

Governor's Marijuana Advisory Commission
Executive Order 15-17 (September 7, 2017)

DECEMBER 18, 2018

REPORT AND RECOMMENDATIONS
TO THE GOVERNOR

I. INTRODUCTION

By Executive Order 15-17 dated September 7, 2017, (the "EO", Appendix A to this report) Governor Phil Scott established the Governor's Marijuana Advisory Commission in recognition of the fact that Vermont must adopt a cautious, data-driven and balanced approach to decisions about cannabis legalization. As the Commission noted in its January 15, 2018 Report, "[s]uch an approach will take into consideration the realities of current consumption levels, legalization in neighboring jurisdictions, and the practical implications of the risk of harm to Vermont's youth, impaired driving and other social and economic consequences of drug use and addiction, particularly in the context of the State's opioid crisis." Over the course of the last 15 months, the Commission's Subcommittees have examined the best available data, studies and other information and have developed recommendations on how the State should address the questions raised by the increased availability of cannabis that are very likely to result from legalized retail sales of cannabis for adult use.¹

The touchstone of the Commission's charge and analysis is the premise that even accepting as a given the existing, now-legal recreational use of cannabis as an individual choice, sanctioning this choice by licensing retail sales in our communities – and thus placing the state's broader approval on it - cannot be permitted to adversely impact public health or safety, especially roadway safety and children's health. At the same time, the work of the Commission proceeded with the recognition that despite past attempts to prohibit its distribution and use, cannabis is widely available and consumed in Vermont already. Thus, while retail sales would inevitably have effects on usage rates and frequency among all demographic groups, many of the issues that must be addressed as a consequence of cannabis production and use would exist regardless of whether adult consumption is legally permitted.

Section III (3) of the EO lays out the elements of the research, study and report the Commission is to complete by December 15, 2018. The Commission believes it is important to frame this report in a manner that will promote clarity around the Commission's mandate and approach. The Commission understands that it is being asked, not to make a recommendation, yes or no, on whether Vermont *ought* to legalize retail sales of various forms of cannabis to be

¹ The commission is familiar with the view that legalized retail sales will not increase the amount of cannabis consumed in Vermont; this was the gist of some testimony at the public listening sessions. The Commission does not think it wise to assume that this will be the case, for purposes of planning for potential impacts.

sold at state-licensed stores, and to regulate and tax those sales (and to regulate commercial cannabis cultivation, distribution, and processing). Rather, the Commission sees its focus under the EO as this: if the state were to make that choice through the legislative process, what would be the best way for Vermont to *implement* that change, in terms of timing; setting the effective date(s) to achieve certain threshold improvements in programs for highway safety, education, prevention, and tax and regulation readiness; assuring that the concerns of towns and cities are addressed; and identifying funding sources for the costs of implementation that will be incurred prior to the receipt of tax revenue from sales, and on the state and local costs of implementation.

As noted above, the Subcommittees have been engaged in this work over the last 15 months, meeting as such and through various working groups, all as shown on the Commission's website <https://marijuanacommission.vermont.gov/>, where agendas, minutes and relevant documents are posted. The Subcommittees have held numerous meetings and heard from many experts in the fields of health, safety, law enforcement, government and regulation. The Subcommittees have studied other states that have legalized and taxed retail sales of cannabis to learn from their experiences and better inform what Vermont could and should do. The Commission also held five public comment meetings around the state over the last three weeks, in Rutland, Williston, St. Johnsbury, Bennington, and Hartford. At these, the Commission took comments, recommendations, concerns and reflections, and engaged in questions and answer exchanges. At these meetings, Vermonters raised diverse and sometimes conflicting concerns and proposals.

The Commission commends the diligent work of the Subcommittees; they have identified the critical issues, risks and choices involved in establishing state regulatory and tax structures and programs should the state choose to legalize retail sales of cannabis. The Commission generally agrees with the approach, analysis and findings of the Subcommittees' respective draft final reports, although not in each and every detail. The Commission has revised the draft Subcommittee reports to align with the Commission's conclusions, and those revised drafts form the substance of the Commission's final report. Those three final reports and recommendations are attached as Exhibits B, C and D.

II. EXECUTIVE SUMMARY

Since the Commission's revised versions of the three Subcommittee reports and recommendations cover a lot of ground and detail (particularly the Taxation and Regulation one), the Commission presents the following summary of the adopted recommendations.

- Summary of Recommendations for Prevention and Education

1. Establish a Substance Misuse Prevention Fund. The Agency of Human Services should be directed to establish and oversee the use of dedicated funds to be generated by taxes levied on cannabis activities to implement comprehensive substance misuse prevention strategies throughout the state.

2. A Substance Misuse Advisory Committee (SMAC) should be established underneath the Commissioner of Health to provide the State with specific advice on the use of the funds.
3. The State should establish six Regional Prevention Networks (RPN). These networks will be responsible for developing capacity, support and oversight of existing infrastructure, and ensuring utilization of proven population health models. Specifically, communities will apply the Strategic Prevention Framework to identify risk and protective factors. The Regional Network would: fund prevention programs (such as afterschool programming, youth leadership and community coalitions), serve as a policy institute, produce data and reports for needs assessments and program evaluation, develop regional strategic plans, and engage youth and young adults in prevention activities.
4. The State should establish and manage a Substance Misuse Advisory Committee (SMAC) by establishing a committee to manage an investment funding model for sustaining substance use primary and secondary prevention efforts.
5. The State should run sustained evaluation and quality improvement on all Substance Misuse Prevention Fund (SMPF) activities to ensure SMPF funds are used appropriately.
6. The State should research, develop, implement, and evaluate statewide media and communication strategies with topics to include: increasing awareness and understanding of cannabis legislation; perceived harm of cannabis use; health effects on youth and young adults; and cannabis use during pregnancy. Development of each communication strategy should include formative research with the intended audience, message and creative concept development and testing, strategic implementation, and evaluation of audience reach and engagement based on identified metrics.
7. The State should fund one full-time position at the Health Department to oversee the Substance Misuse Prevention Fund (SMPF), staff the Substance Misuse Advisory Committee, run technical assistance to the Regional Prevention Networks and manage evaluation efforts to ensure the SMPF dollars are well spent.
8. The State should initiate a program of school-based prevention by funding at least one full-time substance use prevention professional for each 250 student cases to provide prevention and education services to all students and organize and implement peer leadership groups. These professionals will provide intervention, screening and referral services for those students who are identified as having substance abuse problems. Additionally, they will educate and train the school and community in the areas of substance misuse, interpersonal skills, and group and stress management.
9. The State should immediately fund at least one longitudinal study at an academic institution to determine the impact of cannabis use on the health of Vermonters. The Commission recommends \$1 million annually for a minimum of 15 years.

10. The State should ensure that all critical staff are hired, all regulations and rules are in place, and all testing infrastructure is built and functioning before allowing for the licensing of production, distribution or retail of cannabis products
11. If edible or infused products are permitted for sale in Vermont, no products that would be appealing to children should be permitted, and standardized packaging and labeling requirements should be implemented to ensure safety and disclose the potency of any product through mandatory batch testing.
12. Cannabis use should be prohibited in public places.
13. Prohibitions on smoking should be extended to vaping and Vermont's smoke-free laws should be amended to specifically include cannabis products.
14. Access to cannabis should be limited by:
 - a. Limiting outlet density – controlling the number of stores that can sell the substance within a certain area.
 - b. Limiting the type of outlet that can sell cannabis, which can decrease initiation and youth use. If youth have access to cannabis or exposure to cannabis advertising in the retail outlets they frequent, they are more likely to begin use.
 - c. Limiting the times of day that cannabis can be sold.
15. Taxing and a policy of maintaining minimum prices to reduce consumption are important to limiting use and accessibility.
16. Allow local control over outlet density and advertising to foster a culture of health in communities.
17. Limit the age of legal purchase to 21 years old or older to decrease the number of motor vehicle accidents, reduce initiation of use, and use of cannabis. In addition, the State should implement prevention, regulation and enforcement strategies that greatly reduce access to and use of cannabis for those age 25 and younger. This is to protect children, youth and young adults during the time in life of rapid brain development and academic involvement. The Commission acknowledges that political reality likely precludes consideration of an age limit above 21 years of age for cannabis use but emphasizes the need for efforts to provide education and prevention strategies particularly aimed at people under the age of 25 whose brains are still developing.
18. Child-resistant packaging should be mandated to prevent access by young children and accidental ingestion.
19. Limiting advertising can reduce youth initiation and overall use. Prohibiting self-service displays, internet sales, free samples, mass media advertising and flavored products should be a part of any commercial cannabis regulation. Advertising restrictions should be implemented to ensure that youth and young adults are not targeted by, or exposed to, cannabis advertising. Advertising should be restricted from any area where youth could potentially be exposed.

20. Enforcing laws that restrict sale to those of legal age is an effective way to keep substances out of the hands of youth and requires a strong enforcement effort.
21. Build driver testing infrastructure and procedures necessary to conduct appropriate and consistent testing for THC before cannabis is regulated.
22. Implement a public education strategy about the dangers of driving under the influence of THC before cannabis is regulated and ensure that the education includes information on what the legal limits mean in terms of use.
23. Expand screening in primary care practices for substance use disorders and mental health problems and trauma in primary care.
24. Ensure medical providers receive the most recent information and training related to screening for risk factors for substance misuse disorders (e.g. non-adaptive stress response) as well as Screening, Brief Intervention and Navigation to Services (SBINS). Work with local teaching institutions to ensure that medical students, nursing students (and other allied health professionals) receive the most recent information and training on the health impacts of cannabis.

- Summary of Recommendations on Roadway Safety

1. The Commission recommends the immediate adoption and implementation of a plan for monitoring and reporting data related to cannabis use prior to any effective date for the commercial availability of cannabis in Vermont. To this end the Commission recommends (1) initiation of an intensive, long-term data-collection and research effort before any tax and regulate law for cannabis goes into effect; and (2) enacting legislation to fund this data collection, assigning to the Department of Public Safety's Vermont Statistics Analysis Center the task of collection, analysis, tracking, and reporting of data and research on any impacts. The Commission the following non-exhaustive list of data-collection categories:
 - a. Cannabis-related crimes and quality-of-life complaints.
 - b. Cannabis arrests, including amounts
 - c. Cannabis-related traffic accidents and impaired driving generally
 - d. Rates of out-of-state diversion of Vermont products
 - e. Postal service use for cannabis transfer
 - f. Youth
2. The Commission recommends that Vermont work in coordination with other New England states and Canadian provinces to pursue the determination of a scientifically defensible regional impairment standard and that further study of THC levels as it relates to impairment should be pursued.
3. At this time, the Commission does not recommend setting a per se level of THC presence to establish impairment. This recommendation is based on the lack of accepted scientific methods to link measurable THC levels to impairment. However, the Commission notes that per se limits may nevertheless be adopted by policy makers for legitimate public policy reasons such as deterrence.

4. The Commission recommends no changes to Vermont's impairment standards under its impaired driving statute under a taxed-and-regulated cannabis system.

5. The full Commission recommends allowing for the collection for screening purposes of oral fluid from drivers when there is a reasonable belief the person is operating a motor vehicle under the influence of a controlled substance, including cannabis. A majority of the Commission is in favor of allowing the collection of an *evidentiary* oral fluid sample in the same manner and under the same legal standard an evidentiary sample of breath is collected in alcohol impaired driving cases so that such samples can be sent to a forensic lab for testing. The majority believes that the admission in a court case and use of such evidence should be determined through the normal judicial process.

6. The Commission believes that the current level of Drug Recognition Experts ("DREs") is sufficient. However, if some form of commercial cannabis legalization in Vermont should occur, the number of available DREs would need to be closely monitored and evaluated to ensure resource capacity continues to be met across the state.

7. The Commission finds that the current and expected capacity of the Vermont Forensics Laboratory is sufficient for current needs. In the event a commercial cannabis market is created in Vermont, the VFL will need to be closely monitored and evaluated to ensure capacity keeps pace with demand.

8. The Commission recommends continued monitoring of developments in search and seizure law in Vermont and elsewhere, especially given the difficult and often unanswered questions for law enforcement during roadside stops.

- Summary of Recommendations on Taxation and Regulation

If adult sales of cannabis for recreational use are legalized in Vermont, the Commission recommends creating a regulatory structure that allows private industry to develop a viable, controlled market, designed to not encourage use, to generate revenues adequate to cover all costs projected to be needed for education and prevention, roadway safety, regulation and enforcement, while the State retains the crucial roles of gatekeeper and enforcer. To accomplish this, the Commission makes the following recommendations as more fully discussed in the Report of the Taxation and Regulation Subcommittee as adopted by the Commission.

1. A new regulatory structure should primarily be funded by taxing retail sales of recreational cannabis and charging fees to cannabis establishments for licensing and other necessary regulation.

2. The Commission recommends creating a tax structure that will, at a minimum, maintain a revenue-neutral balance sheet for the State. Retail sales of cannabis should be subject to a new 20% excise tax and the existing 6% sales tax as well as any applicable local option tax.

3. The Commission recommends following current law for the allocation of State sales tax and local option sales tax revenues.
4. Regarding the new excise tax revenues, the Commission recommends allocating a portion to every municipality in the State, regardless of whether they have opted out of allowing cannabis establishments to operate in their jurisdiction. The Commission recommends that 5% of all excise tax revenue be distributed amongst all Vermont towns, and an additional 10% of all excise tax revenue be distributed amongst Vermont towns with retail cannabis establishments.
5. Excise tax revenues should be allocated to fund the administrative and programmatic needs of the State agencies that would regulate cannabis establishments and respond to the impacts of cannabis use and sales. Regulatory agencies should also be able to fund their day-to-day cannabis-related operations through fees charged to all cannabis establishments for license applications and renewals.
6. The Commission recommends creating five license categories: Cultivator, Processor, Retailer, Transporter, and Testing.
7. Cultivator licenses should be structured on a tier basis according to plant canopy size, with the smallest tier being issued at the discretion of a cannabis Board of Control. At the start of legalized sales, only the smallest tier of cultivation licenses would be available, so as to encourage small, local farmers to enter the market. Issuance of medium- and large-tier cultivator licenses would be phased-in over time.
8. The basic structure, and a maximum fee per tier should be prescribed by statute, but the licensing authorities and the Board of Control should make final decisions about fee amounts and the number of licenses.
9. License applicants should meet requirements such as background checks. Background checks for recreational licenses should mirror the requirements for medical licensees.
10. Vermont residency is not recommended as a requirement, although in rating and awarding cultivator license applications, preference should be given to Vermont residents.
11. Licensees should only be able to hold one license per category to avoid market domination.
12. Only licensed retailers should be permitted to sell to consumers.
13. Wholesale transactions should only be permitted between licensees, so that products can be tracked from seed to sale to prevent diversion and tax evasion, and to ensure quality control for consumers.
14. The Commission recommends enacting strong protections for consumers that include restricting the allowable forms of consumption, requiring clear labeling and packaging, limiting

dosage and potency per serving, and prohibiting certain types of advertising (see specific recommendations below).

15. Measures to prevent products that are enticing and accessible to children from entering the stream of commerce should be implemented.

16. To centralize the administration of a new regulatory structure for recreational cannabis, and potentially for medical cannabis as well, the Commission recommends creating a new Board of Control. The Board would regulate a marketplace run by private industry. The Commission recommends that Vermont adopt a model of commercial cultivation, production, testing and sales overseen by a Cannabis Board of Control as the most efficacious approach to regulating cannabis similar to the state's current approach to alcohol regulation with the important difference that the state would not at any point in the stream of commerce become a bailee of any cannabis product.

17. The Board of Control should have specified administrative and quasi-judicial powers in relation to licensing and enforcement. The Commission recommends embedding the Board within the Department of Liquor and Lottery

18. The Cannabis Board of Control should include relevant stakeholders and regulators in addition to DLL personnel. The agencies charged with regulating aspects of cannabis and its impacts should be statutorily named members either of the Board or its subcommittees with the primary authority to adopt rules on licensing requirements. Public members and members with industry expertise should also be involved in the Board in an advisory capacity. Board members should be prohibited from maintaining any financial interest in the cannabis industry.

19. Important powers and responsibilities of the Cannabis Board of Control would include:

- a. The authority to act like the Liquor Control Board's listing committee to determine which new products are allowed into the market and which should be removed.
- b. Rulemaking authority to set the standards for products that contain THC from a quality control and consumer protection standpoint.
- c. Determining and monitoring a grading system like maple syrup products could be adopted.
- d. Set rules for testing standards in consultation with the appropriate state agencies.
- e. Set and control the number of licenses issued with the authority to adjust that number in the future to respond to supply and demand in the market
- f. The power to suspend and/or revoke licenses for violations
- g. The authority to set appropriate fees for license applications and renewals.
- h. The authority to promulgate and enforce security and monitoring protocols.
- i. In the event that edibles are authorized for sale, the Board should be given rulemaking authority to set standards for products containing THC under a listing committee process.

20. Creation of a commercial cannabis market should include an express grant of legislative authority from the General Assembly to municipalities, so that municipalities may regulate cannabis activities at the local level, including granting authority to towns to enact local zoning

rules, bylaws, and ordinances that regulate the time, place, and manner of cannabis activities within town boundaries.

21. The Commission recommends authorizing municipalities to elect a choice of allowing commercial cannabis establishments to operate in their jurisdiction by providing either an opt-out or opt-in procedure that municipalities can implement.

22. A change to statute is recommended to exclude recreational cannabis products from the sales tax exemption for food or food ingredients and, if edibles or infused products are permitted for sale in Vermont, that the 9% Meals tax not be applied to these products.

23. The Commission recommends that a Vermont business tax deduction be enacted providing that for the purpose of calculating Vermont net income, a licensed cannabis business shall be allowed any federal income tax deduction that is disallowed by Section 280E.

24. **Funding.** In order to meet the goal of eliminating any impact of the creation of a commercial cannabis market on the State's budget, the Commission recommends adopting a combination of approaches to meet the challenges of funding a new regulatory structure. The Commission considered a variety of options offered by the Subcommittee to mitigate the challenge of funding start-up costs, including:

a. Impose higher licensing fees for initial retail applications, then lower fees for annual licensing renewal. Require application fees to be paid upfront before retail sales begin. This proposal would create a time lag between when the administrative agency would receive fees and when the retailer would start selling to consumers.

b. Stagger the number of licenses issued over the first three fiscal years so that the administrative workload could be balanced with the hiring of new staff.

c. Create a one-time excise tax on the first sale by cultivators with an automatic sunset before retail sales begin. This would allow tax revenues to be collected before retail sales begin.

d. Devise a retail license auctioning system so that a limited number of retail licenses may be sold to the highest bidders.

e. Require licensees to provide upfront capital to the pay for the regulatory system, structuring the payments like a loan to the State that accrues interest.

f. Create a captive pool or marketplace where businesses buy and trade operating shares, similar a carbon emissions trading model (cannabis market trading).

g. Create a fund like that in S.241 of 2016 that could be drawn from early in the year, then is required to be balanced out by the end of the fiscal year (like the Clean Water Fund).

h. Utilize existing medical cannabis program dispensaries to provide an early source of tax revenue by authorizing them to begin retail sales of cannabis under the current medical program requirements (allowing for an expansion of current restrictions on plants for this purpose), with a grace period to come into compliance with the new recreational program laws when they come into effect.

What combination of the options above are appropriate will require a better definition of the parameters and nature of the cannabis market that will ultimately be authorized in Vermont. The budgetary impacts on state agencies and departments not mention in this Report or in the

Subcommittee reports should be examined as well. This includes the 14 State's Attorneys offices, which will bear the cost of prosecuting any increase in cannabis-related crime.

25. The Commission recommends the state expressly prohibit gifting or discounting of cannabis while charging for accessories, merchandise, delivery, or other goods or services. This prohibition should apply to the gifting of materials used for home extraction.
26. The Commission recommends against allowing home delivery of recreational cannabis.
27. A monitoring system allowing all cannabis to be tracked from its seed state until it is sold should be implemented prior to any retail sales.
28. The Commission recommends prohibiting the consumption of cannabis products on any licensee's premises and does not recommend creating social club in the initial stages of a recreational cannabis market.
29. All license types should be specific to the person identified on the license and be non-transferrable.
30. The Commission recommends that no mobile sales such as at farmers' markets or via food trucks should be permitted.
31. The Commission recommends that advertising for cannabis goods and services be strictly limited in at least the following ways:
 - a. Advertisements may not use images of minors, cartoon characters, toys or items that are typically marketed to those under 21, candy-shaped edibles, etc.
 - b. Advertisements may not display consumption, encourage use because of intoxicating effects, or encourage excessive or rapid consumption.
 - c. Advertisements may not promote illegal activity such as transporting over state lines.
 - d. Advertisements may not assert that cannabis is safe because it is regulated and tested, because it has therapeutic or curative effects, or make claims to being "organic," unless the plants used are produced, processed and certified according to national organic standards
 - e. Cannabis establishments may not advertise their products via flyers, television, radio, billboards, print or internet unless the licensee can show that no more than 30% of the audience is reasonably expected to be under 21.
32. If edibles containing cannabis are permitted for sale in Vermont, at least the following should apply:
 - a. All packaging for products be child resistant and be in line with federal regulations for such packaging;
 - b. All labels should also include warnings of the products, especially edibles. These labels should be conspicuous and unobstructed and be in line with restrictions regarding advertising;
 - c. A universal THC symbol to alert consumers that the product contains cannabis;
 - d. Vermont should consider adopting requirements imposed by other states that permit a market for edibles such as Washington;

e. There should be limitations on potency and dosages of cannabis and cannabis products meant for edible consumption. The Commission recommends that products be not more potent than 10 milligrams of active THC per serving and that there be a maximum of 10 servings or 100 milligrams of THC per package (but these limitations should not apply to cannabis permitted for medical use);

f. The sale of cannabis mixed with products containing caffeine, nicotine, tobacco, or alcohol should be prohibited; and

g. A listing committee similar to the Board of Liquor and Lottery, established in 7 V.S.A. § 2 should be created to ensure that cannabis products are suited for the market through a vetting process.

33. In order to protect consumers and verify cannabinoid label guarantees and quality control of cannabis products available on a recreational market there should be standardized testing through laboratories that are certified by the Agency of Agriculture, Food and Markets (AAFV).

34. The creation of a recreational market will impact Vermont's current medical cannabis program. To ensure that cannabis products remain a viable and affordable option for medical patients and ensure the program's continued viability, the requirements imposed on dispensaries will need to be made consistent with the recreational structure where appropriate, and under certain circumstances, the requirements should be customized to accommodate the medical program's particular aims. To achieve these ends, updates will need to be made to 18 V.S.A. ch. 86 in its entirety, including the restriction on the number of plants a dispensary may possess relative to registered patients.

35. Specific modifications to Vermont medical cannabis program that should be considered include:

a. Amending the current dispensing limit of two ounces per 30-day period per registered patient to align with Act 86 of 2018;

b. Amending the cultivation and possession limits for patients to align with Act 86;

c. Removing the requirement that patients designate only one dispensary from which they may make purchases, given that patients could buy from any retail establishment without restriction.

d. Considering broadening the definition of medical conditions that can access the medical program to allow more patients to register cannabis for symptom relief.

36. All licensees should be required to attempt to obtain a depository account with a financial institution, and if unable to do so, to develop and implement a comprehensive cash management and security plan.

37. To maintain adequate security and prevent diversion, the Commission recommends that the statutory and regulatory requirements that are currently imposed on medical cannabis dispensaries should apply to recreational cannabis licensees.

38. With respect to hemp:

a. The Commission recommends the state maintain the current hemp statute so that hemp continues to be treated as an agricultural product under 6 V.S.A. § 563.

b. Any cannabis excise tax should only be imposed on cannabis, which is already defined in statute in a way that excludes hemp, so that hemp would not be subject to the excise tax;

c. The Commission does not recommend any changes to this existing law regarding hemp as AAFCM indicates that it will move towards a taxonomic determination of a Cannabis sativa L. crop, to simplify identification and verify the cultivated crop meet the definition of hemp at the time of planting rather than testing at harvest.

Edibles; Opt-In versus Opt-Out; Oral Fluid Testing

With respect to two important issues, the Commission was evenly divided: 1) whether edible or cannabis-infused products (“edibles”) should be sold in licensed retail stores for non-medical purposes; and 2) whether the Vermont model regarding towns and cities should be “opt-in” or “opt-out.”

Edibles

The Education and Prevention Subcommittee, at page 8 of its report to the Commission, makes the case that edibles should not be sold in the state. The Subcommittee’s main concern is the health and wellbeing of children and youth, who could suffer serious illness or even death by ingesting potent edibles. The Subcommittee stresses the need for labeling and marketing restrictions on edibles if they were to be sold here. The Taxation and Regulation Subcommittee’s report includes edibles in the array of products that would be sold by licensed stores, and its excise and sales tax revenue projections includes edibles. The Commission discussed this issue at its December 12, 2018 meeting, and no consensus was reached. Half the members present support edible sales as part of the effort to regulate those sales and substantially diminish their sales in the illicit market in Vermont. The other half support the theory that maintaining prohibitions against cannabis in an edible form will do more to contribute to public health and safety. Both the Prevention and Education Subcommittee and the Taxation and Regulation Subcommittee referred the Commission to a recent report, Market Size and Demand for Marijuana in Colorado, 2017 Market Update (available at <https://www.colorado.gov/pacific/marijuana/news/market-size-and-demand-study-marijuana-colorado>) for recent figures concerning the prevalence of edibles in a relatively mature cannabis market.

Opt-in Versus Opt-out Permission for Local Jurisdictions.

While the Commission supports local control on decisions about whether to allow commercial cannabis operations within municipalities in Vermont, the Commission was unable to come to consensus on whether this decision should be done by allowing jurisdictions to opt-out of a statewide program or requiring them to opt-in.

Under an opt-in model, no commercial cannabis businesses could operate unless the host town or city took a vote (through its legislative body) to accept such enterprises – subject to local planning and zoning ordinances. Under an opt-out model, these businesses could operate unless the municipality voted to not accept them. If the opt-out model were selected, there would need to be a period, e.g. 12 or 18 months, during which a municipality would be given the opportunity

to hold such a vote. The Commission discussed both options on December 12, 2018 but was unable to come to a consensus. Those in favor of an opt-out model argued that this would provide consistency and predictability to businesses. Those in favor of an opt-in model argued that this would provide more control to localities in managing cannabis operations in their jurisdictions.

Accordingly, on these two issues, the Commission as a whole does not take a position and directs the Governor to review and reflect on the underlying Subcommittee reports and the other materials and Minutes generated by them.

Oral Fluid Testing

The Commission reached consensus on adopting the recommendation of the Roadway Safety Subcommittee that oral fluid testing be used as part of the roadside screening process to determine the presence of THC. The Roadway Safety Subcommittee also recommended the authorization of an evidentiary oral fluid test for potential use in court. While a majority of the Commissioners agreed with this recommendation, a minority of them strongly disagreed (9-4).

The majority of the Commission recommends allowing the collection of an evidentiary oral fluid sample in the same manner and under the same legal standard an evidentiary sample of breath is collected in alcohol impaired driving cases so that such samples can be sent to a forensic lab for testing. The majority of the Commission believes that the admission in a court case and use of such evidence should be determined through the normal judicial process.

Those opposing oral fluid testing for evidentiary purposes argue that a positive THC test does not establish impairment under current science (a premise accepted by all members of the Commission), and that a jury would be unduly influenced by presentation of a test indicating a certain level of THC to find against a defendant. However, those in support of the evidentiary collection of this data argue this evidence would only be presented after a court has decided in favor of the reliability of the test and the relevancy of the proposed evidence, which would occur after a full briefing of the issues and hearings.

Ultimately, it is expected the Vermont Supreme Court will likely have to decide this issue of admissibility. The courts may ultimately agree that without a so-called presumptive level, the test results should not be admitted. On the other hand, the courts may find that a jury should be allowed to consider the test evidence along with all the other evidence presented supporting the charge (e.g., officer observations of driving and motor skills, testimony of a DRE, etc.) and give the test evidence such weight as the jury deems appropriate based on the court's instructions and the particular facts of the case.

III. CLOSING REMARKS; ACKNOWLEDGEMENTS

The Commission strove to prepare a thorough and useful report and recommendations for the Governor and lawmakers to use when developing policy positions, and writing and assessing legislative proposals, for a possible taxed and regulated retail-sales cannabis market in Vermont. We hope that this puts the horse before the cart when compared to the states where voter

referenda enacted state laws without the careful, detailed work the Commission believes it has done – and which the legislative process will no doubt continue.

Not every Commission member endorsed each recommendation adopted by the Commission, and the Commission process was open and encouraging of clearly articulated diverse views. In two important areas - the sale of edibles and the opt-in versus opt-out options for municipalities, the Commission was unable to reach a consensus. Overall, however, the Commission achieved a reasonable level of consensus.

The risk of omission counsels against acknowledging by name the many persons who assisted the Commission and its Subcommittees over the past 15 months. The Co-Chairs do want to underscore the strong leadership of the Subcommittee Chairs, and the diligence of those who served on and staffed the Subcommittees' research, analysis and drafting. We also call out the Legislative Joint Fiscal Office for its assistance and expertise in reaching consensus revenue projections. We thank those who hosted our meetings, especially the five public listening sessions and the Vermonters who testified before (and submitted written proposals and concerns to) the Commission and its Subcommittees.

December 18, 2018



Thomas A. Little, Co-Chair



Jake Perkinson, Co-Chair

Tom Anderson, Commissioner of the Department of Public Safety
Senator Joe Benning
John Campbell, Executive Director of the States' Attorneys and Sheriffs
Representative Maxine Grad
Dr. Mark Levine, Commissioner of the Department of Health
Representative Ann Pugh
David Scherr, Assistant Attorney General - designee of the Attorney General
Kaj Samsom, Commissioner of the Department of Taxes
Michael Schirling, Secretary of the Agency of Commerce and Community Development
Senator Dick Sears
Anson Tebbetts, Secretary of the Agency of Agriculture, Food and Markets