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Lt. Governor

December 14, 2016

Colonel Richard D. McKeon
Massachusetts State Police
470 Worcester Road
Framingham, MA 01702

Re: Passage of Question 4, "Legalization, Regulation, and Taxation of Marijuana"

Dear Colonel:

I am writing to offer some guidance about the way that the recent passage of Question 4 will affect the way you and your officers enforce state laws regarding marijuana. Effective December 15, 2016, aspects of the new law will take effect, permitting some acts of personal possession and home-growing of marijuana that had previously been illegal. Over the course of the coming year, the phasing in of other aspects of the law will create a complex web of different rules for licensed and unlicensed sellers; for juveniles, young adults, and older adults; for those who sell drugs for profit, and for those who give drugs away. Within certain limits, the new law authorizes some conduct that had previously been prohibited. Beyond those limits, however, possession, cultivation and distribution of marijuana remain illegal under state law. These changes in the law will require your officers to reassess how they evaluate the presence of reasonable suspicion and probable cause, and, as a result, how they proceed in evaluating potentially criminal conduct where marijuana is at issue.

Below are some of the situations you and your departments will encounter, and an explanation of how the new law will apply.¹ Please note that this letter is not intended to direct how your department elects to prioritize its enforcement efforts, but merely to provide guidance about what conduct is now legal, and what is illegal under state law.

SIMPLE POSSESSION OF MARIJUANA OUTSIDE PRIMARY RESIDENCE: UNDER ONE OUNCE

Under the new law, a person 21 years or older may legally possess up to one ounce of marijuana outside his or her primary residence. Marijuana concentrate (such as cannabis oil) will be similarly legal, but only in quantities of 5 grams or less. See G.L. c. 94G, § 7(a)(1). This change means that possession of marijuana in

¹ Because Question 4 has no effect upon existing state law regarding medical marijuana, as set out in Chapter 369 of the Acts of 2012, the scenarios below do not address marijuana cultivated, possessed, or sold under the laws governing medical marijuana. See G.L. c. 94G, § 2(a).

these quantities is not merely decriminalized, but *fully legalized*. Accordingly, it will no longer be lawful or appropriate for police to issue a civil citation to a person 21 years or older for possessing quantities of marijuana within these limits, as has been the lawful procedure since the passage of Question 2 in 2008. It will also no longer be lawful for police to seize small quantities of marijuana for forfeiture, as has been past practice, as these small quantities will no longer be considered contraband. Likewise, it will no longer be appropriate for police to initiate a threshold inquiry based merely on a reasonable belief that a person possesses a small quantity of marijuana, if the subject is not consuming the marijuana in a public or a prohibited area, does not appear to be under the age of 21, and does not appear to be engaged in illegal distribution activity.

For persons between the ages of 18 and 21, possession of less than one ounce of marijuana is not fully legalized by Question 4, but it will remain *decriminalized*, as it has been since the passage of Question 2 in 2008. In these cases, a civil citation will remain available, with a penalty of \$100. For juveniles (those under the age of 18), possession of one ounce or less of marijuana likewise remains subject to a civil citation with a penalty of \$100, but with the additional requirement that the juvenile complete a drug awareness program. If the juvenile does not complete the program, the civil fine can be enhanced to \$1000, for which the juvenile's parents may be held liable. See G.L. c. 94C, § 32L.

SCHOOLS AND GOVERNMENT BUILDINGS

The scope of the legal possession provision described above (one ounce or less) does not permit any person to possess any quantity of marijuana on the grounds of a public or private preschool or K-12 school, or on the grounds of (or within) any correctional facility. See G.L. c. 94G, § 2(d)(3). For individuals over 21 who possess less than one ounce of marijuana on school grounds or on the grounds of a correctional facility, a civil penalty will remain available pursuant to G.L. c. 94C, § 32L. For persons under 21, the penalties outlined in the section above will apply. Distribution of (or possession with intent to distribute) marijuana to a prisoner, or concealing marijuana in or about a penal institution with the intent that an inmate should obtain it, remain felony offenses for all persons pursuant to G.L. c. 268, § 28 and G.L. c. 268, § 31, respectively.

State and local governments retain the authority to prohibit possession of marijuana within their buildings, including city halls, police stations, and public housing facilities. See G.L. c. 94G, § 2(d)(2).

SIMPLE POSSESSION OF MARIJUANA OUTSIDE PRIMARY RESIDENCE: 1-2 OUNCES

For an individual 21 years of age or older, possession of a quantity of marijuana greater than one ounce, but less than two ounces, outside his or her primary residence, will be a civil violation subject to a penalty of not more than \$100, and by forfeiture of the *excess* amount of marijuana possessed. See G.L. c. 94G, § 13(e). If such an individual were discovered to possess 1 ½ ounces of marijuana, a police officer could therefore issue a citation and seize ½ ounce of the subject's marijuana, but not the entire quantity.

For an adult under 21 years of age, possession of any quantity over one ounce in an place remains a criminal offense. Likewise, juveniles in possession of more than one ounce remain subject to delinquency proceedings. See G.L. c. 94C, § 34.

POSSESSION OFFENSES OUTSIDE PRIMARY RESIDENCE: OVER TWO OUNCES

A person of any age who possesses more than two ounces of marijuana outside of his or her primary residence will remain subject to existing criminal penalties. See G.L. c. 94C, § 34. The only exception to this rule will be for a person engaged in the lawful operation of a recreational or medical establishment properly licensed by the newly-created Cannabis Control Commission or the Department of Public Health.

POSSESSION OF MARIJUANA OUTSIDE PRIMARY RESIDENCE

	Under 1 Oz.	1-2 Oz.	Over 2 Oz.
21+ with proper Cannabis Control Commission License	Legalized.	Legalized.	Legalized.
21 + w/o License	Legalized.	Civil fine of \$100.	Criminal penalties available. G.L. c. 94C, § 34.
18-21	Civil fine of \$100.	Criminal penalties available. G.L. c. 94C, § 34.	Criminal penalties available. G.L. c. 94C, § 34.
Juvenile (under 18)	Civil fine of \$100, and mandatory drug education program.	Delinquency proceedings available. G.L. c. 94C, § 34.	Delinquency proceedings available. G.L. c. 94C, § 34.

POSSESSION OF MARIJUANA INSIDE PRIMARY RESIDENCE

Question 4 permits a person over the age of 21 to possess up to 10 ounces of marijuana inside his or her own primary residence, and, as drafted, permits the lawful possession of additional quantities that have been lawfully cultivated (grown) on the premises. See G.L. c. 94G, § 7(a)(2). Note that a person may only have one “primary residence” at a time, and the question of whether a given location is a person’s primary residence is one that is subject to circumstantial proof.

Whether a given quantity of marijuana was lawfully cultivated on the premises is also a question subject to circumstantial proof. If the subject has no apparent grow operation on the premises, or has quantities of fresh marijuana that appear wholly inconsistent with the quantity that could have been produced by the plants on the premises, or if the fresh marijuana is a different strain than the marijuana plants on the premises, the facts might well be sufficient for police to conclude that the subject has not abided by the safe harbor requirements of the law.

The safe harbor for possessing marijuana in the home applies only to marijuana possessed for lawful purposes, such as personal use. Possession of *any quantity* of marijuana with intent to sell remains a crime in the absence of a license issued by the Cannabis Control Commission. If a person possessing marijuana does not hold such a license, and there is sufficient evidence to prove that the marijuana is intended for 1) sale of any quantity to another party (distribution “for remuneration”); or 2) gifting (distribution “without remuneration”) of more than one ounce to another party; or 3) transfer of any quantity to a person under 21; then the person would be guilty of Possession of a Class D Substance with Intent to Distribute, pursuant to G.L. c. 94C, § 32C, or of Trafficking in Marijuana, pursuant to G.L. c. 94C, § 32E(a)(1), if the quantity in his possession exceeds fifty pounds.

The new law requires that any quantity of marijuana exceeding one ounce be kept under lock and key. A violation of this requirement, however, is subject only to a civil fine of \$100, and forfeiture of the marijuana, and does not make the possession subject to criminal prosecution. G.L. c. 94G, § 13(b).

CULTIVATION OFFENSES

Where previously the “cultivation” of any quantity of marijuana constituted a violation of G.L. c. 94C, § 32C, the new law legalizes the cultivation of up to 6 marijuana plants by any single person in his or her primary residence, up to a maximum of 12 marijuana plants in a single residence (if there are two or more persons engaged in growing activity there).

A person who grows more than the allowed individual maximum of six plants, but less than the *household* maximum of twelve plants, is subject only to a civil penalty of \$100, see G.L. c. 94G, § 13(e), and not to criminal prosecution. A person who cultivates more than the household limit of twelve plants, however, has violated G.L. c. 94C, § 32C and is subject to criminal prosecution if he is not operating under a cultivator license from the Cannabis Control Commission.

In the absence of a license granted by the Cannabis Control Commission, no place other than a primary residence may be used for the cultivation of marijuana. Accordingly, a person who grows marijuana, even a small quantity, in a rented storage area, at his workplace, or at any location other than his or her primary residence is subject to criminal prosecution pursuant to G.L. c. 94C, § 32C.

In addition, unless a person holds a state license granting him status as a lawful “marijuana retailer” or “marijuana cultivator,” this marijuana may be grown and kept only for limited purposes: personal use, or small scale (under one ounce), non-remunerated “gifting.” If there is sufficient evidence that any quantity of marijuana is being grown for unlawful sale, even if it is within the grower’s primary residence, the grow operation would remain criminal pursuant to G.L. c. 94C, § 32C.

The new law requires that home-grow cultivation be conducted in a manner that is not visible from a public place without the use of aircraft, binoculars, or other optical aids, and that marijuana plants be secured under lock and key or other appropriate security device. Violation of these requirements is subject only to a civil fine of \$300 and forfeiture of the marijuana, and does not make the grower subject to criminal prosecution. See G.L. c. 94G, § 13(a).

DISTRIBUTION OFFENSES

As noted above, the new regime allows persons not licensed to operate a marijuana establishment to “gift” marijuana in quantities under one ounce, but not to sell marijuana in any quantity. Attempts to evade this safe harbor with delayed or disguised payments, contemporaneous reciprocal “gifts” of money or items of value, or other sham transactions, will remain a criminal act. See G.L. c. 94C, § 32C. Simply put, where a person is not operating under the required license, any of the following forms of marijuana distribution remain criminal offenses:

- Giving or selling any amount of marijuana to a person under 21 in any circumstance, even if possession by the purchaser is non-criminal.
- Selling marijuana in any amount, to any person, of any age.
- “Gifting” more than one ounce to any person, of any age.

CULTIVATION AND DISTRIBUTION OF MARIJUANA

	Gift or Possession with Intent to Gift, Under 1 Oz.	Gift or Possession with Intent to Gift, 1 Oz. or more	Sale or Possession with Intent to Sell, any quantity	Cultivation of 6 or fewer plants, at primary residence	Cultivation of 7-12 plants, at primary residence	Cultivation of 12+ plants, at primary residence	Cultivation at location other than primary residence
21+ with proper Cannabis Control Commission License	Legalized.	Legalized.	Legalized.	Legalized.	Legalized.	Legalized.	Legalized.
21 + w/o License	Legalized.	Criminal penalties available. G.L. c. 94C, § 32C.	Criminal penalties available. G.L. c. 94C, § 32C.	Legalized.	Civil fine of \$100, and forfeiture of excess marijuana.	Criminal penalties available. G.L. c. 94C, § 32C.	Criminal penalties available. G.L. c. 94C, § 32C.
18-21	Civil fine of \$100.	Criminal penalties available. G.L. c. 94C, § 32C.	Criminal penalties available. G.L. c. 94C, § 32C.	Criminal penalties available. G.L. c. 94C, § 32C.	Criminal penalties available. G.L. c. 94C, § 32C.	Criminal penalties available. G.L. c. 94C, § 32C.	Criminal penalties available. G.L. c. 94C, § 32C.
Juvenile (under 18)	Civil fine of \$100, and mandatory drug education program.	Delinquency proceedings available. G.L. c. 94C, § 32C.	Delinquency proceedings available. G.L. c. 94C, § 32C.	Delinquency proceedings available. G.L. c. 94C, § 32C.	Delinquency proceedings available. G.L. c. 94C, § 32C.	Delinquency proceedings available. G.L. c. 94C, § 32C.	Delinquency proceedings available. G.L. c. 94C, § 32C.

TRAFFICKING, MONEY LAUNDERING, AND FORFEITURE

Question 4 repeals the prohibition against marijuana Trafficking only to the degree that it protects properly licensed cultivators, manufacturers, and retailers operating within the limits set by the new law and the regulations issued by the Cannabis Control Commission. Unlicensed persons who possess fifty pounds or more with intent to sell remain guilty of a felony offense pursuant to G.L. c. 94C, § 32E(a)(1). Financial transactions involving the proceeds of felony Trafficking activity remain criminal Money Laundering in violation of G.L. c. 267A, § 2, and the funds associated with such transactions remain subject to seizure and forfeiture. Transactions involving the proceeds of misdemeanor offenses (which include most smaller marijuana sales) do not constitute Money Laundering, but the proceeds of such illegal sales are subject to forfeiture pursuant to G.L. c. 94C, § 47.

SCHOOL ZONES

Question 4 did not repeal or modify the School Zone statute. Accordingly, any individual who is convicted of a Distribution, Possession with Intent, or Trafficking offense while within a School Zone or Park Zone may face the enhanced penalties of G.L. c. 94C, § 32J.

USE OF JUVENILES TO DISTRIBUTE MARIJUANA

Marijuana remains a Class D controlled substance under Massachusetts law, and Question 4 does not legalize marijuana for minors. Pursuant to G.L. c. 94C, § 32K, any party, licensed or unlicensed, who causes, induces or abets a person under the age of 18 to distribute marijuana, or to possess with intent to distribute marijuana (e.g., by employing a juvenile as a drug runner for their organization, or by supplying a juvenile drug dealer with marijuana for resale), is subject to criminal prosecution.

ATTEMPTS TO PROCURE BY UNDERAGE PARTIES

Persons under the age of 21, whether they are adults or juveniles, who attempt to purchase or procure any quantity of marijuana are subject to a civil fine of \$100. See G.L. c. 94G, § 13F.

SALE OF MARIJUANA-RELATED DRUG PARAPHERNALIA

The implementation of Question 4 will effectively nullify the application of the existing law prohibiting sale of marijuana-related drug paraphernalia, G.L. c. 94C, § 32I(a), to persons over the age of 21. Thus, it will no longer be illegal to sell bongos, or pipes, or hydroponic equipment intended to facilitate marijuana cultivation, to persons over the age of 21. See G.L. c. 94G, § 8.

Sale of (or possession with intent to sell) such paraphernalia to persons over 18, but under 21 will remain a misdemeanor under G.L. c. 94C, § 32I(a), while sale to persons under the age of 18 will remain a felony. See G.L. c. 94C, § 32I(b). A person under the age of 21 who purchases or attempts to purchase marijuana-related drug paraphernalia may be subject to a civil fine of \$100 and may be required to complete a drug awareness program, but may not be criminally charged. See G.L. c. 94G, § 13(f).

Mere possession of drug paraphernalia remains non-criminal in Massachusetts, though it may be compelling circumstantial evidence either of intent to consume marijuana, or of intent to cultivate or distribute, depending on the nature of the paraphernalia.

OPERATING UNDER THE INFLUENCE

The passage of Question 4 does not have any effect on the longstanding prohibition against operating a motor vehicle under the influence of marijuana. This remains illegal under the terms of G.L. c. 90, § 24(1)(a)(1). See G.L. c. 94G, § 2(a). Though the new law makes the consumption of marijuana broadly legal for individuals over 21, evidence of recent marijuana consumption will remain admissible in OUI prosecutions, much as evidence that a defendant was seen drinking alcohol in a bar shortly before his motor vehicle stop is admissible in an OUI-Liquor prosecution. Accordingly, in OUI-Drugs investigations, police officers may continue to seize evidence of a suspect's marijuana consumption (such as a partially-burned "roach" in a vehicle ashtray) as evidence, just as they may appropriately seize an empty beer can from the floorboards of an OUI-Liquor suspect's vehicle as evidence of recent alcohol consumption.

PUBLIC CONSUMPTION OF MARIJUANA

Prior to the passage of Question 4, municipalities had the authority, but not the obligation, to prohibit public consumption of marijuana. Under the new law, all public consumption of marijuana (other than medical marijuana) is prohibited. Non-public smoking of marijuana is also prohibited in any place where tobacco smoking is prohibited (such as private offices, bars and restaurants, see G.L. c. 270, § 22). Either one of these may result in a civil penalty of not more than \$100. See G.L. c. 94G, § 13(c). For cities and towns that already have a bylaw or municipal ordinance prohibiting public marijuana consumption, these provisions should remain in force and effect, as they do not appear to be preempted by the passage of Question 4. See G.L. c. 94G, § 3(a)(5).

MARIJUANA IN VEHICLES

The new law prohibits possession of an "open container" of marijuana in the passenger area of a motor vehicle while that vehicle is on a public way, whether the car is or is not moving at the time. Violations may be

subject to a civil penalty of not more than \$500. See G.L. c. 94G, § 13(d). Accordingly, any police officer who observes a driver or passenger smoking marijuana in a motor vehicle may lawfully effectuate a motor vehicle stop or initiate a threshold inquiry in order to identify the party and issue a citation. Marijuana that is in a sealed container, or which is secured in a vehicle's trunk or locked glove compartment, is not subject to such a civil penalty.

FIREARMS LICENSING

General language in the new law provides that “a person 21 years or older shall not be . . . disqualified under the laws of the Commonwealth in any manner, or denied any right or privilege . . .” for lawfully possessing, cultivating, or giving away marijuana. See G.L. c. 94G, § 7(a)(1)-(4). Consequently, marijuana-related activity that is now legal cannot constitute a firearms licensing *disqualification* under Massachusetts law, nor can marijuana-related activity that is illegal, but non-criminal (e.g., possession of 1 ½ ounces of marijuana by a person over 21 years old, punishable as a civil offense only). As I noted in my directive to the Firearms Records Bureau on October 8, 2015, past criminal convictions involving the possession of one ounce or less of marijuana should no longer be viewed as a disqualification in a firearms license application.

However, in addition to reviewing an applicant's record for possible disqualifying offenses, a licensing authority is required to assess the *current suitability* of an applicant for a License to Carry or a Firearms Identification Card. In making this evaluation, a licensing authority can and should consider any evidence of an applicant's habitual, excessive consumption of intoxicating substances, which may make an applicant unsuitable in some cases even when the use of those substances (like alcohol and marijuana) has been broadly legalized under state law. See *Ceeley v. Firearms Licensing Review Board*, 78 Mass.App.Ct. 1125 (2011), 2011 WL 445841 (upholding board's determination that applicant was “unsuitable” for restoration of his firearms rights, based in part on his “long history of alcohol abuse”). Cf. 27 C.F.R. 478.11 (federal regulation defining the phrase “Unlawful user of and addicted to any controlled substance” as including “[a] person who uses a controlled substance and has lost the power of self-control with reference to the use of controlled substance”).

51A OBLIGATIONS: ABUSE AND NEGLECT OF CHILDREN

Question Four contains a provision that requires “clear, convincing and articulable evidence” that a person's actions related to marijuana have created “an unreasonable danger to the safety of a minor child” before such actions may form “the sole or primary basis for substantiation, service plans, removal or termination or for denial of custody, visitation or any other parental right or responsibility.” See G.L. c. 94G, § 7(d).

This provision qualifies the manner in which a parent or caregiver's involvement with marijuana may be considered in making decisions about child protection and welfare. The provision does not change a police officer's duties as a mandated reporter pursuant to G.L. c. 119, § 51A. Accordingly, nothing in the new marijuana laws should be viewed as preventing a police officer, in his or her capacity as a mandated reporter, from making a 51A report, as required by the statute, where there is reasonable cause to suspect that a child has been abused or neglected.

PROTECTIVE CUSTODY

The protective custody law, G.L. c. 111E, § 9A, which Governor Baker signed into law in July, is not affected in any way by the passage of Question 4. Police officers retain the authority to take into protective custody any person who is incapacitated by the consumption of *any* drug, regardless of the age of the drug user, and regardless of whether the possession or consumption of the drug was itself illegal. Protective custody is not

an arrest for a criminal act, but an emergency caretaking power designed to protect the immediate safety of the incapacitated party and the public.

FEDERAL LAW

Marijuana remains broadly prohibited under federal law. Since the issuance of its memorandum of August 29, 2013 providing "Guidance Regarding Marijuana Enforcement" (the "Cole Memorandum"), however, the Department of Justice has taken the position that marijuana distribution conducted in compliance with a "strong and effective state regulatory system" should be a relatively lower priority for federal enforcement efforts. At this time, it is not yet clear whether the incoming administration will maintain that position, or whether federal enforcement agencies will take a more aggressive stance toward state legalization initiatives.

State and local law enforcement officers should keep in mind that their primary obligation is to enforce the laws of the Commonwealth, and to protect the citizens of the Commonwealth. But we also have an obligation to be good neighbors. To the extent that actors within Massachusetts are engaged in efforts to illegally traffic controlled substances outside our borders and into neighboring states, we should remain vigilant in helping our federal partners, and our brother and sister agencies in other states, to carry out their duties as well. This is no doubt an area that will require new policies as warranted by developments on the ground.

Thank you, as always, for your commitment to our shared mission.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel Bennett", with a long horizontal flourish extending to the right.

Daniel Bennett, Secretary
Executive Office of Public Safety and Security