

PETITION TO THE OFFICE OF ADMINISTRATIVE LAW CHALLENGING ALLEGED UNDERGROUND REGULATION

Use of this form is optional. It requests the information required by California Code of Regulations, title 1, section 260, for a petition challenging an alleged underground regulation. Whether you use this form or another format, the mandatory information required by California Code of Regulations, title 1, section 260, including the supporting documentation, must be included in your petition. If you create a separate petition, or if you use this form and need to add extra pages, ensure each page is clearly labeled.

Petitioner Contact Information (Title 1, Section 260(b)(1)):

Name: Kiva Sales & Service

Address: 2300 N Loop Rd., Alameda CA 94502

Telephone Number (if available): 510-435-8205

E-Mail Address (if available): caren.woodson@kivaconfections.com

Name of Challenged Agency (Title 1, Section 260(b)(2)):

Department of Cannabis Control,
Business, Consumer Services, and Housing Agency

Complete description of the Challenged Rule (Title 1, Section 260(b)(3)):

On November 20, 2023, the Department of Cannabis Control (Department) and Metrc, the state's track and trace software provider, informed all licensees by email that beginning on December 4, 2023, a new and mandatory process would require all licensees to approve transfers in the state track and trace system before a manifest can be generated pursuant to [4 CCR 15049.2](#). Two days later, licensees were informed by a subsequent Metrc bulletin, available only by logging on to the software, that the effective date for the transfer approval process would be delayed until January 2, 2024. DCC confirmed that implementation delay by email to licensees on November 30.

This is not a minor change to software functionality, Metrc functions without the change and has been facilitating the transfer of cannabis goods for nearly five years. Instead, this change introduces a new and mandatory process to occur in the state's track and trace system before any transfer of cannabis goods may

occur. While the Department and Metrc often facilitate changes to track and trace procedures through the distribution of bulletins and changes to the Metrc User Guide, this change represents a significant departure from current processes which places affirmative regulatory burdens on licensees and will cause disruptions throughout the supply chain. This change is a new standard of general application for all cannabis licensees that does not currently exist in law or regulation, makes specific the Department's authority to administer the state track and trace program ([BPC 26067](#)) and transportation of cannabis goods ([BPC 26070](#)), and without an express statutory exemption from the APA.

As detailed in both the November 20 and 22, 2023 Metrc Bulletins, “a new transfer approval process” details that “Licensees transporting and receiving a transfer will be required to review and approve, or reject, a transfer before a manifest is generated to allow the transfer of inventory from license to another.” This new process is in addition to and occurs prior to any requirement already articulated in [4 CCR Div 19 Article 6: Track and Trace Requirements](#). Interested and affected parties were provided notification of this change only days before a major federal holiday and, initially, with less than two weeks to facilitate implementation. Moreover, the Department provided licensees with no justification for the swift implementation of this new requirement, opportunity for comment, or discussion of other reasonable alternatives.

Attach an original or photocopy of the challenged rule. If the challenged rule is found in an agency manual, identify the specific provision of the manual alleged to comprise the challenged rule.

- (1) [Department of Cannabis Control, Email to Licensees](#), November 20, 2023.
- (2) Department of Cannabis Control, posting of [CCTC Updates to Track and Trace Functionality on Department Website](#).
- (3) [Metrc Support Bulletin. Transfer Approvals](#), CA_IB_2023_008. November 20, 2023.
- (4) [Metrc Support Bulletin. Transfer Approvals](#), CA_IB_2023_008. November 22, 2023

(5) [Department of Cannabis Control, Email to Licensees](#). November 30, 2023.

Description of the actions of the challenged agency showing that it has issued, used, enforced, or attempted to enforce the challenged rule. (Title 1, Section 260(b)(4))

The Department issued the “new transfer approval process” change via email to licensees on November 20, 2023, preceded by a Metrc bulletin made available to Metrc users when they logged on to Metrc the same day. The new process was also posted on the Department's website on a page titled, CCTT Updates and Resources. On November 22, 2023, a subsequent and revised Metrc bulletin was issued to extend the implementation date, which was later confirmed by another email from the Department to all licensees on November 30, 2023.

The applicability and enforcement is inherent in the new process because licensees can not generate the shipping manifest required in [4 CCR 15049.2](#) to support the transportation of goods until the “new transfer approval process” is completed.

Legal basis for concluding that the guideline, criterion, bulletin, provision in a manual, instruction, order, standard of general application, or other rule or procedure is a regulation as defined in Section 11342.600 of the Government Code and that no express statutory exemption to the requirements of the APA is applicable. (Title 1, Section 260(b)(5))

The new procedure, requiring licensees transporting and receiving a transfer to review and approve, or reject, a transfer before a manifest is generated to allow the transfer of inventory from one license to another, outlines a new standard of general application for all cannabis licensees that does not currently exist in law or regulation.

The mandatory procedure has been issued by the agency to make specific the Department's authority to administer the state track and trace program (BPC 26067) and transportation of cannabis goods (BPC 26070). However, the procedure does not enjoy an express statutory exemption from the APA.

Information demonstrating that the petition raises an issue of considerable public importance. (Title 1, Section 260(b)(6))

Specifically, the change creates significant impacts for all cannabis licensees. As one of the state's largest cannabis distributors, Kiva Sales & Service (KSS) is particularly impacted given the volume of cannabis goods transfers we manage on any given day. The new process stymies the internal processes companies use to ensure a timely flow of goods in the supply chain and will result in delayed product shipments impacting brands, retailers, and consumers almost immediately.

Implementation requires KSS to change shipments from a 24-hour to 48-hour turnaround (an important feature of our business model). The change will delay QR coding because stickering cannot occur prior to the approval, and, perhaps most dramatically, requires additional warehouse capacity distributors simply do not have to accommodate the anticipated delays created by the "new transfer approval process."

Broadly, the petition raises an issue of public importance because the regulated public should have an opportunity to review and comment on any new rule, procedure, policy, or interpretation of law that may impose affirmative regulatory burdens on individuals or businesses. Regulation via underground rulemaking channels diminishes political accountability, and frustrates an opportunity to foster broad-based social consensus on public policy. The Administrative Procedure Act exists to ensure that regulations are adopted in an open and deliberative process, wherein the regulated public has an opportunity to engage the comment and response process with questions, concerns and suggestions.

Optional: Please attach any additional relevant information that will assist OAL in evaluating your petition.

All licensees are required to use Metrc to track the movement of cannabis and cannabis products through the supply chain. Users must take training before operating in the system and follow the steps provided in the [Metrc Industry Generic User Guide](#) and the [Metrc User Guide California Supplemental](#) to execute required functions within Metrc.

Directions for performing cannabis transfers, including generation of manifests in California, are found in Section 7 of the [Metrc User Guide California Supplemental](#) and align with current regulatory requirements. Importantly, the User Guide was never incorporated by reference into regulation, and Section 7 does not include the requirement for destination and transporter licensees to review and approve pending transfers. Unfortunately, the result is a significant training gap for new licensees and ongoing administration.

As with any technology, Metrc regularly updates their system to enhance usability, system performance, and to incorporate new legislative cannabis tracking mandates. To notify system users of these types of changes, Metrc issues bulletins. Historically, bulletins have covered the following types of subjects: new functionality, updated functionality, existing functionality, rules & guidance, events and informational. A partial archive of bulletins is available [here](#).

Normally, Metrc bulletins are only issued within the Metrc system when a user logs on, and are not visible or announced to non-Metrc users. It's important to note that within a licensed cannabis business only a segment of the employees are authorized Metrc users. It is unusual for the Department to re-publish a Metrc bulletin for distribution to their wider mailing list which includes non-Metrc users. We believe this is another, however subtle, indication that the change is not associated with a routine functionality update, but instead represents a new, mandatory rule they wanted all interested and affected parties to be aware of.

Confirmation Pursuant to Title 1, Section 260(b)(7):

A copy of this petition and all attachments were submitted to the challenged agency.

Challenged Agency: Department of Cannabis Control

Name of individual at Challenged Agency to whom petition was sent:

Nicole Elliot, Director, Department of Cannabis Control

If submitted by mail, commercial or hand delivery:

Address: _____

If submitted by email:

Email Address: nicole.elliott@cannabis.ca.gov

Please Note: When a petition is submitted to OAL and the challenged agency concurrently in the same e-mail, and the e-mail address of the recipient at the challenged agency is visible to OAL, the e-mail satisfies the written confirmation requirement. (Title 1, Section 260(b)(7)(B).)

Deliver this petition and all supporting documentation to:

Attention: CTU
Office of Administrative Law
300 Capitol Mall, Suite 1250
Sacramento, CA 95814

Or by email to staff@oal.ca.gov

Petitions and accompanying documentation may be submitted to OAL in hard copy, either through the mail, or by hand delivery in person or by a commercial delivery service (FedEx, UPS, etc.), or by e-mail.