

# The Cannabis Control Commission & Attorney General's Office Joint Report

As mandated by Section 74 of Chapter 55 of the Acts of 2017,  
*An Act to Ensure Safe Access to Marijuana*

February 2020

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## **I. INTRODUCTION**

This report is submitted pursuant to Section 74 of Chapter 55 of the Acts of 2017, which requires that the Cannabis Control Commission (Commission) and the Attorney General's Office (AGO) "conduct an investigation and study of the advisability of establishing criminal penalties for violations of this act, and ... report their recommendations for amendments to the General Laws to establish such criminal penalties."<sup>1</sup>

To fulfill this mandate, the Commission and AGO staff worked cooperatively (1) to review existing criminal laws and laws establishing criminal and civil penalties, (2) to identify the existing penalties that apply to individuals and entities licensed by the Commission in accordance with M.G.L. c. 94G and 94I but engaged in illicit activities and to individuals and entities not licensed but engaged in illicit activities, and (3) to recommend new penalties.

## **II. EXECUTIVE SUMMARY**

Based on our review of existing laws, criminal penalties can be applied to unlicensed marijuana operations for the illegal manufacturing, distribution, dispensing, or cultivation of controlled substances, which include marijuana, or possession with such an intent; sales to minors; money laundering; and criminal conspiracy, among other crimes. These statutes also apply to licensed marijuana operations that engage in illegal activity outside the scope of their licensure. Marijuana operations engaged in illegal activity also risk criminal charges and civil penalties under existing environmental laws. Finally, the Department of Revenue (DOR) can assess the sales tax on illegal sales, as an alternative to criminal prosecution.

Given the broad range of available criminal and civil penalties available under existing law, we do not advise establishing any additional criminal penalties at this time. Our review, however, revealed that certain recommendations are warranted to clarify the application of existing laws to address illegal activity, and to provide additional civil enforcement tools and resources to address the illicit market. Accordingly, we recommend the following:

Recommendation 1: To the extent that the Commission's governing laws could be read to allow licensed marijuana operations to engage in illegal activities and claim that they cannot be prosecuted given their licensure status, it is recommended that that M.G.L. c. 94G and 94I be amended to clarify that M.G.L. c. 94C, § 32C and other criminal statutes apply to licensed marijuana operations engaging in activities such as inversion and diversion.

Recommendation 2: We recommend supporting the concept of a multi-agency task force to encourage coordination among administrative agencies and law enforcement to target illegal sales and the illicit market; to promote, where feasible, alternatives to arrest; and to enable the efficient sharing of information and use of resources to narrow the illicit market and achieve compliance with the law.

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<sup>1</sup> A letter was filed with the clerks of the Massachusetts House and Senate on December 23, 2019, providing a status update on this report.

**Recommendation 3:** Currently, DOR can impose liability for the sales tax on illegal marijuana sales, but not the excise and local option taxes. For this reason, we support expanding DOR’s authority to assess these taxes at the same rates for illegal sales as legal sales of marijuana. As with criminal penalties, the goal is to have a deterrent effect on the illicit market.

These recommendations will be discussed in detail in Section V of this report.

### **III. BACKGROUND AND HISTORY**

#### **A. State Context.**

##### **i. The Commission’s Legislative History.<sup>2</sup>**

The joint recommendations may be better understood in the context of marijuana legalization in the Commonwealth. Following decriminalization in 2008, voters approved the legalization of medical-use marijuana in 2012, and of adult-use marijuana in 2016.

On November 4, 2008, Massachusetts voters passed Ballot Question 2, “The Sensible Marijuana Policy Initiative,” which decriminalized possession of small amounts of marijuana. More specifically, it: (1) replaced criminal penalties with a \$100 fine; (2) eliminated collection of Criminal Offender Record Information (CORI) for minor infractions; (3) maintained existing penalties for selling, growing, and trafficking marijuana, as well as the prohibition against driving under the influence of marijuana; and (4) required additional penalties for minors such as parental notification, compulsory drug awareness program, community service, and larger fines, and possible delinquency proceedings for those under age seventeen (17).

Following decriminalization, medical use of marijuana was legalized. On November 6, 2012, Ballot Question 3, “An Initiative Petition for a Law for Humanitarian Medical Use of Marijuana” passed with 63.3% of the vote, making Massachusetts the eighteenth (18<sup>th</sup>) state in the nation, in addition to the District of Columbia (DC), to legalize medical-use marijuana. The resulting law, Chapter 369 of the Acts of 2012, *An Act for the Humanitarian Medical Use of Marijuana*, eliminated state criminal and civil penalties related to the medical use of marijuana, allowing patients meeting certain conditions to purchase through dispensaries marijuana for medical use, and in specific hardship cases, to grow marijuana for their own use. It also required the Massachusetts Department of Public Health (DPH) to issue regulations and implement the medical-use program, which was transferred to the Commission on December 23, 2018.

On November 8, 2016, Ballot Question 4 “Legalization, Regulation and Taxation of Marijuana” passed with 53.6% of the vote. At that time, Massachusetts joined seven (7) other states, and DC in legalizing adult-use marijuana. On December 15, 2016, the corresponding law, Chapter 334 of the Acts of 2016, *The Regulation and Taxation of Marijuana Act*, became

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<sup>2</sup> The Commission’s enabling legislation can be found at <https://mass-cannabis-control.com/the-laws/>.

effective. That law was later amended when, on July 28, 2017, the Governor signed into law Chapter 55 of the Acts of 2017, *An Act to Ensure Safe Access to Marijuana* (the Act).

Chapter 334 of the Acts of 2016, *The Regulation and Taxation of Marijuana Act*, as amended by the Act, created the Commission consisting of five commissioners, appointed by the Governor, the Treasurer, the Attorney General, or all three, and serving three- to five-year terms which began on September 1, 2017. Under the Act, the Commission regulates medical- and adult-use establishments. The mission of the Commission is to honor the will of the voters of Massachusetts by safely, equitably and effectively implementing and administering the laws enabling access to medical- and adult-use marijuana in the Commonwealth.

## **ii. The Current State of Implementation in the Commonwealth.**

### **1. The Commission's Statutory and Regulatory Authority.<sup>3</sup>**

The Commission's statutory authority is set forth in M.G.L. c. 94G, § 4(a),(a½), (b), and M.G.L. c. 94I and requires the Commission to adopt regulations establishing the license application process, standards and qualifications for licensure, and operational requirements for Marijuana Establishments and Medical Marijuana Treatment Centers, including those related to marketing and branding, packaging and labeling, testing, security, energy use and waste management. Section 4(a½) also requires the Commission to establish policies and procedures to promote and encourage full participation in the regulated marijuana industry by people from communities that have previously been disproportionately harmed by marijuana prohibition and enforcement and to positively impact those communities. M.G.L. c. 94G, § 4(a½)(iv).

Since their appointment on September 1, 2017, the Commissioners have promulgated regulations implementing the Act. The first adult-use regulations, 935 CMR 500.00: *Adult Use of Marijuana*, were published on March 23, 2018. On December 23, 2018, as part of the transfer of the medical-use marijuana program from the DPH, the Commission promulgated 935 CMR 501.000: *Medical Use of Marijuana*, which transferred existing regulations 105 CMR 725.000: *Implementation of an Act for the Humanitarian Medical Use of Marijuana*, and also 935 CMR 502.000: *Colocated Adult Use and Medical Use Marijuana Operations*. Most recently, on November 1, 2019, revised medical- and adult-use regulations were promulgated.

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<sup>3</sup> The Commission's statutes and regulations are available at <https://mass-cannabis-control.com/the-laws/>.

## 2. The Scope of the Regulated Market. <sup>4</sup>

As of January 15, 2020, 258 license Marijuana Establishments (MEs)<sup>5</sup> have been approved by the Commission in all but one of the counties of the Commonwealth. Eighty (80) marijuana establishments have been authorized to begin operations. The maps below show the distribution of licensed entities, including entities with a retail license. Given that there are an additional 437 pending applications, it is likely that the number of operational MEs will exponentially increase. Among those seeking to work in the industry, there are 7281 registered agents. Because of statutory limitations, the Commission cannot collect data on the number of adult-use consumers. That being said, the Commission has tracked in its seed-to-sale system, \$471 million of adult-use marijuana sales.

### Licensing Applications | January 15, 2020

| LICENSE TYPE                   | PENDING APPLICATION | INITIAL LICENSE DENIED | PROVISIONALLY APPROVED | PROVISIONAL LICENSE | FINAL LICENSE | COMMENCE OPERATION | TOTAL |
|--------------------------------|---------------------|------------------------|------------------------|---------------------|---------------|--------------------|-------|
| Craft Marijuana Cooperative    | 2                   | 0                      | 0                      | 0                   | 0             | 0                  | 2     |
| Independent Testing Laboratory | 4                   | 0                      | 0                      | 1                   | 0             | 2                  | 7     |
| Marijuana Cultivator           | 128                 | 2                      | 13                     | 35                  | 11            | 22                 | 211   |
| Marijuana Microbusiness        | 11                  | 0                      | 1                      | 2                   | 0             | 1                  | 15    |
| Marijuana Product Manufacturer | 98                  | 1                      | 7                      | 29                  | 7             | 20                 | 162   |
| Marijuana Research Facility    | 4                   | 0                      | 0                      | 0                   | 0             | 0                  | 4     |

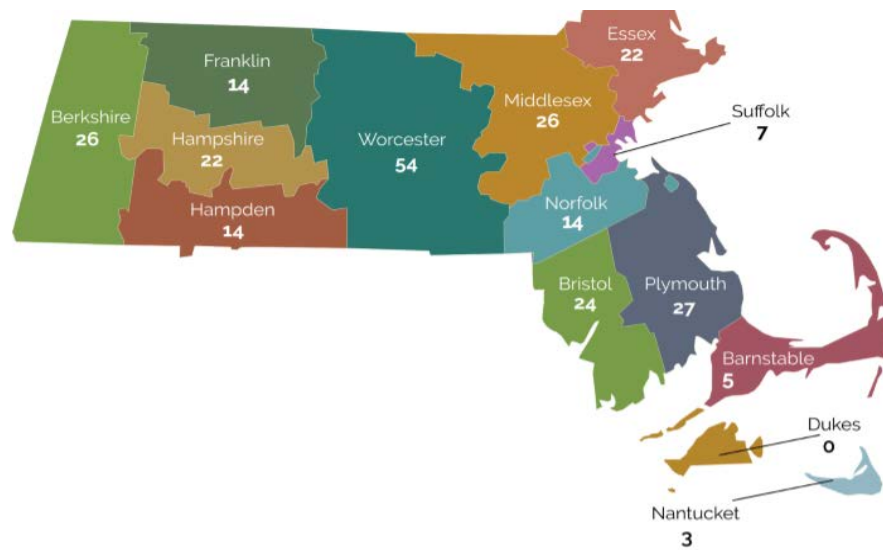
<sup>4</sup> The Commission's latest statistics can be found at <https://mass-cannabis-control.com/documents/>, by searching Meeting Materials.

<sup>5</sup> An ME is an entity licensed under G.L. c. 94G and the adult-use regulations, 935 CMR 500.000. Unlike MTCs, most licenses types are limited to specific regulated activities, including Marijuana Cultivator, Marijuana Product Manufacturer, Independent Testing Laboratory, Transporter, Marijuana Retailer, Delivery, and Marijuana Research Facility. Other license types allow for multiple types of regulated activity, for example, a Craft Marijuana Cooperative or Marijuana Microbusiness.

|                                                      |            |          |           |            |           |           |            |
|------------------------------------------------------|------------|----------|-----------|------------|-----------|-----------|------------|
| Marijuana Retailer                                   | 180        | 1        | 12        | 53         | 6         | 33        | <b>285</b> |
| Marijuana Transporter with Other Existing ME License | 4          | 0        | 0         | 0          | 0         | 2         | <b>6</b>   |
| Third Party Transporter                              | 6          | 0        | 0         | 1          | 0         | 0         | <b>7</b>   |
| <b>Total</b>                                         | <b>437</b> | <b>4</b> | <b>33</b> | <b>121</b> | <b>24</b> | <b>80</b> | <b>699</b> |

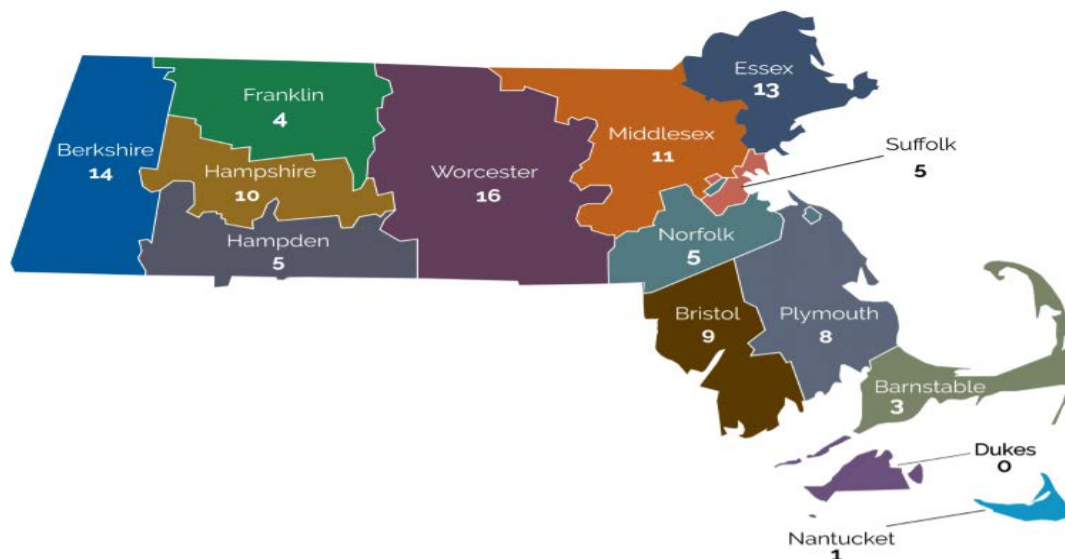
### Approved Licensing Applications | January 15, 2020

*The totals below are the total number of provisionally approved, provisional, final or commence operation licenses by county.*



### Approved Retail Applications | January 15, 2020

*The totals below are the total number of provisionally approved, provisional, final or commence operation retail licenses by county.*



In the medical-use market, 165 license Medical Marijuana Treatment Centers (MTC)<sup>6</sup> have been approved by the Commission, 56 of which have been authorized to operate. Given that there are an additional 57 pending applications, it is likely that the number of operational MTCs will continue to increase, although not at the rate of MEs. Among those seeking to work in this market, 5402 agents have registered to work in MTCs. There are 67,298 active patients and 5,726 caregivers registered to purchase adult-use marijuana. Commission data shows that 1,292,344.7272 ounces of medical-use marijuana were sold in 2019.

| MTC Licenses        | #          |
|---------------------|------------|
| Provisional         | 92         |
| Final               | 7          |
| Commence Operations | 56         |
| License Expired     | 10         |
| <b>Total</b>        | <b>165</b> |

<sup>6</sup> An MTC is an entity licensed under M.G.L. c. 94G and 94I and the medical-use regulations, 935 CMR 501.000. An MTC is vertically integrated, and may acquire, cultivate, possess, process, transport, sell, distribute, deliver, dispense, or administer marijuana, products containing marijuana, related supplies, or educational materials to registered qualifying patients or their personal caregivers for medical use. With Commission approval, MTCs may deliver marijuana, marijuana products and marijuana-infused products.

## **B. National Context.**

The movement to decriminalize and legalize medical and adult-use marijuana across the country has been undertaken on a state-by-state basis. While regulatory structures vary, Massachusetts is among the majority of states that have legalized the use of marijuana in some capacity.

To date, twenty-six (26) states and DC have decriminalized the possession of small amounts of marijuana for personal consumption. Thirty-three (33) states and DC have established medical-marijuana programs.<sup>7</sup> Massachusetts is among eleven (11) states and DC in its legalization of adult-use marijuana and among seven (7) that currently have established regulated markets for legal sales.<sup>8</sup> It is the first state in the Northeast to amend its state statutes, license medical- and adult-use businesses, and authorize legal sales.

At the federal level, the sale of marijuana remains illegal, classified as a Schedule I drug under the Controlled Substances Act of 1970. Although federal officials have indicated that they will not focus prosecutorial resources on businesses operating legally within their jurisdictions, the likelihood of legalization reform at the federal level remains unclear.<sup>9</sup>

The discrepancy between state laws and federal law and the resulting uncertainty has important implications for the rapidly growing marijuana industry. Businesses and individuals that possess and sell marijuana within a state-regulated market are still in violation of federal law. While the Commission works closely with the DOR to track legal state sales, the state/federal dichotomy adds significant burdens for businesses seeking to operate in a manner that is safe and compliant with state law, as well as for law enforcement agencies working to enforce compliance.

Though legal marijuana is a multibillion-dollar industry, it remains difficult for state-regulated businesses to access traditional banking and financial systems. Financial institutions that provide services, even indirectly, risk liability under the Controlled Substances Act and federal banking laws.<sup>10</sup> Across the country, limited banking and financing options lead many businesses to conduct a greater proportion of transactions in cash. This means transactions may

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<sup>7</sup> For a full list of status of medical-use marijuana in each state, see National Conference of State Legislatures <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

<sup>8</sup> For a full list of status of marijuana legalization in each state, see National Conference of State Legislatures <http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>.

<sup>9</sup> Boston Globe, US attorney general says he prefers marijuana reform bill to current federal law, April 10, 2019, available at <https://www.bostonglobe.com/news/marijuana/2019/04/10/attorney-general-says-prefers-marijuana-reform-bill-current-federal-law/XdaqmJ2aAA5EYWTFmXWubK/story.html>.

<sup>10</sup> Caulkins, J. P., Kilmer, B., & Kleiman, M. A. (2016). Marijuana Legalization: What Everyone Needs to Know®. Oxford University Press. 227-228.

not be secure, revenue may be more difficult to manage for regulatory compliance, and the business may be left vulnerable to criminal enterprises targeting their operations.

The reality remains that entrepreneurs attempting to enter the industry legally face barriers in obtaining the financial capital necessary to do so without access to traditional banking and financing systems. This is especially true for women and racial minorities who face well-documented difficulty accessing capital in general.<sup>11</sup> This factor has contributed to the challenges that the Commission has faced in establishing “procedures and policies to promote and encourage full participation in the regulated marijuana industry by people that have previously been disproportionately harmed by marijuana prohibition and enforcement and to positively impact those communities,” an essential part of its statutory mandate under M.G.L. c. 94G, § 4(a½).<sup>12</sup> In Massachusetts, while a limited number of financial institutions have begun to offer basic banking services such as checking accounts to state-licensed businesses, access to traditional means of financing, such as small business loans, remains constrained. Thus, Massachusetts has mitigated, but not eliminated, these barriers.

#### **IV. INVESTIGATION & STUDY**

##### **A. The Commission’s Monitoring of Legal Sales Via the Commission’s Seed-to-Sale Tracking System.**

In compliance with M.G.L. c. 94G, § 4(a½)(xiii), the Commission monitors whether a ME or MTC is engaging in regulated activity within the scope of its license(s) via an electronic seed-to-sale tracking system, which allows for the tracking of individual marijuana plants, from their early cultivation, through growth, harvest and manufacture of marijuana products, including transportation, if any, to final sale of finished products. It also monitors registered agents’ involvement with the marijuana product.

Before the commencement of operations, a licensee must be able to demonstrate that it integrates with the Commission’s Seed-to-sale System of Record (SOR). By requiring this level of tracking as a condition of operating, the Commission minimizes the risk of inversion, or the risk that a business may sell illegal marijuana and marijuana products as if they were legal, and diversion, the potential that it may divert legal marijuana and marijuana products to the illicit market. This tracking system also insures that adult-use licensees comply with DOR’s and municipal requirements to collect sales, excise, and local option taxes.

##### **B. Limitations on the Commission’s Authority.**

The Commission’s primary function as an administrative agency is to regulate licensees operating in the legal adult- and medical-use marijuana markets in Massachusetts. While the

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<sup>11</sup> Politico, Makada Henry-Nickie, John Hudak and Aaron Klein, The cannabis banking bill isn’t just about banks, Sept. 25, 2019, available at <https://www.politico.com/agenda/story/2019/09/25/cannabis-banking-bill-000987>.

<sup>12</sup> M.G.L. c. 94G, § 4 (a 1/2)(iv).

Commission has exclusive authority to regulate medical- and adult-use businesses, this authority does not extend to individuals and entities operating in the illicit market or conducting illegal sales. Accordingly, enforcement against the illicit market remains under the jurisdiction of federal, state, and municipal law enforcement agencies.

### **C. Existing Options for Criminal (and Related Civil) Enforcement.**

As part of our investigation and study, the AGO and the Commission conducted an extensive review of existing statutes that may apply to licensed or unlicensed individuals that engage in illicit marijuana-related activity.<sup>13</sup>

#### **i. A Review of the Controlled Substances Act and Select Enforcement Activities.**

Under M.G.L. c. 94C, § 32C, criminal charges may be brought against unlicensed marijuana operations and individuals that engage in illegal manufacturing, distributing, dispensing, cultivating, or possession of marijuana with such an intent. Additional provisions of the Controlled Substances Act prohibit the illegal trafficking of over 50 pounds of marijuana<sup>14</sup> and criminal conspiracy.<sup>15</sup> Other criminal laws that may apply in the context of illicit marijuana sales include the prohibition on money laundering under M.G.L. c. 267A, § 2.

A number of criminal penalties are targeted toward the protection of children and minors. Any sale of marijuana to a minor is prohibited and carries criminal penalties if violated by any entity under M.G.L. c. 94G, § 13(i). Under the Controlled Substances Act, additional criminal penalties exist for inducing or abetting a minor to distribute marijuana,<sup>16</sup> and for engaging in activity in proximity to a school, park or playground.<sup>17</sup>

Although the law now provides for the licensed sale of marijuana, law enforcement maintains its authority to prosecute individuals that illegally operate outside of the scope of the regulated legal market. For example, in June 2019 an investigation by the AGO in partnership with other law enforcement agencies culminated in the arrest and arraignment of two Braintree brothers accused of operating a major multistate marijuana trafficking operation. The AGO alleged the defendants were running a scheme to launder the proceeds from their multistate marijuana trafficking operation through various casinos in the Northeast. The brothers were charged with Money Laundering, Possession with Intent to Distribute a Class D Substance, Marijuana Trafficking, and Conspiracy to Violate the Drug Laws. This example represents the

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<sup>13</sup> These statutes represent examples and should not be taken to be an exhaustive list of every crime or penalty that can be applied in the illicit marijuana context.

<sup>14</sup> M.G.L. Ch. 94C, § 32E.

<sup>15</sup> M.G.L. Ch. 94C, § 40.

<sup>16</sup> M.G.L. Ch. 94C, § 32K.

<sup>17</sup> M.G.L. Ch. 94C, § 32J.

type of large-scale illicit marijuana operation for which targeted criminal enforcement efforts are particularly appropriate.

## **ii. A Review of DOR’s Ability to Impose Sales Tax on the Illegal Sale of Marijuana and Marijuana Products and Limitations.**

Under the statutes governing the DOR, all sales of adult-use marijuana—both legal and illegal—are subject to the 6.25% state sales tax and DOR has enforcement capabilities as to the sales tax. See M.G.L. c. 64H §§ 1 and 2. In M.G.L. c. 64N: Marijuana Tax Law, the Legislature established a 10.75% excise tax for the sale of adult-use marijuana by a licensed marijuana retailer to an individual, other than a marijuana establishment. In certain communities, sales of marijuana by a licensed retailer are subject to an additional 3% local option tax. See M.G.L. c. 64N, § 3. Because the excise and local option taxes are imposed on the sale by a licensed marijuana retailer, however, DOR does not have the ability to impose the excise and local option taxes on the illegal sale of marijuana, for example, an illegal sale by someone other than a licensed marijuana retailer. See M.G.L. c. 64N § 2. Thus, the DOR could not assess the state excise tax under M.G.L. c. 64N § 2 (10.75%), or any applicable local option tax, for illegal sales.

## **iii. A Review of Select Environmental Laws.**

Massachusetts has a robust set of environmental civil and criminal statutes and regulations that may be applied to licensed or unlicensed marijuana operations that engage in water or air pollution, the improper disposal of hazardous waste, or otherwise create a substantial risk of damage to natural resources or property.<sup>18</sup> (It is important to note too that the Commission has established energy and other environmental standards for its licensees.) These laws provide the potential for civil or criminal exposure for licensed or unlicensed marijuana operations engaged in unlawful activities that have harmful environmental implications, as we have observed in states that legalized prior to Massachusetts. For example, California has seen pesticide pollution in its water supply as a result of illegal grow operations on protected lands.<sup>19</sup> Colorado has experienced air pollution as a result of plant emissions of certain chemicals.<sup>20</sup> We acknowledge that these existing regulations and standards may need to be updated as more is learned about the potential environmental risks associated with the legal marijuana industry.

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<sup>18</sup> M.G.L. c. 21, § 42 (establishing criminal and civil penalties for water pollution); M.G.L. c. 21C, § 5 (establishing criminal and civil penalties for the knowing improper disposal of hazardous waste); M.G.L. c. 21E, § 7 (establishing penalties for the failure to notify the Massachusetts DEP of a release of hazardous material); M.G.L. c. 21H, § 8 (establishing criminal and civil penalties for the failure to comply with the requirements for the disposal of solid waste); M.G.L. c. 21L, § 2 (establishing criminal and civil penalties for environmental violations that create a substantial risk of damage to natural resources or property of another in amount exceeding \$25,000 and of serious bodily injury).

<sup>19</sup> NPR, Eric Westervelt, *Illegal Pot Operations In Public Forests Are Poisoning Wildlife And Water*, Nov. 12, 2019, available at <https://www.npr.org/2019/11/12/773122043/illegal-pot-grows-in-americas-public-forests-are-poisoning-wildlife-and-water>.

<sup>20</sup> Colorado Department of Public Health and Environment, *Air Quality - environmental impacts of cannabis*, available at <https://www.colorado.gov/pacific/cdphe/greencannabis/air-quality>.

## **D. Unknown Scope & Persistence of the Illicit Market.**

### **i. Difficulty of Assessing Current Scope of Illicit Market.**

Under Section 17(a) of the Act, the Commission is tasked with developing a research agenda to include assessing the scope of the illicit market, which includes both legally manufactured, produced, and/or sold *diverted* marijuana as well as illegally manufactured, produced, sold, and/or trafficked marijuana, to understand the social and economic trends of marijuana in the Commonwealth, to inform future decisions to aid in the closure of the illicit marketplace and to inform the Commission on the public health impacts of marijuana. The Commission has published an initial research report on public safety (*see A Baseline Review and Assessment of Cannabis Use and Public Safety Part 2: 94C Violations and Social Equity: Literature Review and Preliminary Data in Massachusetts*), which is available on its website,<sup>21</sup> and is currently preparing four other reports, including an assessment of the illicit market.

Among the factors contributing to the difficulty of assessing the current scope of the illicit market, several data sources identified to assess the market were all subject to significant limitations that preclude valid and reliable estimates. In addition to the limitations of existing data sources, there is simply a lack of available systemic data collection. For example, with regards to assessing M.G.L. c. 94C violations, no research or data sources were identified that link criminal justice data from first-interaction with law enforcement through adjudication and/or incarceration period.

The Commission is currently in the process of implementing a primary survey to assess self-reported marijuana access and amount of use, that may shed light on the illicit market, by providing a preliminary assessment of the expansion or contraction of the legal marketplace, including estimates and comparisons of pricing and product availability in both markets among Massachusetts respondents.

### **ii. Selective Lessons Learned from Other States.**

States' efforts to establish well-regulated, accessible legal markets for marijuana have not deterred illegal sales or eliminated the illicit market. Specific issues vary state-by-state and depend on their respective history and regulatory systems, but there are shared structural similarities that provide incentives and opportunities for the illicit market to survive across the country. In states, such as Massachusetts, that have legalized, networks engaging in unlicensed cultivation and supply continue to meet a high demand for the product, often at a lower cost and greater convenience, compared to a limited number of licensed retailers.<sup>22</sup>

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<sup>21</sup> A Baseline Review and Assessment of Cannabis Use and Public Safety Part 2: 94C Violations and Social Equity: Literature Review and Preliminary Data in Massachusetts) is available at <https://mass-cannabis-control.com/wp-content/uploads/2019/04/1.-RR2-94C-Violations-FINAL.pdf>.

<sup>22</sup> Politico, Natalie Fertig, How Legal Marijuana Is Helping the Black Market, July 21, 2019, available at <https://www.politico.com/magazine/story/2019/07/21/legal-marijuana-black-market-227414>.

States that have legalized have seen that high demand and continued prohibition in other states create an opportunity and a financial incentive for diversion, where marijuana is transferred to the state's illicit market or is transported across state lines. This is the case in Oregon, where favorable environmental conditions for outdoor cultivation have resulted in significant overproduction, a corresponding decline in the price of wholesale legal marijuana, and thus a financial incentive to divert the surplus product to profitable illicit markets in states where marijuana sales are prohibited.<sup>23</sup> Regulators in Washington and northern California have experienced similar instances of diversion.<sup>24</sup> In Colorado, a provision in the 2000 medical marijuana law allowing for individuals to home grow up to 99 plants contributed to the proliferation of operations that may have legally grown marijuana that was ultimately diverted to the illicit market within the state or outside of its borders. Colorado has recently instituted a cap of 12 plants that one is permitted to grow, but illicit activity remains a concern.<sup>25</sup>

Additionally, the creation of a legal, regulated system may provide a way for illicit actors to evade detection by operating under the guise of licensure and making it difficult for consumers and law enforcement to distinguish the legality of the operation.<sup>26</sup> Washington has seen networks of large scale illegal outdoor grow operations utilizing the legal industry as a cover, by establishing locations close to legal sites and using the same type of fencing.<sup>27</sup> In California, this issue is especially persistent in the retail space. The medical marijuana industry operated for decades with minimal oversight, and when these shops became subject to the retail regulations after adult-use marijuana was legalized in 2018, many chose to continue operating as usual rather than go through the process of obtaining licensure. This is compounded by the fact that 80% of the state's municipalities have banned adult-use shops, limiting the number of licensed entities. Difficulty distinguishing between licensed and unlicensed businesses, high consumer demand, and a relatively limited legal supply contribute to California's strong illicit market.<sup>28</sup>

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<sup>23</sup> Oregon State Police, A Baseline Evaluation of Cannabis Enforcement Priorities in Oregon, Jan. 2017, available at [https://media.oregonlive.com/today/other/cannabis\\_enforcement\\_oregon%202.pdf](https://media.oregonlive.com/today/other/cannabis_enforcement_oregon%202.pdf).

<sup>24</sup> NPR, Martin Kaste, Despite Legalization, Marijuana Black Market Hides In Plain Sight, May 16, 2018 available at <https://www.npr.org/2018/05/16/610579599/despite-legalization-marijuana-black-market-hides-in-plain-sight>.

<sup>25</sup> KUNC, Esther Honig, Seven Years After Legalization, Colorado Battles An Illegal Marijuana Market, Aug. 14, 2019, available at <https://www.kunc.org/post/seven-years-after-legalization-colorado-battles-illegal-marijuana-market#stream/0>.

<sup>26</sup> Washington State Institute for Public Policy, Suppressing Illicit Cannabis Markets After State Marijuana Legalization, Aug. 2019, available at [http://www.wsipp.wa.gov/ReportFile/1708/Wsipp\\_Suppressing-Illicit-Cannabis-Markets-After-State-Marijuana-Legalization\\_Report.pdf](http://www.wsipp.wa.gov/ReportFile/1708/Wsipp_Suppressing-Illicit-Cannabis-Markets-After-State-Marijuana-Legalization_Report.pdf).

<sup>27</sup> NPR, Martin Kaste, Despite Legalization, Marijuana Black Market Hides in Plain Sight, May 16, 2018 available at <https://www.npr.org/2018/05/16/610579599/despite-legalization-marijuana-black-market-hides-in-plain-sight>.

<sup>28</sup> New York Times, Thomas Fuller, 'Getting Worse, Not Better': Illegal Pot Market Booming in California Despite Legalization, April 27, 2019, available at <https://www.nytimes.com/2019/04/27/us/marijuana-california-legalization.html>.

The factors perpetuating the existence of the illicit market are interconnected and influenced by the diverse characteristics of each state. As such, lawmakers and regulators are in the process of determining best practices on how to reduce the scope of the illicit market. Pending and enacted measures have included various ways of expanding and increasing the accessibility of the legal market and boosting resources to local law enforcement initiatives to effectively halt illegal operations.

### **iii. Risks Associated with Illicit Market Operations.**

The continued existence of the illicit marijuana market presents significant risks to public health and public safety, diverts tax money from the Commonwealth, and undermines the work of the Commission to implement a legal, regulated and taxed marijuana industry in Massachusetts.

Despite the Commission's efforts to implement comprehensive public health regulations and testing protocols to ensure the safety of marijuana products sold through licensed establishments, products sold on the illicit market go unregulated and untested. The recent outbreak of severe vaping-associated lung illness and injuries highlights the dangers of illicit marijuana products. In Massachusetts, the Governor declared a public health emergency and the Department of Public Health temporarily banned the sale of nicotine and marijuana vaping products and devices in response to confirmed and suspected cases of severe lung disease associated with the use of e-cigarettes and marijuana vaping products. The Commission exercised its authority to quarantine products while it put in place additional testing requirements to ensure the safety of products sold through the legal market.<sup>29</sup>

The Center for Disease Control (CDC) reports that as of January 21, 2020, there have been 2,711 cases of vaping-associated lung illness resulting in hospitalization or death, with 60 deaths confirmed nationwide.<sup>30</sup> The CDC has identified THC-containing vape products obtained through the illicit market as playing a major role in the outbreak. While investigations are ongoing and there may be more than one cause, the CDC has identified Vitamin E acetate, a substance used to dilute THC primarily in illicit and counterfeit vape products, as a substance of concern linked to a large number of patients suffering from vaping-related lung illnesses.<sup>31</sup> Despite the best efforts of the Governor and state and municipal officials to address this recent threat, including the Commission's effort to adjust its laboratory-testing protocols and consumer-labeling requirements, the lack of a comprehensive and coordinated response to

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<sup>29</sup> The Commission's quarantine order can be found at <https://mass-cannabis-control.com/wp-content/uploads/2019/11/20191112114809266.pdf>, and amended quarantine order at <https://mass-cannabis-control.com/wp-content/uploads/2019/12/First-Amended-Quarantine-Order-Applying-to-Vaporizer-Products-with-Conditions-12-12-2019.pdf>.

<sup>30</sup> CDC, States Update Number of Hospitalized EVALI Cases and EVALI Deaths, Dec. 19, 2019, available at <https://www.cdc.gov/media/releases/2019/s1220-states-update-evali-cases.html>.

<sup>31</sup> CDC, Outbreak of Lung Injury Associated with the Use of E-Cigarette, or Vaping, Products, Dec. 20, 2019, available at [https://www.cdc.gov/tobacco/basic\\_information/e-cigarettes/severe-lung-disease.html#map-cases](https://www.cdc.gov/tobacco/basic_information/e-cigarettes/severe-lung-disease.html#map-cases).

prevent dangerous products from being sold on the illicit market continues to present a significant threat to public health.

The illicit sale of marijuana also presents a significant risk to public safety. While licensed marijuana establishments must follow protocols to ensure they do not engage in sales to minors, illicit operators regularly sell to those under 21. Because their business is conducted primarily in cash, illicit marijuana operators may serve as an attractive target for criminal activity such as breaking and entering, assault and battery, and larceny. We have also seen situations in which those engaged in illicit marijuana sales attempt to launder the cash proceeds through criminal schemes, such as the case discussed above in which individuals attempted to use another regulated entity that handles large volumes of cash—casinos—to launder the proceeds from an illicit marijuana trafficking and sales operation. Furthermore, reports from other states with legal marijuana markets suggest that foreign cartels and transnational criminal organizations may have a hand in some large scale multistate illicit trafficking operations.<sup>32</sup>

Ultimately, the persistence of the illicit market threatens to undermine the will of the voters and the Legislature to create a legal market in the Commonwealth subject to regulation and taxation. Businesses seeking licensure from the Commission must invest significant capital to meet regulatory requirements before they are able to commence operations. However, these licensed operators must compete for customers with an illicit market that offers marijuana products at a significantly reduced price and sometimes with greater convenience for customers. These illicit operations provide unfair competition to those licensed entities who comply with our laws and regulations.

One concrete consequence is that illicit market sales of marijuana divert large amounts of tax revenue from the Commonwealth. When the voters and Legislature put in place the framework for the legal market, taxation of marijuana was an important component of the law. Legal marijuana sales are subject to a 6.75% sales tax, a 10.25% excise tax, and, in some communities, an additional local option tax of up to 3%. According to the Commissioner of the Massachusetts Department of Revenue, the DOR expects to collect between \$ 93 million and \$173 million in legal marijuana tax revenue this current fiscal year and could collect as much as \$189 million in the next budget year.<sup>33</sup> As set forth in statute, this money will be allocated to the Marijuana Regulation Fund and expended on the operations of the Commission, as well as articulated priorities including public and behavioral health, public safety, municipal police training, and programing for restorative justice, jail diversion, workforce development, industry specific technical assistance, and mentoring services for economically-disadvantaged persons in communities disproportionately impacted by high rates of arrest and incarceration for marijuana offenses. M.G.L. c. 94G, § 14. But because all taxes are not collected on illicit market sales, the

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<sup>32</sup> NBC News, Dennis Romero, Foreign cartels embrace home-grown marijuana in pot-legal states, May 29, 2018, available at <https://www.nbcnews.com/news/us-news/foreign-cartels-embrace-home-grown-marijuana-pot-legal-states-n875666>.

<sup>33</sup> Colin Young, Boston Globe, Massachusetts on target for sizeable share of pot money, Dec. 4, 2019, available at <https://www.bostonglobe.com/news/marijuana/2019/12/04/massachusetts-target-for-sizeable-share-pot-money/xteLqLREdIhL3kV7roMdZK/story.html>.

Commonwealth is potentially losing millions of dollars each year in revenue that should be dedicated to these and other important legislative priorities. However, the exact amount of lost revenue is unknown. Researching and collecting data to obtain this figure would be useful in understanding the scope of the loss to the Commonwealth.

## **V. PROPOSED RECOMMENDATIONS**

### **A. Recommendation 1: Amend M.G.L. c. 94G and 94I to Clarify that Individuals and Entities Could be Subject to Criminal Prosecution Under the Controlled Substances Act, M.G.L. c. 94C, § 32C, and Other Applicable Statutes.**

While as a result of decriminalization and legalization, licensed individuals and entities cannot be prosecuted for engaging in lawful activities, it is also true that they are not immune from prosecution for criminal activity. We recommend that M.G.L. c. 94G and 94I be amended<sup>34</sup> to clarify that the Controlled Substances Act, M.G.L. c. 94C, § 32C, and other applicable statutes apply to licensed marijuana operations engaging in illicit activities, such as diversion. For example, an agent of a licensed retail entity that cultivates and diverts marijuana to the illicit market, beyond the scope of licensure, remains subject to prosecution. These amendments would clarify that under M.G.L. c. 94G and 94I, licensed marijuana operations could not claim that they cannot be prosecuted given their licensure status. Proposed language is attached.

### **B. Recommendation 2: Establish a Multi-Agency Illicit Marijuana Task Force.**

Given the continued threat posed by the illicit market, we recommend the creation of a Multi-Agency Illicit Marijuana Task Force, modeled after the Illegal Tobacco Task Force, to coordinate efforts between state agency partners with a focus on recouping tax revenue lost to illicit sales and protecting public health and safety from the risks of unregulated and untested illicit marijuana products. Such a Task Force would receive and develop information about those entities that engage in illicit operations or hold themselves out as licensed marijuana businesses but operate without a license from the Commission.

An effective Task Force would bring together state agencies with relevant expertise, regulatory and enforcement authority, including the DOR, the State Police, the Commission, the AGO, the Department of Agricultural Resources, the DPH and local law enforcement representatives. The creation of such an investigatory Task Force will facilitate timely sharing of information and coordination among these stakeholders in order to identify and carry out joint investigations and enforcement actions to address unlicensed marijuana cultivation, processing, manufacturing, transportation, and distribution.

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<sup>34</sup> While M.G.L. c. 94G, § 12(f)-(g) addresses this concern for MEs, in part, the proposed amendments would apply to MEs and MTCs and provide further clarity for law enforcement officials.

Working together, Task Force members could have access to a range of tools available to effectively identify and cause to be shut down unlicensed marijuana operations. The Task Force would serve as a central point to accept referrals of potential investigatory interest from state and local law enforcement, state and municipal agencies, and the general public. It would also facilitate the coordination and sharing of resources between state agencies to maximize efficiency and effectiveness of investigations. When an investigation uncovers an unlicensed business engaged in illicit marijuana sales, DOR will be able to use its civil enforcement authority to assess taxes and seize illegal marijuana products. To maximize resources, any criminal enforcement efforts should focus on disrupting large scale illicit marijuana operations and those that present additional criminal elements, such as organized crime, money laundering operations, sales of untested marijuana products and their associated accessories, or sales to minors. The Task Force would also collaborate with and make referrals to federal law enforcement and other law enforcement partners as appropriate.

The existing Illegal Tobacco Task Force provides a model for multi-agency coordination that can be readily applied to address unlicensed marijuana distribution. Created by the Legislature in 2015, the Illegal Tobacco Task Force is co-chaired by the DOR and the State Police, and also includes representation from the Executive Office of Public Safety and Security, the DPH, the State Treasurer's Office and the AGO. The Illegal Tobacco Task Force is charged with coordinating efforts to combat contraband tobacco distribution, including efforts to foster compliance with the law and conduct targeted investigations and enforcement actions against violators. It is funded through its own line-item in the state budget, which provides for investigatory and prosecutorial resources at the relevant state agencies to carry out the work of the task force. Enforcement actions have resulted in disrupting and shutting down tobacco smuggling operations, removing illegal contraband tobacco from circulation, increasing tobacco tax collections, and suspending or revoking the licenses of tobacco retailers found to be in violation of state tobacco laws. This model can be adapted to bring an efficient coordination of investigation and civil and criminal enforcement resources to achieve similar success in disrupting illicit marijuana market operations.

We are aware that legislation is currently pending before the Joint Committee on Cannabis Policy, filed by Representative Hannah Kane, that would establish a Multi-Agency Illicit Marijuana Task Force.<sup>35</sup> A similar bill has been filed by Senator Michael Moore. The AGO and the Commission welcome the opportunity to work with the Legislature as they consider these proposals. In particular, we encourage the Legislature to consider the critical issue of a funding mechanism for the Task Force, which could include an expenditure from the Marijuana Regulation Fund or a dedicated line-item budget appropriation. For any Task Force to be successful, it must be well-resourced and come with adequate funding to support the investigatory and enforcement resources necessary to carry out its mission. This includes funding for law enforcement, financial investigators, prosecutors, and infrastructure such as

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<sup>35</sup> See H. 4168, An Act to Enhance Enforcement Against Unlicensed Marijuana Operators, available at <https://malegislature.gov/Bills/191/H4168>.

storage facilities to secure seized contraband marijuana products that must be preserved as evidence in civil or criminal enforcement cases.

To maximize the efficiency and effectiveness of the Task Force, we also encourage the Legislature to consider options to enable the Task Force to conduct its meetings in a manner conducive to the sharing confidential information and coordination of investigatory and enforcement efforts. However, we recommend that the Task Force be required to collect data and report on its civil and criminal enforcement efforts, including demographic information about the subjects of enforcement actions. This will allow for transparency, without compromising the operational efficiency of the Task Force.

**C. Recommendation 3: Expand DOR's Authority to Assess Excise Taxes at the Same Rates for Illegal Sales as Legal Sales of Marijuana.**

A critical component of the Commission and AGO's joint recommendations is the ability of the DOR comprehensively to assess a business engaged in the illicit sale of marijuana products for forgone tax revenue.

As discussed above, a gap in the law currently exists with respect to DOR's ability to assess the 10.75% excise tax and up to 3% local option tax against those operating without a Commission-issued license. M.G.L. c. 64N § 2; M.G.L. c. 64N § 3. Accordingly, we recommend that the law be amended to impose the excise tax and any applicable local option tax at the same rate for legal and illegal marijuana sales alike.

While DOR currently has authority to assess unpaid sales tax on marijuana sales by unlicensed entities, extending this authority to the excise and local option tax will significantly increase the amount of assessments and thus have a broader deterrent effect. Such a change in the law will also allow DOR to utilize its full range of enforcement powers to recoup the lost tax revenue owed to the Commonwealth and its municipalities in sales, excise and any applicable local option tax. M.G.L. c. 62C § 2.

Finally, in order to maximize participation in the legal market, we recommend that a tax assessment against a person engaged in the illicit sale of marijuana not necessarily serve as a bar to that person later receiving a license from the Commission, provided that the individual or entity is otherwise deemed suitable under the Commission's suitability standards.

## **VI. CONCLUSION**

The Commission has put in place and implemented a robust regulatory structure that applies to licensed marijuana operations in Massachusetts. Meanwhile, existing criminal statutes continue to apply to illegal marijuana activities, including cultivation, manufacturing, and sales, that take place beyond the scope of the regulated market. For this reason, the Commission and AGO do not advise establishing any additional criminal penalties at this time.

We acknowledge, however, that the continued prevalence of the illicit market remains a problem—both in our state and across the country—that presents significant risks to public health and public safety, diverts tax money from the Commonwealth, and undermines the legal marijuana industry. Accordingly, our recommendations aim to clarify the application of existing laws to address illegal activity, and to provide additional civil enforcement tools and resources to address the illicit market. In particular, the creation of an Illicit Marijuana Task Force will bring together key stakeholders to recoup tax revenue lost to illicit sales and protect public health and safety from the risks of unregulated and untested illicit marijuana products. We encourage the Legislature to consider these recommendations and believe that, if implemented, they will deter and contribute to a reduction in the scope of the illicit market and maximize participation in the legal market.

## **ADDENDUM**

### **Suggested Language for Recommendation 1.**

- i. M.G.L. 94G § 9: Lawful operation of marijuana establishments.<sup>36</sup>
  - 1. Proposed amendments to M.G.L. c. 94G, § 9(a) are highlighted in green.

Notwithstanding any general or special law to the contrary, except as otherwise provided in this chapter, the following people involved in the distribution of marijuana as authorized by this chapter shall not be arrested, prosecuted, penalized, sanctioned or disqualified and shall not be subject to seizure or forfeiture of assets for activities **authorized by this chapter when conducted under a valid license or registration issued by the commission** and specified for:

- (1) a marijuana retailer or an owner, operator, employee or other agent acting on behalf of a marijuana retailer possessing or testing marijuana or marijuana products; purchasing, selling or otherwise transferring or delivering marijuana or marijuana products to or from a marijuana establishment; or selling or otherwise transferring or delivering marijuana or marijuana products to a consumer;
- (2) a marijuana cultivator or an owner, operator, employee or other agent acting on behalf of a marijuana cultivator cultivating, propagating, breeding, harvesting, processing, packaging, testing, storing or possessing marijuana or marijuana products, or selling or otherwise transferring, purchasing or delivering marijuana and marijuana products to or from a marijuana establishment;
- (3) a marijuana product manufacturer or an owner, operator, employee or other agent acting on behalf of a marijuana product manufacturer packaging, processing, manufacturing, storing, testing or possessing marijuana or marijuana products, or delivering, selling or otherwise transferring and purchasing marijuana or marijuana products to or from a marijuana establishment; or
- (4) a marijuana testing facility or an owner, operator, employee or other agent acting on behalf of a marijuana testing facility possessing, processing, storing, transferring or testing marijuana or marijuana products.

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<sup>36</sup> The text of this section can be found at <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXV/Chapter94G/Section9>.

- ii. M.G.L. c. 94I, § 2: Medical use of marijuana program; immunity from penalty, arrest or prosecution; cultivation registrations; lists of registered qualifying patients.<sup>37</sup>

2. Proposed amendments to M.G.L. c. 94I, § 92(c) are highlighted in green.

[ ] Notwithstanding any general or special law to the contrary, a medical marijuana treatment center and its employees registered with the commission shall not be penalized or arrested for activities authorized by this chapter when conducted under a valid license or registration issued by the commission, including acquiring, possessing, cultivating, processing, transferring, transporting, selling, distributing or dispensing medical use marijuana and related supplies and educational materials to qualifying patients or their personal caregivers.

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<sup>37</sup> The text of this section can be found at <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXV/Chapter94I/Section2>.