Roadway Safety Subcommittee
Recommendations and Options for the Governor's Marijuana Advisory Commission's
December 15, 2018 Report

Introduction

Background

Executive Order 15-17 (EO 15-17), signed September 7, 2017 by Governor Philip B. Scott, established the Governor's Marijuana Advisory Commission. The Roadway Safety Subcommittee, one of three subcommittees that make up the Commission, was "formed to examine and present findings on drugged driving and recommend appropriate measures to ensure roadway safety." EO 15-17, Section I. Additionally, the Subcommittee was tasked with pursuing "a regional impairment threshold for the New England states, and parity in drugged driving roadway safety laws and penalties." *Id.*

In November 2017, the Roadway Safety Subcommittee issued its first report, as required by EO 15-17. The report presented Vermont data and research deemed high quality by the Subcommittee on two health and safety endpoints listed in the Executive Order: "Injury and death"—specifically, motor vehicle crashes—and "crime rates." Based on those endpoints, the Subcommittee's three research questions were as follows:

- Is marijuana **use**, alone or in combination with other substances, associated with an increased risk of (1) motor vehicle crashes and (2) motor vehicle fatalities?
- Is marijuana **legalization** associated with an increased risk of (1) motor vehicle crashes and (2) motor vehicle fatalities?
- Do crime rates (i.e., rates of violent crime, property crimes or other collateral crimes) increase or decrease when marijuana is (1) decriminalized or (2) legalized for recreational use?

The November 2017 report is available here:
http://marijuanacommission.vermont.gov/document/roadway-safety-subcommittee-report-11142017-0.

In January 2018, the full Commission issued recommendations to the Governor per EO 15-17. The Roadway Safety Subcommittee's recommendations were the following:

- "Saliva-based or oral fluid testing is a scientifically reliable means of determining the presence of drugs in impaired drivers. It is effective and reliable both as a roadside screening test and as an evidentiary test."
- "At this time and under current law, the number of DREs is adequate for most of the State of Vermont. . . . However, if some form of 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."
- The Vermont Forensic Laboratory (VFL) is building capacity for in-state testing and analysis of toxicology samples for DUIs related to drugs such as marijuana, and may need to continue to build capacity depending on additional pressures.
- A regional impairment threshold for the New England states requires further study.

- The State of Vermont should begin gathering specific baseline data to measure the impact of marijuana decriminalization or legalization in Vermont—regardless of whether legalization involves adult possession and/or retail sales.
- Marijuana legalization, regardless of whether for possession or retail sales, will impact current search and seizure law in Vermont.
- Certain changes to Vermont law should be considered to ensure roadway safety and protect youth under 21.

Governor's Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 9–25, *available at* http://marijuanacommission.vermont.gov/document/report-and-recommendations-governor.

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Now, on or before December 15, 2018, EO 15-17 requires the Commission to issue a second set of recommendations for the Governor "on implementing and operating a comprehensive regulatory and revenue system for an adult marijuana market, and accompanying legislation if deemed necessary." EO 15-17, Section III(3). In satisfaction of its obligations under the Executive Order, the Roadway Safety Subcommittee presents the below recommendations and options for the Commission's and the public's consideration in the December 2018 report. In making these recommendations, the Roadway Safety Subcommittee has kept abreast of any new or additional studies and research in areas which may impact its earlier recommendations and incorporated supplemental information herein as appropriate.

1. Recommendation regarding "a plan for continued monitoring and reporting on impacts to public health, with specific reference to the health endpoints listed in Section III(1) above," which for the Roadway Safety Subcommittee were "injury and death" (i.e., motor vehicle crashes) and "crime rates."

Because many of the recommendations outlined in this report will depend on the measurable impacts, if any, of marijuana legalization in Vermont, the Roadway Safety Subcommittee begins its discussion with a recommended plan for monitoring and reporting. As discussed more fully below, the Subcommittee reaffirms the Commission's January 2018 recommendation to begin collecting baseline data "as soon as possible." Governor's Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 18. Along with this earlier recommendation, the Subcommittee adds the following proposals for consideration: (1) Vermont engage in an intensive, long-term data-collection and research effort before any tax and regulate scheme for marijuana goes into effect; and (2) such an initiative be mandated legislatively and properly funded, tasking a specific entity with the collection, analysis, tracking, and reporting of data and research on any impacts.

Prior Recommendation – Collect Baseline Data

First, the Subcommittee reaffirms the Commission's January 2018 recommendation for a data-collection initiative. *Id.* at 17. As described in the January report, the effort would be based on a data-collection initiative in Colorado, which was mandated by legislation. *See id.* (citing Colorado Senate Bill 13-283). With the assistance of the Crime Research Group, the Roadway Safety Subcommittee recommended (based on the Colorado example) the following non-exhaustive list of data-collection categories:

- **Cannabis-related crimes and quality-of-life complaints**
- **Cannabis arrests, including amounts**
- **Cannabis-related traffic accidents and impaired driving generally**
- **Out-of-state diversion**
- **Postal service use for cannabis transfer**
- **Youth**

Id. at 17–18. The Subcommittee again reiterates and cannot over emphasize the importance of a data-collection initiative in a plan for monitoring and reporting in Vermont. **Absent the collection of baseline data, Vermonters may never fully understand the impacts of legalization, if any, in this state.**

Legislation – Data and Research Initiative by Governmental Entity

To underscore the importance of such an initiative, the Subcommittee now asks that the Commission consider recommending a statutory mandate for data collection and analysis prior to the effective date of any taxation and regulation scheme. Not only could the legislation require the state to collect and analyze data, but it also could require the tracking of and reporting on scientific research relating to any impacts of legalization across the U.S. and Canada. If the Commission finds prohibitive the timeline for such a long-term effort, the Commission could consider, at a minimum, recommending that tax-and-regulate legislation still include a monitoring and reporting component, to begin immediately.

Finally, any proposed legislation could assign the above-described tasks to a specific governmental entity. For example, the tasks could be assigned to the entity charged with regulating the marijuana market (i.e., a board or commission, if created). Alternatively, the Commission may wish to assign the tasks to the Department of Public Safety, which serves as Vermont's Statistical Analysis Center. *See* Executive Order 13-7, *available at* https://legislature.vermont.gov/statutes/section/03APPENDIX/013/00007. Regardless of which entity would be responsible, the new initiative would need to be supported by adequate funding and staffing.

In sum, a mandatory plan for collecting, analyzing, and monitoring data and research, and reporting on such efforts, would assist the state both in understanding the impacts of legalization, if any, and in refining the Commission's recommendations to ensure that any final, adopted tax-and-regulate scheme is supported by the best available data and research.

2. Recommendation regarding "a set impairment threshold for operating a motor vehicle on State roads and highways," "an appropriate impairment testing mechanism, and/or increased DREs and training."

As noted above, Executive Order (EO) 15-17 tasks the Roadway Safety Subcommittee with recommending "appropriate measures to ensure roadway safety." EO 15-17, Section I. The Subcommittee's charge includes "pursu[ing] a regional impairment threshold for the New England States, and parity in drugged driving roadway safety laws and penalties." *Id.* Now, the Executive Order requires that the Subcommittee revisit the issue of impairment standards as the Commission formulates its final recommendation. Specifically, for the December 2018 report, the EO requires the Commission to "[d]etermine a set impairment threshold for operating a motor vehicle on State roads and highways, identify an appropriate impairment testing mechanism, and/or recommend increased DREs and

training." EO 15-17, Section III(3)(v). The topics of an "impairment testing mechanism" and Drug Recognition Experts (DREs) are discussed below in Recommendation #3 (equipment and staffing resources). The focus here is the topic of impairment thresholds.

With respect to an impairment threshold, the January 2018 report specifically addressed the "[f]easibility of regional impairment standards." EO 15-17, Section III(2). In the January report, the Roadway Safety Subcommittee recommended further study of this topic given all of the following: the different laws in other New England states; the uncertain status of marijuana legalization in some of those states; and the Subcommittee's review of scientific research, which suggested "that an impairment threshold in New England may not be the most effective way to ensure highway safety." Governor's Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 13. Ultimately, the Commission adopted the Roadway Safety Subcommittee's recommendation not to propose a *per se* threshold at the time of the January 2018 report. The Commission noted further study of THC levels and impairment was required, and it noted that Vermont "should coordinate with other states in developing a scientifically defensible standard." *Id.*

As discussed more fully below, the Subcommittee continues to recommend coordination with other New England states, and possibly Canadian provinces, in order to pursue—if possible—a regional standard; the Subcommittee also continues to recommend further study of THC levels and impairment. However, should the Commission wish to contemplate changes to Vermont's impaired driving laws, the Subcommittee also presents below multiple legislative options for the Commission's and the public's consideration.

Pursue Parity with New England States and Canada

First, to pursue a possible regional standard, the Subcommittee continues to recommend coordination with New England states. As indicated in the January 2018 report, marijuana legalization is a quickly evolving issue, including in the northeast. *See* An Act to Ensure Safe Access to Marijuana, Section 50, Chapter 55 of the Acts of 2017, Massachusetts Legislature, *available at* https://malegislature.gov/Laws/SessionLaws/Acts/2017/Chapter55; *see also* Recreational Marijuana in Maine, Maine State Legislature, https://legislature.maine.gov/lawlibrary/recreational_marijuana_in_maine/9419; "Maine seeks consultant to craft rules and regulations for recreational pot sales," Press Herald (Sept. 11, 2018), https://www.pressherald.com/2018/09/11/state-seeks-cannabis-consultant-for-rule-making/ (referring to April 30 deadline for rules). For example, the Commission's January 2018 report noted that Massachusetts established "a special commission on operating under the influence and impaired driving"; the special commission will issue a final report "on or before January 1, 2019." An Act to Ensure Safe Access to Marijuana, Section 50, Chapter 55 of the Acts of 2017, Massachusetts Legislature. The special commission in Massachusetts is tasked with studying the following:

> (i) scientific types of testing and data; (ii) medical types of testing and data; (iii) possible new technological forms of testing; (iv) civil liberties of the operator; (v) social economic aspects of the testing; (vi) admissibility of evidence of impaired driving in court proceedings; (vii) burden on law enforcement; (viii) the current status of law within the commonwealth; (ix) training of law enforcement; (x) intrusiveness of tests; (xi) cost analysis of testing; (xii) the current threshold for determining impairment; (xiii) the rate

of success in stopping impaired operators; and (xiv) anything else the commission deems necessary or significant.

Id. Given all of the above—and the information presented in the January 2018 report regarding other New England states[1]—a regional standard may be easier to pursue once other states have engaged in further study of the issue.

As part of such coordination, the State may also wish to expand its regional scope, and the Commission should thus consider recent developments in Canada. As of late June 2018 (prior to the legalization of marijuana for retail sales in Canada), the Canadian federal government passed amendments to its Criminal Code. *See* Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts* (2018), 42nd Parliament, First Session, *available at* http://www.parl.ca/DocumentViewer/en/42-1/bill/C-46/royal-assent. Specifically, Bill C-46 amended Section 253 of the Code to prohibit general blood drug concentrations as set forth by regulation. *Id.* pt. 1 ("Offences Relating to Transportation — Drugs").[2] Subsequently, Canada's Blood Drug Concentration Regulations went into effect. *See* Blood Drug Concentration Regulations, *available at* http://www.gazette.gc.ca/rp-pr/p2/2018/2018-07-11/html/sor-dors148-eng.html. Those regulations established the following offenses:

> Summary offence: "For the purpose of paragraph 253(3)(b) of the *Criminal Code*, the prescribed blood drug concentration for tetrahydrocannabinol (THC) is 2 ng of THC per mL of blood." *Id.*

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[1] The January 2018 report discussed the absence of a *per se* threshold in New England state statutes, except it noted that Rhode Island has a "zero tolerance" statute for the "blood presence" of a controlled substance. *See* Governor's Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 12–13; 31 R.I. Gen. Laws § 31-27-2. As noted later in this report, Rhode Island has not legalized marijuana for recreation, but the state does have a medical program. *See* 21 R.I. Gen. Laws, Chapter 28.6 ("The Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act").

[2] The amendment to Section 253 is as follows:

> **Operation while impaired — blood drug concentration**
> **(3)** Subject to subsection (4), everyone commits an offence who has within two hours after ceasing to operate a motor vehicle or vessel or after ceasing to operate or to assist in the operation of an aircraft or of railway equipment or after ceasing to have the care or control of a motor vehicle, vessel, aircraft or railway equipment
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> **(a)** a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation;
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> **(b)** a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation and that is less than the concentration prescribed for the purposes of paragraph (a); or
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> **(c)** a blood alcohol concentration and a blood drug concentration that is equal to or exceeds the blood alcohol concentration and the blood drug concentration for the drug that are prescribed by regulation for instances where alcohol and that drug are combined.

Part 1, Bill C-46, *available at* http://www.parl.ca/DocumentViewer/en/42-1/bill/C-46/royal-assent.

Hybrid offence, drugs: "For the purpose of paragraph 253(3)(a) of the *Criminal Code*, the prescribed blood drug concentration for" Tetrahydrocannabinol (THC) is set at "5 ng/mL of blood." *Id.*

Hybrid offence, combination of drugs and alcohol: "For the purpose of paragraph 253(3)(c) of the *Criminal Code*, the prescribed blood alcohol concentration is 50 mg of alcohol per 100 mL of blood and the prescribed blood drug concentration for tetrahydrocannabinol (THC) is 2.5 ng of THC per mL of blood." *Id.*

Moreover, Canadian provinces are addressing drug-impaired driving in a variety of ways, and the Commission also should review the provinces' efforts. For instance, Quebec has adopted what it is referring to as a "zero tolerance" policy in Bill 157: "the Act introduces a new zero tolerance principle for drugs by prohibiting any person from driving or having the care or control of a road vehicle if there is a detectable presence of cannabis or any other drug in the person's saliva." Bill 157, *An Act to constitute the Société québécoise du cannabis, to enact the Cannabis Regulation Act and to amend various highway safety-related provisions* (2018), Explanatory Notes, *available at* www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2018C19A.PDF.[3] And Ontario has adopted what it calls "[z]ero tolerance for young, novice and commercial drivers." Cannabis Legalization, Government of Ontario, https://www.ontario.ca/page/cannabis-legalization#section-3.

In sum, with respect to impaired driving laws in the region, there currently is a lack of parity and further coordination is required. On the one hand, Canada has set numerical thresholds for THC in blood, and certain provinces are establishing some form of a "zero tolerance" law. In New England, by contrast, only Rhode Island has a zero tolerance law, which operates in the context of a medical marijuana program, and no New England state—including any state that is legalizing marijuana for retail sales—has to date adopted a set impairment threshold in statute. Additionally, marijuana-legalization efforts in New England are evolving. Accordingly, the Subcommittee continues to recommend coordination with Vermont's neighbors, including Canada, for a possible regional standard.

Continued Study of Marijuana Impairment and an Impairment Threshold

As set forth in the January 2018 report, the Subcommittee continues to recommend further study of marijuana impairment and a possible impairment threshold in light of current scientific literature. Notably—and as cited in the January 2018 report—the 2017 National Academies study (in discussing the

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[3] The text of the Act reads in part as follows:

> "202.2.1.3. It is prohibited for any person to drive or have the care or control of a road vehicle if cannabis or any other drug is present in the person's body, subject to the exceptions provided for by government regulation.
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> For the purposes of this section, the prohibited presence of cannabis or any other drug in a person's body means a presence that is detectable in oral fluid by means of the screening equipment referred to in section 202.3."

Bill 157, Section 42, *available at* www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2018C19A.PDF.

potential limitations of current studies on marijuana-impaired driving) states, "the association between THC levels in blood and either acute intoxication or driving impairment remains a subject of controversy." National Academies of Sciences, Engineering, and Medicine. 2017. *The health effects of cannabis and cannabinoids: The current state of evidence and recommendations for research*. Washington, DC: The National Academies Press. doi: 10.17226/24625 (available online at https://www.nap.edu/read/24625/chapter/11#229). Because any adopted regional standard should be "scientifically defensible," *see* Governor's Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 13, further study is recommended before adopting a threshold.

Public Policy Considerations and Legislative Options

Independent of the science regarding threshold marijuana levels of impairment, the Subcommittee acknowledges that the establishment of such thresholds may be driven by other important public policy goals. In the context of marijuana legalization, one policy consideration (among others) might be deterrence—that is, deterring individuals from engaging in marijuana-impaired driving on Vermont's roadways.[4] According to the AAA Foundation for Traffic Safety, "Part of the value of alcohol *per se* laws is the general deterrent impact." Barry Logan, AAA Foundation for Traffic Safety, *An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to* Per se *Limits for Cannabis* at 27 (May 2016) (citing research on deterrence). The establishment of threshold levels for marijuana may similarly have a deterrent impact on marijuana-impaired driving. Should the Commission, after public comment, subsequently choose to recommend legislative action on this topic, the Subcommittee presents below for review a non-exhaustive list of possible options.

Option 1

Under this option, the Commission would recommend that Vermont adopt a *per se* threshold in statute. A *per se* statute has been defined as a law that prohibits driving with or above a specific level of a drug in one's system. *See, e.g.*, Governor's Highway Safety Association, *Drug-Impaired Driving* at 22 (Apr. 2017), https://www.ghsa.org/sites/default/files/2017-04/GHSA_DruggedDriving2017_FINAL.pdf. Models of *per se* statutes include those adopted in Colorado, Washington, other states, and Canada. A few such laws are presented below.

Colorado statute provides an example of a state statute that sets a *per se* threshold but treats such a threshold as giving rise to a permissible inference. *See id.* The Colorado statute reads that "[i]n any prosecution for DUI or DWAI" there is the following inference: "If at such time the driver's blood contained five nanograms or more of delta 9-tetrahydrocannabinol per milliliter in whole blood, as shown by analysis of the defendant's blood, such fact gives rise to a permissible inference that the defendant was under the influence of one or more drugs." Colo. Rev. Stat. Ann. § 42-4-1301(6)(a), (6)(a)(IV). Please note that Colorado statute prohibits "driving under the influence" of a drug and

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[4] As presented in the November 2017 report, the National Academies study concluded, "There is substantial evidence of a statistical association between cannabis use and increased risk of motor vehicle crashes" (230). National Academies of Sciences, Engineering, and Medicine. 2017. *The health effects of cannabis and cannabinoids: The current state of evidence and recommendations for research*. Washington, DC: The National Academies Press. doi: 10.17226/24625 (available online at https://www.nap.edu/read/24625/chapter/11#230). The study also stated that based on a "meta-analysis" by other researchers (Rogeberg and Elvik 2016), the magnitude of the impact was "low to moderate in range" (229). *Id.* at 229.

"driving while ability impaired." Colo. Rev. Stat. Ann. § 42-4-1301(1)(a), (b), (f), (g). Please see footnote 6 of this report for a few other examples of *per se* laws.

The Commission could recommend amending Vermont statute to include a *per se* threshold in blood or oral fluid, and the *per se* provision could be an alternative to 23 V.S.A. § 1201(a)(3), which prohibits driving under the influence of a drug.[5] Moreover, similar to Colorado, the Commission could choose to recommend that a concentration meeting a *per se* threshold gives rise to a permissive inference under section 1201(a)(3). *Cf.* 23 V.S.A. § 1204(a)(2) ("If the person's alcohol concentration at that time was 0.08 or more, it shall be a permissive inference that the person was under the influence of alcohol in violation of subdivision 1201(a)(2) or (3) of this title."). Please note that the exact wording of any statutory change would also depend on whether another marijuana-detection testing mechanism (i.e., oral fluid testing) is approved.

The "*per se*" option raises additional considerations. For instance, in assessing a *per se* model, the Commission should consider what the statutory threshold would be, what substance or component of marijuana would be measured, and what bodily fluid would be tested—i.e., blood, urine, or oral fluids.[6] The Subcommittee also recommends receiving input from the State's Attorneys and defense bar on how such a statutory change would impact prosecutions for drug-impaired driving.

Option 2

Another option for the Commission's consideration is a "zero tolerance" model. A "zero tolerance" law has been defined as one that prohibits driving with any amount of a drug in one's system. *See* Governor's Highway Safety Association, *Drug-Impaired Driving* at 21 (Apr. 2017), https://www.ghsa.org/sites/default/files/2017-04/GHSA_DruggedDriving2017_FINAL.pdf. The Subcommittee notes that (as of the date of drafting this section) no state that has legalized marijuana for recreational use or a retail market has adopted a zero tolerance statute.[7] However, the Canadian province of Quebec has enacted what it is calling a "zero tolerance principle." *See* Bill 157, Explanatory

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[5] The Subcommittee understands that a threshold level for oral fluid has yet to be determined in the scientific literature.

[6] Colorado specifies a level of "five nanograms" of "delta 9-tetrahydrocannabinol per milliliter in whole blood." *See* Colo. Rev. Stat. Ann. § 42-4-1301(6)(a)(IV). Washington's statute specifies "THC concentration of 5.00 or higher as shown by analysis of the person's blood," Wash. Rev. Code Ann. § 46.61.502(1)(b), and "[t]he blood analysis of the person's THC concentration shall be based upon nanograms per milliliter of whole blood," Wash. Rev. Code Ann. § 46.61.506(2)(b). Nevada statute prohibits driving or being in control of a vehicle with the following in one's blood: two or more "Blood Nanograms per milliliter" of "Marijuana (delta-9-tetrahydrocannabinol)"; or five or more "Blood Nanograms per milliliter" of "Marijuana metabolite (11-OH-tetrahydrocannabinol)." Nev. Rev. Stat. Ann. § 484C.110(4). And, as discussed above, Canada has set thresholds for three offenses: 2 nanograms, 5 nanograms, and 2.5 nanograms of "tetrahydrocannabinol . . . per mL of blood." Blood Drug Concentration Regulations, *available at* http://www.gazette.gc.ca/rp-pr/p2/2018/2018-07-11/html/sor-dors148-eng.html. These and other laws provide models for Vermont to consider, should the Commission wish to pursue a statutory threshold in the impaired driving statute.

[7] *See* Alaska Stat. Ann. § 28.35.030 (Alaska); Cal. Vehicle Code § 23152 (California); Colo. Rev. Stat. Ann. § 42-4-1301 (Colorado); D.C. Code § 50-2206.11 (Washington, D.C.); Mass. Gen. Laws Ann. ch. 90, § 24 (Massachusetts); Me. Rev. Stat. Ann. tit. 29-A, § 2411 (Maine); Nev. Rev. Stat. Ann. § 484C.110 (Nevada); Or. Rev. Stat. Ann. § 813.010 (Oregon); Wash. Rev. Code Ann. 46.61.502 (Washington); 23 V.S.A. § 1201 (Vermont).

Notes,
www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2018C19A.PDF.
"Zero tolerance" statutes exist in many forms, and below the Subcommittee presents a few examples.

For purposes of this report, the Subcommittee considers "zero tolerance" laws to include variations on the general prohibition set forth above. While not an exhaustive list (and without getting too detailed), some examples of "zero tolerance" laws—in states with medical marijuana programs—include the following:

- **Pennsylvania:** In Pennsylvania, one cannot drive with "any amount of" certain controlled substances or a metabolite of such controlled substances in one's blood. 75 Pa. Stat. and Cons. Stat. Ann. § 3802; *see also Commonwealth v. Campbell*, No. 1744 WDA 2015, 2016 WL 6311752, at *6 (Pa. Super. Ct. Oct. 28, 2016) (non-precedential decision) ("Subsection (d)(1) is a zero-tolerance provision. . . . Subsection (d)(1) thus reflects the legislature's policy determination that the mere presence of active marijuana compounds in a driver's blood presents an unacceptable risk to public safety. This is so regardless of whether the individual is impaired, is simply inattentive from ingesting the substance, or believes he is unimpaired." (citations omitted)); *but cf.* 47 Pa. Bull. 4045 (July 22, 2017), *available at* https://www.pabulletin.com/secure/data/vol47/47-29/1223.html (setting minimum levels, including 0.5 nanogram per milliliter Delta-9-THC, "that must be present in a person's blood for the test results to be admissible in a prosecution for a violation of . . . § 3802(d)(1), (2) or (3)").

- **Arizona:** In Arizona, "[i]t is unlawful for a person to drive or be in actual physical control of a vehicle in this state . . . While there is any drug defined in § 13-3401 or its metabolite in the person's body." Ariz. Rev. Stat. Ann. § 28-1381(a)(3). The Arizona Supreme Court has interpreted the statute's reference to "metabolite" as follows:

  > Because the legislature intended to prevent impaired driving, we hold that the "metabolite" reference in § 28–1381(A)(3) is limited to any of a proscribed substance's metabolites that are capable of causing impairment. Accordingly, marijuana users . . . , regardless of impairment, violate (A)(3) if they are discovered with any amount of THC or an impairing metabolite in their body. Drivers cannot be convicted of the (A)(3) offense based merely on the presence of a non-impairing metabolite that may reflect the prior usage of marijuana.

  State ex rel. Montgomery v. Harris, 237 Ariz. 98, 104, 346 P.3d 984, 990 (2014).

  In the context of Arizona's medical marijuana program, the Arizona Supreme Court also makes the following statement: "The State's interpretation that 'its metabolite' includes *any* byproduct of a drug listed in § 13–3401 found in a driver's system leads to absurd results." *Id.* at 102, 346 P.3d at 988. First, the Court states, "Most notably, this interpretation would create criminal liability regardless of how long the metabolite remains in the driver's system or whether it has any impairing effect." *Id.* Also, "this interpretation would criminalize otherwise legal conduct." *Id.*

- **Delaware:** Delaware statute reads as follows:

  > (a) No person shall drive a vehicle: . . . (6) When the person's blood contains, within 4 hours of driving, any amount of an illicit or recreational drug that is the

result of the unlawful use or consumption of such illicit or recreational drug or any amount of a substance or compound that is the result of the unlawful use or consumption of an illicit or recreational drug prior to or during driving.

Del. Code Ann. tit. 21, § 4177 (a)(6). The same statute reads, "In a prosecution brought under paragraph (a)(6) of this section, if a person claims that such person lawfully used or consumed a drug, it is that person's burden to show that person has complied with and satisfied the provisions of this Code regarding obtaining, using or consumption of the drug detected." *Id.* § 4177(a)(8). And, under the statute, "'Substance or compound that is the result of the unlawful use or consumption of an illicit or recreational drug' as that phrase is used in paragraph (a)(6) of this section shall not include any substance or compound that is solely an inactive ingredient or inactive metabolite of such drug." *Id.* § 4177(a)(9). Finally, Delaware's medical marijuana law provides as follows: "a registered qualifying patient shall not be considered to be under the influence of marijuana solely because of the presence of metabolites or components of marijuana." Del. Code Ann. tit. 16, § 4904A(a)(4).

- **Michigan:** Michigan statute reads, "A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance [listed in law]. . . ." Mich. Comp. Laws Ann. § 257.625(8). Michigan's Supreme Court has also interpreted the statute in relation to the state's medical marijuana program: "the Michigan Vehicle Code's zero-tolerance provision, MCL 257.625(8), which is inconsistent with the [Michigan Medical Marihuana Act], does not apply to the medical use of marijuana." *People v. Koon*, 494 Mich. 1, 7, 832 N.W.2d 724, 727 (2013).

In addition—and as noted above—laws in Rhode Island and certain Canadian provinces are examples of "zero tolerance" laws in the region. The Subcommittee noted previously that Rhode Island is the only New England state that has thus far adopted a "zero tolerance" law. *See* 31 R.I. Gen. Laws Ann. § 31-27-2 (b)(2) ("Whoever drives, or otherwise operates, any vehicle in the state with a blood presence of any scheduled controlled substance as defined within chapter 28 of title 21, as shown by analysis of a blood or urine sample, shall be guilty of a misdemeanor and shall be punished as provided in subsection (d)."); *see also* 21 R.I. Gen. Laws Ann. § 21-28-2.08 (d)(10) (listing "marihuana"). Again, Rhode Island has a medical marijuana program, but the state has not legalized marijuana for recreational use or retail sales. Like some of the states noted above, Rhode Island statute also addresses medical marijuana users: "a registered qualifying patient shall not be considered to be under the influence solely for having marijuana metabolites in his or her system." 21 R.I. Gen. Laws Ann. § 21-28.6-7 (a)(3).

As for Canadian provinces, Quebec has adopted what it is calling a "zero tolerance principle," which prohibits driving "if cannabis or any other drug is present in the person's body" as detected in oral fluid. Section 42 of Bill 157, page 58, www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2018C19A.PDF. This bill was assented to in June of 2018, and it is unclear if there are or will be exceptions to the zero tolerance law set in regulation. *See id.* ("It is prohibited for any person to drive or have the care or control of a road vehicle if cannabis or any other drug is present in the person's body, *subject to the exceptions provided for by government regulation*."). Accordingly, the Commission might consider

Rhode Island and Quebec laws as regional models, but, at least with respect to Quebec, the Commission should also continue to track regulations in that province.

Should the Commission be interested in pursuing a "zero tolerance" law, the Commission could consider qualifying any such law in a manner similar to other states. For instance, the "zero tolerance" prohibition could apply only to ingredients that can cause impairment but not to a "non-impairing metabolite that may reflect the prior usage of marijuana." *See State ex rel. Montgomery v. Harris*, 237 Ariz. 98, 104, 346 P.3d 984, 990 (2014). Alternatively, the statute could exempt medical or lawful non-impaired marijuana users in some other way.

Option 3

Other recommendations aside, the Commission could choose to recommend not making any changes to Vermont's impaired driving statute under a tax-and-regulate system. *See* 23 V.S.A. § 1201. Vermont's impaired driving statute, as it relates to drugs, currently prohibits the following: "(a) A person shall not operate, attempt to operate, or be in actual physical control of any vehicle on a highway: . . .(3) when the person is under the influence of any other drug or under the combined influence of alcohol and any other drug . . . ." 23 V.S.A. § 1201(a)(3). And in section 1201, "'under the influence of a drug' means that a person's ability to operate a motor vehicle safely is diminished or impaired in the slightest degree." § 1201(h).

One advantage of Option 3 is that it avoids relying on a set numerical impairment threshold. As set forth above and in our report of January 2018, numerical thresholds may not be fully supportable in the scientific literature. This option may also account for those drivers who have residual amounts of marijuana in their system—i.e., due to either prior medical or other legal use—but who are not impaired by any residual substance that remains in their system when they are on the roadway. *See generally* F. Grotenherman et al. (2007). *Developing limits for driving under cannabis*. Addiction, 102: 1910–1917. doi:10.1111/j.1360-0443.2007.02009.x; *see also* Mayo Clinic, https://www.mayomedicallaboratories.com/test-info/drug-book/marijuana.html (last visited Oct. 19, 2018). Option 3 also may help avoid situations in which impaired drivers are not captured by set thresholds. *See Phase I and II Cannabinoid Disposition in Blood and Plasma of Occasional and Frequent Smokers Following Controlled Smoked Cannabis*. Nathalie A. Desrosiers, Sarah K. Himes, Karl B. Scheidweiler, Marta Concheiro-Guisan, David A. Gorelick, Marilyn A. Huestis. Clinical Chemistry Apr 2014, 60 (4) 631-643; DOI: 10.1373/clinchem.2013.216507 (available online at http://clinchem.aaccjnls.org/content/60/4/631.long). However, the Subcommittee also recommends consulting prosecutors and defense attorneys on any possible difficulties or drawbacks under existing statute.[8]

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[8] For the Commission's consideration, the Subcommittee notes that at least one decision by the Massachusetts Supreme Court cites a lack of scientific consensus on certain field sobriety tests as indicators of marijuana impairment. *See Commonwealth v. Gerhardt*, 477 Mass. 775, 781, 81 N.E.3d 751, 759 (2017) ("The scientific community has not reached a consensus as to whether a defendant's performance on any combination of FSTs, or on any individual FST, is correlated with marijuana use or impairment."). Despite the lack of consensus, the court finds FST information relevant and sets forth principles governing admission of such information. *See id.* at 783, 81 N.E.3d at 759 ("The unsettled state of the scientific research suggests that FST evidence should be neither treated as a definitive test of impairment nor excluded entirely from consideration by the finder of fact.").

Given all of the above, the Commission could consider recommending no change to Vermont's DUI statute beyond allowing for the collection 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 marijuana. This would be consistent with the Roadway Safety Subcommittee's recommendation regarding the need for Vermont to allow for the collection of oral fluid in suspected drugged driving offenses.

3. Recommendation regarding "a business plan for a comprehensive regulatory and revenue system which completely self-funds the regulatory infrastructure at both the State and local level, including . . . [r]equired equipment and/or staffing resources required to address impaired driving due to marijuana or marijuana and alcohol at both the State and local level."

Executive Order 15-17 tasks the Commission with making recommendations regarding "[r]equired equipment and/or staffing resources required to address impaired driving due to marijuana or marijuana and alcohol at both the State and local level." EO 15-17, Section III(3)(ii)(b). In the January 16, 2018 report, the Roadway Safety Subcommittee addressed equipment and staffing resources in the following recommendations:

- "An appropriate impairment testing mechanism";
- "Adequacy of and funding for drug recognition experts (DREs) and training"; and
- "Capacity for in-state testing and analysis of toxicology samples for DUIs related to drugs such as marijuana." EO 15-17, Section III(2)(v), (vi), (vii).

The Roadway Safety Subcommittee readopts its earlier recommendations on these topics, and provides the following updates on equipment and staffing for law enforcement and the Vermont Forensic Laboratory.

First, with respect to equipment, the Subcommittee reaffirms its prior recommendation regarding oral fluid testing for roadside detection. In addition to the recommendation provided in the January 16, 2018 report, the Subcommittee adds, for the Commission's consideration, that Canada has approved oral fluid screening equipment. *See* "Minister of Justice and Attorney General of Canada Approves Roadside Drug Screening Equipment to Fight Drug-Impaired Driving," News Release (Aug. 27, 2018), https://www.canada.ca/en/department-justice/news/2018/08/minister-of-justice-and-attorney-general-of-canada-approves-roadside-drug-screening-equipment-to-fight-drug-impaired-driving.html; *see also* Bill C-46, *available at* http://www.parl.ca/DocumentViewer/en/42-1/bill/C-46/royal-assent (assented to June 21, 2018). The Commission may wish to study the equipment approved in Canada.

As for DREs, the Commission's January 16, 2018 report noted that the number of Drug Recognition Experts (DREs) in Vermont was adequate and a new class in August 2018 likely would "further alleviate concerns regarding DRE coverage." Governor's Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 11. The Report also noted, however, "if some form of 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." *Id.* The Roadway Safety Subcommittee readopts this earlier recommendation, stressing that DRE equipment and staffing needs likely will depend on whether there are measurable roadway-safety impacts in Vermont from marijuana legalization post-Act 86 or any tax-and-regulate system. Since the January

2018 report, nine new DREs have been trained. Now, with a total of 58 DREs, careful monitoring of staffing should continue as the new DREs begin their work.

In addition, the use of DREs in court is now being challenged. Should these challenges be successful and DREs be precluded from providing testimony in drugged driving prosecutions, it would significantly impact the ability to enforce Vermont's drugged driving laws.

With respect to the Vermont Forensic Laboratory (VFL) resources, the Commission also addressed VFL capacity in the January 16, 2018 report, and the Roadway Safety Subcommittee reaffirms its earlier recommendation here. In the January report, the Commission wrote, "The Vermont Forensic Laboratory (VFL) is currently building the capacity for in-state testing and analysis of toxicology samples for DUIs related to drugs such as cannabis." *Id.* The report also stated,

> Based on the historical number of samples submitted for drug analysis, the VFL could absorb a 20–25% increase in workload. However, should the legalization of cannabis cause an increase in the number of drug impaired drivers, there is likely to be a corresponding increase in the number of samples submitted to the VFL. In addition, if saliva/oral fluid testing for drugs is adopted and implemented, it is expected that there will be a sharp increase in the number of samples submitted to the VFL for testing. There will also be start-up costs for a program involving saliva/oral fluid testing. Once this increase in samples exceeds the 20–25% threshold the VFL can absorb, additional laboratory personnel, supplies, and consumables will be needed.

Id. at 12. Because the VFL is still building capacity, the Subcommittee's recommendation remains the same.

4. Other Miscellaneous Issues – Search and Seizure

In its January 2018 report to the Governor, the Commission recognized "that cannabis legalization, regardless of whether for possession or retail sales, will impact current search and seizure law in Vermont, especially in light of the fact-intensive nature of search and seizure jurisprudence." Governor's Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 20, *available at* http://marijuanacommission.vermont.gov/document/report-and-recommendations-governor. The report went on to state, "Accordingly, it is anticipated that search and seizure law in Vermont will be subject to renewed litigation should cannabis be legalized in some manner." *Id.* The Subcommittee reiterates this prior consideration, and it recommends continued monitoring of search and seizure law in Vermont and other states, especially in light of the passage of Act 86 in Vermont. Below please find a discussion of Act 86, and—as part of the Subcommittee's initial monitoring of search-and-seizure case law—a brief reference to various developments in search-and-seizure law in the U.S.

Since the Commission issued its January 2018 report, the Vermont General Assembly's Act 86 of 2018 legalized adult possession of up to one ounce of marijuana and home cultivation of a certain number of marijuana plants. *See* Act 86 of 2018, *available at* https://legislature.vermont.gov/assets/Documents/2018/Docs/ACTS/ACT086/ACT086%20As%20Enacted.pdf. Act 86 also amended 18 V.S.A. § 4230a to now read as follows: "Marijuana possessed or

consumed in violation of State law is contraband pursuant to subsection 4242(d) of this title and subject to seizure and forfeiture." § 4230a(b)(1) (as amended by Act 86). Act 86 struck statutory language clarifying that the prior marijuana decriminalization statute was "not intended to affect the search and seizure laws afforded to duly authorized law enforcement officers under the laws of this State." *See* § 4230a(c)(2) (2017) (prior version of statute); *see also* Act 76 of 2013. The Roadway Safety Subcommittee cannot predict exactly how Act 86's textual change will affect search and seizure jurisprudence in Vermont.

Still, the Roadway Safety Subcommittee continues to anticipate that courts in Vermont will "be faced with redefining the contours of established search and seizure law." *See* Governor's Marijuana Advisory Commission, January 16, 2018, Report and Recommendations to the Governor at 21. This expectation is based, in part, on developments in other states where marijuana has been legalized in some form. *See People v. Zuniga*, 2016 CO 52, ¶ 23 ("[W]e note that while Amendment 64 allows possession of one ounce or less of marijuana, a substantial number of other marijuana-related activities remain unlawful under Colorado law. Given that state of affairs, the odor of marijuana is still suggestive of criminal activity. Hence, we hold that the odor of marijuana is relevant to the totality of the circumstances test and can contribute to a probable cause determination."); *People v. Cox*, 2017 CO 8, ¶ 17 ("As in Zuniga, we conclude that, . . . the canine alert in this case 'suggested that illegal drugs were present in the vehicle' and that such an alert is a factor that should be considered as part of the totality of circumstances." (quoting *Zuniga*, 2016 CO 52, ¶ 29)); *State v. Souza*, 199 Wash. App. 1052, at *6 (2017) (unpublished opinion) ("In Washington, an alert by a trained drug dog is sufficient to establish probable cause for the presence of a controlled substance. While we acknowledge that the State trained Isko to detect miniscule amounts of marijuana before the substance's legalization, such training does not disqualify his alert. As the State highlights, marijuana remains illegal for some persons and under some circumstances." (internal citation omitted)). The Subcommittee also notes that marijuana legalization may raise questions in Vermont about search-and-seizure law in the context of federal-state relationships. *See State v. McCarthy*, Docket # 469-2017-CR-01888, at *10 (May 1, 2018) (order) (stating the following in the context of state court prosecutions for possession of controlled substances, including marijuana: "[B]ased on the Court's finding above that the evidence would be inadmissible if seized by State law enforcement officials because there was no articulable reasonable suspicion that any of these defendants was involved in criminal activity prior to the initial dog search, the Court also finds that the inadmissibility of the evidence does not change based on the fact that it was seized by federal officers and then handed over to the State."); *see also State v. McCarthy*, Docket # 469-2017-CR-01888 (Aug. 21, 2018) (order on motion for reconsideration).

Based on all of the above, the Subcommittee recommends continued monitoring of developments in search and seizure law in Vermont and elsewhere, especially given—as stated in the January 2018 report—the difficult and often unanswered questions for law enforcement during roadside stops.