

Department of Legislative Services
Maryland General Assembly
2014 Session

FISCAL AND POLICY NOTE

House Bill 1016
Judiciary

(Delegate Dwyer, *et al.*)

Cannabis Freedom Act

This bill declares federal prohibitions against *cannabis* farming, production, possession, and sale to be null and void in the State and prohibits State and local government involvement in the enforcement of those prohibitions.

Fiscal Summary

State Effect: Potential significant decrease in federal fund revenues (potentially over \$100,000 in a given fiscal year) due to loss of asset seizure/forfeiture funds. The bill is not anticipated to have a significant, direct impact on State expenditures.

Local Effect: Potential significant decrease in federal fund revenues annually due to loss of asset seizure/forfeiture funds. Expenditures may increase significantly to the extent local law enforcement agency personnel are unable to use federal office space or other resources in drug enforcement efforts.

Small Business Effect: Minimal.

Analysis

Bill Summary: The bill specifies findings of the General Assembly regarding the power of the U.S. Congress to regulate commerce and declares that all federal acts, laws, orders, rules, and regulations that result in a prohibition of *cannabis* farming, production, possession, and sale are not authorized by the U.S. Constitution and are considered null and void in the State.

Regardless of any law, regulation, rule, or order to the contrary, a State agency, a political subdivision of the State, an agent or employee of the State or a political subdivision of the State acting in the agent's or employee's official capacity, or a corporation providing services on behalf of the State or a political subdivision of the State may not:

- enforce a federal act, law, order, rule, or regulation prohibiting *cannabis* within the State;
- provide material support, participation, or assistance to a federal agency or employee engaged in the enforcement of, or investigation of an alleged violation of, a federal act, law, order, rule, or regulation prohibiting *cannabis* within the State; or
- use State assets, State funds, or funds allocated by the State to local entities to engage in an activity that aids a federal agency, federal agent, or corporation providing services to the federal government in the enforcement of a federal act, law, order, rule, or regulation prohibiting *cannabis* within the State.

If a political subdivision intentionally violates the above prohibitions, State grant funds for the political subdivision must be denied for the fiscal year following a judicial determination that there has been a violation. An agent or employee of the State or a political subdivision of the State who knowingly violates the prohibitions is deemed to have resigned any commission of the State that the agent or employee may possess and is permanently ineligible for any office of trust, honor, or emolument under State law. A person providing services to or on behalf of the State who violates the prohibitions is permanently ineligible to act on behalf of, or provide services to, the State or a political subdivision of the State.

Current Law/Background:

Cannabis – Federal and State Law

Under the Maryland Controlled Dangerous Substances Act (MCDSA) and the federal Controlled Substances Act (CSA), marijuana is a controlled dangerous substance (“controlled substance,” under CSA), and the production, possession, and sale of marijuana are subject to criminal penalties. Under MCDSA, similar to the federal definition under CSA, “marijuana” is defined as (1) all parts of any plant of the genus *Cannabis*, whether or not the plant is growing; (2) the seeds of the plant; (3) the resin extracted from the plant; and (4) each compound, manufactured product, salt, derivative, mixture, or preparation of the plant, its seeds, or its resin. “Marijuana” does not include (1) the mature stalks of the plant; (2) fiber produced from the mature stalks; (3) oil or cake made from the seeds of the plant; (4) except for resin, any other compound, manufactured product, salt, derivative, mixture, or preparation of the mature stalks, fiber, oil, or cake; or (5) the sterilized seed of the plant that is incapable of germination.

Recent changes to Maryland laws have reduced the penalties for possession of small amounts of marijuana and have established affirmative defenses and exemptions from prosecution for certain medical use of marijuana. Pursuant to Chapters 193 and 194 of 2012, use or possession of less than 10 grams of marijuana is subject to penalties of imprisonment for up to 90 days and/or a fine of up to \$500 (in comparison to imprisonment for up to one year and/or a fine of up to \$1,000 for use or possession of greater amounts). In addition, pursuant to Chapter 215 of 2011 and Chapters 61 and 62 of 2013, it is an affirmative defense in a prosecution for use or possession of marijuana and related drug paraphernalia that the use or possession was for a debilitating medical condition or the defendant possessed marijuana and/or related drug paraphernalia as a caregiver for a person with such a condition. The affirmative defense is only allowed for use that is not in a public place and possession of one ounce or less of marijuana.

Chapter 403 of 2013 established, under the Health-General Article, a process for the approval of up to five programs overseen by academic medical centers to make marijuana available to patients for medical use. Patients, licensed growers, academic medical centers, and others associated with the programs, that act in accordance with the provisions established under Chapter 403 are not subject to arrest, prosecution, or any civil or administrative penalties under State law. The Governor is authorized to suspend implementation of the law if there is a reasonable chance of federal prosecution of State employees for involvement with implementation of the law.

U.S. Department of Justice Guidance

Following the approval of ballot measures in Colorado and Washington in 2012 that legalize use and possession of small amounts of marijuana by those 21 and older and regulate production, processing, and sale of marijuana, the U.S. Department of Justice (DOJ) issued updated guidance for U.S. Attorneys in August 2013 regarding federal marijuana enforcement. The guidance reiterated a list of eight enforcement priorities for DOJ in recent years as several states enacted laws relating to the use of marijuana for medical purposes. The priorities include preventing distribution to minors; preventing revenue from going to criminal enterprises, gangs, or cartels; and preventing state-authorized marijuana activity from being used as a cover or pretext for other illegal activity.

The guidance states that outside of the eight priorities, “the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws,” giving possession of small amounts of marijuana for personal use on private property as an example of conduct that DOJ has not historically prosecuted. With respect to state-authorized production, distribution, and possession, the guidance indicates that in jurisdictions that have implemented strong and effective regulatory and enforcement systems to control the

cultivation, distribution, sale, and possession of marijuana, state and local enforcement should remain the primary means of addressing marijuana-related activity. Lack of sufficient enforcement, however, could result in the federal government challenging the state regulatory structure itself as well as individual federal enforcement actions.

The guidance notes that it does not alter DOJ's authority to enforce federal law, and does not provide a legal defense to a violation of federal law.

Similar guidance focused on DOJ's eight enforcement priorities was issued in February 2014 regarding the exercise of federal investigative and prosecutorial discretion with respect to those that provide financial services to marijuana-related businesses. The guidance was issued concurrently with guidance issued by the U.S. Department of the Treasury's Financial Crimes Enforcement Network clarifying expectations of financial institutions that provide services to marijuana-related businesses.

Nullification

Nullification refers to an action of a state in abrogating federal law by declaring federal law void and unenforceable in that state. The theory of nullification has never been legally upheld by the U.S. Supreme Court. *See Cooper v. Aaron*, 358 U.S. 1 (1958). The court has held that, under the Supremacy Clause, federal law is superior to state law, and under Article III of the Constitution, the federal judiciary has the final power to interpret the Constitution. Consequently, federal courts, not the states, are vested with the authority to make final decisions about the constitutionality of federal laws, and states may not nullify federal laws. Thus, while a state may challenge the constitutionality of federal laws by filing a lawsuit in federal court, the Supreme Court has held that states do not have the unilateral power to pass state laws that invalidate federal law.

State/Local Fiscal Effect: The bill may result in a significant decrease in federal fund revenues as a result of the termination of State and local law enforcement participation in drug enforcement task forces involving federal law enforcement; the decrease in revenues likely varies from year to year. The Natural Resources Police within the Department of Natural Resources, for example, indicates that it has officers assigned to two U.S. Drug Enforcement Administration (DEA) task forces, through which it periodically receives a portion of asset seizures and forfeitures resulting from the task forces' work – potentially over \$100,000 in a given fiscal year. The Hagerstown Department of Police also expects a loss of asset seizure/forfeiture funds, of approximately \$100,000 annually, as a result of ending coordination with DEA through its joint Narcotics Task Force with the Washington County Sheriff's Office. In addition, certain overtime costs for officers assigned to a DEA task force are reimbursed with federal funds.

Local expenditures may increase significantly as a result of ending participation in drug enforcement task forces and any coordination with federal law enforcement in drug enforcement efforts. The Hagerstown Department of Police indicates that the Narcotics Task Force is based in a DEA building and that ending coordination with DEA may result in a need for alternative office space for those operations and personnel.

This analysis assumes that State and local law enforcement are not able to work in coordination with federal law enforcement with respect to drug enforcement in general as a result of the bill because of the difficulty or impossibility of separating marijuana enforcement efforts from other drug enforcement efforts. It is also assumed that local governments comply with the bill and State grants to local governments are not affected.

Ending coordination with federal law enforcement affects Maryland law enforcement's ability to pursue mid- and upper-level drug enforcement cases that cross state lines. The inability to coordinate with federal law enforcement may have significant operational and fiscal effects. The magnitude of the impact cannot be reliably estimated.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Department of Natural Resources, Department of State Police, Maryland Department of Agriculture, Governor's Office of Crime Control and Prevention, Office of the Attorney General, Baltimore City, Montgomery County, Maryland Association of Counties, City of Hagerstown, Town of Berlin, Maryland Municipal League, U.S. Department of Justice, U.S. Department of the Treasury, Department of Legislative Services

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