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## MEDICAL MARIJUANA IN MASSACHUSETTS: AN IMPLEMENTATION FRAMEWORK

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### Context

Massachusetts voters overwhelmingly approved Question 3<sup>1</sup> – the legalization of medical marijuana – because its proponents made two promises:

- Their intent was to relieve the suffering of the very sick with this unique substance; and
- The law would be one of the strictest in the nation in preventing improper access through regulatory control.<sup>2</sup>

We should take them at their word. My framework proposes specific regulations for the current law, which will result in a more responsible program going forward.

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<sup>1</sup> The law is entitled, “An Act for the Humanitarian Medical Use of Marijuana” (hereinafter “the act” or “the law” and, when specific sections are cited, as “MM Act at \_\_\_”).

<sup>2</sup> Go to [www.compassionforpatients.com](http://www.compassionforpatients.com). This is the website of the Committee for Compassionate Medicine, which sponsored the ballot initiative for Question 3. Click on the tab “Get the Facts” and see, among other statements, this comment: “The Massachusetts initiative is based on the best practices of seventeen other states and the District of Columbia. The *hallmark of the initiative* is state regulation. It requires that doctors writing recommendations have a *bona fide relationship* with their patients and that the state *verifies* all recommendations. A patient would be able to obtain medical marijuana from a limited number of state regulated non-profit treatment centers.” [emphasis added]

## **Recommended Regulations**

- **Establish the Medical Marijuana Control Division (MMCD) within DPH under the direction of a Deputy Commissioner.** The mission of the MMCD will be to promulgate regulations that ensure the safe and effective implementation of the law. The MMCD will draw on the expertise of health care practitioners and law enforcement officials.
- **Create regulations<sup>3</sup> pertaining to the following features of the law.**
  - **“Written certification” signed by a physician in the course of a “bona fide physician-patient relationship” that specifies the debilitating medical condition.** MM Act at § 2(N). An accompanying regulation should:
    - Require a standardized form with imprinted number consistent with medical prescriptions.
    - Require a filing procedure that will allow the approval process and subsequent doctor and patient purchases to be retained in an electronic data base, subject to search by designated agents of DPH.<sup>4</sup>
    - Define a “bona fide relationship” as involving a physician who has:
      1. Successfully completed a DPH-approved training course about marijuana’s health properties and side effects;
      2. Been involved in the actual treatment of the patient’s underlying health condition that justifies resort to marijuana;
      3. Conducted a separate physical examination of the patient prior to filing a certification<sup>5</sup>;
      4. Documented the current FDA-approved medications that have been tried for symptom and/or pain relief, including cannabinoid medications such as Marinol or Sativex;
      5. Documented any other medications and the physician’s reasonable belief that marijuana will not cause adverse side effects in combination with these medications;
      6. Informed the patient of all potential side effects<sup>6</sup> from marijuana use (including its addictive properties and respiratory impact);

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<sup>3</sup> These are my suggestions. Naturally, the regulatory process will be informed by subject matter experts from medicine, law enforcement, and allied disciplines.

<sup>4</sup> Similar to our current regulatory structure for alcohol, which features the Alcohol Beverage Control Commission (see G.L. c. 138, § 56), police officers could be specially trained and designated as DPH agents.

<sup>5</sup> Physicians and other health care professionals under a physician’s supervision only attain immunity from prosecution or civil liability if they follow this procedure. MM Act § 3(b).

<sup>6</sup> MM Act at § 3(a).

7. Established and documented dosage recommendations and manner of intake (e.g., via smoked marijuana or food products); and
  8. In the case of any patient under the age of 21, informed a parent or guardian and, in the case of any patient under the age of 18, received documented parental/guardian consent for marijuana treatment prior to filing the certification.
- Define “other health care professional under a physician’s supervision” (see MM Act § 3) to include only a licensed RN, LPN, NP or PA who has: (1) successfully completed the DPH-approved training course about marijuana’s health properties and side effects; (2) has directly communicated his or her findings to the licensed physician filing the certification; and (3) has also signed the certification as having been involved in the certification process.
  - Warn physicians and other supervised health care professionals that the failure to comply with this regulation, including inadequate supervision:
    - May constitute conspiracy or an attempt to unlawfully distribute or dispense marijuana, a Class D controlled substance, *upon the filing* of a written certification;
    - May constitute unlawful distribution and/or trafficking in Class D upon a patient’s acquisition of marijuana;
    - May result in the revocation of the ability to file a written certification for marijuana treatment with DPH; and
    - In addition to any criminal or civil penalties, may subject the physician or health care professional to licensure suspension or revocation by the board of registration in medicine or other applicable licensing authority.

- **“Dispensary agent”**. MM Act at § 2(E). An accompanying regulation should require that all agents, even volunteer staff members, officers or board members<sup>7</sup>:
  - Submit a standard application and undergo a brief background investigation in which a prior history of drug or alcohol addiction and/or conviction for any narcotics offense disqualifies them from working as an agent<sup>8</sup>;
  - Understand that submitting a knowingly false statement on their application disqualifies them from working as a dispensary agent and may subject them to prosecution for perjury;
  - Successfully complete, prior to being eligible for registration, a DPH-approved course on the proper storage, cultivation, packaging, labeling, security and ethical sales practices, and criminal and civil penalties for non-compliance pertaining to the manufacture, processing and dispensing of medical marijuana within a treatment center;
  - Carry their registration card at all times while performing the functions of a dispensary agent and, upon demand, present it to an agent of DPH or any law enforcement officer.
    - The agent’s card is subject to suspension or revocation for non-compliance with this provision; and/or
    - The agent may be subject to arrest or other civil penalty<sup>9</sup>;
  - Promptly notify DPH, in writing, of their termination from their position as an agent, even if they are planning to transfer to a different treatment center;
  - Promptly notify DPH, in writing, of their arrest for any crime involving controlled substances under Chapter 94C or dangerous substances under Chapter 270<sup>10</sup>, or operation under the influence of

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<sup>7</sup> MM Act §10(A) (agent must be registered with DPH before working); 10(B) (treatment centers must apply by submitting information about the agent); 10(C) (treatment center has obligation to notify DPH within one business day if agent is no longer associated with the center; agent’s card is immediately revoked).

<sup>8</sup> MM Act § 10(D) provides that “no one shall be a dispensary agent who has been convicted of a felony drug offense.” This section does not expressly limit DPH’s authority to enact other qualifications for dispensary agents. Therefore, other relevant factors may be considered.

<sup>9</sup> MM Act § 5(a) (presentation of registration card on demand is a condition of immunity).

<sup>10</sup> See, e.g., G.L. c. 270, § 3 (delivery of any drug, poison or other dangerous substance); G.L. c. 270, § 18 (inhalant abuse).

alcohol or a controlled substance, or their being issued a ticket for the non-criminal possession of marijuana (G.L. c. 94C, § 32L).<sup>11</sup>

- **“Personal caregiver”**. MM Act at § 2(J). An accompanying regulation should require that all personal caregivers:
  - Submit a standard application and undergo a brief background investigation in which a prior history of drug or alcohol addiction and/or conviction for any narcotics offense automatically disqualifies them from working as an agent<sup>12</sup>;
  - Understand that submitting a knowingly false statement on their application disqualifies them from working as a personal caregiver and may subject them to prosecution for perjury;
  - Successfully complete a DPH-approved course on the proper storage, cultivation, and administration of marijuana and its related products; on the restricted areas for smoking or using marijuana; on the situations where marijuana use is ill-advised, including in the presence of minors<sup>13</sup>; and on the criminal and civil penalties for non-compliance pertaining to the dispensing of medical marijuana as a caregiver;
  - Be promptly notified by DPH, in writing, when any patient (for which they are responsible) has had his or her registration card revoked or not renewed;
  - Carry their registration card at all times while performing the functions of a personal caregiver and, upon demand, present it to an agent of DPH or any law enforcement officer;
    - The personal caregiver’s card is subject to suspension or revocation for non-compliance with this provision; and/or
    - The personal caregiver may be subject to arrest or other civil penalty<sup>14</sup>;

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<sup>11</sup> Even a civil infraction by a dispensary agent warrants some investigation due to the possible diversion of medical marijuana for personal use and/or sale, which is strictly prohibited under the law. See MM Act § 7(E)

<sup>12</sup> This restriction is warranted under the law, since personal caregivers with prior drug addiction experience or a drug conviction will have a propensity to use medical marijuana. Caregivers are “prohibited from consuming marijuana obtained for the personal, medical use of the qualifying patient.” MM Act § 2(J).

<sup>13</sup> Even if marijuana is medically necessary, its use in appropriate settings in the presence of a child may warrant the filing of a 51A report or, in more extreme cases, may constitute the crime of child endangerment, G.L. c. 265, § 13L. *Comm. v. Paul*, 2012 WL 3154545 (Appeals Court Unpublished) (defendant was found by police in his apartment with two small children; the marijuana smoke was so thick that officers summoned EMS to check on the children).

<sup>14</sup> MM Act § 4(b) (presentation of registration card on demand is a condition of immunity).

- Promptly notify DPH, in writing, of their arrest for any crime involving controlled substances under Chapter 94C or dangerous substances under Chapter 270<sup>15</sup>, or operation under the influence of alcohol or a controlled substance, or their being issued a ticket for the non-criminal possession of marijuana (G.L. c. 94C, § 32L).
- **“Hardship cultivation registration”.** MM Act at §§ 2(B) and 11. An accompanying regulation should require that a cultivation registration:
  - Shall be granted *only* upon a showing of verified:
    - Financial hardship, which shall mean: (1) that there is no comparable substitute for pain relief or treatment that is covered under a private or public health plan to which the applicant is currently eligible, and (2) that the applicant qualifies for public assistance within the Commonwealth; or
    - Physical incapacity to access reasonable transportation. However, if a personal caregiver is involved, then the application shall be denied on the basis alone, since the caregiver may access a 60 day supply of medical marijuana at a treatment center on behalf of the applicant; or
    - Lack of a treatment center within a reasonable distance of the patient’s residence. Reasonable distance is defined as anywhere within the county where the applicant currently resides.
  - Shall not be granted at any location that is considered federal property, or is funded by a federal grant or payment (e.g., Section 8 housing).<sup>16</sup>
  - Be limited to an “enclosed, locked facility”<sup>17</sup> that has been inspected by an agent of DPH or a law enforcement officer prior to the issuance of the registration card;
  - Require that cardholders consent to inspection of their grow areas during normal business hours upon request of a DPH agent or law enforcement officer.

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<sup>15</sup> See note 9, *supra*.

<sup>16</sup> This provision may be necessary, since MM Act § 7(F) states that this law does not require federal violations. More research will be necessary into the intricacies of federal law in relation to grow operations.

<sup>17</sup> See definition in MM Act at § 2(F).

- **Limitations of the law.** MM Act at § 7(D). An accompanying regulation should:
  - Define “school grounds” to include structures or property that is owned, or being used, or being occupied for any activity related to an elementary, secondary, vocational, college or university.
  - Define “any youth center” to include any public or private daycare, pre-school, Headstart, athletic facility, recreational facility (e.g., YMCA) or any associated playground (whether enclosed or not), or any center or program (whether permanent or temporary) where an artistic, educational, athletic or social gathering is taking place that primarily caters to youth under the age of 18.
- **“Registration card”.** MM Act at § 2(L). An accompanying regulation should require that any registration card contain:
  - A recent photo of the cardholder and identification number that is logged within a DPH data base for monitoring all activity concerning medical marijuana;
  - Biographical information, including name, date of birth, identification number, current address, and signature;
  - Security features, such as lamination and overlay printing, with at least as much sophistication as the current driver’s license issued by the registry;
  - Color-coded marking designating qualifying patients, caregivers, cultivators, and dispensary agents;
  - An expiration date:
    - 2 years for qualifying patients, caregivers and cultivators.
    - 4 years for qualifying dispensary agents.
  - A notice that the fraudulent or unauthorized use of the card is a crime punishable by incarceration.

- **Registration of treatment centers.** MM Act at § 9 1.(c). An accompanying regulation should require that any treatment center:
  - Be inspected by an agent of DPH or law enforcement officers prior to be registered;
  - Satisfy the requirements on a checklist of specifications pertaining to:
    - Locks, entrances and exits;
    - Fire safety devices;
    - Video surveillance cameras; and
    - Other features and procedures developed by building code and loss prevention/security subject matter experts.

### **Conclusion**

There are certainly other specifics and training curriculums that will need to be developed, but I hope this framework provides a helpful starting point for the hard work of responsibly implementing the medical marijuana law.

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