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JOHN HUDAK
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March 3, 2023

Re: LD 365 – *An Act to Support Compliance and Establish Graduated Sanctions Under the Maine Medical Use of Cannabis Act*

Senator Hickman, Representative Supica, Members of the Joint Standing Committee on Veterans and Legal Affairs:

I am Vern Malloch, Deputy Director for Operations at the Office of Cannabis Policy (OCP) and I am before you today to provide testimony on behalf of our office in opposition to LD 365. While my office welcomes the opportunity to discuss the lack of compliance or enforcement tools at our disposal in the medical program, this bill does nothing to remedy that problem and fails to provide OCP with the legislative intent necessary to move the discussion forward in a meaningful way.

To begin, we need to acknowledge that the woefully outdated *Maine Medical Use of Marijuana Program Rule* contemplates the use of "progressive enforcement" when compliance cannot be achieved through technical assistance.[1] Those rules were adopted by the Department of Health and Human Services in early 2018, prior to the establishment of the Office of Cannabis Policy, and in accordance with the routine technical rulemaking process required by the Maine Administrative Procedures Act. Included in that rulemaking process is the solicitation of "input…from caregivers, registered caregivers, dispensaries and qualifying patients with significant knowledge of and experience in the medical use of cannabis." It is unclear to OCP how that rulemaking process should be distinguished from the process to "solicit input" described in this bill.

Even if we were to solicit such input in ways distinguishable from the existing rulemaking process, this bill continues to lack the key tools OCP has repeatedly identified as necessary for implementing a meaningful system of "graduated sanctions" that are "proportional to the seriousness of the violation and reasonable in comparison to similar violations in the State's alcohol industry…." This bill does not give OCP the ability to levy fines, a key tool in a regulator's toolkit, and a tool program participants have repeatedly told us they favor.[2] It does

[1] *Maine Medical Use of Marijuana Program Rule*, 18-691 CMR, ch. 2, section 10, subsection E: **Progressive enforcement.** The Department may take progressive enforcement action when the Department is unable to determine compliance when conducting an on-site assessment, or when a finding of non-compliance is not resolved through technical assistance provided on-site or through other remedial action. Progressive enforcement action may include fines or penalties, required plan of correction, registration denial or revocation, and referral to law enforcement. *See also, Id* at subsection D.

[2] *See e.g.*, Title 28-A, chapters 81 and 83, enumerating civil and criminal violations and fines and administrative fines for misconduct related to the sale, transfer, transport or consumption of liquor.

not give OCP the ability to place restrictions on the kinds of authorized activities a registrant may conduct in response to administrative action, nor does it permit OCP to place an administrative hold on a registrant's inventory during the pendency of an investigation – both of which are tools OCP has requested from the legislature in the past informed by our experience utilizing these tools to ensure compliance in the adult use cannabis program.

To be clear: OCP has brought to this committee, and the Health and Human Services (HHS) committee previously, department bills to add these missing tools to our regulatory toolbox.[3] Before the state shutdown due to the COVID-19 pandemic, OCP and medical program stakeholders engaged in consensus-building discussions at the direction of the HHS committee and provided a memo to that committee detailing the results of those discussions, including discussions regarding enforcement and fines. We have attached a copy of that memo to our testimony for your reference, along with some rough definitions of different "violation" types we have provided to this committee in the past. That document could be used as the basis for implementing some sort of graduated fining structure for the medical program.[4]

We have made several good faith efforts to discuss enforcement with our stakeholders; we have engaged in multiple public hearings and work sessions on bills proposed by our office and your colleagues and have reviewed the statutes and rules governing liquor, as well those governing adult use cannabis.[5] Simply put, without action by this body to add in statute additional tools to OCP's regulatory toolbox, OCP is unable to develop a "graduated enforcement plan" beyond our already technical assistance-focused compliance program.

For those reasons, we oppose this bill as written. We thank the committee for its careful consideration of this bill, and we are happy to answer any questions you may have for us.

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[3] *See* from the 129th Legislature, LD 2099, *An Act To Amend Provisions of the Maine Medical Use of Marijuana Act* and from the 130th Legislature, LD 882, An Act To Amend the Maine Medical Use of Marijuana Act.

[4] The "violation" categories are modeled off the categories identified by the Marijuana Legalization Implementation (MLI) Committee for inclusion in the Cannabis Legalization Act, 28-B MRS § 802.

[5] *See* section 9 of the original text of LD 1928 from last session in addition to the aforementioned LDs 2099 and 882 from the 129th and 130th Legislatures, respectively. *See also* the report of the State of Maine Medical Marijuana Workgroup, provided to the VLA committee on January 21, 2022 in accordance with PL 2021, ch. 387 and Resolves 2021, ch. 95.

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ADMINISTRATIVE & FINANCIAL SERVICES

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ERIK GUNDERSEN
DIRECTOR

To: Joint Standing Committee on Health and Human Services

From: Director Erik Gundersen, Office of Marijuana Policy

Date: March 11, 2020

Re: LD 2099 Consensus-building Discussions

This memorandum is respectfully submitted by the Office of Marijuana Policy (OMP) on behalf of a group of stakeholders assembled, at the request of the Chairs of the Joint Standing Committee on Health and Human Services (HHS), to identify areas of consensus within the proposals put forth by OMP in LD 2099, *An Act to Amend Provisions of the Maine Medical Use of Marijuana Act*. The following individuals participated in discussions on March 3 and 4, 2020:

- Representing Patients and Program Registrants: Mark Barnett, Jennifer Bergeron, Samantha Brown, Patricia Callahan, Malina Dumas, Scott Galbiati, Paul T. McCarrier, Dawson Julia, Hannah King, Catherine Lewis, Susan Meehan, Alysia Melnick, Brian Patterson, Kellie Roberge, and Dan Walker
- Representing the Office of Marijuana Policy: Gabrielle Bérubé Pierce, Erik Gundersen, and Qilian Luo
- Representing HHS/Office of Policy and Legal Analysis: Erin Dooling

OMP has prepared this memorandum to summarize the outcomes of the LD 2099 consensus-building discussions.

Areas of Consensus

Generally, the participants came to consensus on three issues addressed in OMP's department bill.

First, there was agreement among the parties that the extension of local authorization requirements for medical marijuana caregiver retail stores, registered dispensaries, medical marijuana testing facilities and manufacturing facilities to the unorganized and deorganized territories is appropriate (*See generally,* Part C of LD 2099).

While there was agreement regarding the extension of local authorization to all forms of local entities across the state, there were several discussion participants who expressed concerns regarding municipal implementation of the statute's current local authorization provision for municipalities found in 22 MRSA § 2429-D. Several discussion participants indicated that they had experienced varied and inconsistent application of the municipal authorization provision and were hesitant to extend local authorization powers to the unorganized and deorganized territories until implementation of the municipal authorization provision improved.

Second, there was agreement among the parties that OMP should have the ability to assess fines for misconduct by registrants in the medical program, although there was no consensus reached regarding the statutory limits for those fines (*See generally,* Part D of LD 2099). The parties also agreed, along the same lines, that OMP should have the ability to permanently revoke a registry identification card from bad actors with repeated or particularly egregious program violations. LD 2099 does not address revocation, but currently, a revocation is effective for a year or less by statute.

Third, there was agreement among the parties that OMP could require a separate registration certificate for caregiver retail stores, including assessment of a separate registration fee of between $50 and $240. Additionally, the parties agreed to provide a fee schedule for caregivers using a canopy-based calculation to register with the department of between $50 and $1500 (*See* Sections F-1, F-3, F-5, F-6, F-7, F-8 and F-10).

Areas Without Consensus

Despite the lively and respectful discussions between the convened parties, there were, unfortunately, several aspects of LD 2099 where no clear consensus could be reached.

Definitions of "batch" and "batch number" (Sections A-1 and A-2)

- No individual participating in the stakeholder discussions expressed overt opposition to these provisions; however, several requested additional time and information to understand how these terms are used in the context of OMP's marijuana inventory tracking system (METRC).
- Proponents indicated support for these provisions because it provides necessary information to be used in the event of a recall of marijuana or marijuana products.

OMP's recommendation is that the committee adopt these provisions as written.

Obscuring cultivation operations from public viewing (Section A-3)

- Opponents indicated that the language currently in statute is sufficient to protect the public health and safety and that OMP's response to one incident was more restrictive than necessary.
- Proponents generally indicated deference to OMP's assessment regarding the necessity of this provision.

OMP's recommendation is that the committee strike this provision from LD 2099.

Definitions of "immature plant" and "seedling" (Sections A-4 and A-7)

- Opponents indicated that reducing the size of a seedling from 24"x24" to 12"x12" ignores common cultivation challenges in the medical program – specifically, that these plants cannot be determined to be viable until they reach 24"x24". Patients and caregivers are allowed to have an unlimited number of seedlings but are restricted on the number of immature plants and mature plants they can possess at one time (Patients may possess up to 12 immature plants, caregivers may possess up to 60 immature plants). Opponents say that this change could require a change in their cultivation practices and would have the effect of requiring them to track, in the inventory tracking system (METRC), immature plants before they are actually viable.
- Proponents generally agreed with OMP's assessment that aligning these definitions across both the medical and adult use programs is appropriate, that 12"x12" is a compromise between the small seedling size in the adult use program and the larger seedling size in the medical program, and that findings from Washington State indicating that a marijuana plant is 99 percent viable when it reaches 8"x8" are credible. Furthermore, while each state defines marijuana plant height differently anywhere from 8" to 18", the proposed 12" definition strikes a balance that reasonably aligns these definitions between both programs.

OMP's recommendation is that the committee adopt these provisions as written.

Inclusion of alcohol and ethanol in the definition of "inherently hazardous substance" (Section A-5)

- Opponents indicated that inclusion of alcohol and ethanol in the definition of "inherently hazardous substance" and the required registration, inspection, equipment, and safety regulations that apply to extraction using inherently hazardous substances are unnecessary and unduly burdensome, especially to small-scale caregivers and patients extracting in their kitchens, given that alcohol is a substance commonly found in homes. It was also noted that OMP did not report any specific incidents in the state arising from alcohol or ethanol extraction in the medical program. Many included in this discussion expressed concerns that they or their patients would be unable to access medicine in the formulation and quantities necessary if they are unable to extract at home using alcohol or ethanol. Many opponents indicated that some regulation regarding the storage or use of large quantities (quantities in excess of anywhere between 2.5 gallons and 55 gallons) of alcohol or ethanol may be appropriate but expressed concern that OMP's proposed language was far too broad and restricted activities being conducted in kitchens across the state without incident.
- Proponents indicated the inclusion of alcohol and ethanol in the definition of "inherently hazardous substance" makes sense from a scientific perspective, given the substances low flashpoints and the use of heat in the extraction process.

OMP's recommendation is that the committee adopt the following compromise provisions regarding extraction using alcohol or ethanol by a caregiver:
Strike Section A-5 from LD 2099.
Instead, amend 22 MRSA § 2423-A(2)(G) to add the following:
G. Manufacture marijuana products and marijuana concentrate for medical use, except that a caregiver may not manufacture food, as defined in section 2152, subsection 4, unless the caregiver is licensed pursuant to section 2167; ~~and~~ except that a caregiver may not produce marijuana concentrate using inherently hazardous substances unless authorized pursuant to section 2423-F, subsection 3; **and except that a caregiver using ethanol or any form of alcohol to extract marijuana for medical use must provide notice to the department that the caregiver is using ethanol or any form of alcohol to extract marijuana for medical use.**

Mandatory labeling of marijuana and marijuana products (Part B)

- Opponents indicated that the mandatory labeling required in Part B is too broad and would result in mandatory testing not currently required under the medical program, which would lead to a corresponding increase in cost to patients. Additionally, opponents expressed concerns about usurping the role of the medical provider regarding instructing qualified patients how to use marijuana pursuant to sub-¶ H. Some opponents indicated support for some provisions included Part B, such as labeling regarding the identity of the marijuana or marijuana product, ingredients and allergens, tracking information (batch number), and information on gases, solvents and chemicals used in marijuana extraction.
- Proponents indicated that the requirements in Part B were reasonable and provided patients with necessary information to assess the safety and appropriateness of the medicine to address their individual needs. It was also noted that labeling would protect the health and safety of the public in the event of accidental ingestion by an individual other than the patient. Proponents agreed with OMP's assessment that it is important to create uniform public health and safety standards across both programs.

OMP's recommendation is that the committee strike sub-¶ A (lines 28-31 on page 2), revise sub-¶ H to read "route of administration", modify Part B as recommended in OMP's amendment to delay the implementation of any mandatory testing, and adopt the remainder of Part B in its entirety.

The limits on fines permitted (Part D)

- While there was agreement that OMP should have the ability to assess fines for misconduct by program registrants, there was a lack of consensus regarding the appropriate amount of the fines OMP would be permitted to levy. There appeared to be agreement that the statute should create two tiers of fines:
    - Tier One: Caregiver retail stores, registered dispensaries, manufacturing facilities and inherently hazardous extraction facilities
    - Tier Two: Caregivers and assistants

- Part D sets out a fine structure identical to those in the Marijuana Legalization Act that would permit the following fines:
    - Tier One: $25,000 for minor registration violations, $50,000 for major registration violations, and $100,000 for major registration violations affecting public safety
    - Tier Two: $1,000 for minor registration violations, $5,000 for major registration violations, and $10,000 for major violations affecting public safety

OMP's recommendation is that the committee adopt the following fine limits in §2430-H(2)(A)&(B) respectively:

- **Tier One: A limit of $12,500 for minor registration violations, a limit of $25,000 for major registration violations, and a limit of $50,000 for major registration violations affecting public health**
- **Tier Two: A limit of $500 for minor registration violations, a limit of $2,500 for major registration violations, and a limit of $5,000 for major registration violations affecting public safety.**

OMP further recommends that the committee allow for, when appropriate, permanent revocation of a participant's registry identification card.

Requiring registry identification card holders to submit to federal background checks (Part E)

- Opponents indicated that federal background checks are not necessary to protect the health and safety of patients; will exclude from program participation individuals who have completed their sentence and are seeking to give back to their community; perpetuate stigma regarding the cultivation, distribution, and consumption of marijuana; and may subject individual registrants to unwanted and unnecessary scrutiny by the Federal Bureau of Investigation or other federal agencies.
- Proponents indicated that requiring medical program registrants to submit to state and federal background checks, as is required by all participants in the Adult Use Marijuana Program, is reasonable and prevents bad actors from out-of-state relocating to Maine to participate in the medical program.

OMP's recommendation is that the committee require all individuals with a registry identification card to submit to state and federal background checks. OMP further recommends that the committee strike qualifying patients and visiting qualifying patients from those who may voluntarily request a registry identification card from the department. This provision is a vestige from before patients received a physical patient certification card from their certifying medical provider as proof of lawful possession of marijuana for medical use.

Whether to permit caregivers to transfer 100 percent of marijuana cultivated in wholesale transactions (Not in LD 2099 but addressed in testimony at the hearing)

- There did not appear to be any explicit opposition to the inclusion of this provision, and proponents indicated that it would allow caregivers to ensure

steady supply and a variety of options for their patients. Proponents also indicated this provision would allow caregivers to focus on their areas of expertise—some prefer cultivation-related activities, others are best at patient assistance, while others are particularly skilled at manufacturing marijuana.

OMP does not have a recommendation regarding this provision.

Revision of the definition of "officer or director" (Not in LD 2099 but addressed in testimony and proposed in an amendment put forth by Dan Walker of Preti Flaherty)

- There did not appear to be any explicit opposition to the inclusion of this provision, but some participants indicated a strong preference to defer this change until they had additional time to consider its implications. Several participants indicated concern regarding what they perceived to be large out-of-state interests participating in Maine's market and having an unfair advantage in the market due to access to large amounts of capital not necessarily available to smaller caregiver operations.
- Proponents indicated that the provisions in the amendment represent correction of a lingering issue presented when the Legislature allowed dispensaries to convert from non-profit to for-profit entities. Proponents further indicated that the amendment will allow converted dispensaries to raise necessary capital in amounts simply unavailable in Maine.

OMP does not have a recommendation regarding this provision.

Conclusion

OMP is grateful for the opportunity to continue our stakeholder engagement and to seek common ground with those affected by the Maine Medical Use of Marijuana Program. While it is regrettable that we were unable to identify more areas of consensus, we continue to be committed to working with program participants and identifying solutions that promote the mission of the Office of Marijuana Policy: "To ensure the health and safety of all Mainers by effectively and responsibility licensing and regulating marijuana establishments."

The recommendations contained in this report are OMP's good faith effort to identify solutions to programmatic challenges that are also responsive to the concerns expressed by participants at the consensus building discussion. We remain committed to engaging with stakeholders in both program across the state and look forward to continuing a team-based approach to addressing new challenges as they arise.

Possible Categories of Violations for the Maine Medical Use of Cannabis Program

- **Major registration violation affecting public safety** means an intentional, willful or reckless violation of this chapter or the rules promulgated pursuant to this chapter, that jeopardizes public safety, by a registered caregiver, dispensary or manufacturing facility or an assistant.
- **Major registration violation** means an intentional, willful or reckless violation of this chapter or the rules promulgated pursuant to this chapter, or a repeat pattern of minor registration violations, by a registered caregiver, dispensary or manufacturing facility or an assistant.
- **Minor registration violation** means a knowing or negligent violation of this chapter or the rules promulgated pursuant to this chapter by a registered caregiver, dispensary or manufacturing facility or an assistant.