

Comment on Proposed Regulation:
California Bureau of Cannabis Control
Medicinal and Adult-Use Cannabis Regulation
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Candice M. Bowling, JD, MPA
Postdoctoral Fellow

Daniel G. Orenstein, JD, MPH
Postdoctoral Fellow

Stanton A. Glantz, PhD
Professor of Medicine
Director, Center for Tobacco Control Research and Education

Center for Tobacco Control Research and Education
University of California, San Francisco
530 Parnassus Ave., Suite 366
San Francisco, CA 94143
candice.bowling@ucsf.edu

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Incorporating best practices from public administration and public-health oriented restrictions into California’s cannabis regulations is necessary to protect public health by restricting conflicts of interest and revolving door abuses, imposing environmentally sound exit packaging requirements limiting the use of single-use plastic products, and clarifying the daily sale limit for edibles containing concentrates.

GENERAL COMMENTS

Legalization of recreational (adult-use) cannabis in California and other states is a significant regulatory shift despite continued illegality under federal law. While there may be positive impacts of such change from a social justice perspective, there are also considerable public health risks. ***Protecting the public health requires that both medical and recreational cannabis markets be well controlled. Unless the State of California clearly adopts a public health***

framework for regulating this new legal market,¹ normal corporate profit-maximizing behavior is likely to impose health costs on the people of California.

Public health best practices drawn from ethics rules in public administration can inform regulatory approaches to cannabis, and the Bureau of Cannabis Control should model its cannabis regulations on these best practices. ***Protecting public health in an era of legal recreational cannabis markets requires that these markets be well-controlled and designed to prevent abuse, increased prevalence, youth use, diversion to illicit markets, and the creation of a powerful industry that encourages these negative outcomes.***

With a strong regulatory framework, the cannabis industry can be brought out of the shadows and allowed to operate legally without enabling the repetition of practices from other industries, such as tobacco or alcohol, that have been detrimental to public health.

Many elements of the proposed regulations are consistent with public health and public administration best practices and represent improvements on prior draft and emergency regulations. The following provisions should be maintained in the final regulations adopted and issued by the California Bureau of Cannabis Control.

- (1) Revision of §5005 as it applies to conflicts of interest by public personnel prohibited from holding licenses, and importation of the restrictions into the proposed regulatory codes promulgated by the California Department of Public Health and California Department of Food and Agriculture.
- (2) Clarification of § 5019, which addresses Excessive Concentration, by importing and reiterating the mandatory edict denoted by the “shall consider excessive concentration” language directly from MAUCRSA.
- (3) Expanding upon advertising regulations in § 5040. Specifically,
 - The added prohibition on objects (toys, etc.) that are appealing to minors (§ 5040(a)(3))
 - The added prohibition on advertising free cannabis goods or giveaways of any type of product (§ 5040(a)(4))
 - The added clarification about audience composition data which states that census data is an insufficient benchmark, and that demographic data used must be for a particular viewing audience ((§ 5040(c))
 - The added prohibition on outdoor signs not affixed to a building or permanent structure (§ 5040(b))
- (4) The re-incorporation of compassionate use program models (§ 5411(b)-(c))
- (5) The expansion of explicit and distinct daily sale limits as applied to medical *and* adult-use plant, flower, concentrates, manufactured edibles, pre-roll joints, and infused pre-roll joints (§5409).

¹ Barry RA, Glantz SA. A Public Health Framework for legalized Retail marijuana Based on the US Experience: Avoiding a New Tobacco Industry. *PLoS Med* 2016;13(9): e1002131. doi: [10.1371/journal.pmed.1002131](https://doi.org/10.1371/journal.pmed.1002131)
Barry RA, Glantz SA. Marijuana Regulatory Frameworks in Four US States: An Analysis Against a Public Health Standard. *Am J Public Health*. 2018 Jul;108(7):914-923. doi: 10.2105/AJPH.2018.304401.

There are, however, four problematic areas in the proposed regulations that need to be strengthened:

- (1) § 5005 should be revised to reiterate the existing California restriction on revolving door employment issues by former public employees' professional involvement in the cannabis industry.
- (2) § 5413 should be revised to require environmentally-friendly exit packaging made of recyclable, compostable, or reusable materials that will reduce the output of single-use, non-biodegradable plastic bags.
- (3) § 5409 should be revised after the Bureau performs research to further refine, improve, and clarify the rule regarding the daily limit for edibles.
- (4) § 5407 should be revised in consideration of branded merchandising lessons learned from tobacco and alcohol control.

Building on the strong foundation established by the proposed regulations, the following specific changes will ensure that California's cannabis legal framework is consistent with evidence-based best practices in order to create a well-regulated market that minimizes adverse effects on the health of Californians.

§5005: Conflict of Interest Provisions

The re-drafting of the Conflict of Interest provision found in § 5005 to more accurately reflect cannabis law as implemented in other states is appropriate and fundamental to notions of sound public policy affecting the health and safety of California residents.² Further, we applaud the California Bureau of Cannabis Control, the California Department of Public Health, and the California Department of Food and Agriculture for thoughtfully adding the cannabis-specific conflict of interest to each set of proposed final regulations. As a result, relationships between public employees and the private sector will be more clearly delineated so as to best serve the public.

However, the Bureau still needs to add language that addresses “revolving door” concerns to prevent former employees of the state and its political subdivisions from immediately entering the cannabis industry and bringing business before their former employer. Two states possess subject-matter general revolving door provisions applicable only to executive officers (both imposed 1 year restrictions); 27 states have subject-matter general revolving door provisions

² Bowling CM, Orenstein DG, Glantz SA. July 23, 2017. Public Commentary on Bureau of Cannabis Control Proposed Medical Cannabis Regulations. University of California San Francisco. <<Is these a more complete citation? You could always use the link to where I have it posted on my blog. You can find the link on this page; scroll down to MJ comments. <https://tobacco.ucsf.edu/list-public-comments-fda-and-other-agencies-ucsf-faculty-and-fellows-and-others-links-comments>>>

applicable to both legislators and executive officeholders (20 imposed 1-year restrictions; 7 imposed 2-year restrictions); and 28 states have subject-matter general revolving door provisions applicable to public staff who possess decisionmaking capacity (20 imposed 1-year restrictions; 8 imposed 2-year restrictions). See attached Appendix.

The final regulations should include the language below, which is the current revolving-door rule applicable to California Public Employees:

The post-employment activities of former state officials; air pollution control/air quality management district members, officers, and employers; and local officials are restricted under respective one-year bans. While there are subtle differences between the various one-year bans, generally, the bans restrict officials, for one year after leaving governmental service, from being paid to communicate with their former agency in an attempt to influence certain actions or proceedings.³

While this language states the existing California rule, the one-year requirement should be repeated with specific applicability to public employees involved in regulation, licensure, and enforcement of California cannabis law and regulations governing licensure, retail, manufacturing, distribution, and cultivation for maximal prescriptive clarity law directly within the three agencies' cannabis codes of regulations.

§ 5413: Exit packaging

While we do not take issue with the general approach of the exit packaging requirement as stated in Cal. Bus. and Prof. Code § 26070.1 and its restatement in Bureau of Cannabis Control proposed § 5413 per se, we believe the environmental ethos of the State California would be better served by requiring exit packaging to incorporate more sustainable packaging options than single-use plastic that will most likely end up sorted into trash waste or otherwise discarded. Though the statewide single-use plastic bag ban (Ann. Cal. Pub. Res. Code § 42280-42288) does not yet apply to sales of cannabis, similar environmental considerations should be applied to single-use plastic waste created by the sale of cannabis and cannabis goods through the rulemaking process.

³ <http://www.fppc.ca.gov/learn/public-officials-and-employees-rules-/rules-on-leaving-government-service.html>



The meme above circulated on Instagram posits, in jest, that when plastic bags are banned in California, that cannabis retailers will have to resort to packaging cannabis in a biodegradable, environmentally-friendly receptacle, such as a tortilla. Though we do not suggest using biodegradable tortillas as exit packaging, this meme points to the need for more sustainable exit packaging options that reflect California's commitment to environmentally sound policy that is protective of public health.

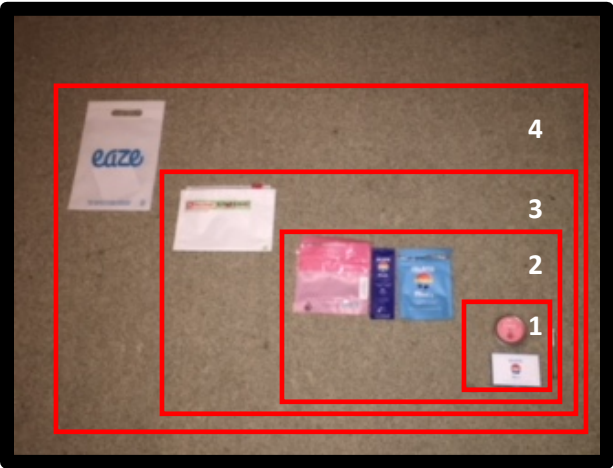


Figure 1: Four strata of Eaze delivery packaging

As can be seen from Figure 1, much material goes into packaging compliant cannabis and cannabis products. Stratum 1 of packaging is completely reasonable—the material to be consumed should have protective packaging sizeable enough to contain the physical matter being sold. The breakdown occurs somewhere between packaging strata 2 and strata 3. Except for the branding on the packaging stratum 2, the packaging in stratum 2 provided by the manufacturers or distributors is ostensibly identical to the packaging in stratum 3. The outer packaging of the listed products in stratum 2—Plus edible gummies, a 5-pack of mini Island pre-rolls, and a single Island pre-rolled joint—meet the exit packaging requirements of child-safety and opacity as listed in proposed final regulation § 5413, *and* meet the tamper-evident requirements embodied in CDPH proposed regulation § 40415. Even without considering that many retailers will place stratum 3 packaging into its own branded packaging in stratum 4, the resulting competing interpretations of the rules should be given consideration and clarified for maximal understanding and predictability. Given that manufacturers are placing their products (stratum 2) in packages that meet exit packaging requirements, which are then placed in packages *also* meeting exit-packaging requirements (stratum 3), the “package within a package” interpretation of the rules is redundant and unnecessarily wasteful. So as to reduce the amount of waste created by the packaging and sale of cannabis and cannabis goods, ***the Bureau should revise and clarify the rules surrounding packaging, and eliminate either stratum 2 or stratum 3 of the current duplicative packaging scheme.*** If stratum 2 is eliminated, stratum 1 products may then be placed directly in an opaque exit package that meets the requirements of both BCC and CDPH’s proposed regulations.

We encourage the Bureau of Cannabis Control to work toward harmonizing its proposed regulations with those embodied in CDPH’s proposed regulation § 40415 with the ultimate goal of eliminating the need for duplicative packaging (e.g. a tin of pre-rolls placed in an opaque package, which is then placed in additional opaque exit packaging). The following are examples of environmentally-sound exit packaging options that would meet the current statutory and regulatory requirements:

- Opaque, hemp-derived reusable, compostable, child-resistant, tamper-evident, resealable zipper bags, which would contribute to the creation of a closed-loop cannabis system.
- Opaque nylon or canvas reusable bags or satchels with a draw-string closure, with receipt stapled so as to cover the opening on either side, creating a “closed container” or alternatively, with a disposable, recyclable zip-tie applied to the closure prior to exiting the dispensary.
- Opaque recycled or compostable, child-resistant, temper-evident, resealable (CDPH proposed regulation § 40415) plastic exit packages that mirror general requirements found in Cal. Pub. Res. Code § 42283(e)(1)-(2) for compostable or recyclable plastic bags found in the statewide single-use plastic bag ban not currently or readily applicable to cannabis and cannabis goods.

The Bureau should include exit packaging requirements mandating biodegradable, compostable, or recyclable exit and individual packaging in the final rulemaking process.

While California cannabis establishments cognizant of environmental concerns may have already innovated environmentally-friendly compliant exit packaging, the ***inclusion of a specific mandatory regulation regarding provision of recyclable/reusable/compostable exit packaging would aid the spread of awareness of and interest in employing environmentally-friendly exit packaging.***

§ 5409: Daily Limit

We applaud the Bureau for clarifying daily dispensation limits as they apply to distinct types of medical and adult-use cannabis products. Draft regulation § 5409 establishes an eight (8) ounce daily sale limit for the dispensing of medical cannabis to patients which exceeds the daily limits for medical cannabis imposed in other states.⁴ The Initial Statement of Reasons states that the dispensing limit is tied to the eight (8) ounce medical cannabis possession limit referenced in Cal. Health & Safety Code § 11362.77(a) (Initial Statement of Reasons, p.102). The Initial Statement of Reasons justifies imposing the eight (8) ounce to: (1) prevent patients and caregivers from running afoul of the possession limit in Cal. Health & Safety Code § 11362.77(a); (2) stem the urge for a patient to purchase more than she can use and divert the excess to the grey or black markets; and (3) reduce the risk that a patient becomes a target of crime after they exit the dispensary (Initial Statement of Reasons, pg. 102).

The Bureau should perform research to further refine, improve, and clarify the rule regarding the daily limit for edibles. MAUCRSA’s definition of cannabis provides some insight,

⁴ Bowling CM, Orenstein DG, Glantz SA. July, 13, 2017. Public Commentary on Bureau of Cannabis Control Proposed Medical Cannabis regulations. University of California San Francisco. Available at <https://tobacco.ucsf.edu/public-comment-we-submitted-ca-bureau-medical-cannabis-regulation-rule-too-lax-protect-public-health>

specifically stating that “cannabis” does not include the weight of anything mixed with cannabis or concentrate (BPC § 1108.1). However, neither the relevant rules in proposed § 5409 nor the definition of cannabis in MAUCRSA adequately explain the daily limit for edibles. Specifically, the Bureau should clarify whether manufacturers have to report the total weight of concentrates included in addition to cannabinoid content. While the weight of concentrates (and everything else) must be listed in manufacturers’ Master Manufacturing Protocol (CDPH proposed regs § 40262(b)), the Master Protocols are not public information. For manufactured products the only weight included on the label is the net weight of the total contents of the package (CDPH proposed regs § 40405(a)(3)), meaning that there is not a codified method for a budtender to tally up concentrate weights in edibles to check against the daily limit other than to use the milligrams of cannabinoids (8 g = 8000 mg = ~80 edibles at 100 mg THC each, not accounting for any reported CBD content).

Given that CDPH has proposed different product standards for medical versus recreational in the CDPH regulations (e.g., adult use concentrates capped at 1000 mg THC and medical concentrates are capped at 2000 mg), ***the Bureau of Cannabis Control should bifurcate the daily limit for edibles as well.***

Example: The daily limit for concentrates is X amount unless the person is a qualified medical patient whose daily dispensation limit for concentrates is eight grams.

Regardless of what specific limit the Bureau adopts for daily edible sales, the Bureau should also set a schedule for reviewing and revising this provision (e.g., every two years). As the legal markets in California and other states solidify and expand, scientific evidence and practical experience will accumulate rapidly, and California should prepare to adapt quickly to protect consumers and public health.

§ 5407: Branded Merchandise

In addition to cannabis goods and cannabis products, the proposed regulations permit retailers to sell “any licensee’s branded merchandise or promotional materials” (§ 5407). ***The Bureau should remove this language and prohibit the sale or giving away of branded merchandise or promotional materials.***

Like tobacco and alcohol, cannabis is an age-restricted product, and California has a substantial interest in preventing cannabis advertising to minors, as reflected in MAUCRSA [CAL. BUS. & PROF. CODE § 26152(d)-(g)] and the proposed regulations (§§ 5040-5041). Branded merchandise that places a company brand, logo, etc. on an unrelated item is a common form of corporate advertising. It is part of techniques known as “brand stretching” or “brand extension” that also include methods such as event sponsorship and product placement. These techniques associate a brand with an attractive lifestyle and increase exposure to the brand in new advertising locations, potentially allowing makers of age-restricted products (like cannabis, tobacco, and alcohol) to inappropriately circumvent advertising restrictions absent strong regulatory safeguards.

Tobacco control best practices provide a model for prohibiting the cannabis industry from inappropriately advertising to youth via brand stretching techniques. Federal regulations [1 C.F.R. 1140.34(a)] under the Family Smoking Prevention and Tobacco Control Act of 2009 [123 Stat. 1776, §201(d)] prohibit any tobacco company branding on non-tobacco products. The implementing guidelines for the World Health Organization Framework Convention on Tobacco Control, the widely-adopted global tobacco control treaty, similarly recognize brand stretching as a form of advertising and recommend countries ban tobacco companies from engaging in the practice.⁵

A simple solution would entail removal of the second half of the sentence in § 5407, which would limit retailers to selling cannabis goods and cannabis accessories and nothing else. *Should the Bureau desire to implement a broad provision that is maximally protective of public health, it could impose an additional restriction on production of branded products.*

Example language mirroring the Federal prohibition on merchandising by tobacco companies:

“Other than cannabis or a cannabis product subject to the authority of the Bureau of Cannabis Control, Department of Public Health, or Department of Food & Agriculture, a cannabis licensee may not market, license, distribute, sell, product, or authorize or cause to be marketed, licensed, distributed, sold, or produced any item that includes the brand name, logo, symbol, motto, selling message, recognizable color pattern of colors, or any other indicia of product identification identical to, similar to, or identifiable with, those used for branded cannabis or cannabis products, including but not limited to clothing or novelty items.” [https://escholarship.org/uc/item/05d5g5db, Orenstein and Glantz, 2018]

Conclusion

The BCC’s proposed final regulations constitute an important penultimate step in the important process of bringing the medical and adult-use cannabis industry into the light and away from its status as an under-regulated or black market industry. The Bureau’s proposed final regulations regarding public personnel prohibited from holding licenses and accompanying conflict of interest restrictions, the re-incorporation of compassionate use program, and specification of daily limits for categories of medical and adult-use cannabis and cannabis goods will improve the efficacy of administration while protecting public health. However, the conflict of interest rules as applied to public employees lacks an explicit recitation of the existing revolving door provision which should be imported directly into the BCC regulations. The provision establishing environmentally-sound standards for exit packaging will ensure that consumption of single-use plastic waste is reduced while also ensuring that patients and consumers do not violate open

⁵ FCTC Conference of the Parties. Guidelines for implementation of Article 13 of the WHO Framework Convention on Tobacco Control WHO Press; 2013. Available at http://www.who.int/fctc/guidelines/adopted/article_13/en/

container laws while operating vehicles; and tamper-evident and child-resistant packaging will protect the public.

APPENDIX

Using a 50-state survey on the presence of revolving door provisions performed in 2011,⁶ we updated the 50-state survey as it relates to executive branch officials and staff that are subject to post-termination restrictions on employment in industry. We recommend that the Bureau reiterate California's existing one-year (1) revolving door prohibition directly in the code of final cannabis regulations.

The below citations to different categories of revolving door provisions in state codes are separated into 1-year and 2-year terms. Two states possess subject-matter general revolving door provisions applicable only to executive officers (both imposed 1 year restrictions); 27 states have subject-matter general revolving door provisions applicable to both legislators and executive officeholders (74% imposed 1 year restrictions; 26% imposed 2 year restrictions); and 28 states have subject-matter general revolving door provisions applicable to public staff who possess decisionmaking capacity (71% imposed 1 year restrictions; 29% imposed 2 year restrictions).

1. Prohibition applies to executive officeholders only (2 states)

Wisconsin (1 year restriction) [§19.45(8)(b)]
New Mexico (1 year restriction) [§10-16-8]

2. Prohibition applies to both legislative and executive officeholders (27 states)

Arizona (1 year restriction) [§38-504(a)(b)]
California (1 year restriction) [§87406(b)]
Connecticut (1 year restriction) [§§2-16a, 1-84b]
Georgia (1 year restriction) [§ 21-5-75]
Kentucky (1 year for executive official, 2 years for legislator) [§§6.757, 11A.040]
Massachusetts (1 year restriction) [§268A]
Mississippi (1 year restriction) [§25-4105(2)(3)(e)]
Missouri (1 year restriction) [§105.454(5)(6)]
Montana (1 year restriction) [§ 2-2-105(3)]⁵
New Jersey (1 year restriction) [§ 52:13C21.4]
Ohio (1 year restriction) [§102.03(A)]⁶
Pennsylvania (1 year restriction) [§1103(g)]
Rhode Island (1 year restriction) [§36-14-5]
South Carolina (1 year restriction) [§8-13-755]
Tennessee (1 year restriction) [§ 3-6-304 (1)]
Utah (1 year restriction)[Utah Code Ann. § 67-24-103]
Vermont (1 year restriction)[Vt. Stat. Ann. Title 2, §262]
Virginia (1 year restriction) [§2.2-3104]
Washington (1 year restriction) [§42.50.090, 42.52.080]
West Virginia (1 year restriction) [§6B-2-5(g)]

⁶ Holman, C and Reddy, P. Revolving door restrictions by state. 2011. Available at <https://www.citizen.org/sites/default/files/state-revolving-door-restrictions-2011.pdf>

Alabama (2 year restriction) [§36-25-13]
Colorado (2 year restriction) [Colorado State Const. Article XXIX, Section 4]
Florida (2 year restriction) [§112.313(9)-(10)]
Iowa (2 year restriction) [§§68B.5A, 68B.7]
Louisiana (2 year restriction) [§42:1121]
New York (2 year restriction) [§73(8)(a)]
South Dakota (2 year restriction) [§2-12-8.2]

3. Prohibition also applies to staff in a decision making capacity (28 states)

Arizona (1 year restriction) [§38-504(a)(b)]
California (1 year restriction) [§87406(b)]
Connecticut (1 year restriction) [§§2-16a, 1-84b]
Hawaii (1 year restriction) [§84-18]
Kentucky (1 year restriction for executive official only)
[§11A.040]
Massachusetts (1 year restriction) [§268A]
Mississippi (1 year restriction) [§25-4-105(2)(3)(e)]
Missouri (1 year restriction) [§105.454(5)(6)]
Montana (1 year restriction) [§ 2-2-105(3)]11
Nevada (1 year restriction) [Nev. Rev. Stat. Ann. § 281A.550]
New Jersey (1 year restriction) [§52:13C-21.4]
New Mexico (1 year restriction) [§10-16-8]
Ohio (1 year restriction) [§102.03(A)]
Pennsylvania (1 year restriction) [§1103(g)]
Rhode Island (1 year restriction) [§36-14-5]
South Carolina (1 year restriction) [§8-13-755]
Virginia (1 year restriction) [§2.2-3104]
Washington (1 year restriction) [§42.50.090, 42.52.080]
West Virginia (1 year restriction) [§6B-2-5(g)]
Wisconsin (1 year restriction for executive official only) [W.S.A. §19.45(8)(b)]

Alabama (2 year restriction) [§36-25-13]
Delaware (2 year restriction)[29 Del. C. §5805(d)]
Florida (2 year restriction) [§112.313(9)]
Iowa (2 year restriction) [§§68B.5A, 68B.7]
Louisiana (2 year restriction) [§42:1121]
New York (2 year restriction) [§73(8)(a)]
South Dakota (2 year restriction) [§2-12-8.2]
Texas (2 year restriction for executive directors only) [§572.051]