

## **RESPONSES TO OLSON, HAGEL AND FISHBURN CRITICISMS OF JANUARY 6 DRAFT OF THE REPORT**

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On January 6, 2016, Rachel Barry, first author of the report, provided drafts of the report to several individuals and organizations that support marijuana legalization and requested feedback to help us make the report as accurate as possible. On Saturday, January 30, 2016 (after the embargoed UCSF press release on the report was issued) we received an email transmitting a letter dated January 29, 2016 from the law firm of Olson, Hagel, and Fishburn, which represents the advocates for the AUMA initiative that contained detailed criticisms of the draft report. This memo reproduces their criticisms (in italics) and our responses.

The criticisms are in italics; page numbers refer to the final report.

*COMMENT (from cover letter): As a threshold matter, your report blurs the distinctions between AUMA and the Reform CA initiative by repeatedly asserting what “the initiatives” do or do not do.*

RESPONSE: The report explicitly recognizes the differences between the two initiatives, as noted on pages 7 and 8 of the final report, which says:

These two initiatives contain many similar provisions, but differ substantially in the way they assign authority to regulate marijuana cultivation, production, distribution, and sales. The AUMA initiative grants authority to existing local and state governments, and the California Legislature. The ReformCA initiative creates and grants rulemaking authority to a 13-member California Cannabis Commission consisting of representatives from the marijuana industry and organized labor to adopt, amend, and rescind any “reasonable” rules or regulations.

This analysis focuses on the AUMA initiative because, as of December 2015, several key members of the Coalition for Cannabis Policy Reform, the coalition that introduced the ReformCA initiative, endorsed the AUMA initiative. In addition, it is more detailed (at 64 pages) and more prescriptive than the ReformCA initiative.

Tables 1 and 2 provide comparisons of many aspects of the initiatives. When we refer to “the initiatives” rather than one or the other it is because, from a public health perspective, the effects will be similar.

**The initiatives are written primarily to create a new business and only include minimal protections for the public that are unlikely to prevent public health harms caused by the burgeoning marijuana industry.**

*COMMENT: This is not an accurate statement with respect to AUMA for several reasons.*

*First and foremost, “protection of the public” is the “highest priority” of the Bureau of Marijuana Control, the lead regulatory agency designated by the initiative. If there is ever a conflict between public protection and commercial interests, the Bureau is legally obligated to view protection of the public as the “paramount” interest. (See B&P § 19303; AUMA Proposed B&P § 26010(b) [providing that newly named “Bureau of Marijuana Control” shall succeed to “all duties” required of existing Bureau of Medical Marijuana Regulation, which include duty under existing B&P § 19303 to make public protection its highest priority].)*

*Second, AUMA explicitly requires state regulators to evaluate the several public health-related factors when determining to issue or renew a marijuana business license and empowers state regulators to deny a license or renewal based on those factors. For example, regulators must consider – and may deny a license application or renewal – based on factors such as whether issuance of the license or renewal would encourage underage use or adult abuse of marijuana, result in an excessive concentration of marijuana businesses in a particular area, or present an unreasonable risk of minors being exposed to marijuana or marijuana products. (AUMA Proposed B&P § 26051.)*

*Third, AUMA requires independent testing of all commercial non-medical marijuana and marijuana products, with both testing and manufacturing licensees being licensed and supervised by the Department of Public Health. (AUMA Proposed B&P § 26100.) The type of testing for non-medical marijuana and marijuana products will be similar to the requirements imposed under the medical marijuana legislation recently enacted by the Legislature and signed into law by Governor Brown. (Id. at §§ 26101-26104; 26110.)*

*Fourth, AUMA establishes even stricter packaging and labeling requirements than contained in the medical marijuana legislation recently enacted by the Legislature and signed by Governor Brown. For example, AUMA requires all labels on marijuana and marijuana product packages to contain a specific warning about the potential harm of using marijuana while pregnant or breastfeeding, and requires all marijuana product labels to warn users that they effects of marijuana products may be delayed by several hours and requires those labels to disclose the same nutritional information as all other food products. (AUMA Proposed B&P § 26120.) AUMA also prohibits marijuana products from being designed to be appealing to children, requires marijuana products to be sold in standardized dosages, and requires consumers to be provided sufficient information to enable informed consumption, including potential side effects. (Id. at § 26130.)*

**RESPONSE:** This is a summary statement based on our overall assessment of the initiative, based on the detailed analysis in the report.

While the initiative *states* that it is designed to protect public health, for the reasons detailed in the report, many of the specific provisions do not follow best practices in public health. “Evaluating” and “considering” public health when making regulatory decisions is not the same as prioritizing public health over business interests. While the testing required in AUMA is to be

done by independent laboratories supervised by the California Department of Public Health, the standards are based on the voluntary standards established by the United States Pharmacopeia (page 66 of the final report), an organization that includes members of the pharmaceutical, food, and dietary supplement industries; the Department is not free to develop its own standards based on public health principles. Finally, the standard we were using was not the recent medical marijuana legislation, but a public health standard.

**The regulatory licensing authorities defined in the pending marijuana legalization initiatives are agencies whose primary goals are to create a competitive marketplace for businesses, not protect public health.**

*COMMENT; Not true for AUMA. As discussed above, “protection of the public” is the “highest priority” of the Bureau of Marijuana Control, the lead regulatory agency under AUMA.*

RESPONSE: Simply stating that “protection of the public” is “the highest priority” is meaningless if the technical details of the licensing scheme are not adequate to achieve this goal. As our report notes, there are many lessons from tobacco control that the AUMA initiative could have used regarding licensing. As detailed on Pages 15-16 and 18-19, the initiative does not create policies based on these lessons.

**The marijuana advisory committees created in the initiatives contain marijuana industry representatives, so are unlikely to prioritize public health over maximizing business potential.**

**The initiatives include marijuana industry representatives on advisory committees rather than independent public health experts.**

*COMMENT: These statements are misleading with respect to AUMA. AUMA requires the Bureau of Marijuana Control to convene an advisory committee for the specific purpose of advising the Bureau and the other state licensing authorities “on the development of standards and regulations . . . including best practices and guidelines that protect public health and safety.” (Proposed B&P §26014(a).) Moreover, AUMA requires that “public health experts” be included as members of this advisory committee, in addition to representatives from state regulatory agencies, the marijuana industry and other subject matter experts.*

RESPONSE: The first statement is from the executive summary and is developed in detail second statement, which is the heading for the detailed discussion on pages 15 and 16 of the final report, which summarizes the extensive evidence-based rationale for avoiding industry groups on such committees, even if they are only advisory, because it compromises public health. Indeed, as we note in our report, the World Health Organization Framework Convention on Tobacco Control, a global public health treaty ratified by 180 parties as of January 2016 (not including the United States), includes Article 5.3., which specifies that:

The involvement of organizations or individuals with commercial or vested interests in the tobacco industry in public health policies with respect to tobacco control is most likely to have a negative effect... [Governments] should not allow

any person employed by the tobacco industry or any entity working to further its interests to be a member of any government body, committee or advisory group that sets or implements tobacco control or public health policy.”

This same principle applies to marijuana companies and related vested interests.

**Without broad-based media campaigns aimed at the general public (not just youth), California is at risk of reversing years of progress on tobacco control as well as increasing the potential health costs associated with legalizing marijuana.**

*COMMENT: This statement inaccurately suggests that AUMA does not require a broad-based public information campaign aimed at educating the general public. In fact, AUMA requires the Department of Health Care Services to establish and implement a comprehensive public information program no later than September 1, 2017 aimed at the general public – not just youth. This public information program will, at a minimum, describe AUMA’s provisions, the scientific basis for limiting access to marijuana and marijuana products to persons 21 years of age and older, the penalties for providing access to marijuana and marijuana products to persons under the age of 21 years, and provide information regarding the dangers of driving a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation while impaired from marijuana use, the potential harms of using marijuana while pregnant or breastfeeding, and the potential harms of overusing marijuana or marijuana products. (Proposed B&P § 26211(c).)*

RESPONSE: As detailed on pages 21-24, the AUMA initiative prevention programs are not modeled on the successful California Tobacco Control Program (that specifically is *not* focused on youth) and instead focuses funding on youth-centered substance abuse treatment programs without a specific mandate dedicated to the primary purpose of preventing and reducing marijuana use among everyone, including adults.

**The initiatives do not provide funding or time to conduct scientific research to gain a comprehensive understanding of the evolving adverse health effects of legalizing marijuana on population health that can be used to modernize regulation as understanding of these effects improves.**

Please note that this statement in the final report has been revised to read:

***The initiatives do not provide adequate funding or time to conduct scientific research to gain a comprehensive understanding of the evolving adverse health effects of legalizing marijuana on population health that can be used to modernize regulation as understanding of these effects improves.***

*COMMENT: Again, not true. AUMA prioritizes the expenditure of tax revenues for research – including the “impacts [of marijuana] on public health,” “public safety issues related to marijuana use,” and “the health-related effects among users of varying potency levels of marijuana and marijuana products” – as second only to ensuring sufficient funding to support the state agencies tasked with regulating marijuana. (Proposed Revenue and Taxation § 34019(b).)*

RESPONSE: As detailed on page 28 of the final report, the research program specified in the AUMA initiative includes many important issues related to marijuana legalization, but, as detailed on pages 29 and 30, many important areas are left out, particularly related to the adverse health effects of marijuana. The research program is also managed by the Bureau of Marijuana Control (which includes industry representatives on its advisory board) rather than an independent entity modeled on the National Institutes of Health, as the University of California Tobacco Related Disease Research Program is. As noted in the Executive Summary and detailed on page 27, research program funding will end ten years after implementation without enough time to gain a comprehensive understanding of the evolving adverse health effects of legalizing marijuana on population health.

**The marijuana product safety and testing standards will be based on voluntary codes established by industry organizations not independent public health agencies, so could compromise public health for the sake of business.**

*COMMENT: Patently false with respect to AUMA. AUMA places the manufacturing and testing of marijuana and marijuana products under the supervision and control of the Department of Public Health – the same state agency that oversees the manufacture and testing of medical marijuana. (Proposed B&P § 26100.) AUMA enacts specific requirements for testing of marijuana and marijuana products and empowers the Legislature and/or DPH to impose additional requirements as needed. (Id. at §§ 26101-26110.) Moreover, as discussed above, AUMA imposes rigorous packaging and labeling requirements for marijuana and marijuana products. (Id. at §§ 26120; 26130.) It is simply not true that AUMA leaves product safety and testing standards to “voluntary codes.”*

RESPONSE: As noted above, the independent laboratories supervised by the California Department of Public Health are supposed to use the standards based on the voluntary standards established by the United States Pharmacopeia (page 66 of the final report), an organization that includes members of the pharmaceutical, food, and dietary supplement industries.

**Neither [initiative] establishes limits on the number or type of licenses issued to the same person or entity.**

*COMMENT: This is not accurate for AUMA. AUMA limits those holding the largest cultivation license category from being both producers and distributors. (Proposed B&P § 26062(e).) Those holding testing licenses are also not allowed to hold a license of any other type and cannot have an ownership interest in other non-testing licensees. (Id. at § 26100(c).)*

RESPONSE: Page 18 of the report discusses the fact that there are no limitations on the number of licenses, which reflects what is in Section 26053(c): “Except as provided in subdivision (b), a person or entity may apply for and be issued more than one license under this division.”

The phrase “or types” has been deleted on page 12 of the report it now reads “Neither establishes limits on the number of licenses issued to the same person or entity.”

**Neither [initiative] establishes health education and prevention programs for the general public.**

*COMMENT: This is not accurate for AUMA. Sixty percent of the tax revenues raised by AUMA is dedicated to the youth prevention account which states specifically “If the Department of Finance ever determines that funding pursuant to marijuana taxation exceeds demand for youth prevention and treatment services in the state, the departments shall provide a plan to the Department of Finance to provide treatment services to adults as well as youth using these funds.” (Proposed R&T § 34019(f)(1)(N).)*

RESPONSE: As your letter states, money from tax revenues “is dedicated to the youth prevention account;” youth is not “the general public.” The fact that the initiative allows departments to request more money from the Department of Finance does not guarantee that money will be provided. The only funds that the State of California dedicates to tobacco control were allocated to by the voters when they passed Proposition 99 in 1988. The reason is simple: Rich and powerful tobacco interests dominate the Legislature in such matters. There is no reason to think that the new marijuana industry would be any different. That is why a specific legal requirement creating a robust marijuana prevention and control program modeled on the California Tobacco Control Program with earmarked funds would be included in an initiative that prioritized public health.

**Neither requires the state to publish reports on the successes, failures, and challenges of implementation of the new laws that would allow the public and stakeholders to recommend corrections.**

*COMMENT: This is not accurate for AUMA. AUMA dedicates \$10 million per year from tax revenues to research and requires a report every two years be made publicly available. (Proposed R&T § 34019(b).) Additionally the AUMA advisory committee must publish an annual report that shall be made publicly available. (Proposed B&P § 26014(c).)*

RESPONSE: Section 34019(b) only requires that “a public university or universities in California annually beginning with fiscal year 2018-2019 until fiscal year 2028-2029 to research and evaluate the implementation and effect of the Control, Regulate and Tax Adult Use of Marijuana Act, and shall, if appropriate, make recommendations to the Legislature and Governor regarding possible amendments to the Control, Regulate and Tax Adult Use of Marijuana Act. The recipients of these funds shall publish reports on their findings at a minimum of every two years and shall make the reports available to the public. The Bureau shall select the universities to be funded.”

As recommended by the BRC and as noted on page 11 of the report there are no requirements for “the state to periodically publish reports of comprehensive data, including on the success, failure, and challenges of implementation of the new laws.”

Page 27 of our report also noted that, “A public health framework would require continuing support for scientific research to understand the adverse health consequences of marijuana and guide marijuana prevention and control with the goal of preventing and minimizing marijuana

use, and mitigating the human and economic costs of marijuana use in California. Research would also include evaluation of the marijuana prevention and control program as a crucial element to inform and assess program performance and impact, and provide government accountability.”

These provisions are not included in the AUMA initiative.

As noted on page 27 of our report, “The AUMA initiative only allocates \$10 million annually for just ten years to support research conducted by universities in California. The Bureau of Marijuana Control will determine the grant amount, what type of research, and which universities will be funded.”

While funded universities are required to publish their findings every two years in publicly available reports, this is not the same as requiring the state to annually publish reports on the successes, failures, and challenges of implementation of the new laws that would allow the public and stakeholders to recommend corrections.

Finally, Section 26014(c) only requires that “the advisory committee shall publish an annual public report describing its activities including, but not limited to, the recommendations the advisory committee made to the bureau and licensing authorities during the immediately preceding calendar year and whether those recommendations were implemented by the bureau or licensing authorities.” This requirement does not include any of the details on the actual impact of marijuana legalization that an adequate public health surveillance system would provide.

**Neither initiative provides funding for marijuana prevention and control programs aimed at youth, young adult, or adult populations.**

*COMMENT: This is not accurate for AUMA. Sixty percent of tax revenues under AUMA go to youth treatment and prevention. (Proposed R&T § 34019(f)(1).)*

RESPONSE: As you yourself state, the educational programs are only directed at youth. See also response on this point above.

**Both initiatives permit local governments adopt exemptions for indoor marijuana use inside retail stores and marijuana clubs.**

Please note that this statement in the final report has been revised to read:

***Both initiatives permit local governments adopt exemptions for indoor marijuana use inside retail stores and marijuana clubs that would undermine enforcement of smokefree laws to reduce tobacco smoking and exposure, fail to protect nonusers from secondhand marijuana smoke, as well as further contribute to occupational health disparities.***

*COMMENT: AUMA permits local governments to allow on-site consumption by licensed retailers and microbusinesses, but not in so-called “marijuana clubs.” (Proposed B&P § 26200(d).)*

RESPONSE: This loophole is discussed in detail on pages 26 and 27 of the final report. The point is that on-site consumption is not explicitly prohibited, whether the locations are called “marijuana clubs” or “licensed retailers and microbusinesses.”

**Neither initiative prohibits highly potent marijuana products that may resemble cookies or candy.**

Please note that this statement in the final report has been revised to read:

*Neither initiative prohibits highly potent marijuana products that may resemble cookies or candy, and may increase the chances that children and adults will overdose or accidentally ingest marijuana edibles.*

*COMMENT: Not true for AUMA, which specifically provides that marijuana products can't be designed to be confused with commercially sold candy or foods that do not contain marijuana. (Proposed B&P § 26130(a)(1).)*

RESPONSE: As noted on page 34 of the report: “The requirement for marijuana and marijuana products states that products may not be ‘designed to be appealing to children or be easily confused with commercially sold candy or foods that do not contain marijuana.’ Because the intent of design is hard to determine and prove, an enforceable public health standard would replace “designed to” with “have the effect of” or “is known to be” appealing to children or easily confused with non-marijuana candy or food products.”

**The California Department of Public Health, the agency with experience implementing effective tobacco prevention and control programs, is not in charge of a similar program for marijuana.**

*COMMENT: Misleading with respect to AUMA. AUMA designates DPH as one of the three regulating agencies and provides that DPH, along with the Department of Education, will receive funds from the youth treatment and prevention account for purposes of implementing and administering youth treatment and prevention programs.*

RESPONSE: Your letter points out, correctly, that the CDPH is involved in some aspects marijuana regulation. The AUMA initiative, however, neither puts CDPH in charge of the prevention activities nor does it create a broad-based demand reduction program based on the California Tobacco Control Program.

**Research priorities favor growth of the industry while ignoring the need for marijuana-induced disease research as a foundation for future policy.**

*COMMENT: Not accurate. The first research priority under AUMA is impacts on public health, including health costs associated with marijuana use. (Proposed R&T § 34019(b).) None of the research priorities would favor industry growth.*

RESPONSE: As discussed above and detailed on page 28 of the final report, the research program specified in the AUMA initiative includes many important issues related to marijuana legalization, but, as detailed on pages 29 and 30, many important areas are left out, particularly related to the adverse health effects of marijuana. The research program is also managed by the Bureau of Marijuana Control (which includes industry representatives on its advisory board) rather than an independent entity modeled on the National Institutes of Health, as the University of California Tobacco Related Disease Research Program is.

**Businesses, like the tobacco companies, will be permitted to market and sell products that contain nicotine, alcohol, caffeine, or other additives that make marijuana more addictive, potent, or toxic when consumed as intended.**

*COMMENT: Untrue with respect to AUMA. AUMA specifically prohibits marijuana businesses from being selling alcohol or tobacco products. (Proposed B&P § 26054.) This would preclude the sale of a product containing marijuana and alcohol or marijuana and tobacco. Additionally marijuana is sold in marijuana only stores—not supermarkets, not convenience stores, not target, not 7-11. This is a substantial improvement over the existing alcohol and tobacco model. Kids will not see the products sold or on display ever, nor will adults unless they intentionally enter a marijuana retail store.*

RESPONSE: While Section 26054 (a) states that “A licensee shall not also be licensed as a retailer of alcoholic beverages under Division 9 or of tobacco products [emphasis added],” there are no such restrictions on the manufacturers of marijuana products. The rise of a tobacco industry-like marijuana industry is the concern of this report. The tobacco companies do not directly engage in *retail* trade.

**Labeling requirements will not require state of the art tobacco control warning labels that are effective at informing consumers on the health risks associated with consuming a substance with adverse effects.**

*COMMENT: Misleading with respect to AUMA. AUMA specifically allows the Department of Public Health to require additional labels or health warnings from those specified in the initiative. (Proposed B&P § 26120(c)(11).)*

RESPONSE: While the initiative allows “Any other requirement set by the bureau or the Department of Public Health,” such changes would be in addition to the long and ineffectual warning label specified in the initiative. As discussion on pages 35 to 37 of the report, a state of the art warning label would be completely different from the one specified in the initiative.

**Marijuana industry representation on decision-making boards raises serious public health and safety concerns.**

Please note that this statement in the final report has been revised to read:

***Marijuana industry representation on advisory boards raises serious public health and safety concerns.***

*COMMENT: Misleading with respect to AUMA. The advisory committee under AUMA is not a decision making board. As its name indicates, the role of the AUMA advisory committee is to “advise” the Bureau and state licensing authorities. (Proposed B&P § 26014(a).)*

RESPONSE: As discussed in detail on page 27 of the final report, the fact that the committee is only advisory does not obviate this problem. See also discussion of this issue above.

**Because the licensing systems will be overseen by an advisory committee with marijuana industry representatives, it is unlikely that these members will require a licensing system with adequate enforcement or fees high enough to cover administrative and enforcement costs, or create penalties for retailers that violate the law, including license suspensions, fines and revocations.**

*COMMENT: Misleading with respect to AUMA. The licensing system under AUMA is not “overseen” by an advisory committee; it is overseen by the Bureau, the Department of Consumer Affairs, the Department of Public Health, and the Department of Food and Agriculture. (Proposed B&P §§ 26010; 26012.)*

RESPONSE: The problems associated with industry members on the advisory board are discussed above. The difficulties of the licensing system created by AUMA are detailed on pages 28 and 29 of the final report.

We revised this sentence to change the word “required” to “recommend” on page 18.

**Except for companies licensed to test marijuana products, there are no limits on the number of licenses per stage of production. Licensees may be issued more than one license, and may hold licenses in multiple stages of production.**

Please note that this statement in the final report has been revised to read:

***Except for companies licensed to test marijuana products, there are with few exemptions no limits on the number of licenses per stage of production. Licensees may be issued more than one license, and may hold licenses in multiple stages of production.***

*COMMENT: Inaccurate with respect to AUMA. There is a limitation on the largest class of cultivation license. (26061(e).) In AUMA there is also broad authority to deny a license or renewal application for a variety of reasons including monopolization. (Id. at § 26051.) There is no “right” under AUMA to obtain a license, and a license can be denied to prevent out of state diversion, which would allow cultivation licenses to be capped. (Ibid.) Also there is very strong local control for localities to completely ban marijuana businesses entirely. (Id. at § 26200.)*

RESPONSE: AUMA created very complex licensing scheme. Sections 26050(a)(11), (12), and (13) lay out the Type 5, Type 5A, and Type 5B categories for outdoor large, indoor large, and mixed-light large cultivation license classifications. Section 26061(e) provides that a licensee with either a Type 5, Type 5A, or Type 5B license shall not be eligible to apply for or hold a Type 8 [testing], a Type 11 [distributor], or a Type 12 [microbusiness] license. Notably left out

of the list of licenses that a large cultivator can't have is Type 10 – retailer. In fact, section 26061(e) explicitly provides that the large cultivators (Types 5, 5A, and 5B licensees) CAN apply for Type 6 [manufacturer 1], Type 7 [manufacturer 2] and Type 10 [retailer] licensee.

The report notes that local governments are granted authority to adopt stronger regulations that the state on marijuana businesses in several places.

Page 7: “These two initiatives contain many similar provisions, but differ substantially in the way they assign authority to regulate marijuana cultivation, production, distribution, and sales. The AUMA initiative grants authority to existing local and state governments, and the California Legislature.”

Page 12: “The AUMA initiative grants local governments the authority to regulate the marijuana industry, including prohibiting any marijuana licensed facility.”

Page 19: “Local governments will be permitted to adopt retail licensing restrictions stronger than the state law.”

It is also included in Table 1 on page 45 of the final analysis.

To further emphasize this point in the section on licensing regulations, we included the following statement on page 18: “An important provision included in AUMA is that local governments are granted authority to adopt stronger licensing ordinances than the state, including the authority to prohibit marijuana businesses.”

**There are, however, no provisions preventing out-of-state businesses from entering the market through individuals acting as intermediaries.**

*COMMENT: This is not accurate for AUMA. AUMA defines “applicant” based on a percentage ownership in the business. Basically if you own more than 20% or have a greater than 20% investment you have to be a CA resident and meet all the other specific licensing requirements. (Proposed B&P 26001(a).)*

RESPONSE: AUMA does not prohibit out-of-state businesses from entering the market so long as their investment is 20% or less of the total investment associated with the license. Multiple out-of-state investors are possible so long as they are at or stay under the 20% threshold. 20% would still allow an out-of-state owner to have plenty of pull (especially if no in-state owner had 20% or more, or if the out-of-state owner had out-of-state partners who also owned 20%).

**The AUMA initiative appropriately prohibits sales of marijuana to minors (defined as under age 21) and prohibits anyone under the minimum age be allowed in any store that sells marijuana and marijuana products, including staff. This provision is stronger than regulations for retail alcohol stores, which explicitly allow underage people in convenience stores. However, AUMA fails to include other important provisions that will prevent underage access and appeal including vending machine, internet, and mail order sales, coupons, promotional discounts, and sales of flavored products, including THC-containing e-liquid.**

*COMMENT: Misleading. Sales or any kind are only allowed through licensed marijuana retail outlets. So no person under 21 would have access to a vending machine. Additionally IDs are required to be presented before each sale. AUMA also gives the DPH discretion to regulate and limit products.*

RESPONSE: There are no provisions in the AUMA initiative that would require face-to-face sales in licensed retail facilities. As noted on page 19, a public health framework would include:

In addition to these prohibitions, the law would also mandate that retailers be required to verify government-issued identification cards through age-verification systems for face-to-face sales. *Electronic commerce such as internet, mail order, text messaging, and social media sales would be prohibited because these forms of nontraditional sales are difficult to regulate, age-verification is impossible, and they can easily avoid taxation.* (Preventing internet, mail order, text messaging, and social media sales will also reduce the size of the illicit market, a defined goal of AUMA) The state would establish a minimum set of restrictions for marijuana retailers that local governments could not weaken (i.e. floor preemption) and local governments would be permitted to adopt stronger regulations than the state law, including additional annual licensing fees and penalties for noncompliance (i.e. ceiling preemption). [emphasis added]

None of our recommendations for prohibiting electronic commerce are included in the AUMA initiative.

In addition, good public health practice would prohibit sales in all vending machines, regardless of where they are located.

**The AUMA initiative also prohibits marijuana businesses within a 600-foot radius (and prohibits marijuana advertisements and marketing within a 1,000-foot radius; detailed below) of “a school providing instruction in kindergarten or any grades 1 through 12, day care center, or youth center that is in existence at the time the license is issued, unless a licensing authority or a local jurisdiction specifies a different radius.” The number of available licenses will be limited based on population only if such limitation did not impede development of the legal market or perpetuate the illicit market. Local governments will be permitted to adopt retail licensing restrictions stronger than the state law. (p. 19)**

Please note that this statement in the final report has been revised to read:

*The AUMA initiative also prohibits marijuana businesses within a 600-foot radius (and prohibits marijuana advertisements and marketing within a 1,000-foot radius; detailed below) of “a school providing instruction in kindergarten or any grades 1 through 12, day care center, or youth center that is in existence at the time the license is issued, unless a licensing authority or a local jurisdiction specifies a different radius.” AUMA establishes a series of discretionary criteria for determining whether a license should be issued, including “excessive concentration.” However, this term is not adequately defined and is applicable if such limitation did not impede development of the legal market or perpetuate the illicit market. The*

*effectiveness of these licensing criteria is severely hampered because they are discretionary and lack specificity. An important provision in AUMA is that local governments will be permitted to adopt retail licensing restrictions stronger than the state law.*

*COMMENT: This is not accurate. This limitation about market development only applies to the “excessive concentration” factor. Licenses can also be denied or limited for a number of reasons other than excessive concentration—to prevent monopolization, risk of exposure to minors, violation of environmental laws, and perpetuation of an illegal market in or out of state. (Proposed B&P § 26051.) Preventing an illegal market out of state allows for the denial in order to prevent over production or oversupply. Local governments can also ban businesses entirely. (Id. at § 26200.)*

RESPONSE: Section 26051 (a) states, “In determining whether to grant, deny, or renew a license authorized under this division, a licensing authority shall *consider* factors reasonably related to the determination, including, but not limited to, whether it is reasonably foreseeable that issuance, denial, or renewal of the license could contain language defining excessive concentration [emphasis added].” This language does not *require* that licenses be denied to avoid excessive concentration.

As the report notes, in several places in AUMA the use of the terms “reasonably” or “reasonably foreseeable” is not clear and open to different interpretations. Further, excessive concentration would be allowed if “denial of the application would unduly limit the development of the legal market so as to perpetuate the illegal market for marijuana or marijuana products” (Section 26051(1)). This loophole could be used as justification for ignoring the other criteria for considering whether or not to issue, renew, or deny a license.

In addition, Section 26051 only requires that the licensing agencies consider these other factors rather than require that existence of these factors would prohibit a licensing agency from issuing or renewing a license, which is another example of how the initiative prioritizes business development over health.

**Prevention of marijuana use for underage persons is an important public health goal. Good public health practice, based on provisions for tobacco retailers, would prohibit marijuana retail stores within 1,000 feet of schools and parks. There would be requirements against issuing new licenses in areas that already have a significant number of retail outlets, which would not be contingent upon whether or not such limitation impeded market growth. Retail marijuana businesses would be prohibited from selling marijuana through vending machines or self-service displays, using coupons including digital coupons, promotions, discounts, sale of flavored products (that largely appeal to children), and other offers that would encourage underage initiation and frequent use, as well as impulse buys.” (p. 19.)**

*COMMENT: This is not accurate with respect to AUMA. The language does not just say to impede market growth. Rather it is tied to allowing the development of a legal market until we can get rid of the illicit market. So the agency can’t restrict on that basis and allow an illegal market to thrive. However, it is not restrained so as to allow the legal market to grow as big as possible, but rather to simply develop enough to displace an 80 year old, thriving illegal market.*

RESPONSE: That is the point. The statement in question refers to what a public health framework would require and that is not in the initiative.

**“Furthermore, it will be legal to sell marijuana in ways that will increase underage persons’ access and appeal, through vending machines, self-service displays, and coupons, and through nontraditional sales, such as the internet, mail order, text messaging, and social media.” (p.20.)**

*COMMENT: Not accurate. Proposed B&P § 26140 in AUMA does not allow for the sale or transfer of any marijuana or products unless the purchaser presents a valid identification card showing his or her legal age. An ID card can’t be presented through most of these ways, thus the sale would not be valid. Additionally, person under 21 years of age are not allowed on the premises so would not have access to a vending machine.*

RESPONSE: There are no provisions in the AUMA initiative that would require face-to-face sales in licensed retail facilities.

The substance of the critique on sales restrictions is on pages 20-21 of the report:

While an age-restriction for marijuana (21 years and above) and compliance checks to deter sales to underage persons are included in the initiative, it severely limits the capacity to use the licensing system to enforce this restriction on retailers by suspending or revoking licenses for businesses that sell to underage persons. In particular, the initiative states that retailers will be penalized if they “intended” or “knowingly” sold to underage persons. Experience from tobacco and alcohol control demonstrates that requiring knowledge (rather than a more strict “negligence” standard) makes enforcement difficult, if not impossible, and compliance much less likely. Further, the initiative’s language requiring licensees see documentation prior to selling or transferring marijuana is weak and at risk of being violated by marijuana retailers. The initiative states a licensee shall not sell marijuana unless presented with “documentation which *reasonably* appears to be a valid government-issued identification card showing that the person is 21 years of age or older [emphasis added].”<sup>7</sup>

Rather than creating a duplicative system, a public health framework would model the marijuana retail licensing system on existing inspection systems (e.g., the Stop Tobacco Access to Kids Enforcement (STAKE) or the Target Responsibility for Alcohol Connected Emergencies (TRACE) programs in California). As with tobacco and alcohol enforcement programs, marijuana retailers would be required to ask for identification from anyone that looks under the age of forty. Marijuana retailers would be required to enter government-issued identification cards into age-verification system for face-to-face sales or the transaction would be cancelled. Violations would be for cases in which retailers do not ask for identification before selling marijuana to consumers and for cases in which the retailer asked for identification but still sold marijuana to an underage person without the state having to prove intent.

These provisions are not included in the AUMA initiative.

**It is likely that marijuana retail density will have the same impact. There are also no provisions that will require new marijuana retailers be located a minimum distance from other retail stores or that will limit the number of marijuana retailers in a specific geographic unit (i.e., county, city, town). (p.20.)**

*COMMENT: Not true, as the language allowing for denial of a license for excessive concentration specifically addresses this. (Proposed B&P § 26051.)*

RESPONSE: See response on this point above.