

[Assembly Bill 2243](#) (Wood)

Date: 06/15/16

Program: Medical Cannabis Tax

Sponsor: Author

Revenue and Taxation Code Part 13.5 (commencing with Section 31001) of Division 2

Effective immediately but operative date dependent on funding

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Summary: Requires every distributor to pay tax upon the distribution of medical cannabis flowers, immature medical cannabis plants, and medical cannabis products.

Summary of Amendments: Among other things, the amendments since the previous analysis revise definitions, establish a tiered per-ounce tax on medical cannabis flowers, and impose a wholesale cost tax on medical cannabis products.

Purpose: To provide funding to address the impacts of illegal cannabis cultivation.

Fiscal Impact Summary: Unknown.

Existing Law: Federal Law. Existing federal law prohibits the manufacture, possession, sale, or distribution of marijuana.¹ Congress enacted the Controlled Substances Act (CSA)² as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The CSA establishes five “schedules” of certain drugs and other substances designated “controlled substances.”³ For a drug or other substance to be designated as a schedule I controlled substance, it must be found that the substance “has a high potential for abuse,” has “no currently accepted medical use in treatment in the United States,” and “lack accepted safety for use of the drug or other substance under medical supervision.”⁴ Federal law lists marijuana as a schedule I controlled substance, deemed to have no accepted medical use.⁵

California’s Medical Marijuana Program. Under existing law, the California Uniform Controlled Substances Act⁶ prohibits, except as authorized by law, the possession, cultivation, transportation, and sale of marijuana and derivatives of marijuana. Existing law authorizes, under The Compassionate Use Act of 1996 (Proposition 215 of 1996), a patient or the patient’s primary caregiver to cultivate or possess marijuana for the patient’s medical use when recommended by a physician, as specified.⁷

California’s Sales and Use Tax Law.⁸ Existing law imposes the sales tax on all retailers for the privilege of selling tangible personal property at retail in this state or the use tax on the storage, use or other consumption in this state of tangible personal property purchased from a retailer, except where the law specifies an exclusion or exemption. Nothing in the Sales and Use Tax Law exempts or excludes the sale of illegal substances. Therefore, under the law, sales and use tax apply to retail sales of marijuana, including medical marijuana, to the same extent as any other retail sale of tangible personal property.

There is no specific exemption or exclusion for marijuana or medical marijuana. For patient treatment, RTC Section 6369 exempts from the sales and use tax retail sales of medicines, as defined, when the medicines sold or furnished are:

- prescribed by an authorized person and dispensed on a prescription filled by a pharmacist,
- furnished by a licensed physician to his or her own patient, or
- furnished by a health facility for treatment pursuant to a licensed physician’s order, or sold to a licensed physician.

¹ 21 U.S.C. § 841 et seq.

² 21 U.S.C. § 801 et seq.

³ 21 U.S.C. §§802(6), 812(a).

⁴ 21 U.S.C. § 812 (b)(1).

⁵ 21 U.S.C. § 812:Schedule I(c)(10).

⁶ Division 10 (commencing with Section 11000) of the Health and Safety Code (HSC).

⁷ HSC Section 11362.5.

⁸ Part 1 of Division 2 of the Revenue and Taxation Code (RTC) (commencing with Section 6001).

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The sale of medical marijuana, however, is generally not made under conditions that would satisfy the elements of RTC section 6369.

Proposed Law: This bill adds Part 13.5 (commencing with Section 31001) to Division 2 of the RTC, known as the Medical Cannabis Tax Law (MCTL). The MCTL imposes upon every distributor a tax on any distribution of medical cannabis flowers, medical cannabis products, and immature medical cannabis plants at the following rates:

Medical Cannabis Flowers:

- Unspecified amount per ounce of medical cannabis flowers cultivated by a licensee with a Type 1, Type 1A, or Type 1B classification.
- Nine dollars and twenty-five cents (\$9.25) per ounce of medical cannabis flowers cultivated by a licensee with a Type 2, Type 2A, or Type 2B classification.
- Unspecified amount per ounce of medical cannabis flowers cultivated by a licensee with a Type 3, Type 3A, or Type 3B classification.

Immature Medical Cannabis Plant: One dollar and twenty five cents (\$1.25) per immature medical cannabis plant.

Medical Cannabis Products: At the rate equivalent to the combined rate of taxes on the privilege of selling tangible personal property at retail in this state that are imposed by the Sales and Use Tax Law and the California Constitution, upon the wholesale cost of any medical cannabis product manufactured by a licensee with a Type 6 or Type 7 classification.

The tax rates imposed apply proportionately to quantities of less than one ounce.

The MCTL shall not apply to the sale of medical cannabis flowers and immature medical cannabis plants by a cultivator to the distributor.

The MCTL authorizes the BOE to prescribe by regulation a method and manner for payment of the tax that utilizes tax stamps or state-issued product bags that indicate that all required tax has been paid, as described.

Rate Adjustment. The MCTL requires the Legislative Analyst's Office (LAO) to regularly review the established tax levels at least every other year, beginning in 2020. The LAO must make recommendations to the Legislature, as appropriate, regarding adjustments that would further the goal of addressing public safety and the environmental impacts caused by the proliferation of cannabis cultivation.

Administration. This bill requires the BOE to administer and collect the tax pursuant to the Fee Collection Procedures Law (FCPL),⁹ except that the provisions that require payments by electronic funds transfer do not apply.¹⁰ For purposes of the MCTL, the bill clarifies the terms "fee" and "feepayer" as follows:

- "Fee" includes the medical cannabis tax; and
- "Feepayer" includes a person required to pay the medical cannabis tax.

The FCPL generally provides for the BOE's administration of fee programs. Among other things, the FCPL provides for collection, reporting, return, refund, and appeals procedures, as well as the BOE's authority to adopt regulations related to the FCPL's administration and enforcement.

The MCTL specifically authorizes the BOE to prescribe and adopt tax administration and enforcement regulations including, but not limited to, collections, reporting, refunds, and appeals.

⁹ Part 30 (commencing with Section 55001) of Division 2 of the RTC.

¹⁰ Article 1.1 (commencing with Section 55050) of Chapter 3.

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Registration, Reporting, and Payment. The MCTL requires every distributor required to pay the tax to register for a permit on a BOE-prescribed form. That form shall include: (1) the name under which the applicant transacts or intends to transact business, (2) the location of the distributor's place or places of business, and (3) any other information that the BOE may require.

The BOE will grant and issue a separate permit for each business location within the state. The MCTL prohibits assigning the permit. A permit is valid only for the person to whom it is issued and at the designated location for business transactions. The MCTL requires the permit be conspicuously displayed at the location for which it is issued.

The medical cannabis tax is due and payable to the BOE quarterly on or before the last day of the month following each calendar quarter. In addition, a return for the preceding calendar quarter must be filed with the BOE using electronic media. (The BOE may, however, require tax payments and the filing of returns for periods other than the period or periods specified in the tax and fee laws administered under the FCPL.)¹¹

An electronic tax return would be authenticated in a form or pursuant to a method as the BOE may prescribe.

Non-Compliance. The bill authorizes the BOE to suspend or revoke a distributor's permit whenever any distributor fails to comply with the MCTL or any BOE-prescribed regulation. The MCTL requires the BOE to give the distributor at least 10 days' written notice that specifies the hearing time and place for the distributor to show cause why the permit should not be suspended or revoked.

The MCTL requires the BOE to give the distributor written notice of suspension or revocation. The notice may be served personally or by mail in the manner prescribed for service of notice of a deficiency determination. The MCTL prohibits the BOE from issuing a new permit after the revocation unless it is satisfied that the former holder of the permit will comply with the MCTL and BOE-prescribed regulations.

Definitions. The MCTL defines the following terms:

- "Cultivator" means a person subject to licensing as a cultivator under the Medical Marijuana Regulation and Safety Act (MMRSA).
- "Distribution" means both of the following:
 - The sale of untaxed medical cannabis flowers, immature medical cannabis plants, and medical cannabis products in this state.
 - The use or consumption of untaxed medical cannabis flowers, immature medical cannabis plants, and medical cannabis products in this state.
- "Distributor" means "distributor" as defined in the MMRSA.
- "Medical cannabis product" means "medical cannabis" as defined in the MMRSA.
- "Sale" means the transfer of title or possession for consideration in any manner or by any means whatever.
- "Use" includes the exercise of any right or power over medical cannabis flowers, immature medical cannabis plants, and medical cannabis products, except that it does not include the sale of medical cannabis flowers, immature medical cannabis plants, and medical cannabis products in the regular course of business. "Use" includes a withdrawal of medical cannabis flowers and immature medical cannabis plants from inventory and used in the manufacture of a medical cannabis product.

Deposit of Revenues. The BOE must deposit all revenues, less refunds and BOE reimbursement for expenses incurred in the administration of the medical cannabis tax, into the Cannabis Production and Environment Mitigation Fund, which this bill creates in the State Treasury. All moneys deposited into the fund are continuously appropriated as follows:

¹¹ RTC Section 55041.1.

- 30% to the Board of State and Community Corrections for disbursement to local law enforcement-related activities pertaining to illegal cannabis cultivation.
- 2% to the Department of Justice (DOJ) to fund and create Regional Marijuana Enforcement Officers who shall coordinate enforcement efforts, related to illegal cannabis cultivation, between the Department of Fish and Wildlife's Marijuana Enforcement Team, the DOJ's Bureau of Narcotic Enforcement, the United States Drug Enforcement Administration, and local law enforcement.
- 30% to the Natural Resources Agency for environmental cleanup restoration and protection of public and private lands that have been damaged from illegal cannabis cultivation.
- 8% to the Open Space Subvention Payment Account of the California Land Conservation Act of 1965.
- 30% to the multiagency task force, the Department of Fish and Wildlife, and the State Water Resources Control Board, to address the environmental impacts of cannabis cultivation on public and private lands in California and other state enforcement-related activities from illegal cannabis cultivation.

Report. The BOE must submit a report to the Legislature on the total amount of revenue collected over the two-year time period from the operative date of the medical cannabis tax. The report is due on or before the last day of the month commencing 180 days after the two-year period from the tax operative date.

Miscellaneous. The MCTL becomes inoperative on January 1, 2018, if voters approve Secretary of State Initiative Number 1762¹² at the November 8, 2016 statewide general election.

However, the MCTL provisions relating to the collection of the tax, refunds, allowance for credits, disposition of moneys deposited into the CPEM Fund, and the commencement of an action or proceeding shall remain operative with respect to taxes for which the liability accrued before January 1, 2018.

The MCTL also provides that the tax shall be in addition to, and shall not limit, any taxes or fees imposed by a county or city and county.

Repeal Date: The MCTL remains in effect only until January 1, 2025, and as of that date is repealed.

Tax Operative Date and Funding. The tax becomes operative on or after the first day of the first calendar quarter commencing more than 270 days after adequate funding has been received by the BOE to implement and administer the MCTL. The MCTL requires the BOE to post a notice on its Internet Website when this condition has been satisfied.

The MCTL requires a General Fund or special fund loan to fund the BOE's MCTL regulatory activity establishment and support. The loan would be repaid by the BOE from the initial proceeds from taxes collected pursuant to this part or any rule or regulation adopted pursuant to this part, no later than six months after the MCTL's operative date.

This bill becomes effective immediately as an urgency statute; however, the tax becomes operative on or after the first day of the first calendar quarter commencing more than 270 days after the BOE's receipt of adequate funding.

Background: Medical Marijuana Sellers – Sales Tax. In 1996, California voters passed Proposition 215, also known as the Compassionate Use Act of 1996, which allows patients and their primary caregivers to cultivate or possess marijuana for personal medical treatment with the recommendation of a physician, as specified.

In 2003, [Senate Bill 420](#) (Ch. 875, Stats. 2003, Vasconcellos) established statewide guidelines for Proposition 215 enforcement. In particular, SB 420 allows nonprofit distribution in certain cases for patient cultivation cooperatives, small-scale caregiver gardens, and dispensing collectives. However, despite the fact that numerous medical marijuana dispensaries currently do business in California, the sale of medical cannabis is illegal under federal law.

¹² [Secretary of State Initiative Number 1762](#).

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On August 29, 2013, the U.S. Department of Justice issued guidance to federal prosecutors regarding cannabis enforcement under the CSA (referred to as the [Cole Memo](#)).¹³ The Cole Memo reiterated the Department's commitment to enforcing the CSA consistent with Congress' determination that cannabis is a dangerous drug that serves as a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. In furtherance of those objectives, the Cole Memo instructed the Department attorneys and law enforcement to focus on the following eight priorities in enforcing the CSA against cannabis-related conduct:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

Under the Cole Memo, marijuana-related conduct that implicates one or more of these enforcement priorities should be the primary question when considering CSA prosecution. Although the guidance was issued in response to recent marijuana legalization initiatives in certain states, it applies to all Department marijuana enforcement nationwide.

Operative December 16, 2014, Public Law 113-235¹⁴ prohibits the United States Department of Justice from using funds to prevent specified states, including California, from implementing laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

Because the sale of medical marijuana¹⁵ is taxable, the BOE issues seller's permits to those medical marijuana sellers and will issue seller's permits to any other sellers making unlawful sales.

In 2007, the BOE mailed a special notice to California sellers of medical marijuana to clarify the application of tax to medical marijuana sales and the requirement that they must hold a seller's permit.

Medical Marijuana Regulation and Safety Act. In 2015, the Legislature enacted the MMRSA, a package of legislation that establishes a comprehensive licensing and regulatory framework for medical marijuana, including cultivation, manufacturing, transportation, distribution, sale, and product. The MMRSA consists of three bills: [SB 643](#) (Ch. 719, McGuire), [AB 243](#) (Ch. 688, Wood), and [AB 266](#) (Ch. 689, Bonta).

Among its provisions, the MMRSA establishes the Bureau of Medical Marijuana Regulation (Bureau) within the Department of Consumer Affairs to oversee and enforce the state's medical marijuana regulations, in collaboration with the California Department of Public Health and the CDFR. Additionally, it establishes categories of licenses for various medical marijuana activities, such as cultivation, manufacturing, distribution, transportation, and sale.

¹³ <http://medicalmarijuana.procon.org/sourcefiles/cole-DOJ-memo-aug-2013.pdf>

¹⁴ [H.R. 83](#) / Public Law 113-235, Consolidated and Further Continuing Appropriations Act, 2015, (Dec. 16, 2014; 128 Stat. 2130; 701 pages).

¹⁵ All retail sales, including illegal sales, are subject to tax unless otherwise exempt.

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AB 266 also added RTC Section 31020 to require the BOE, in consultation with the CDFA, to adopt a system to report commercial cannabis and cannabis product movement throughout the distribution chain (track and trace). The adopted system must employ secure packaging and provide information to the BOE. Section 31020 also requires the system to capture, at a minimum, all of the following:

- The amount of tax due by the designated entity;
- The name, address, and license number of the designated entity that remitted the tax;
- The name, address, and license number of the succeeding entity receiving the product;
- The transaction date; and
- Any other information the BOE deems necessary for marijuana and marijuana taxation and regulation.

Commentary:

1. **The June 15, 2016 amendments** revise definitions, establish a tiered per-ounce tax on medical cannabis flowers, and impose a wholesale cost tax on medical cannabis products. The **June 2, 2016 amendments** added a January 1, 2025 repeal date and revised how monies are appropriated from the Cannabis Production and Environmental Mitigation Fund. The **May 31, 2016 amendments** added an urgency clause. The **May 3, 2016 amendments** made several changes based on suggestions included in the BOE's previous analysis. Among other things, the amendments (1) revised the tax imposition from the cultivator's sale to the distributor's distribution of medical cannabis flowers, medical cannabis leaves, and immature medical cannabis plants, (2) updated definitions for key terms, (3) allowed the BOE to collect the medical cannabis tax through the use of stamps or state-issued bags, (4) removed the EFT requirement, (5) required electronic return filing, (6) added registration requirements, (7) authorized the BOE to suspend or revoke a permit for not complying with the MCTL, and (8) made the MCTL inoperative if voters approve Secretary of State Initiative Number 1762.
2. **Budget Trailer Bill.** The tax scheme proposed by this measure relies on the enactment of [SB 837](#) (Budget and Fiscal Review), which clarifies the medical marijuana distribution chain. Under existing law, the MMRSA could be interpreted to require only dried flowers and medical cannabis extracts to be sent to a distributor for presale inspection and batch testing. The budget trailer bill instead requires medical cannabis and medical cannabis products, which includes dry flowers, extracts and manufactured medical cannabis products, to be sent to a distributor for presale inspection and batch testing. The tax imposed on medical cannabis flowers, extracts and manufactured medical cannabis products appears conducive to the proposed distribution chain with respect to presale inspection and testing.
3. **MMRSA conformity.** This bill should conform definitions to the MMRSA. For example, the definition of medical cannabis flower differs from the MMRSA definition of dried flower. Additional MMRSA definitions may also be helpful for terms such as "manufactured."
4. **Medical flower tax problematic.** This bill imposes a weight-based tax upon every distributor's distribution of medical cannabis flowers. Imposing a weight-based tax requires a distributor to distribute (e.g. sell or use) medical cannabis flowers in a form that can be weighed and taxed. However, the MMRSA does not require a licensed cultivator or licensed manufacturer to sell medical cannabis flowers to a distributor. Instead, the MMRSA requires them "to send" all medical cannabis and medical cannabis products to a distributor for quality assurance, inspection, and batch testing prior to distribution to a dispensary.

Furthermore, the bill imposes the medical cannabis flower tax at a rate based on the cultivator's license type. Therefore, the tax rate is zero (unspecified) if the cultivator is not licensed.

The author may wish to clarify the incidence of tax to conform to the MMRSA requirements. The BOE staff is continuing to work with the author's staff to find a workable solution and provide amendments.

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5. **Medical cannabis product tax.** This bill prescribes the tax on medical cannabis products at a rate equivalent to the rate of taxes imposed by the Sales and Use Tax Law and California Constitution. Currently, the combined rate of taxes on the privilege of selling tangible personal property at retail in this state imposed by the Sales and Use Tax Law and the California Constitution is 6.25%, which does not include the Uniform Local Sales and Use Taxes¹⁶ or Transactions and Use Taxes¹⁷ and the statutes imposing additional local taxes¹⁸. BOE staff recommends specifying the tax rate in statute to avoid any confusion about the equivalent tax rate and components of that rate.

The bill requires the calculated tax rate to apply to the wholesale cost of medical cannabis products. Will the distributor know the wholesale cost of the medical cannabis products upon distribution?

6. **Proposed tax is subject to sales tax.** The total retail sales price of tangible personal property is subject to the sales or use tax, with no deduction for the costs and expenses of the retailer, unless specifically exempted or excluded by law.

To be reimbursed for the proposed new tax, a distributor would likely incorporate the additional tax into the sales price of the medical cannabis, and that expense would likely be carried forward in the price at each subsequent sale. The sales tax applies to the entire retail sales price of medical cannabis, including the portion of the price corresponding to this expense.

7. **Suggested technical amendments.** Since the bill adds a January 1, 2025 repeal date, language should be added to preserve administrative provisions that are applicable for the collection of the tax and any liability that accrues prior to the repeal date, similar to the language contained in RTC Section 31032(b).
8. **Related legislation.** [SB 987](#) (McGuire) imposes a 10% fee on medical marijuana purchased from a retailer of medical marijuana, beginning January 1, 2018.

Costs: BOE administrative costs related to this bill are substantial. These costs include: taxpayer identification, notification, and registration; regulation development; manual and publication revisions; tax return design; computer programming; return, payment, and refund claim processing; audit and collection tasks; staff training; and public inquiry responses. A detailed cost estimate is pending.

Revenue Impact: The bill does not include a specific tax rate for medical marijuana flowers cultivated by Type 1, 1A, 1B, 3, 3A, and 3B licensee, thus a revenue estimate cannot be prepared.

¹⁶ Part 1.5 of Division 2 of the RTC, commencing with Section 7200.

¹⁷ Part 1.6 of Division 2 of the RTC, commencing with Section 7251.

¹⁸ Part 1.7 of Division 2 of the RTC, commencing with Section 7280.