

[Senate Bill 148](#) (Wiener and Atkins)

Date: 01/17/17

Programs: Cannabis State Payment Collection

Sponsor: BOE Chairwoman Fiona Ma

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

Effective: January 1, 2018

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**Summary:** Authorizes the Board of Equalization (BOE) or a county to enter into agreements with specified state agencies to collect cash payments from cannabis<sup>1</sup>-related businesses.

**Purpose:** To provide a safe and simplified method for cannabis business owners to pay their state taxes and fees and comply with state and local laws.

**Fiscal Impact Summary:** No impact to state revenue.

**Existing Law: California's Sales and Use Tax Law.**<sup>2</sup> Under existing law, California's sales tax is paid by retailers engaged in business in the state and applies to all retail transactions involving sales of tangible personal property, except those the law specifically exempts or excludes. While the Sales and Use Tax Law does not exempt medical cannabis sales, **the Marijuana Tax Law (MTL)**<sup>3</sup> provides that the sales and use tax does not apply to retail sales of medical cannabis, medical cannabis concentrate, edible medical cannabis products or topical cannabis when a qualified patient or primary caregiver provides his or her medical marijuana card and a valid government-issued identification card.

Effective January 1, 2018, the MTL imposes a marijuana retail excise tax and a cultivation tax. Specifically, RTC Section 34011 imposes upon purchasers a fifteen percent (15%) **excise tax on the gross receipts of any retail sale** of marijuana or marijuana product. The marijuana excise tax applies to the full price, if non-itemized, of any transaction involving both marijuana and marijuana products, unless otherwise provided. A dispensary or other retail licensee is required to collect the tax and remit it to the BOE.

RTC Section 34012 imposes upon cultivators required to be licensed a **cultivation tax** on all harvested marijuana that enters the commercial market at the following rates:

- Nine dollars and twenty-five cents (\$9.25) per dry-weight ounce of marijuana flowers.
- Two dollars and seventy-five cents (\$2.75) per dry-weight ounce of marijuana leaves.

The BOE will collect the marijuana taxes and, after payments of refunds, deposit the revenue in the California Marijuana Tax Fund.

**BOE-Collection Programs.** Currently, the BOE does not collect payments (cashier function) on behalf of other state agencies. However, the BOE administers tax and fee programs that simply require the BOE to assess (bill) and collect a tax or fee based on information received from another state agency. These programs include the water rights fee, the fire prevention fee, childhood lead poisoning prevention fee, and the hazardous substances taxes.

**BOE Payment Collection for Use Tax.** When a California consumer or business purchases tangible items for their own use from an out-of-state retailer that is not registered with the BOE to collect the California use tax, the purchaser must remit the use tax to the BOE. As an alternative to reporting the use tax directly to the BOE, existing law<sup>4</sup> allows purchasers that are not otherwise required to register

<sup>1</sup> The Medical Cannabis Regulation and Safety Act utilizes the term "cannabis," while Marijuana Regulation and Safety utilizes the term "marijuana." The Marijuana Tax Law utilizes the term "marijuana" for both medical and nonmedical purposes. This analysis uses the term of "cannabis" and "marijuana" based on context; however, cannabis and marijuana may be used interchangeably.

<sup>2</sup> Part 1 of Division 2 of the Revenue and Taxation Code (RTC) (commencing with Section 6001).

<sup>3</sup> Part 14.5 of Division 2 of the RTC (commencing with Section 34010).

<sup>4</sup> RTC Section 6452.1.

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with the BOE to report their use tax liability on their state personal income tax returns or their state corporation franchise or income tax returns filed with the Franchise Tax Board (FTB). The BOE reimburses the FTB for its administrative costs.

Additionally, when a private party (non-dealer) sells a vehicle, mobilehome, or undocumented vessel required to be registered under the Vehicle Code, the law<sup>5</sup> requires the purchaser to pay the use tax to the Department of Motor Vehicles (DMV) or Department of Housing and Community Development (HCD), as applicable. The BOE contracts with the DMV and HCD to collect use tax payments from these purchasers on behalf of the BOE. The DMV and HCD have no other administrative responsibilities except to report and transmit use tax collections to the BOE.

**Medical Cannabis Regulation and Safety Act (MCRSA)<sup>6</sup> and Marijuana Regulation and Safety (MRS).<sup>7</sup>**

Under existing law, the Bureau of Marijuana Control (Bureau) within the Department of Consumer Affairs (DCA) oversees and enforces the state's medical and nonmedical marijuana regulations, in collaboration with the California Department of Public Health (CDPH) and the California Department of Food and Agriculture (CDFA). Additionally, the MCRSA and MRS establish categories of licenses for various medical and nonmedical marijuana activities, such as cultivation, manufacturing, distribution, transportation, and sale. The MCRSA and MRS require each licensing authority to establish a scale of application, licensing, and renewal fees, based upon enforcement costs. These fees have not yet been set.

**Proposed Law:** This bill enacts the Cannabis State Payment Collection Law (Collection Law)<sup>8</sup> to authorize the BOE or a county to enter into an agreement with a state agency to collect cash payments. Cash payments include payments for any fee, fine, penalty, or other charge payable to the state agency by a person that is a cannabis-related business. "State agency" includes, but is not limited to:

- Bureau of Marijuana Control.
- Department of Consumer Affairs.
- Department of Fish and Wildlife.
- Department of Food and Agriculture.
- Department of Pesticide Regulation.
- Employment Development Department.
- Franchise Tax Board.
- State Department of Public Health.
- State Water Resources Control Board.
- Regional water boards, as described.

**Agreements.** The Collection Law requires an agreement between the BOE or a county and a state agency to include all of the following:

- The BOE or county is to be reimbursed for the administrative collection costs from the funds or accounts for which the fees, fines, penalties, taxes, or other charges are otherwise required by law to be deposited. Also, the agreement shall specify if reimbursement is to be continuously appropriated or upon appropriation by the Legislature
- The BOE or county will transmit the collected moneys to the Treasurer to be deposited in the State Treasury to the credit of the funds or accounts for which the fees, fines, penalties, taxes, or other charges are otherwise required by law to be deposited.
- A description of administrative costs the BOE or county will incur in carrying out the collection, which costs shall not exceed 10% of the moneys collected.

<sup>5</sup> RTC Sections 6292 and 6294.

<sup>6</sup> Chapter 3.5 (commencing with Section 19300) of Division 8 of the Business and Professions Code (BPC).

<sup>7</sup> Division 10 (commencing with Section 26000) of the BPC.

<sup>8</sup> Part 13.5 (commencing with Section 31001) to Division 2 of the RTC.

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- The cash collection fee amount and how the state agency and the BOE or county determined that amount if the state agency imposes a cash collection fee.
- Any other provision the BOE or county and state agency determines is necessary to properly implement the collection of the fees, fines, penalties, taxes, or other charges.

**Reimbursement.** The Collection Law requires reimbursement to the BOE or county for collection costs from the following:

- **Regulatory Fees.** Funds or accounts into which regulatory fees are to be deposited, not to exceed 10% of the amounts collected. The bill continuously appropriates to the BOE or county an amount equal to the amount necessary for its regulatory fee collection costs on behalf of a state agency pursuant to an agreement authorized by the Collection Law, not to exceed 10% of the amounts collected.
- **Fines, Penalties, Taxes, or other Charges.** Funds or accounts that those fines, penalties, taxes, or other charges are to be deposited, not to exceed 10% of the amounts collected, upon appropriation by the Legislature.

**Cash Collection Fee.** A state agency that enters into an agreement with the BOE or a county may impose a cash collection fee. The Collection Law requires the state agency to determine the cash collection fee, which must be in an amount reasonably necessary to recover the collection costs incurred by the BOE or county in dealing with cash payments. The collection costs include, but are not limited to, the costs of processing and securing the cash payments. The bill prohibits the cash collection fee from exceeding 10% of any amounts collected.

No cash collection fee may be imposed on:

- A fine, penalty, or other charge that already includes amounts reasonably necessary to recover the cash payment collection costs, or
- The collection of a tax, as defined in [Section 3](#) of Article XIII A of the California Constitution.

The cash collection fee shall be deposited into the funds or accounts for which the fine, penalty, or other charge to be collected is deposited.

**Definitions.** The Collection Law defines the following terms:

- “County” means a county and a city and county.
- “Regulatory fee” means a charge as defined in paragraph (3) of subdivision (b) of Section 3 of Article XIII A of the California Constitution.

**Operative Date.** The bill becomes operative January 1, 2018.

**In General.** In 1996, California voters approved 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 a physician’s recommendation, as specified.

In 2003, legislation was enacted to establish statewide guidelines for Proposition 215 enforcement.<sup>9</sup> In particular, the legislation clarified that nonprofit distribution is allowed in certain cases for patient cultivation cooperatives, small-scale caregiver gardeners, and dispensing collectives. However, despite the fact that numerous medical marijuana dispensaries currently do business in California, medical cannabis sales are illegal under federal law. Because of this conflict between state and federal law, most banks do not allow marijuana-related businesses to hold accounts.

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](#)).<sup>10</sup> 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

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<sup>9</sup> [Senate Bill 420](#) (Ch. 875, Stats. 2003, Vasconcellos).

<sup>10</sup> <http://medicalmarijuana.procon.org/sourcefiles/cole-DOJ-memo-aug-2013.pdf>

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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 marijuana legalization initiatives in certain states, it applies to all Department marijuana enforcement nationwide.

Operative December 16, 2014, Public Law 113-235<sup>11</sup> 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.

In 2015, the Legislature enacted the MCRSA, a package of legislation that establishes a comprehensive licensing and regulatory framework for medical cannabis, including cultivation, manufacturing, transportation, distribution, sale, and product. The MCRSA consists of three bills: [SB 643](#) (Ch. 719, McGuire), [AB 243](#) (Ch. 688, Wood), and [AB 266](#) (Ch. 689, Bonta). Among its provisions, the MCRSA establishes the Bureau within the DCA to oversee and enforce the state's medical marijuana regulations, in collaboration with the CDPH and the CDFA.

In 2016, the voters approved [Proposition 64](#), which legalizes marijuana for adults 21 and older, regulates nonmedical marijuana, and imposes an excise tax of 15% of the gross receipts of any retail sale of marijuana, and a marijuana cultivation tax of \$9.25 per dry-weight ounce of flowers and \$2.75 per dry-weight ounce of leaves.

In 2016, [AB 2149](#) (Bonta) also sought to authorize the BOE or county to enter into agreements with specified state agencies to collect cash payments from medical cannabis-related businesses. That measure was placed on suspense in the Senate Appropriations Committee with no further action.

## Commentary:

1. **“No Cash” policy.** Since early 2014, all BOE field offices stopped accepting cash from taxpayers attempting to pay their sales or use tax liabilities. This “No Cash Policy” allows BOE to reduce costs and ensure employee safety. The BOE allows an exception when taxpayers can document that they are unable to obtain a bank account or that paying in cash is necessary to avoid significant hardship.
2. **BOE authorized to enter into an agreement with counties.** The BOE has [22 district/branch offices](#) throughout California. Many BOE offices are not in locations convenient to taxpayers, and therefore may provide a risk for taxpayers that must pay taxes in cash, including cannabis-related businesses. For example, the Northern California region, known as the Emerald Triangle, produces the largest

<sup>11</sup> [H.R. 83](#) / Public Law 113-235, Consolidated and Further Continuing Appropriations Act, 2015, (Dec. 16, 2014; 128 Stat. 2130; 701 pages).

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amount of marijuana in the United States. The Emerald Triangle consists of Mendocino, Humboldt, and Trinity Counties. When the MTL excise taxes are imposed beginning January 1, 2018, Emerald Triangle taxpayers who are unable to obtain banking services must make tax payments in cash, which requires travel to a BOE office in either Redding or Santa Rosa. The approximate travel times to BOE's Redding or Santa Rosa are:

- Hayfork (Trinity County) to Redding: 1.5 hours
- Eureka (Humboldt County) to Redding or Santa Rosa: 3.5 hours
- Fort Bragg (Mendocino County) to Santa Rosa: 2.5 hours

This measure authorizes the BOE to contract with counties, such as Trinity, Humboldt, and Mendocino, to collect marijuana taxes on behalf of the BOE, subject to local approval.



3. **BOE staff safety.** The BOE administers and collects California's sales and use tax, which applies to retail sales of marijuana, including medical cannabis. Many medical cannabis retailers report and pay sales and use tax on retail sales of medical cannabis and other tangible personal property. The BOE grants exemptions from the "No Cash Policy" to businesses that are unable to establish a bank account or pay by cashier's check or money order. As a result, the BOE district offices receive hundreds of thousands of dollars in sales and use tax payments from medical cannabis-related businesses. Cash tax payments received at BOE district offices will increase significantly beginning January 1, 2018, when the marijuana retail excise tax and cultivation tax become operative. Accepting such large cash payments creates a safety concern for BOE staff. Collecting cash payments on behalf of other state agencies only enhances that risk for BOE staff. However, the bill does not require the BOE to collect cash payments from cannabis-related businesses for a state agency, including if there is concern about staff safety.
4. **Practical issues.** In addition to safety issues, this measure compounds the BOE's administrative challenges with accepting cash payments. Collecting cannabis cash payments for other state agencies, as proposed by this bill, will require additional modifications and upgrades to BOE district office security systems and cash storage, as well as the BOE's computer system and cash payment procedures.
5. **BOE's mission and tasks.** The BOE's mission "is to serve the public through fair, effective, and efficient tax administration." Facilitating cash payments for taxpayers who have barriers to banking would make it easier for those taxpayers to pay their taxes. However, this bill's authorization for the BOE to collect cash payments from cannabis-related businesses on behalf of other state agencies departs from the BOE's traditional "tax collection and enforcement" functions. In general, the BOE does not collect cash payments on behalf of other state agencies when it has no role in administering the revenue-generating tax or fee, nor does it collect and administer partial tax and fee programs that relate to a specified category of tax and fee payers.

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6. **Cost cap may be problematic.** The bill requires an agreement to include a provision “that describes the administrative costs the BOE will incur in carrying out the collection and administration, which costs shall not exceed 10% of the moneys collected.” Without an exact agreement specifying the scope of work, the BOE is unable to determine administrative costs. Consequently, it is unclear whether the BOE’s administrative costs would exceed the 10% cap contained in the bill.

7. **Cash payment collection companies.** In early 2016, the Internal Revenue Service announced a new payment option for taxpayers who need to pay taxes in cash. The IRS partnered with ACI Worldwide’s OfficialPayments.com and the PayNearMe Company. PayNearMe has also partnered with the California Department of Child Support Services, and several California cities and utilities. PayNearMe has approximately 8,000 California locations, including 7-Eleven stores.

A cash payment collection company or their billing clientele may limit the dollar amount remitted by cash. The IRS limits cash payments to \$1,000 per day. With respect to BOE marijuana-related taxpayers, a cash payment limit could be problematic. Marijuana-related taxpayers make tax payments (monthly, quarterly, yearly) in the hundreds of thousands of dollars. One solution would be to allow a taxpayer to make cash payments more frequently than their assigned filing/payment schedule, such as daily payments.

A taxpayer utilizing a cash collection payment service also may be subject to service fees. The IRS imposes a \$3.99 fee per cash payment transaction. Service/processing/convenience fees applicable to electronic payments, such as credit card payments, are fairly common. A 2.3% service fee of the transaction amount applies to credit card payments for BOE-administered taxes and fees.<sup>12</sup>

8. **How do other states handle cash payments?** Alaska, Colorado, Oregon, and Washington impose marijuana taxes, with the latter three also imposing other state and local taxes. Officials in these states continue to grapple with cash payments due to the marijuana industry’s lack of banking options. Tax offices in these states manage cash collections by investing in various upgrades (e.g. security, new offices, armored cars, teller windows, safes, and deposit bags) and providing cash payment guidelines to taxpayers.

- [Alaska](#): Cash payments accepted at a key-access drop box in Anchorage, or by mail. Both options require a Tax Division-approved deposit bag.
- [Colorado](#): Cash tax payments may be made at any time at the Department of Revenue, located in Lakewood.
- [Oregon](#): Taxpayers must schedule an appointment at least 48 hours in advance to make cash payments at the Oregon Department of Revenue building, located in Salem.
- [Washington](#): Cash payments may be made with an appointment at the following Department of Revenue Field offices: Seattle, Port Angeles, Bellingham, Bothell, Wenatchee, Spokane, Yakima, Richland, Vancouver, Tacoma, Tumwater, and Kent. Taxpayers must fill out a denomination sheet.

**Costs:** This bill does not increase administrative costs to the BOE because it only authorizes the BOE to contract with state agencies for cash payment collection of fees, fines, penalties or other charges from cannabis-related businesses. However, every BOE contract with a state agency to collect these payments would require total reimbursement of BOE administrative costs, including implementation costs. The bill also authorizes a county to collect cash payments from cannabis-related businesses for the BOE. In this case, the county would be reimbursed for collection costs from the funds or accounts into which the collected funds are deposited. The bill prohibits the imposition of a cash collection fee for the collection of a tax.

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<sup>12</sup> A service fee of 2.3% of the transaction amount will be charged by the credit card processing vendor. This service fee is retained by the vendor and is not revenue to the BOE. The minimum fee is \$1.

As a point of reference, the BOE contracts with the DMV for use tax collection, as discussed under existing law. The maximum amount of that [agreement](#) is \$6,558,750 for Fiscal Year (FY) 2016-17. The BOE reimburses the DMV based on a flat rate per transaction, not to exceed the agreement's stated maximum amount. The agreement also outlines the scope of work the DMV agrees to provide on behalf of the BOE.

State agencies also contract with the BOE for tax and fee collection. For example, the Department of Resources Recycling and Recovery (CalRecycle) [contracts](#) with the BOE to collect the California Tire Fee. The scope of work not only includes tax collection, but also seller registration, fee returns, returns examination, billings and refunds, audits, petitions, advisory services, meeting attendance, electronic storage, and monthly reports. CalRecycle reimburses BOE for actual costs to collect and administer the tire fee program, not to exceed \$1,023,949 for FY 2016-17.

These examples illustrate how interagency agreement amounts vary depending on the scope of work and that the contractor's costs are reimbursed by the contracting state agency pursuant to the agreement's payment provisions.

**Revenue Impact:** This bill has no direct impact on state revenues.