



# Commonwealth of Massachusetts

## Harm Reduction Commission

---

### Review of Safe Injection Site Legal Issues

*December 17, 2018*



# Overview

---

- **Discussion of safe injection sites has considered apparent similarities between State-sponsored medical marijuana regimes and potential State embrace of safe injection sites**
  - State-level approval of medical marijuana use represents a reversal of historic drug enforcement policy in favor of patient-driven health agenda
  - State support and licensing of medical marijuana programs require Federal forbearance to proceed due to direct conflict with Federal drug laws and rule of Federal supremacy in instances of conflict
- **State-level Marijuana law as of 2018**
  - California first legalized home grow for medical marijuana in 1996
  - Medical marijuana in some form now legal in 33 of 50 States
  - Recreational marijuana now legal in some form in 10 States plus District of Columbia
  - Conflict with Federal law remains despite general lack of Federal prosecution
    - Controlled Substance Act
      - Possession - 21 U.S.C 844(a) —punishable up to 1 year for first offense
      - Distribution of Marijuana – 21 U.S.C. 841(b)(1)(A)(vii)—felony punishable up to life imprisonment for 1000 kilograms or more
    - Money Laundering statute – 18 U.S.C. 1956 – felony punishable by up to 20 years imprisonment
    - Risk of civil and criminal asset forfeitures – 18 U.S.C. 981(a)(1)(B)(i)
    - RICO/Civil RICO



# Federal marijuana policy and safe injection sites

- **Key Differences/Qualifiers to the Analogy—no easy Federal forbearance**

- Reminder: Federal prosecutors did enforce CSA against medical marijuana patients and dispensaries in early days and Supreme Court repeatedly affirmed DOJ authority to do so under Federal CSA
  - Gonzalez v. Raich (2005)—CA patient may be prosecuted for possession of 6 marijuana plants notwithstanding compliance with CA Compassionate Use Act
  - United States v. Oakland Cannabis Buyers' Cooperative (2001)—marijuana dispensary may be prosecuted for seeking to distribute marijuana to patients pursuant to CA Compassionate Use Act
- Factors in gradual Federal forbearance: law enforcement resources and DOJ priorities
  - Simple use and possession of marijuana never a Federal enforcement priority
  - DEA/DOJ resources insufficient for programmatic enforcement against individual use and possession

- **Formal statements of Federal drug enforcement priority**

- DOJ “Cole Memorandum” (2013) – prosecution of marijuana offenses not a Federal law enforcement priority where lawfully conducted under well-regulated State regulatory schemes [currently withdrawn]
- FinCEN (Federal Financial Crimes Enforcement Network) guidance (2014)—parallel to Cole Memorandum and concerning banking and financial transactions involving proceeds from marijuana [never withdrawn]
- Rohrabacher-Farr amendment (2014): prohibits DOJ from spending funds to interfere with medical marijuana possession and distribution conducted in compliance with State law
- Andrew Lelling—US Attorney for Massachusetts:
  - “Because I have a constitutional obligation to enforce the laws passed by Congress, I will not effectively immunize the residents of the Commonwealth from federal marijuana enforcement. My office’s resources, however, are primarily focused on combatting the opioid epidemic that claims thousands of lives in the Commonwealth each year.” [Statement Regarding the Legalization of Recreational Marijuana in Massachusetts, July 10, 2018]



# Current Legal Status of State Marijuana Regimes

- **The CSA was not overcome by any kind of legal challenge in the marijuana context: Federal enforcement is held in abeyance by purely political considerations**
  - Medical marijuana supporters lost every important legal contest over whether State-regulated programs should be exempt from CSA prohibitions
  - Nothing has changed: State approved marijuana programs would continue to lose those legal challenges if tested now

“The Supremacy Clause unambiguously provides that if there is any conflict between Federal and State law, Federal law shall prevail. It is beyond peradventure that Federal power over commerce is superior to that of the States to provide for the welfare or necessities of their inhabitants, however legitimate or dire those necessities may be.”  
Gonzalez v. Raich (2005) (medical marijuana challenge to CSA)
- **What has changed Federal decision-making on CSA enforcement is 20+ years of voter approved referenda across more than 30 States**
  - Massachusetts example
    - 2008: De-criminalization of possession of < 1 ounce (possession remains a civil offense)
    - 2012: Legalization of Medical Marijuana
    - 2016: Legalization of Adult Use Marijuana (recreational)



# Current DOJ position on safe injection sites

---

- **Rod Rosenstein—Deputy Attorney General**
  - “[C]ities and counties should expect the Department of Justice to meet the opening of any injection site with swift and aggressive action.” [NY Times Editorial, August 17, 2018]
- **Andrew Lelling—US Attorney for Massachusetts**
  - “‘Supervised injection facilities’ would violate federal laws prohibiting the use of illicit drugs and the operation of sites where illicit drugs are used and distributed. Employees and users of such a site would be exposed to federal criminal charges regardless of any state law or study. **I cannot envision any scenario in which sites that normalize intravenous use of heroin and fentanyl would be off limits to federal law enforcement efforts.**” [Statement Regarding Proposed Injection Sites, July 19, 2018]



# Federal prohibitions implicated by safe injection sites

- **Possession of a Controlled Substance 21 USC 844**
  - It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner
    - first conviction: up to 1 year sentence or \$1,000 fine or both
    - third and subsequent: up to 3 year sentence (90 minimum mandatory) plus minimum \$5,000 fine
    - plus costs of investigation and prosecution assessed for any conviction
    - additional \$10,000 civil fine available in some circumstances (21 USC §§ 844a & 847)
  - **Potentially liable:** patients/users directly but also facility staff (see expanded liability)
- **Maintaining a Drug-Involved Premises (“Crack House Statute”) 21 USC 856**
  - General Prohibition: It shall be unlawful to—
    - knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance; or
    - manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.
  - Enforcement Mechanisms for violations
    - Criminal penalties
      - individuals: up to 20 year sentence or \$500,000 fine or both
      - corporate entities: \$2 million fine
    - Civil penalty: up to \$250,000 per person
    - Injunctive Relief or Declaratory Judgment
  - **Potentially liable:** any person or entity who operates, promotes, or otherwise provides direct support to the facility (see expanded liability)



# Federal prohibitions implicated by safe injection sites

---

- **Indirect and Expanded Liability**

- **Attempt and Conspiracy to commit any CSA offense 21 USC 846**

- same penalties as underlying substantive offense
- conspiracy: (a) proof of agreement among conspirators to commit offense; (b) specific intent to achieve objective of conspiracy; and (c) an overt act to effect object of conspiracy by one conspirator

- **Aiding and Abetting 21 USC 2**

- Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal

- **Activities that could contribute to expanded liability**

- Advertising safe space available for criminal possession and use of controlled substance
- Providing clean needles and other paraphernalia for on-site use
- Safety testing user-obtained controlled substances
  - potentially a direct possession offense for staff who handle
  - returning tested controlled substances to user is technically also a distribution offense



# Federal prohibitions implicated by safe injection sites

---

## Potential Additional Penalties and Liabilities

- **Criminal Forfeiture 21 USC 853 and Civil Forfeiture 21 USC 881**
  - Generally covers all property used or intended to be used in any manner, to commit, or to facilitate the commission of, a violation of Federal criminal statute that is punishable by more than one year's imprisonment
- **Civil RICO Claims: Private Attorneys General**
  - Treble damages for any private harm (nuisance, property devaluation) harmed by violation of CSA
- **Revocation of Health Care Professional or Facility CSA Prescribing Authority 21 USC 824**
  - A criminal violation of Federal drug laws would violate suitability standards
  - Loss of CSA registration effectively suspends State prescribing license as well
- **Loss of Federal Funding**
  - Standard terms of Federal grants treat criminal violations as automatic disqualifiers



## Maintaining a Drug-Involved Premises (“Crack House Statute”)

- **Theories proposed for possible defenses and challenges to 21 USC 856**
  - Federalism: regulation of health and safety practices are a matter of State police power outside scope of CSA
    - Requires a highly generalized approach: not difficult to separate elements of safe injection site that qualify as legitimate medical practice from elements that violate § 856 and may be held to encourage drug use
    - Statute criminalizes maintaining any place for “purpose” of using controlled substance—that purpose need not be exclusive or even primary, so a larger health purpose may be irrelevant
    - Any accommodation for use of a Schedule I drug (heroin) difficult to resolve with CSA
  - Limits of the Commerce Clause
    - Effectively foreclosed by Supreme Court in medical marijuana case law
    - Opioids necessarily move in commerce—a stronger case than home-grown medical marijuana
    - Commerce Clause power extends even to control of non-economic local activity that is reasonably related to enforcement of regulatory scheme otherwise valid under Commerce Clause. See Wickard v. Filburn, 317 U.S. 111 (1942) (wheat that farmer grows on his own property to feed to his own animals still subject to federal limits on wheat production deemed necessary to control prices)
  - Medical Necessity Exception
    - Flatly rejected by Supreme Court and other courts as a theory to override CSA
    - Even on its own terms would require proof in every individual case of no legal alternative to violating the law in order to avoid imminent harm
  - Immunity statute 21 USC 885(d)
    - Protects “duly authorized officer” of Federal, State, or municipal government from civil or criminal liability when “lawfully engaged in the enforcement of any law . . . relating to controlled substances”
    - Never applied in this context—understood to apply to undercover officers, lab handling of drugs
    - No application to non-governmental actors
    - No impediment to injunctive or declaratory relief—the most straightforward route of Federal enforcement



## Relevant State Law Limitations

---

- **State Criminal laws parallel the Federal scheme**
  - Possession of Class A substance – G.L. c. 94C, § 34 (max penalty two years HOC for first offense)
  - Distribution of Class A substance - G.L. c. 94C, § 32 (max penalty 10 years state prison for first offense)
  - Matching provisions for aiding and abetting and conspiracy
  - Forfeiture statute - G.L. c. 94C, § 47
- **Chapter 94C registration for prescribers/dispensers**
  - Automatic suspension of 94C registration on suspension of Federal registration 94C, § 13
  - Requirements of Federal conformity: 94C, § 43 (“no practitioner shall dispense . . . except in conformity with the provisions of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970”)
  - Any possession or distribution offense would be a disqualifier
- **Licensing standards for medical professionals and facilities**
  - DPH facility licensing 105 CMR 130.104 & 130: license revocation for non-suitability based on may rest on statutory or regulatory non-compliance or criminal conduct
  - Boards of Registration (Medicine, Nursing)
    - Violations of State or Federal drug laws are grounds for discipline or license revocation
    - Violation of any State law or regulation regarding practice of medicine is grounds for discipline
    - Participation in safe injection programs may fall outside professional standard of care (a license violation)
- **Potential Tort Law exposure from off-site personal injuries or property damage**
  - Potential wrongful death and third-party injuries (parallel to server/social host liability with alcohol)
  - Unclear how far facility worker’s duty of care would extend