Analysis of AB 390

January 14, 2010

No Effective Regulation of Purity, Composition, or Quality

Many people are concerned that marijuana purchased from "street dealers" may be contaminated with heavy metals, fungus, bacteria, and/or pesticides. There is good basis for this concern, since samples of marijuana, purchased from "medical marijuana" dispensaries by the L.A. City Attorney's office in an undercover buy, were significantly contaminated by bifenthrin, a pesticide. If marijuana is contaminated in such dispensaries (which are allegedly selling to seriously ill patients), it is very likely that marijuana sold on the street is even more unsafe. However, it does not appear that the quality of marijuana is effectively regulated by AB 390.

Under AB 390, the California Department of Alcoholic Beverage Control (ABC) is required to issue regulations which cover "packaging and labeling" requirements for licensed wholesalers and must require the package of marijuana to describe the "purity, potency, processing and any adulteration" of the product. However, because this is generally regulated at the federal level (at least for alcohol, which is the "model" that is used by AB 390), there are really no standards or precedents for ABC to use in developing regulations. In addition, how would wholesalers satisfy such requirements? For example, would each wholesaler be required to utilize a sophisticated laboratory to determine THC and other cannabinoid levels of each batch of marijuana, as well as the levels of pesticides, heavy metals, or microbes?

Therefore, under AB 390, contaminated marijuana, or marijuana whose THC levels are unknown, may be sold to the public. This problem may be exacerbated by the fact that AB 390 may also permit marijuana products, such as highly-concentrated tinctures and extracts, baked goods, and candies, to be sold as marijuana "derivatives." Marijuana products in general, and baked goods in particular, may be contaminated with salmonella and E.coli.

The lack of effective state regulation of quality is not surprising, when one examines the federal/state allocation of responsibility regarding the manufacture of alcoholic beverages, the system upon which AB 390 was modeled. **The content, labeling, and quality of alcoholic beverages are primarily controlled at the federal level.** The U.S. Department of the Treasury's Alcohol and Tobacco Tax and Trade Bureau (TTB) has primary responsibility for the labeling and advertising of alcoholic beverages. TTB also enforces provisions of the Internal Revenue Code of 1986 related to Distilled Spirits, Wines, and Beer. The use of fungicide, such as sulfur dioxide, on grapes comes under the jurisdiction of the Environmental Protection Agency (EPA). Since 1987, the federal government has required that there be a warning label on wine concerning the presence of sulfites.

The Food and Drug Administration (FDA) also has a role to play in ensuring that alcoholic beverages are not misbranded or adulterated. FDA enforces the provisions of the federal Food, Drug, and Cosmetic Act (FDCA). The definition of "food" under the FDCA includes "articles used for food or drink" and thus includes alcoholic beverages. See 21 U.S.C. 321(f) and 21 CFR Part 170.3 (n)(2). As such, alcoholic beverages are subject to the FDCA adulteration and misbranding provisions, and implementing regulations, related to food. Among other things, a food is adulterated under section 402 of the FFDCA if

it was produced, packed, or held under insanitary conditions; if it contains any poisonous or deleterious substance which may render the food injurious to health; or if it contains an unapproved food additive. FDA has authority to initiate seizure of adulterated foods, including alcoholic beverages, and to seek to enjoin the introduction of such products into interstate commerce (see MOU 225-88-2000 – **http://www.fda.gov/AboutFDA/PartnershipsCollaborations/MemorandaofUnderstandingMOUs/DomesticMOUs/ucm116370.htm**

The FDA will take enforcement action if there is evidence that an alcoholic beverage is contaminated. For example, the FDA has recently notified 30 manufacturers of alcoholic beverages containing added caffeine that the agency intends to look into the safety of their products. The FDA stated: "Under the Federal Food, Drug, and Cosmetic Act, a substance added intentionally to food (such as caffeine in alcoholic beverages) is deemed "unsafe" and is unlawful unless its particular use has been approved by FDA regulation, the substance is subject to a prior sanction, or the substance is Generally Recognized As Safe (GRAS)."
http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2009/ucm190427.htm

Since marijuana is illegal under federal law, this entire system of federal quality-control is missing.

No Elimination of a Black Market

The Act will not eliminate a black market. It provides for the licensure of cultivators, wholesalers, and retailers. However, these provisions do not go into effect until 30 days after the state Department of Alcoholic Beverage Control (ABC) issues specified regulations, which could take years. In addition, violators (those who do not seek licenses) are, for the most part, subject only to a $100 fine, which is a negligible deterrent. The $50 per ounce fee, plus the current sales tax, may make marijuana in licensed retail shops expensive enough that a black market (which undercuts this price) will flourish. Finally, there is no prohibition against the importation of marijuana **into** California from such places as Mexico; this seems to fall outside the purview of the licensure system, which applies to cultivators, wholesalers, and retailers.

Promotion of Sales to, and Use by, Minors

Although Section 1(c) of the statement of intent indicates that the Act is intended to "more effectively limit access to marijuana by minors," the penalties for selling marijuana to minors is a **maximum** $100 fine (except to the extent that Penal Code sec. 272 applies, which deals with actions constituting/causing the abandonment and neglect of children). Retailers are supposedly subject to "heavy penalties" for selling to persons under 21, but such penalties are not set forth with specificity, but rather are analogized to those applicable to alcohol sales. Therefore, it is likely that such penalties are **too vague to be valid** and enforceable.

Similarly, **use** of marijuana **by** minors is also subject only to a maximum $100 fine. In addition, the Act permits persons over 21 to cultivate marijuana in a home, even if minors are present in the household.

Furthermore, the bill also deletes the current provision making it a crime for anyone over 18 to hire or use a minor in transporting, carrying, selling, giving away, preparing for sale, etc., marijuana, although commercial cultivators and wholesalers are not allowed to permit persons under 21 to

transport marijuana. Therefore, it is unclear what penalty, if any, would apply if a commercial seller or retailer/buyer were to use a minor to transport marijuana.

Finally, an off-sales alcohol retail license would also allow a merchant to sell marijuana. Therefore, it would facilitate the purchase by persons over 21 of **both** alcohol and marijuana, for distribution to persons under 21.

Uncertain Amount of Revenue Generated

The Act will not put substantial revenues into the state's general coffers. First, "medical marijuana" is exempt from the supplemental fee provisions. This provides an even greater incentive for "medical marijuana" dispensaries to proliferate under the alleged auspices of Proposition 215 and SB 420 and does nothing to rectify those abuses.

Second, it is unclear whether amounts of marijuana less than one ounce are exempt; yet, marijuana is often sold in 1/8 ounce bags. If such smaller quantities are exempt, this could represent a significant underestimate of revenue.

Third, it is unclear whether marijuana products, such as edibles or candies, are exempt or, if not exempt, how the $50/ounce will be determined, since most of the content of such products will be non-cannabinoid material. By contrast, it is similarly unclear how the $50/ounce will be assessed if the retailer is selling tinctures, extracts, and oils, which may contain extremely high concentrations of THC.

Fourth, since the cultivation and sale of marijuana continues to be illegal under federal law, it is likely that cultivators, wholesalers, and retailers may be reluctant to identify themselves by obtaining licenses, particularly since the penalty for failing to do so is only an infraction.

Fifth, if the black market undercuts the price charged in licensed retail outlets, state revenues will be reduced.

Sixth, the fee will be largely consumed by the costs of administering the regulatory system. The State Board of Equalization Staff Legislative Bill Analysis states that AB 390 does not specify how payments for refunds and for the Department of Alcoholic Beverage Control's (ABC) administrative costs would be funded. ABC would incur "substantial administrative costs" in creating the new fee program, identifying and notifying affected fee payers, developing computer programs, developing returns and supplemental schedule, developing publications and regulations, preparing and mailing special notices, training staff, and responding to numerous inquiries from affected fee payers and the public. These administrative costs have not yet been estimated and would likely reduce the revenue available for DADP programs.

Seventh, any fee revenues in excess of administrative costs will be deposited in a fund that is to be used **exclusively** for drug and alcohol education programs, not into the General Fund for other state expenses or programs. Only state and local **sales taxes** will go into the general coffer.

Finally, there is also a serious legal question as to whether the supplemental fees are in effect "taxes" which, under Proposition 13, must be enacted by a 2/3 vote of the Legislature, rather than a bona fide regulatory fee. It is likely that the supplemental fee will be challenged in court.

Potential Prohibition of Local Zoning and other Land Use Ordinances

It is possible that the Act may prevent local jurisdictions from enacting and enforcing zoning and other land use ordinances to keep marijuana cultivation and sale out of their cities, or even severely to restrict the locations where such activity can take place. The Act states that it is intended to remove **all** existing **civil and criminal penalties** relating to marijuana cultivation and sale. It also prohibits state or local funds from being expended on, and state and local law enforcement or other personnel from assisting in, the enforcement of any federal **or other laws** that are "inconsistent" with the Act, or provide for greater "sanctions" for conduct prohibited by the Act. This section is not limited to state criminal laws, but could also apply to state or local nuisance laws or local zoning ordinances.

Removing Marijuana from the Definition of Controlled Substances Throughout the California Codes

The bill amends H&S Code sec. 11054 (part of the California Uniform Controlled Substances Act) to amend Schedule I to **delete** marijuana and even pure, naturally-derived (i.e., not synthetic) THC. **This would mean that marijuana and pure THC are no longer considered controlled substances in California.** H&S Code sec. 11007 defines a "controlled substance," unless otherwise specified, as a drug, substance, or immediate precursor **which is listed in any schedule in Section 11054, 11055, 11056, 11057, or 11058.** This could have ramifications that extend beyond the provisions of AB 390, since the term "controlled substance" is used frequently throughout various state statutes.

Specific Sections of the Bill

Sec. 1 contains the intent language.

Sec. 2 adds sec. 23394.1 to the Business and Professions Code (B&P Code) to allow an off-sale general liquor license (to sell liquor that must be consumed off the premises) **also** to authorize the licensee to sell marijuana, concentrated cannabis, and its "derivatives." Presumably, any retailer with a general off-sale (i.e., consumption off the premises) liquor license issued under B&P sec. 23393-94 would also become licensed to sell marijuana, such as liquor stores, grocery stores, and even Wal-Mart. Therefore, **marijuana and alcohol could be purchased in the same transaction.**

Section 3 adds Chapter 19 (Commercial Marijuana Production and Sale), to Division 9 of the B&P Code, beginning with section 26000 et seq.

B&P sec. 26010 defines "marijuana" broadly to include every compound, derivative, mixture, or preparation of the plant. This could include products containing very high levels of THC (35% THC and above), such as tinctures, extracts, and oils, as well as edibles (baked goods, candies) and the hemp plant itself. While AB390 does not appear to be focused on hemp, hemp would be covered by its provisions, although the fee of $50 per ounce might make hemp cultivation infeasible. *See also* Section 21 of AB 390, adding Division 10.3 to the Health & Safety Code, Sec. 11720 (defining "marijuana" for purposes of imposing the fee). (If hemp contains less than ½ of 1% THC by weight, it is exempt from the fee.)

Section 26010 explicitly **excludes "medical marijuana**" from the definition of marijuana. This provides an even greater incentive for "medical marijuana" dispensaries to proliferate under the alleged auspices of Proposition 215 and SB 420 and does nothing to rectify those abuses.

B&P secs. 26020-26030 govern the licensing of **commercial cultivators** and **require ABC to issue regulations** as described above, mandating security, employment rules, tracking and recordkeeping.

Cultivators must provide a detailed crop security plan, including proof of financial ability to provide that security. Sec. 26030(g) also requires that ABC ensure that "all applicable statutory environmental and agricultural requirements are followed in the cultivation" of marijuana. Since much of this is determined at the **federal level** for agricultural products, such as wine grapes, it is unclear which statutory requirements would be "applicable" to marijuana, and whether these would control the levels of pesticides and fungus.

The ABC regulations must establish safeguards to "assure" that persons under 21 do not transport marijuana on behalf of a commercial buyer or seller. **However**, the bill **removes** the existing criminal prohibition against allowing a person under 21 to transport marijuana. Therefore, it is unclear what, if any, penalty there would be if a seller or buyer did use a minor to transport marijuana.

ABC must require "background checks," and the AG/local agency must provide a "summary criminal history," but **nothing indicates which individuals, e.g., those who have committed specified crimes, must be excluded** on the basis of that information. Nor are those individuals excluded who may have attempted to circumvent the licensure provisions by, e.g., commercially cultivating marijuana without a license. This is also an issue for marijuana wholesalers.

There is no time period specified, within which ABC must issue the required regulations. This could take several years. In the meantime, commercial cultivation can take place without licensure or other restriction.

It should be noted that the **unlawful** cultivation of marijuana is **only an infraction**, punishable by a fine of up to $100. Nothing in the "new" penalties limits this to non-commercial cultivation; therefore, attempts to circumvent the licensure requirements would be punishable as an infraction. In addition, individuals who have been guilty of such circumvention in the past are not clearly excluded from being able to be licensed in the future.

It is also unclear how the fine is to be assessed; for example, it appears that a violator would be assessed the fine each time he/she is "caught," rather than on "continuous violation" basis, akin to an ongoing nuisance, wherein fines can be assessed on a daily basis until the nuisance is abated. There is also nothing which states that the fine will be increased for second and subsequent violations. It would potentially be cheaper for a violator to pay the fine (even repeatedly) than to purchase a license (which is $5,000 for cultivators and wholesalers), especially since there is no provision for assessment of any court costs against violators.

It is unclear to what extent local jurisdictions can enact <u>zoning ordinances or even bans</u> against the commercial cultivation of marijuana.

B&P sec. 26040-26050 govern the licensure of **wholesalers**, who are allowed to "package and prepare" marijuana (including derivatives, preparations, etc.). **ABC must issue regulations** as above, which also cover "packaging and labeling," and must require the package of marijuana to describe the "purity, potency, processing and any adulteration" of the product. However, because this is generally regulated at the federal level (at least for alcohol, which is the "model" that is used by AB 390), there are really no standards or precedents for ABC to use in developing regulations. In addition, how would wholesalers satisfy such requirements? For example, would each wholesaler be required to utilize a sophisticated laboratory to determine THC and other cannabinoid levels, as well as the levels of pesticides, heavy metals, or microbes? This testing should presumably be performed by the manufacturer/cultivator, but they are not subject to such a requirement.

As with cultivation, the ABC regulations must establish safeguards to "assure" that persons under 21 do not transport marijuana on behalf of a commercial buyer or seller. **However**, the bill **removes** the existing criminal prohibition against allowing a person under 21 to transport marijuana. Therefore, it is unclear what, if any, penalty there would be if a seller or buyer did use a minor to transport marijuana.

It should be noted that, under the new penalty provisions adding Division 10.3 of the H&S Code, the **unlawful/unlicensed sale** of marijuana is **only an infraction**, punishable by a fine of $100. Therefore, as with unlicensed commercial cultivation, attempts to circumvent the licensure requirements would be punishable as an infraction. In addition, individuals who have been guilty of such circumvention in the past are not clearly excluded from being able to be licensed in the future.

It is also unclear how the fine is to be assessed; for example, it appears that a violator would be assessed the fine each time he/she is "caught," rather than on "continuous violation" basis, akin to an ongoing nuisance, wherein fines can be assessed on a daily basis until the nuisance is abated. There is also nothing which states that the fine will be increased for second and subsequent violations. It would potentially be cheaper for a violator to pay the fine (even repeatedly) than to purchase a license (which is $5,000 for cultivators and wholesalers), especially since there is no provision for assessment of any court costs.

There is no time period specified, within which ABC must issue the required regulations. This could take several years. In the meantime, sales can take place from wholesalers to retailers without licensure or other restriction.

It is unclear to what extent local jurisdictions can enact <u>zoning ordinances or even bans</u> against the wholesale distribution of marijuana.

B&P sec. 2606-26070 provide for ABD to issue regulations concerning the **retail** sale of marijuana by holders of general **"off-sale"** liquor license. Presumably, any retailer with a general off-sale (i.e., consumption off the premises) liquor license under B&P sec. 23393-94 could also become licensed to sell marijuana, such as liquor stores, grocery stores, and even Wal-Mart. Therefore, marijuana and alcohol could be purchased in the same transaction. Such retailers cannot sell to anyone under 21, and the punishments for violations are supposed to be in "substantial accord" with those applicable to alcohol sales, to the extent that that is "feasible." **<u>However</u>**, under new H&S Code sec. 11726(b) (see Sec. 21 below), the providing or selling marijuana to a person **under** 21 is **only an infraction** subject to a maximum $100 fine. This apparent inconsistency would seem to create an ambiguity in the penalty provisions, rendering them potentially unconstitutional (void for vagueness).

This differs from the issuance of a liquor license, which is generally issued by municipalities after the governing body determines that the applicant is qualified for the license. Municipalities often establish quotas for such licenses, based on population. There appears to be no limit on the number or location of licenses that can be issued by ABC under AB 390.

It is unclear to what extent local jurisdictions can enact <u>zoning ordinances or even bans</u> against the retail sale of marijuana.

Sec. 4 amends Government Code sec. 7597(a) to add marijuana to the provisions prohibiting smoking in specified places. However, marijuana is not explicitly added to subsection (b), which allows local jurisdictions to adopt and enforce additional "smoking and tobacco control" ordinances, regulations, etc., that are more restrictive. The addition of the word "marijuana" to (a) but **<u>not</u>** to (b) **may call into**

question whether local jurisdictions could adopt more restrictive ordinances regulating where marijuana could be smoked.

This is of particular concern, since **Sec. 6**, amending H&S Code sec. 1596.795 (forbidding the smoking of tobacco in a family day care home) **explicitly adds marijuana** to the provision stating that nothing in that section prohibits a local jurisdiction from enacting a more stringent ordinance relating to the smoking of tobacco or marijuana in a family day care home.

In addition, H&S Code sec. 11723(b), added by AB 390 Sec. 21, states that smoking marijuana in a public place **can only be punished as an infraction**. Local jurisdictions may not enforce any "other law" that is "inconsistent" with the bill. Therefore, cities and counties could not enact more severe sanctions.

Sec. 7 amends H&S Code sec. 11014.5, dealing with drug paraphernalia, to **delete** "objects designed for use or marketed for use in ingesting, inhaling, or otherwise introducing marijuana, hashish, or hashish oil in the human body." **However**, the section **does not affect** other provisions that define paraphernalia to include kits designed for use in planting, harvesting, etc., any controlled substance (CS), kits designed for manufacturing, compounding, processing, or preparing CSs, testing equipment used for identifying or analyzing the strength, etc., of CSs, scales and balances, and containers for storing CSs.

Sec. 8 amends H&S Code sec. 11054 (part of the California Uniform Controlled Substances Act) to amend Schedule I to **delete** marijuana and even pure, naturally-derived (i.e., not synthetic) THC. **This would mean that marijuana and pure THC are no longer considered controlled substances in California.** H&S Code sec. 11007 defines a "controlled substance," unless otherwise specified, as a drug, substance, or immediate precursor **which is listed in any schedule in Section 11054, 11055, 11056, 11057, or 11058.** This could have ramifications that extend beyond the provisions of AB 390, since the term "controlled substance" is used frequently throughout various state statutes.

Sec. 9 amends H&S Code sec. 11357 to **delete** the provisions making possession of marijuana or concentrated cannabis a crime, **except when** a person possesses those materials on the grounds of, or within, any school (K-12) when it is open for classes or school-related programs.

Secs. 10-12 delete H&S Code secs. 11358 (marijuana cultivation), 11359 (possession for sale), 11360 (transportation, importation into the state, sale, furnishing, or giving away of marijuana), and 11361 (anyone over 18 who hires or uses **a minor** in **transporting,** carrying, selling, giving away, preparing for sale, etc., marijuana or who gives, etc., marijuana **to a minor**). It should be noted that the new penalties established in Sec. 21 make it a **mere infraction** to **provide or sell** marijuana to a **person under 21**.[1]

By deleting section 11360, AB 390 **removes the prohibition against importing** marijuana into the state. However, the provisions governing licensure do not apply to importers. Therefore, individuals from outside the state could bring marijuana into the state. The subsequent unlicensed/unlawful sale of such imported marijuana would be only an **infraction**. Such importers could presumably circumvent any ABC regulations relating to **environmental and agricultural requirements**, as well as the **purity and potency** requirements that are supposed to apply to wholesalers.

[1] Retailers are supposedly subject to "heavy penalties" for selling to persons under 21, but such penalties are not set forth with specificity, but rather are analogized to those applicable to alcohol sales. Therefore, it is likely that such penalties are **too vague to be valid** and enforceable, particularly in light of the conflicting terms of new sec. 11726.

Sec. 13 amends H&S Code sec. 11364.5, which states that no person may maintain a place of business in which **drug paraphernalia** is kept, displayed, sold, etc., unless that paraphernalia is kept within a separate room/enclosure to which **persons under 18 are excluded**. As with H&S Code sec. 11014, the term "drug paraphernalia" is amended to **exclude** objects intended for use in ingesting, inhaling, or otherwise introducing marijuana, hashish, or hashish oil in the body. "Separation gins and sifters" for removing twigs and stems from marijuana are also excluded. **However**, as with sec. 11014, the other definitions of paraphernalia, **which would apply to many of the other items used by marijuana sellers**, (such as envelopes or other containers used in "packaging small quantities of controlled substances." (subsec. (d)(8)), are still in place.

This is important, since subsection (g) states that operation of a business in violation of this section is grounds for revocation/nonrenewal of any license, permit, etc., previously issues by a city or county and is grounds for denial of any future license, etc., if the business includes the sale of "drug paraphernalia." It is unclear how sec. 11014 relates to 11364.5 (or whether marijuana is even still a "controlled substance"; see Sec. 8 above).

Sec. 14 amends H&S Code sec. 11370, which currently prohibits a trial court from granting probation to, or suspending the sentence of, a person convicted of violating specified criminal laws, if that person has been previously convicted of certain state criminal law offenses or of a federal offense, if that would also have been an offense in California. The amendment deletes the sections relating to unlawful cultivation, possession for sale, and sale of marijuana from the list of specified sections. It also deletes marijuana from the list of controlled substances, relating to which a previous felony conviction would render a person ineligible for probation or suspension of sentence.

Sec. 15 amends H&S Code sec. 11470 relating to **forfeiture** to delete the provision allowing forfeiture of a boat, plane or other vehicle that has been used to facilitate the manufacture or, or possession for sale or sale of marijuana. It also deletes the subsection allowing forfeiture of money or other valuables furnished in exchange for marijuana. This would mean that, **even if** marijuana were being sold, cultivated, imported, etc., in violation of the new licensure provisions, the only penalty would be an **infraction**.

Sec. 16 repeals H&S Code sec. 11485, which allowed peace officers to **seize personal property** used for the cultivation, harvesting, processing, etc., of marijuana. Therefore, even if the marijuana is being cultivated for sale without adherence to the new licensure scheme, police officers could not seize the personal property.

These two sections call into question whether **any seizure and/or forfeiture laws** could continue to be enforced with regard to marijuana, **even if** the marijuana is not being cultivated and/or sold in conformity with the new licensure schedule. This is supported by the statement of intent in Section 1(b) of AB 390 that the Marijuana Control, Regulation, and Education Act is intended to remove **all existing civil and criminal penalties**.

Sec. 18 amends H&S Code sec. 11532, which makes it unlawful to loiter in any public place for the purpose of committing certain drug related offenses, by deleting the circumstance (that can be considered to determine the person's intent) of being under the influence of a controlled substance (marijuana would no longer be a CS), or possessing narcotic or drug paraphernalia, to the extent that the paraphernalia was a device, etc., for the smoking, ingesting, injecting or consuming marijuana or hashish. Groups of persons could therefore loiter about being under the influence of marijuana and/or

having bongs, etc., in their possession in a public place. (The Act makes it **lawful** for someone 21 or older to be **under the influence** of marijuana, **except** as provided in Penal Code sec. 647(f), which provides that anyone who is found in any public place under the influence of any drug, etc., in a condition that he/she is unable to exercise care for his or her own safety or the safety of others, or by reason of his/her being under the influence of any drug, etc., interferes with the free use of any street, sidewalk, or other public way, is guilty of disorderly conduct, a misdemeanor.)

Secs. 19-20 amend H&S Code sec. 11703-11705, part of the **Drug Dealer Liability Act**. The Act is intended to provide a **civil remedy for damages** to persons in a community who have been injured as a result of the use of an illegal controlled substance. These persons include parents, spouses, children or siblings (of users), employers, insurers, certain governmental entities and others (like church groups) who pay for/provide drug treatment or employee assistance programs. They can recover damages from those individuals who have engaged in the marketing if illegal controlled substances. **Secs. 19-20 delete any reference to marijuana**. Therefore, **even if "black market" dealers in marijuana continue to exist** (and do not become licensed), parents, church groups, and other authorized persons could not seek damages from such dealers under the Drug Dealer Liability Act.

Sec. 21 adds Division 10.3 to the H&S Code, beginning with Section 11720.

H&S Section 11720 defines marijuana, as in Sec. 3 (B&P sec. 26010) above, to include every compound, derivative, mixture, or preparation of the plant. This could include products containing very high levels of THC, such as tinctures and extracts, as well as edibles (baked goods, candies) and the hemp plant itself. While AB390 does not appear to be focused on hemp, hemp would be covered by its provisions, although the fee of $50 per ounce might make hemp cultivation infeasible. (If hemp contains less than ½ of 1% THC by weight, it is exempt from the fee.)

Again, it explicitly **excludes "medical marijuana**" from the definition of marijuana. This provides an even greater incentive for "medical marijuana" dispensaries to proliferate under the alleged auspices of Proposition 215 and SB 420 and does nothing to rectify those abuses.

H&S Section 11721 makes it **lawful** for a person 21 or older to possess or transport marijuana. This will take effect immediately upon enactment of the bill into law.

H&S Section 11722 makes it **lawful** to sell marijuana to someone 21 or older in accordance with the new licensure scheme. Any sale by an unlicensed person which takes place 30 or more days after ABC issues the required regulations (see Sec. 3 above) is a violation of the division **but** is punished only as an **infraction**. Under subsection (b), **unlicensed sales can take place without any penalty** until 30 days after ABC issues its regulations (which could take years).

H&S Section 11723 makes it **lawful** for someone 21 or older to smoke/ingest marijuana in a home or private residence, or on the grounds thereof if not visible from any public place of neighboring property, with the consent of **any** resident 21 or older. **This section is silent about whether minors may be present in the home/residence.** Subsection (b) makes it an **infraction** to **smoke marijuana in a public place**.

H&S Section 11724 makes it **lawful** for someone 21 or older to be **under the influence** of marijuana, **except** as provided in Penal Code sec. 647(f), which provides that anyone who is found in any public place under the influence of any drug, etc., in a condition that he/she is unable to exercise care for his or her own safety or the safety of others, or by reason of his/her being under the influence of any drug, etc., interferes with the free use of any street, sidewalk, or other public way, is guilty of disorderly conduct, a misdemeanor.

H&S Section 11725 makes it **unlawful** for an unlicensed person to cultivate marijuana, **except** that someone 21 or older can cultivate marijuana in a home or yard if it is not visible from any public place. Such person may cultivate no more than 6 mature plants at any time. **The fact that minors are present in the household does not make the cultivation unlawful**. A **licensed nursery** may cultivate seedlings for sale.

H&S Section 11726 states that the following activities are **infractions** subject to a $100 fine:

- unlawful cultivation;
- providing or selling marijuana **to a person under 21** (except to the extent that Penal Code sec. 272 applies, which deals with actions constituting/causing the abandonment and neglect of children);[2]
- possession or use of marijuana **by a person under 21**;
- any other violation of the division;

except that selling, providing, or transporting marijuana **into another state** in which such activity would violate that state's laws, is a **felony**.

H&S Section 11727 makes it lawful to possess, transport or sell hemp products, including mature stalks.

***H&S Section 11728 does not allow **state or local funds** to be expended on, nor state or local law enforcement or other personnel to assist in, the **enforcement** of **any federal or other laws** that are "inconsistent" with this division, or provide for greater "sanctions" for conduct prohibited by this division. This may **imperil the ability** of the state or local jurisdictions to **obtain certain federal funds**. It also may prevent **local jurisdictions from passing zoning or nuisance ordinances** to ban the cultivation or sale of marijuana, or to limit such cultivation/sale to specified locations. This section is not limited to state criminal laws, but could also apply to state or local nuisance laws or local zoning ordinances.

H&S Section 11729 states that nothing is intended to affect or limit any criminal statute that forbids impairment while engaging in hazardous activities or that penalizes bringing marijuana to a school (K-12). **However**, apparently selling marijuana on a college campus to persons under 21 would be only an infraction.

H&S Section 11730 states that nothing is intended to affect the rights of employers with regard to employees who use marijuana.

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[2] Retailers are supposedly subject to "heavy penalties" for selling to persons under 21, but such penalties are not set forth with specificity, but rather are analogized to those applicable to alcohol sales. Therefore, it is likely that such penalties are **too vague to be valid** and enforceable, particularly in light of the conflicting terms of new sec. 11726.

Secs. 22-32 amend specified sections of the H&S Code (beginning with sec. 11880), Labor Code (beginning with sec. 6404.5), and Public Utilities Code (beginning with sec. 561) to extend existing prohibitions against tobacco smoking to include marijuana smoking. Specified exceptions allowing tobacco smoking under limited circumstances are **not** extended to marijuana smoking.

It should be noted that, since the definition of "marijuana" in this bill does not include "medical marijuana," these prohibitions would **not extend to the smoking of "medical marijuana."** Any prohibitions against smoking "medical marijuana" in public places, places of employment, on trains or buses, etc., would therefore be determined by Proposition 215, SB 420, and court interpretations thereof.

Sec. 33 adds Division 2 of the Revenue and Taxation Code (R&T Code), commencing with section 34001, to establish a marijuana fee system, to be known as the "Marijuana Supplemental Fee Law."

R&T Code 34004 states that all marijuana, concentrated cannabis, and their "derivatives" are subject to the fee system, except marijuana containing less than ½ of 1% THC by weight (hemp). No fee is imposed on "medical marijuana."

R&T Section 34011 imposes an initial fee of **$50 per ounce** for the retail sale of marijuana. It is **unclear** whether **quantities less than one ounce will be taxable at all**. Marijuana is often sold in small quantities, such as 1/8 ounce, so this issue becomes rather important from a revenue-generating perspective.

It is also unclear whether marijuana products, such as edibles, will be subject to the fee, and, if so, how the fee will be assessed, since most of the weight of the edible product can be attributable to materials other than marijuana. By contrast, it is similarly unclear how the $50/ounce will be assessed if the retailer is selling tinctures, extracts, and oils, which may contain extremely high concentrations of THC.

The Board's Staff Analysis, at page 4, acknowledges many of these uncertainties.

R&T Sections 34021-34022 state that existing R&T sections govern returns and payments, etc., and that the State Board of Equalization shall enforce the fee system. The Board **may adopt rules** and regulations, but is **not mandated** to do so.

R&T Section 34031 states that the fee shall be transmitted by the Board to the Treasurer to be deposited in the Drug Abuse Prevention Supplemental Funding Account, to be expended exclusively for drug education, awareness, and rehabilitation programs under the Department of Alcohol and Drug Programs (DADP).
R&T Section requires that the fee be annually reviewed by DADP to determine whether a lesser fee will be sufficient to fund the programs.

Sec. 34 amends Vehicle Code sec. 23222 to **include** marijuana products in the **existing prohibition** against having an opened receptacle containing any alcoholic beverage while **driving a motor vehicle**. **However**, the Act does **not add smoking or otherwise ingesting marijuana to Vehicle Code sec. 23220-23221, which make it unlawful to drink any alcoholic beverage while driving, or riding in, a motor vehicle.**

Sec. 35 amends Vehicle Code sec. 40000.15 to **delete** the provision making the possession of marijuana (while driving a motor vehicle) a misdemeanor, rather than an infraction. It would remain a misdemeanor to drive under the influence of an alcoholic beverage or drug.

Sec. 36 amends Welfare and Institutions Code (W&I) sec. 4138 to extend to marijuana products the existing prohibition relating to the possession, use, or sale of tobacco products on the grounds of a state hospital.

Sec. 37 amends W&I Code sec. 18901.3 which allows a **convicted drug felon to obtain food stamps, unless** he/she has been convicted of cultivating, harvesting, or processing marijuana. The amendment **deletes this exception** and therefore allows a convicted felon to obtain food stamps, despite a former conviction of major marijuana trafficking.