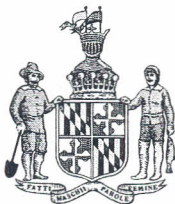


DOUGLAS F. GANSLER
Attorney General

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



WILLIAM D. GRUHN
Chief
Consumer Protection Division

STATE OF MARYLAND
OFFICE OF THE ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION

WRITER'S DIRECT DIAL NO.

January 12, 2011

The Honorable Brian E. Frosh
Chair
Judicial Proceedings Committee
2 East, Miller Senate Building
Annapolis, Maryland 21401

The Honorable Joseph F. Vallario, Jr.
Chair
Judiciary Committee
Room 101, House Office Building
Annapolis, Maryland 21401- 1912

Re: Salvia divinorum / Salvinorin Regulation

Dear Senator Frosh and Delegate Vallario:

Pursuant to Section 2 of SB 17 (Chapter 200, Acts 2010) and HB 1145 (Chapter 201, Acts 2010) the Office of the Attorney General submits this report regarding a proposed regulatory framework to govern the sales of Salvia divinorum and Salvinorin A.

Last year's legislation amended the Criminal Law Article of the Maryland Code and prohibited the sale or distribution of Salvia divinorum or Salvia A to a person under 21 years of age. Likewise, the statute forbids a person under the age of 21 to possess Salvia divinorum or Salvia A.

As is set forth more fully in the attached recommendations, the Office of the Attorney General recommends that only the seller or the seller's agents should have access to products containing Salvinorin A or Salvia divinorum. Likewise, the seller should require the customer to provide valid identification in the same manner as cigarette sales are regulated.

200 Saint Paul Place ❖ Baltimore, Maryland 21202-2021

Main Office (410) 576-6300 ❖ Main Office Toll Free (888) 743-0023

Consumer Complaints and Inquiries (410) 528-8662 ❖ Health Advocacy Unit/Billing Complaints (410) 528-1840

Health Advocacy Unit Toll Free (877) 261-8807 ❖ Homebuilders Division Toll Free (877) 259-4525 ❖ Telephone for Deaf (410) 576-6372

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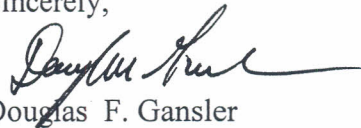
The Honorable Brian E. Frosh

The Honorable Joseph F. Vallario, Jr.

The statute currently does not contain any mechanism by which to regulate the manner in which Salvia divinorum and Salvinorin A are sold. Accordingly, we recommend that the General Assembly consider amendments to the statute which would clearly specify the scope of this regulatory authority.

If you should have any questions or comments, please do not hesitate to contact Assistant Attorneys General Kathleen Ellis or Lisa Barkan. Ms. Ellis may be reached at (410) 767 – 1867 and Ms. Barkan is available at (410) 767 – 1877.

Sincerely,

A handwritten signature in black ink, appearing to read "Douglas F. Gansler", written in a cursive style.

Douglas F. Gansler
Attorney General

cc: The Honorable Michael E. Busch
The Honorable Thomas V. Mike Miller, Jr.

OFFICE OF THE ATTORNEY GENERAL

RECOMMENDED PLAN FOR THE REGULATION OF

SALVIA DIVINORUM AND SALVINORIN

As directed by the General Assembly, the Office of the Attorney General submits the following recommended plan for the regulation of sales of Salvia divinorum and Salvinorin A. These recommendations build upon the type of restrictive distribution procedures that have been found successful in reducing youth access to tobacco products.

BACKGROUND

According to the National Institute on Drug Abuse, Salvia divinorum is an herb that is common to Southern Mexico, and Central and South America. Its active ingredient is Salvinorin A. Traditionally, it has been ingested by chewing fresh leaves or by drinking juices extracted from the leaves. It also can be smoked or inhaled. When taken, the drug causes hallucinations that last from less than one minute to about 30 minutes¹. At the current time, the Drug Enforcement Agency has not classified Salvia divinorum or Salvinorin A as a controlled dangerous substance, although these products are listed as “drugs of concern”². Salvia divinorum and Salvinorin A do not currently have any approved medical uses.³

Although the federal government has not yet prohibited the distribution of these substances, several States have restricted or banned the use of Salvia divinorum or

¹ NIDA InfoFacts: Salvia, December 2009.

² U.S. Department of Justice, Drug Enforcement Administration, Drugs and Chemicals of concern, Salvia divinorum and Salvinorin A.

³ U.S. Department of Justice, Drug Enforcement Administration, Drugs and Chemicals of Concern, Salvia divinorum and Salvinorin A.

Salvinorin A. Maine restricted the distribution of these substances to people who are 18 years old or younger. Likewise, jurisdictions within Maryland have restricted or banned the use of Salvia divinorum and Salvinorin A.

LEGISLATION REGARDING SALVIA DIVORNUM AND SALVINORIN A

During the 2010 Legislative Session, both the House and the Senate introduced bills restricting the sale of Salvia divinorum and Salvinorin A.⁴ At the hearings on these proposals, the General Assembly considered testimony regarding the use of these two substances by minors and the harm that they caused. For example, the Ocean City Chief of Police testified about the availability of this substance and presented a video of a minor under the influence of the drug. The video showed a very rapid onset of symptoms after ingesting Salvia and the child became increasingly confused and disoriented within a matter of minutes. This presentation is consistent with information reported by the U.S. Drug Enforcement Agency in its bulletins establishing these substances as “drugs of concern”.⁵

Ultimately, two Salvia – related bills were passed by the General Assembly – SB 17 (Act 200) and HB 1145 (Act 201). The latter provision is codified at Annotated Code of Maryland Criminal Law Article Title 10, Subtitle 1, Part IV.

A key provision in the new law is set forth in Criminal Law Section 10-131 which prohibits a person from distributing Salvia divinorum (defined as Salvinorin A and any material, compound, mixture, preparation, or product that contains Salvia divinorum or

⁴ Three bills were introduced – HB 13, HB 1145 and SB 17. The latter two were passed into law.

⁵ See http://www.dea.gov/diversion/usdoj/drugs_concern/salvia_d/salvia_d.htm

salvinorin A) to a person under 21. A person who violates this law is guilty of a misdemeanor unless the person:

Examined the purchaser's or recipient's driver's license or other valid identification issued by an employer, a government unit, or an institution of higher education that positively identified the purchaser or recipient as at least 21 years of age.

Md. Code. Ann. Crim. Law § 10-131(b) (2010). Likewise, pursuant to Criminal Law Section 10-132, "an individual under the age of 21 years may not possess Salvia divinorum." Criminal Law Section 10-133 (b) authorizes enforcement personnel who have probable cause to believe that a person under 21 possesses Salvia divinorum to issue citations to such person. Violation of Criminal Law Section 10-132 constitutes a code violation and is a civil offense. Md. Code Ann. Criminal Law §10-133 (f)(1).

RECOMMENDATIONS FOR REGULATING SALVIA DIVINORUM AND SALVIA A

The General Assembly has determined that sales of this drug should be permitted to persons who are 21 years and older. However, in making this determination, the legislature also recognized that it would be advisable to establish a regulatory framework designed to assure that sales to persons under the age of 21 are minimized.

An uncodified section of the statute requires the Office of the Attorney General "to submit a report detailing a recommended plan for the regulation of sales of Salvia divinorum and Salvinorin A." In a similar situation, the Food and Drug Administration (the "FDA") recently adopted regulations prohibiting a retailer from selling cigarettes and smokeless tobacco products to persons under 18 and specifying the manner of such sales. Specifically, the regulations require the retailer to obtain a photo identification that contains the purchaser's birth date, from any person 26 years old or younger, 21 C.F.R. §

1140.14 (b)(1) 2010, and require “direct face-to face” sales of such products “without the assistance of any electronic or mechanical device (such as a vending machine)” 21 C.F.R. § 1140.14(c) (2010).

After consulting with the Director of the Alcohol and Drug Abuse Administration and the Deputy Chief of the Division of Drug Control, and guided by the Food and Drug Administration’s recent adoption of regulations regarding the sale of cigarettes and smokeless tobacco, the Office of the Attorney General recommends that products containing Salvia divinorum and Salvia A only be accessible to the owner or operator of the business or an agent or employee of the owner or operator, and that all such products be stored together. This means that the customer must request the product from the seller and that the products must be kept behind a watched counter or other location that is inaccessible to customers.

The Office of the Attorney General further recommends that prior to selling a product containing Salvia divinorum or Salvia A, the seller (defined as the owner, or operator or agent or employee or the owner or operator) should be required to ask a customer who is 26 years old or younger for valid photo identification. A driver’s license, or other identification issued by an employer, a government unit, or an institution of higher education that positively identifies the person as being 21 years of age or older, would constitute valid identification.

In addition, sellers should be required to review the store inventory and maintain a current list of commercial names of products that contain Salvia divinorum or Salvia A. The seller would then be expected to consult the list to determine whether a customer is attempting to purchase a product containing Salvia divinorum or Salvia A. Finally, this

Office recommends that the store contain a sign with the current month and birth year for persons who are 21 years old.

In order to require sellers to implement these recommendations, the Department of Health and Mental Hygiene would need to adopt regulations under the Administrative Procedure Act. The Legislature could either amend Criminal Law Title 10 Subtitle 1 part IV, the statute governing Salvia divinorum or Salvinorin A, to include language that grants the Secretary regulatory authority; or, could enact comparable statutory language that allows the Secretary to regulate Salvia divinorum or Salvinorin A. In a similar situation, express statutory authority exists in the criminal law to allow the Department of Health and Mental Hygiene to enforce and regulate the laws regarding controlled and dangerous substances. Md. Code Ann. Crim. Law §5-201, 5-301 *et seq.* (2002 and 2010 Supp.).⁶

CONCLUSION

As further described above, the Office of the Attorney General recommends that the Legislature amend Criminal Law Title 10 Subtitle 1 part IV to clearly allow the Department of Health and Mental Hygiene to adopt and enforce regulations regarding the sale of Salvia divinorum and Salvinorin A. The Office of the Attorney General further recommends that the regulations mandate that a seller (1) verifies the customer's birth date by checking appropriate photo identification; (2) keeps Salvia divinorum and Salvinorin A in an area inaccessible to customers; (3) maintains a current list of names of

⁶ Although beyond the scope of these recommendations, the General Assembly should be aware that the U.S. Food and Drug Administration does identify certain substances as "drugs of concern". Salvia has been identified in this fashion. The legislature may wish to examine whether the Department of Health and Mental Hygiene or other State agencies have an effective means of responding to such designations in order to fully protect the public health.

products that contain Salvia divinorum or Salvinorin A; and (4) put a sign in the store that contains the current month and year of persons who are 21 years old.