQA Exemption

- The trailer bill enacts a temporary CEQA exemption (through July 1, 2019) for the adoption of local ordinances that regulate commercial cannabis facilities through discretionary permits.



Business & Professions Code 26055(h)

# SB 94 & AB 133 – State Verification of Local Approval

- Like AUMA, SB 94 does not require that applicants for state licenses must first obtain a local permit.

However . . .

- SB 94 includes a communication process between State licensing agencies and local jurisdictions to ensure that only locally-approved facilities receive State licenses:
  - 1) Each jurisdiction must send a copy of their commercial cannabis ordinance (if any) to the Bureau of Cannabis Control. State license applications in jurisdictions whose ordinances ban that type of cannabis activity must be denied.
  - 2) In all other cases, the state licensing agency would send notification to the local jurisdiction. The local jurisdiction would have 60 business days to respond (positively or negatively). If the local jurisdiction responds that the applicant is not in compliance with local ordinances, the state license will be denied.
  - 3) If the local jurisdiction does not respond within 60 business days, the State may presume that the applicant complies with local ordinances and can proceed with the licensing process. This will not preclude the local jurisdiction from subsequently taking enforcement action if the applicant/licensee does not, in fact, comply.

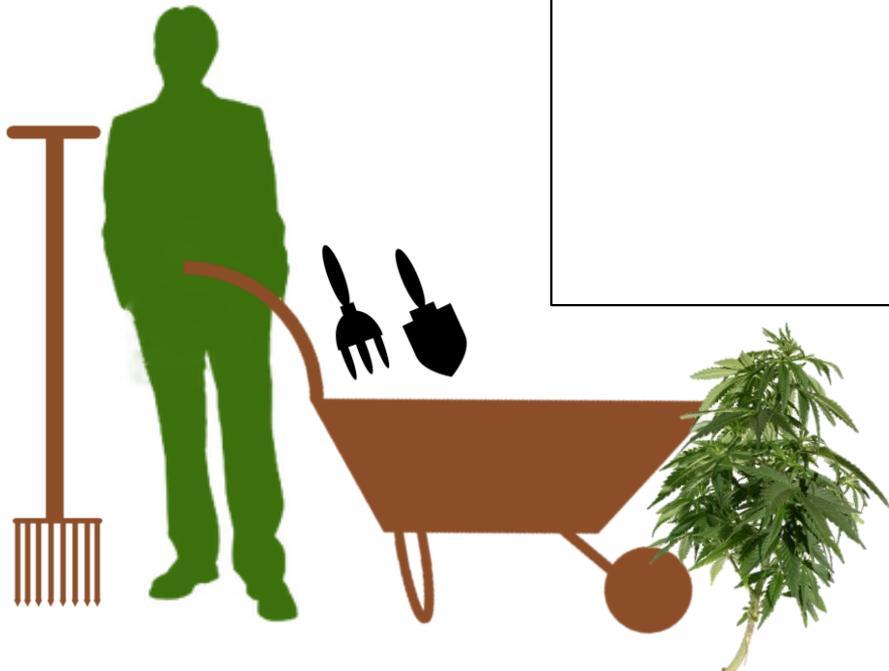
# AB 133 (2017 Cannabis Trailer Bill II)

Second set of cannabis regulatory statues proposed late in the 2017 Legislative Session – Sponsored by the Administration

- Revises the State Verification of Local Approval process in cases where the applicant provides a state licensing authority with a copy of an apparently valid local permit.
- In those cases, the state will presume the applicant is in compliance with local ordinance and proceed with the state licensing process. The local jurisdiction will be notified, but the state need not wait for any response.
- Local jurisdiction may notify the state that the applicant is not in compliance at any time. However, there is no accompanying provisions to have a state license revoked.
- AB 133 does not impact the local jurisdiction's enforcement of its own ordinances.

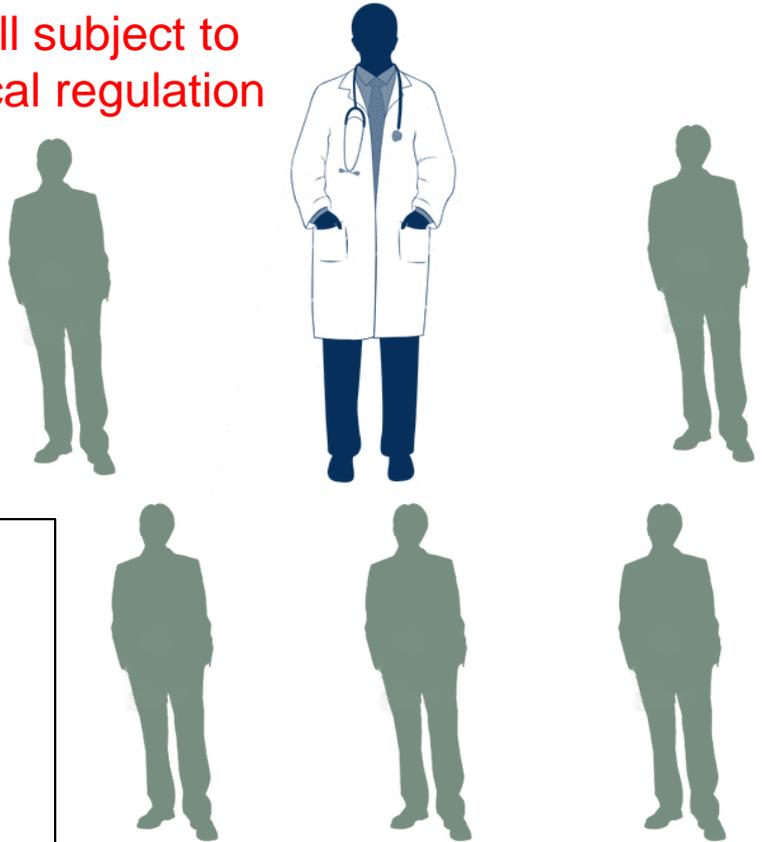
# Key Aspects of the Cannabis Regulatory Scheme

## State Licensure Exemptions



Personal Grows Exemption

Still subject to local regulation



Patient Caregivers Exemption

Business & Professions Code 26033

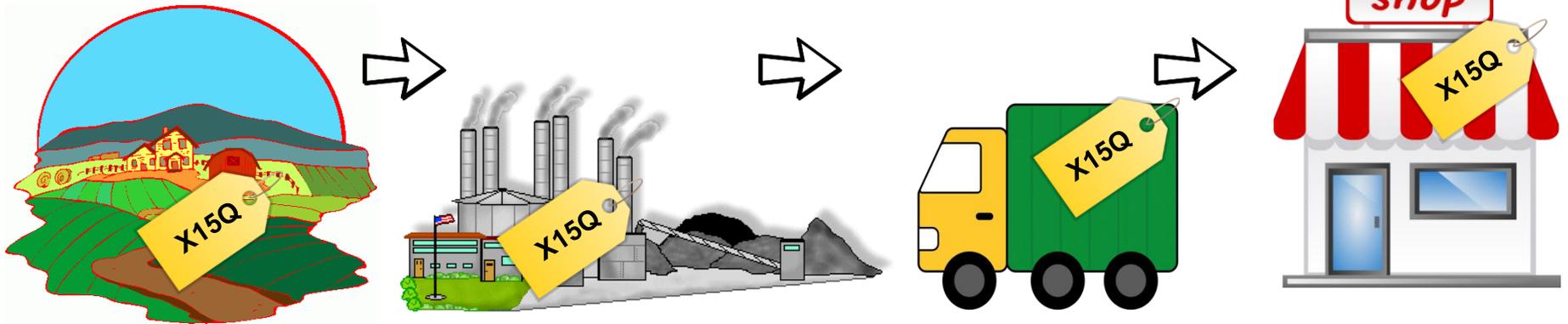


# Timelines and Priorities

- No requirement that local jurisdictions have permitting program in place by 2018.
- Temporary state licenses are likely to be issued for locally-permitted applicants after January 1, 2018 and be valid through January 1, 2019
- Likely to begin accepting permanent licensing applications later in the year with first licenses issued 6-12 months later
- State agencies shall give priority in issuing state licenses for applicants operating in compliance with the Compassionate Use Act before September 1, 2016



# Track & Trace Requirement



- All plants must be tagged with unique identifier
- Data subject to inspection at all times
- Minimize inversion and diversion
- Helpful tool for tax and fee collection

Business & Professions Code 26067-26069.9

# State/Local Enforcement - Cultivation

- Requires indoor and outdoor cultivation of cannabis to be conducted in accordance with state and local laws. (Business & Professions Code 26060)
- Designates state agencies as the primary enforcement agencies when addressing environmental impacts, but requires those agencies to coordinate, when appropriate, with local agencies and local law enforcement in enforcement efforts. (Business & Professions Code 26066)
- Authorizes the California Department of Food & Agriculture to enter into cooperative agreements with county agricultural commissioners to administer, investigate, inspect, and license medical cannabis cultivation. (Business & Professions Code 26069.1)



# Enforcement Options and Concerns

- Many rural counties face difficulty enforcing cultivation ordinances – too many non-compliant grows, not enough resources.
- Criminal (misdemeanor) enforcement of cultivation ordinances potentially problematic after *Kirby v. County of Fresno* (2015) 242 Cal.App.4th 940.
- Administrative abatement is often the most effective tool. Successful ordinances can include an efficient hearing process that allows rapid action to remove violations, while still providing due process of law.
- Many jurisdictions also impose administrative penalties for cannabis ordinance violations.
- Jurisdictions with an active and unified growers' organization have sometimes found success in developing self-policing efforts.

# Cities Could Have Regulatory Function

For facilities issued a state license that are located within the incorporated area of a city, the city shall have full power and authority to enforce this division and the regulations promulgated by the bureau or any licensing authority, if delegated by the state. Notwithstanding Sections 101375, 101400, and 101405 of the Health and Safety Code or any contract entered into pursuant thereto, or any other law, the city shall assume complete responsibility for any regulatory function pursuant to this division within the city limits that would otherwise be performed by the county or any county officer or employee, including a county health officer, without liability, cost, or expense to the county.

Business & Professions Code 26200(d)

# Mobile Deliveries

- Mobile deliveries must originate from a licensed retailer or microbusiness.
- Deliveries must be “in compliance with . . . local law as adopted under Section 26200.”
- Local governments cannot “prevent delivery of cannabis . . . on public roads.” (Business & Professions Code 26090)



Licensed deliveries must be made in response to a specific "delivery request" (i.e., no roaming mobile vending)

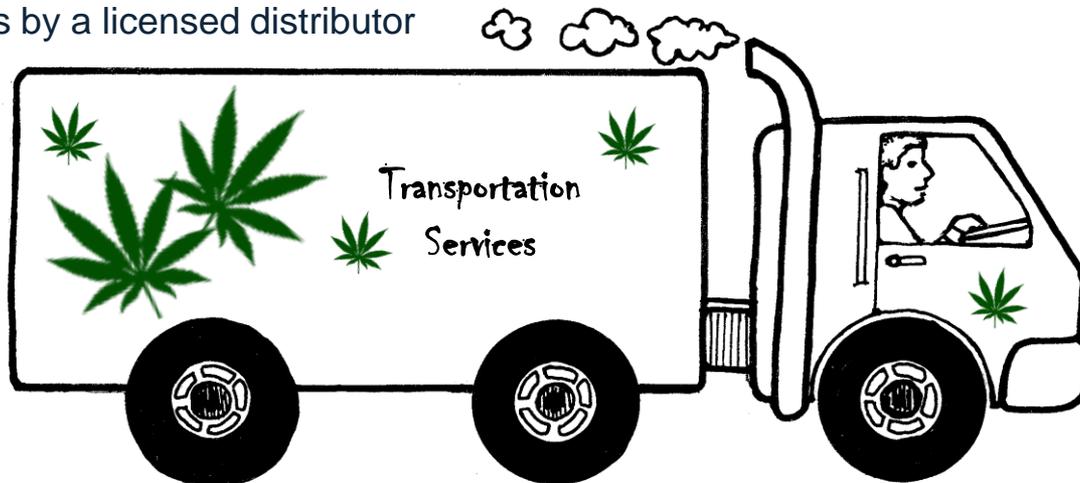
Growing consensus that local jurisdictions can ban deliveries occurring within their boundaries

# Proposed Medical Cannabis Regulatory Package

- Draft regulations for medical cannabis from all three licensing agencies were released on April 28, 2017.
- Regulations were withdrawn once SB 94 was signed into law.
- New emergency regulations (for both medical and adult use) will be put forth in late Fall.

# Transport Requirements

- Authorizes limited marijuana transport between licensees
- Only licensed distributors may transport between licensed cannabis facilities
- Provides that licensed distributors be bonded and insured
- Requires the Bureau to establish minimum security requirements for the commercial transportation, storage, and delivery of cannabis and cannabis-related products
- Requires licensed distributors to complete and maintain electronic shipping manifest as prescribed by the Bureau
- Prohibits a local government from preventing the transportation of cannabis and related products on public roads by a licensed distributor



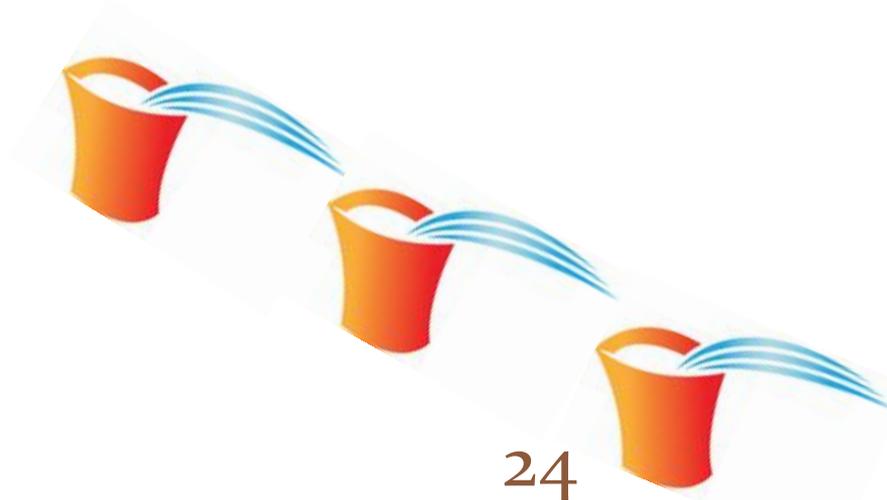
# State Tax Aspects of Proposition 64

- Imposes a State 15% excise tax @ retail - Referenced in Revenue & Taxation Code 34011 (a)
- No sales & use tax on medical cannabis; to qualify, patient must present county-issued medical identification card - Referenced in Revenue & Taxation Code 34011 (g)
- State cultivation tax: Flowers: \$9.25 per ounce/Leaves: \$2.75 per ounce - Referenced in Revenue & Taxation Code 34012
- Taxes will be collected by distributors from cultivation, retailer, and manufacturer licensees, and remitted to Department of Tax & Fee Administration (CDTFA)
- CDTFA:
  - Receives & administers
  - Can make adjustment
  - Use tax stamps
  - Link to track & trace
  - Personal cultivation and caregiver exemption
  - Paid quarterly
  - Effective January 1, 2018
  - May require licensees to have security requirements for tax liabilities



# State Tax Aspects of Proposition 64

- Proceeds from taxes placed in Marijuana Tax Fund
  - Administration, then:
  - 60% = Youth-related use
  - 20% = Environment-related
  - 20% = Local government & California Highway Patrol (local grants in this category are limited to jurisdictions that do not ban outdoor cultivation or retail sale)
- Legislature can change tax distribution formula after July 1, 2028



# Industrial Hemp



- Proposition 64 also decriminalizes and regulates cultivation of industrial hemp under state law.
- “Industrial hemp” consists of “the plant *Cannabis sativa* L. having no more than three-tenths of 1 percent tetrahydrocannabinol (THC) . . .”
- State regulatory program for industrial hemp is completely separate from other commercial cannabis laws and regulations.
- Industrial hemp cultivators will be required to register with the County Agricultural Commissioner. Other details of the state regulatory program remain under development by the California Department of Food & Agriculture Advisory Board.
- State law does not appear to pre-empt additional local regulations (or bans) of industrial hemp cultivation.
- Cultivation of industrial hemp remains largely illegal under federal law. (2014 federal Farm Bill - 7 U.S.C. § 5940 - legalized cultivation of industrial hemp for research purposes by qualifying institutions, but commercial cultivation by private parties remains prohibited by the Controlled Substances Act.)