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The Business of Marijuana: Will States' Rights Prevail?

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¹ Copyright 2018, All rights reserved. Mr. Fersko is a partner at Greenbaum, Rowe, Smith & Davis, LLP where he Co-Chairs the Real Estate Department; Ms. Gambale is an associate in the firm's Tax, Trusts & Estates Department; Mr. Kay is an associate in the firm's Real Estate Department. This article has been updated to February 19, 2018. This article should not be used as, nor is it intended to give, legal advice. Any opinions set forth in this article are of the authors only and not of the firm. Growing, processing, distributing and selling marijuana remains a federal crime and also violates the law in many states.

The Business of Marijuana: Will States' Rights Prevail?

Introduction

On November 7, 2017, the New Jersey voters elected Phil Murphy as the new Governor for the state. Governor-elect Murphy signaled a strong inclination to legalize marijuana for recreational use during the course of his campaign, and reiterated that intention immediately following the election.² With tremendous budgetary issues, a low credit rating and high property taxes, the potential revenue that may be realized from legalized marijuana has generated a bullish environment for such an enactment.³

Twenty-nine states have legalized the sale of marijuana for medical purposes and nine states and the District of Columbia have legalized the sale of marijuana for recreational use.⁴ It is predicted that the field will grow to a \$50 billion industry by 2026.⁵ As already indicated, one of the motivating forces behind this anticipated growth and the favorable view of many state legislatures, is the revenues generated for state and local governments. In 2017, retail sales of medical and recreational marijuana totaled \$1.5 billion in edibles and concentrates, up 15% from 2016.⁶ In Colorado, “nearly \$200 million in tax revenue [was earned in 2016] from \$1.3 billion in marijuana sales.”⁷ It is reported that “more than \$1 billion in revenue [was generated] less than 12 months after legalization.”⁸ More than 2.3 million people used marijuana for medicinal purposes in the United States in 2017 and 1.8 million did so recreationally in those states where it is legal to do so.⁹ It is also projected that more than \$10 billion will be spent in North America in 2018.¹⁰ Just this past January, a Toronto-based investment firm reportedly executed a letter of intent to acquire a 3% interest in a California based cannabis management company Medmen Enterprises for \$30 million, a \$1 billion valuation of the business.¹¹

² See generally Nick Corasaniti, *Marijuana Industry Gears Up After N.J. Candidate Backs Legalization*, The New York Times, July 7, 2017.

³ See generally Arthur Augustyn, *Green Rush: New Jersey businesses prepare to cash in on cannabis*, NJBiz, November 10, 2017.

⁴ Melia Robinson, *Here's where you can legally smoke weed in 2018*, Business Insider. Kathleen McCormick, *Marijuana Sector Creates Opportunity*, Urban Land May/June 2017 at 35. Vermont became the ninth state to legalize cannabis in the United States in January 2018, the first state to do so through legislation rather than citizen referendum. 2017 Bill Text VT H.B. 511, Jan. 16, 2018. The law goes into effect July 1, 2018 and will allow adults to possess up to one ounce of marijuana and grow up to four immature plants and two mature plants. The law does not have a commercial component, however, and as such there is no provision for its taxation or retail sale.

⁵ Kathleen McCormick, *Marijuana Sector Creates Opportunity*, Urban Land May/June 2017 at 35.

⁶ *Colorado marijuana sales break another record, hit \$1.5 billion in 2017*, Marijuana Business Daily, February 12, 2018.

⁷ *HIGH CLAIMS Legalizing recreational marijuana is linked to increased crashes*, Insurance Institute for Highway Safety Highway Loss Data Institute. Status Report Vol. 52, No. 4, June 22, 2017.

⁸ Arthur Augustyn, *Green Rush: New Jersey businesses prepare to cash in on cannabis*, NJBiz, November 10, 2017.

⁹ Paul Sullivan, *Investors Discovering Big Returns in Cannabis*, The New York Times, January 27, 2018.

¹⁰ *I'm Good: Pot Start-Ups Pass up the Joint*, The New York Times, January 25, 2018.

¹¹ *A \$1 billion cannabis company? Recent deals shed light on marijuana valuations*, Marijuana Business Daily, February 15, 2018.

The use of marijuana for medicinal purposes dates back to 2737 BC, when the Chinese Emperor Shen Neng reportedly prescribed marijuana infused tea to treat such ailments as gout, malaria, poor memory and rheumatism.¹² Its popularity is reported to have “spread throughout Asia and the Middle East and down the eastern coast of Africa.”¹³ By the late 1700s, hemp seeds and roots were a recommended treatment for a number of ailments in U.S. medical journals.¹⁴ However, in 1906, Congress created the Food and Drug Administration to address a growing issue with opium and morphine, and in 1937, the Marihuana Tax Act was passed, making non-medical use of marijuana illegal.¹⁵ Over the years, the federal government and the states have enacted laws outlawing growing, distribution and use of marijuana. The pendulum, however, clearly has shifted once again. While marijuana remains illegal in many states, and at the federal level, there is a growing national chorus for its legalization both medicinally and recreationally.

In August 2015, the National Conference of State Legislatures adopted a resolution providing that the federal laws should be amended to allow states to establish their own policies with respect to marijuana, stating expressly that the federal government should not undermine the policies of the states in this area.¹⁶ And according to a new Gallup poll released on October 25, 2017, 64% of those surveyed supported making marijuana legal in the United States.¹⁷ Based on a recently released poll conducted by Fairleigh Dickinson University’s PublicMind Poll, however, New Jersey voters do not follow the national trend.¹⁸ Of those polled, 42% support the legalization of marijuana for sale and use, and 27% support its continued sale for medicinal purposes.¹⁹ Interestingly, the support for legalization has dropped from 2015 when 49% favored full legalization.²⁰ Perhaps even more interesting in light of the reduced support for legalization, when asked if marijuana did become legal, 49% of the respondents said they would favor a store selling marijuana opening close to their home.²¹

While New Jersey may lag behind the nation in its support for legalization of recreational marijuana, the national lovefest with marijuana has produced a number of interesting social

¹² Leonard I. Frieling. *Overview of Medical Marijuana in Colorado*. The Colorado Lawyer, Vol. 40, No. 4 April 2011, at 37.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 38.

¹⁶ A copy of the resolution can be found at

http://www.ncsl.org/documents/standcomm/sclaw/Marijuana_Policies_Federal_Interference.pdf.

¹⁷ The poll may be located at <https://www.mpp.org/news/press/new-gallup-poll-finds-record-support-making-marijuana-legal-u-s-64/>.

¹⁸ *Recreational Weed Not a Slam Dunk Among Garden Staters*. Fairleigh Dickenson University’s PublicMind Poll. February 1, 2018. A copy of the article can be found at <http://publicmind.fdu.edu/2018/180201/final.pdf>. A copy of the 2018 and 2015 poll results is attached as **Exhibit A** and **Exhibit A-1**. It should be noted that several New Jersey State Senators have come out against the legalization of marijuana. See *Former top N.J. cop and lawmaker insist state should just say No. Making the case against marijuana legalization*. The Star-Ledger, February 4, 2018. What does N.J. say to legal recreational weed? *New poll has answers*. NJ.com January 31, 2018. *Some Dems set to fight Murphy on legal-pot plan*. The Star-Ledger, January 19, 2018. Presently, two counties have passed resolutions opposing the legalization of cannabis for recreational purposes in New Jersey and several municipalities have, as well, including Point Pleasant Beach, Berkeley Township, Brick Township, Old Bridge Township, Seaside Heights Borough and Toms River. Arthur Augustyn, *Ocean County passes resolution against legalizing marijuana*. NJBiz, February 9, 2018.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

twists. In a May 28, 2017 article published in The New York Times, it was reported that in 2015 “women comprised about 36% of the executives in the legal-marijuana industry, compared with 22 percent in senior roles in other areas.”²² In a March 18, 2017 article in the New York Post, it was reported that marijuana has infused the social circles of many elites.²³ In California, entrepreneurs are sponsoring pairing dinners, matching wines and cannabis, and charging upwards of “\$150 for a meal that experiments with everything from marijuana-leaf pesto sauce to sniffs of cannabis flowers paired with sips of crisp Russian River chardonnay.”²⁴ The growth of the cannabis industry has not gone unnoticed by the alcohol industry at large.

Researchers have found that between 2006 and 2015, there has been a 15% drop in monthly alcohol sales in those states that have legalized medical marijuana.²⁵ In fact, in its February 14, 2018 10K filing, the Molson Coors Brewing Co., stated that the cannabis industry could have a material adverse effect on its business and financial results.²⁶ In addition, the maker of Samuel Adams, The Boston Beer Co., has warned in its 10-K filing that recreational marijuana use could adversely affect its sales, and Jack Daniel’s maker, Brown-Forman identified recreational marijuana as a potentially negative impact on its business.²⁷ Perhaps recognizing the impact the cannabis industry may have long term on the alcohol industry, Constellation Brands, the world’s leading international producer and marketer of spirits, wine and beer, purchased a 9.9% stake in Canada’s largest licensed marijuana producer Canopy Growth for \$245 million (Can).²⁸

The cannabis industry has not only affected the social scene and caused the alcohol industry to take notice and affirmative action. The real estate industry as well has been, and all indications are will continue to be, impacted greatly.²⁹ Two real estate investment trusts have been established to focus exclusively on the industry. Innovative Industrial Properties is a public entity traded on the New York Stock Exchange and Kalyx Development is a private New York based REIT that has in excess of 600,000 square feet of industrial space.³⁰ This is not an unexpected happening. It is not uncommon for marijuana dispensaries to pay a substantial premium for rental space, sometimes as much as “four times the going rental rate.”³¹ Industrial rents are reported to have risen 33% from first quarter 2014 through May 2017 in Denver, and 27 percent in Seattle and Portland, as compared with a 19% increase in 54 of the other largest U.S.

²² Abby Ellin. *Older Women and Cannabis: A Growth Industry*. The New York Times, May 28, 2017.

²³ Dana Schuster. *How pot is infiltrating New York's most elite social circles*. New York Post, March 18, 2017.

²⁴ Thomas Fuller. *Pot to Pair With Wines? Sonoma Embraces Possibilities*. The New York Times, March 19, 2017.

²⁵ *Medical cannabis laws led to 15% drop in alcohol sales, study shows*. Marijuana Business Daily, January 24, 2018.

²⁶ Alicia Wallace. *Molson Coors calls legal marijuana a “risk factor” for its beer business*. The Cannabist, February 14, 2018.

²⁷ *Constellation’s purchase of Canopy stake is ‘transformative,’ portends further investments*. Marijuana Business Daily, October 30, 2017.

²⁸ *Global cannabis market poised for 1,000%-plus growth to \$140B, report predicts*. Marijuana Business Daily, January 23, 2018. *Constellation’s purchase of Canopy stake is ‘transformative,’ portends further investments*. Marijuana Business Daily, October 30, 2017.

²⁹ *See generally* David Gelles. *A Real Estate Boom, Powered by Pot*. The New York Times, April 1, 2017.

³⁰ Patricia Kirk. *Pot Warehouses Are Going Through a Boom*. National Real Estate Investor, April 7, 2017.

³¹ Subrina Hudson. *Real Estate: High rents draw in landlords*. Los Angeles Business Journal, December 19, 2016 – January 1, 2017, Volume 38, Number 51.

markets.³² According to a recent research study by CBRE, Inc., dated June 2017, marijuana grow operations in the Metro Denver's industrial market are located solely in Class B and Class C industrial space.³³ The average sales price for marijuana occupied industrial properties in 2016 increased 17.6% over a three year period to \$115 per square foot, which was a 20% average premium over all industrial properties and a 25% premium over Class B and Class C properties.³⁴ Vacant land too has become increasingly more valuable. And properties in favorable zoning locations are being acquired by speculators with an eye on the significant profits to be earned from the cannabis industry.³⁵ Michael McGuinness, the CEO of NAIOP New Jersey, has predicted that the legalization of marijuana in New Jersey will be "transformational and will likely drive up rents for older industrial buildings in the 20,000- to 50,000- square-foot range with 15-foot or higher ceilings."³⁶

The impact of the marijuana industry has also affected related industries. For example, the Institute of Real Estate Management has published a legislative white paper titled "Marijuana in Property Management" (updated November, 2016), that can be obtained on the IREM website. The paper addresses a number of issues property managers need to familiarize themselves with and consider in their day to day activities, including potential lease provisions, claims for reasonable accommodations,³⁷ rights of a tenant to grow or smoke marijuana on site, and security concerns. The paper also touches on unique issues that may affect different property types, including community association properties, multifamily properties, federally assisted properties, and traditional retail, office and industrial space.

Marijuana operations also pose unique insurance issues that stem from the high usage of water (presenting potential issues of mold), the highly flammable nature of certain processing techniques, and the increased need for security.³⁸ Some of the potential insurance products impacted include general liability policies, product liability policies,³⁹ property policies,

³² Jennifer Kaplan. *Weed Startups Will Make Warehouse Rents More Expensive in L.A. and Boston*. BloombergMarkets, June 7, 2017.

³³ *Three Years After Legalization ... Marijuana Real Estate In Denver*. June 2017 CBRE Research, pg. 2.

³⁴ *Id.* at pg. 6.

³⁵ Henry Meier. *Marijuana: Doors open in Gateway cities*. Los Angeles Business Journal, December 19, 2016 – January 1, 2017, Volume 38, Number 51.

³⁶ Michael G. McGuinness. *Thinking green: The role of indoor farming in older industrial space*. Real Estate NJ, July 18, 2017.

³⁷ See e.g., *James v. City of Costa Mesa*, 700 F.3d 394 (9th Cir. 2012); *EEOC v. Pines of Clarkston*, 2015 U.S. Dist. LEXIS 55926 (E.D. Mich. 2015); *Carlson v. Charter Communications, LLC*, Slip Copy, 2017 WL 3473316 (D. Montana), *appeal docketed*, 17-35917 (9th Cir., Nov. 15, 2017). New Jersey's medical marijuana statute provides expressly that an employer does not have to provide any accommodations to an employee to use medical marijuana in the workplace. N.J.S.A. 24-6I-14.

³⁸ See *Green Earth Wellness Center, LLC v. Atain Specialty Insurance Co.*, 163 F. Supp. 3d 821 (D. Colo. 2016) denying insurance carrier's motion for summary judgment to declare an insurance policy void on public policy grounds in light of the insured's claim concerning damage to its marijuana crop. By contrast, in *K.V.G. Properties, Inc. v. Westfield Insurance Company*, 2017 U.S. Dist. LEXIS 185005 (E.D. Mich. 2017), the District Court granted the insurer summary judgment against a claim stemming from losses attributable to a tenants' cannabis operation at the property, based on a number of policy exclusions, including dishonest or criminal acts by someone to whom the landlord entrusts the property. It is important to note that in this case, the property owner/landlord did not learn of the unlawful use of its property until DEA agents executed a search warrant on the property. After learning of the illegal operations, the landlord filed eviction actions against the tenants.

³⁹ In a recently filed suit, United Specialty Insurance Company seeks a declaratory judgment against its insured with respect to a commercial lines insurance policy with respect to a loss arising from an insured's customer's ingestion

commercial automobile insurance policies,⁴⁰ workers' compensation policies, and more, including whether a failure of coverage triggers a claim against the agent or broker and whether their errors and omissions coverage will address the claim.

For attorneys, rendering advice on issues involving the use, growing, selling and dispensing of marijuana, as well as related real estate and financing issues, presents certain ethical concerns that require careful consideration.⁴¹ The issue is beyond the scope of this article, but is covered thoroughly by Michael H. Rubin in an article titled *Smokin' Hot: New Jersey Lawyers, Marijuana Laws, And Legal Ethics*.⁴² Similarly, attorneys practicing in the cannabis field need to confirm that their respective malpractice insurance carrier will cover claims arising out of cannabis industry related advice.

While excitement for the medical and recreational marijuana industries continues to grow nationally, there nevertheless remains a black cloud in the form of the federal government.⁴³ Marijuana remains a Schedule I drug under the Controlled Substances Act.⁴⁴ As discussed below, a series of Justice Department guidance documents were issued between October 2009 and February 2014 that provided the industry with a level of comfort to move forward with industry investment. On January 4, 2018, however, Attorney General Jeff Sessions, a long-time critic of legalized marijuana, issued a Memorandum for all United States Attorneys, rescinding these guidance documents.⁴⁵ A copy of the Sessions memorandum is attached as **Exhibit B**. It remains to be seen whether the Sessions' memorandum will deter future medical and recreational cannabis efforts. Interestingly, Vermont enacted its recreational law after the Sessions memorandum. In addition, Ohio subsequently awarded a contract to a private company to establish a medical marijuana patient call center.⁴⁶ It has been reported, however, that some doctors are withdrawing from medical marijuana programs following the Sessions' memo.⁴⁷

of a marijuana edible, which was followed by a psychotic episode resulting in the customer's killing his spouse. See *United Specialty Insurance Company v. Gaia's Garden, LLC*, filed in the United States District Court for the District of Colorado May 4, 2017.

⁴⁰ New Jersey's medical marijuana laws require that an alternative treatment center maintain a current automobile liability insurance policy of at least one million dollars per incident for each vehicle used to transport medical marijuana. N.J.A.C. §8:64-10.11(d).

⁴¹ Bruce E. Reinhart. *Dazed & Confused – Legal and Ethical Pitfalls in Marijuana Law*. Criminal Justice, Volume 31, Number 4, Winter 2017.

⁴² Mr. Rubin's materials were prepared for, and were published in connection with, the New Jersey Institute for Continuing Legal Education program titled: *Commercial Leasing 2017: A Focus on Leasing, Insurance and Ethical Issues*, held December 6, 2017.

⁴³ See generally Avantika Chilkoti. *States Keep Saying Yes to Marijuana Use. Now Comes the Federal No*. The New York Times, July 15, 2017.

⁴⁴ 21 U.S.C. §801 *et seq.*

⁴⁵ It is interesting to note that, while a Republican administration has overseen the rescission of the Cole memoranda, the biggest beneficiaries of campaign donations are states' rights Congressional Republicans. *More Republicans are raking in money from cannabis industry*. Marijuana Business Daily, January 23, 2018.

⁴⁶ John Schroyer. *Ohio awards contract for medical marijuana customer call center*. Marijuana Business Daily, February 2, 2018.

⁴⁷ Steve Hendrix. *Doctors backing out of recommending medical marijuana in response to Sessions memo*. The Cannabist, February 2, 2018. <https://www.thecannabist.co/2018/02/02/maryland-massachusetts-medical-marijuana-doctors-sessions/98160/>.

Federal Overview

United States Constitution

An analysis at the federal level, must begin with the fact that the Supremacy Clause of the United States Constitution provides that federal law preempts state law.⁴⁸ As such, notwithstanding the fact that a person may be licensed under state law to grow, produce or dispense for medicinal or recreational purposes, they remain subject to criminal and civil action under the full panoply of federal laws addressing growing, production and distribution of marijuana.

Controlled Substances Act

As stated above, marijuana is a Schedule I drug under the Controlled Substances Act. Pursuant to §822(a)(1), “[e]very person who manufactures or distributes any controlled substance or list I chemical, or who proposes to engage in the manufacture or distribution of any controlled substance or list I chemical, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him.” Pursuant to §822(a)(2), a similar registration requirement applies to those wishing to dispense a controlled substance. Under §822(d), there is authority for the Attorney General to “waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety.” In addition, §811(a)(2) authorizes the Attorney General to remove a drug or other substance from a schedule. In December 2009, a petition was filed by a Bryan Krumm to remove marijuana as a schedule I controlled substance. On July 19, 2016 the Drug Enforcement Administration of the Department of Justice denied the petition.⁴⁹

Pursuant to §841 of the Controlled Substances Act, those violating the Act may be liable for a fine of upwards of \$10,000,000 for an individual and \$50,000,000 if a non-individual defendant, and for a repeat offender, a fine of upwards of \$20,000,000 for an individual and \$75,000,000 if a non-individual defendant, all depending on the quantity possessed, distributed, dispensed, or manufactured. In addition, the same section authorizes imprisonment of up to life, again depending on the quantity possessed, distributed, dispensed, or manufactured.

Potential liability under the Controlled Substances Act is not limited to those directly involved in the manufacture, distribution, dispensing or possessing of marijuana. Under §856(a)(1), liability also rests with those who “open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using” marijuana. And pursuant to subsection (2), liability also extends to those who “manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent,

⁴⁸ U.S. Const. Art. VI cl. 2. It should be noted that even the Supremacy Clause has its limitations. The Tenth Amendment provides: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. Const. Amendment X. As such, the federal government cannot compel the states to either enact laws that are in the federal interest or to spend money enforcing federal laws. We may see the relationship of the Supremacy Clause and the Tenth Amendment played out in court if the Justice Department begins an active campaign against cannabis facilities lawfully existing per state law.

⁴⁹ See Federal Register Vol. 81, No. 156, Friday, August 12, 2016.

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” marijuana. Under §856(b), criminal penalties for such violations can include imprisonment of up to 20 years and a fine of no greater than \$500,000 for an individual and \$2,000,000 if a non-individual defendant. Pursuant to §856(d), violations can yield a civil penalty of the greater of \$250,000 or two times the gross receipts derived from each violation.

Section 846 of the Controlled Substances Act makes the same fines and imprisonment penalties applicable to those who conspire with others to commit an offense otherwise governed by the act.

Fines and imprisonment are not the only risk presented at the federal level. Property forfeiture is also available to the federal government under 21 U.S.C. §853 (a person convicted of a violation of the act that is punishable by imprisonment for more than one year, also forfeits their real property used to commit the violation), §881(a)(7) (civil forfeiture and loss of property rights with respect to real estate and any leasehold interest therein, used in the commission of a violation of the act that is punishable by more than a year in prison). Forfeiture also may occur in the event of a violation of the Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. §1961 *et seq.*

Titles 18 and 21 are not the only tools in the federal government’s toolkit. In addition, there is the Currency and Foreign Transactions Reporting Act of 1970 (better known as the Bank Secrecy Act) and the PATRIOT Act.⁵⁰

With the background of Titles 18 and 21, the Bank Secrecy Act and the Patriot Act, one would expect there to be great reluctance to participate in the medical and recreational marijuana industry. A number of mechanisms exist, however, that enable the industry to continue - at least to a degree.

DAG Memoranda

On October 19, 2009, Deputy Attorney General David W. Ogden issued a memorandum (the “Ogden Memo”), with respect to investigations and prosecutions in states that authorize medical use of marijuana. A copy of the Ogden Memo is annexed to this article as **Exhibit C**. The Ogden Memo was designed to provide guidance to federal prosecutors in states that had enacted laws authorizing the medical use of marijuana. Based on the Ogden Memo, the Justice Department determined that federal prosecutors should not focus federal resources on those “whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.” The Ogden Memo made clear, however, that it was not designed to “‘legalize’ marijuana or provide a legal defense to a violation of federal law” but rather, to provide “a guide to the exercise of investigative and prosecutorial discretion.”

On June 29, 2011, Deputy Attorney General James M. Cole issued a memorandum (the “Cole I Memo”), which provided clarification of the Ogden Memo. A copy of the Cole I Memo is annexed to this article as **Exhibit D**. The Cole I Memo acknowledged that a growing number of jurisdictions enacted, or were considering the enactment of legislation that would allow

⁵⁰ For an excellent discussion of the general federal statutory scheme and the related potential civil and criminal penalties, *See* J. Marcus Painter. *Rents, Refi’s, and Reefer Madness*. Probate & Property, January/February 2015.

commercial cultivation and distribution of marijuana for medical purposes. The Cole I Memo underscored that the Ogden Memo focused on enforcement efforts with respect to “individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers.” In the Cole I Memo, the Department made it clear that a “caregiver” did not include “commercial operations cultivating, selling or distributing marijuana.” Further, the Cole I Memo removed any comfort that the Ogden Memo afforded the medical marijuana industry, stating: “The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law.”

On August 29, 2013, Deputy Attorney General James M. Cole issued a second memorandum (the “Cole II Memo”), which provided further clarification of both the Ogden Memo and the Cole I Memo. A copy of the Cole II Memo is annexed to this article as **Exhibit E**. The Cole II Memo highlighted certain enforcement priorities of the Department (the “Cole Priorities”), including preventing (i) distribution of marijuana to minors, (ii) revenue from marijuana sales going to a criminal enterprise, (iii) diversion of marijuana from states in which it is legal to states in which it is not, (iv) use of state authorized activity as a cover for illegal activity, (v) the use of firearms in the cultivation and distribution of marijuana, (vi) driving while under the influence of marijuana, (vii) growing of marijuana on public lands, and (viii) possession or use of marijuana on federal property. The Cole II Memo made it clear that the foregoing list is a general, and not an exclusive, list of priorities. The Cole II Memo also underscored the historic relationship between the federal government and the states to allow and rely on the states “to address marijuana activity through enforcement of their own narcotics laws.” Significantly, the Cole II Memo acknowledged the focus of the two prior memoranda on medical marijuana, and the patient and caregiver, as well as the carve-out for the commercial grower, distributor and seller, and concluded that those limitations were no longer applicable. So long as state laws established a regulatory scheme that contains strong and effective enforcement systems and will address the Cole Priorities, then “enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana related activity.” Furthermore, the Cole II Memo went on to provide expressly that “prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department’s enforcement priorities listed above.”

On February 14, 2014, Deputy Attorney General James M. Cole issued a third memorandum (the “Cole III Memo”), which provided further clarification of the Cole II Memo, and additional guidance. A copy of the Cole III Memo is annexed to this article as **Exhibit F**. The Cole III Memo provided that, while “issued in response to recent marijuana legalization initiatives in certain states, it applies to all Department marijuana enforcement nationwide.” Significantly, the Cole III Memo went further to address the impact of the Cole III Memo “on certain financial crimes for which marijuana-related conduct is a predicate.”

The Cole III Memo raised the fact that “[f]inancial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under the money laundering statutes (18 U.S.C. §§1956 and 1957), the unlicensed money transmitter statute (18 U.S.C. §1960), and the [Bank Secrecy Act (“BSA”).” The memo also pointed out that “financial institutions that conduct transactions with money generated by marijuana-related conduct could face criminal liability under the BSA for, among other things, failing to identify or

report financial transactions that involved the proceeds of marijuana-related violations of the [Controlled Substances Act (“CSA”)].” Significantly, prosecution for these violations does not require an underlying conviction under state or federal law. The Cole III Memo provides that in determining whether to prosecute a financial institution or an individual for any of these violations, the prosecutor should focus on the Cole Priorities. The Cole III Memo also noted that the Department of the Treasury’s Financial Crimes Enforcement Network was issuing concurrent guidance for financial institutions providing services to businesses involved in the marijuana related industry.

As set forth above, on January 4, 2018, Attorney General Sessions issued a memorandum for all United States Attorneys pertaining to marijuana enforcement. Although Sessions rescinded the series of guidance documents discussed above, he left actual prosecution to the individual federal prosecutors’ determination, consistent with Chapter 9-27.000 of the U.S. Attorneys’ Manual. The manual requires federal prosecutors to examine a number of factors in determining whether to bring a prosecution, including federal law enforcement priorities, the seriousness of a crime, the impact of a crime on the community and the deterrent effect of the prosecution.

FinCEN Guidance

As set forth above, the Department of the Treasury’s Financial Crimes Enforcement Network (“FinCEN”), issued “Guidance to clarify Bank Secrecy Act (“BSA”) expectations for financial institutions seeking to provide services to marijuana-related businesses.” A copy of the FinCEN guidance is annexed to this article as **Exhibit G**. The introductory language of the guidance is important since it provides that its intent is to clarify “how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations” and expects that the guidance will “enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.” The guidance appears clear in its application to both medical and recreational marijuana-related businesses.

The FinCEN guidance sets out a protocol of due diligence that a financial institution should undertake of a customer in order to assess the risk of providing financial services to the customer. The due diligence includes (i) verifying that the customer is licensed by and registered with the state, (ii) reviewing the state license application, (iii) requesting available information from the state licensing authority with respect to the customer, (iv) developing an understanding of the normal business activity of the customer and whether its business concerns medical or recreational marijuana, (v) on-going monitoring of available public resources, (vi) on-going monitoring for any suspicious activity, and (vii) regularly updating customer information. The due diligence is intended to enable consideration by the financial institution of whether the customer’s business violates state law or implicates any of the Cole Priorities.

In addition, a financial institution providing services to a marijuana-related business must file suspicious activity reports (“SARs”), even though legal under state law, due to its illegality under federal law. The FinCEN guidance sets out three different SARs that may be filed, (i) a “Marijuana Limited” SAR Filing, (ii) a “Marijuana Priority” SAR Filing and (iii) a “Marijuana Termination” SAR Filing.⁵¹ The FinCEN guidance noted that where the financial institution is

⁵¹ There are Frequently Asked Questions Regarding the FinCEN Suspicious Activity Report available at http://fincen.gov/whatsnew/html/sar_faqs.html.

providing services to a non-marijuana-related business that provides goods or services to a marijuana-related business (such as a landlord that leases property to a marijuana-related business), the financial institution will file SARs based on existing regulations without the foregoing three marijuana distinctions.

If, as a result of the financial institution's due diligence, the financial institution reasonably believes that none of the Cole Priorities are implicated or that state law is not violated, then a "Marijuana Limited" SAR should be filed. The FinCEN guidance sets out the details to be included in the "Marijuana Limited" SAR.

If, as a result of the financial institution's due diligence, the financial institution reasonably believes that there is a violation of state law or one of the Cole Priorities, then the institution is required to file a "Marijuana Priority" SAR. The FinCEN guidance sets out the details to be included in the "Marijuana Priority" SAR.

If, as a result of the financial institution's due diligence, the financial institution reasonably believes that it should terminate its customer relationship "in order to maintain an effective anti-money laundering compliance program, then it should file a "Marijuana Termination" SAR and if the financial institution becomes aware that the customer will move to a new financial institution, it should warn the new financial institution, as outlined in the FinCEN guidance. The guidance also sets forth the red flags indicating that the customer may be engaged in an activity violating the Cole Priorities.

Finally, financial institutions (and others) are required to report currency transactions in connection with marijuana-related businesses, just as in any other situation. The guidance makes it clear that such a business does not qualify as a "non-listed business under 31 C.F.R. §1020.315(e)(8). Thus FinCEN Form 8300 must be filed. A copy of the FinCEN Form 8300 is annexed to this article as **Exhibit H**.

Interestingly, notwithstanding the Sessions' memorandum, the FinCEN guidance has not been rescinded as of the date of this presentation. Since the issuance of the Sessions' memorandum, Treasury Department Deputy Secretary Sigal Mandelker testified at a Senate hearing that the department was continuing to review the FinCEN guidance.⁵² In addition, Treasury Secretary Mnuchin testified before the House Financial Services Committee on February 5, 2018 confirmed that the guidance is under review and that the department wants the IRS to be able to collect taxes without having to take cash.⁵³

Appropriation Bills

In addition to the Ogden and Cole memoranda and FinCEN guidance, there have been a number of appropriation bills enacted, beginning in December 2014, that bar the Department of Justice from utilizing appropriated funds to interfere with delineated states, Guam and Puerto Rico from implementing their own laws authorizing cultivation, use, possession and distribution of medical marijuana.⁵⁴ This legislation enabled a group of defendants, indicted under the

⁵² Tom Angell. *Feds Reviewing Marijuana Banking Protections*. Marijuana Moment, January 18, 2018.

⁵³ Tom Angell. *Trump Treasury Secretary Wants Marijuana Money In Banks*. Forbes.com, February 6, 2018. <http://www.forbes.com/sites/tomangell/2018/02/06/trump-treasury-secretary-wants-marijuana-money-in-banks>.

⁵⁴ Congress first passed the Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 538 (2014). This law was extended until December 22, 2015. In December 2015, Congress enacted the

Controlled Substances Act in connection with their marijuana-related businesses, to secure an injunction to prohibit the Justice Department from spending money to interfere with the particular state's medical marijuana laws.⁵⁵

Case Law

Although the Ogden and Cole memoranda and FinCEN guidance give some degree of comfort, they do not override the fact that under federal law marijuana continues to be a Schedule I Controlled Substance, and thus, illegal in all circumstances under federal law. For example, in *The Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City*,⁵⁶ the Court held that although the guidance documents seem to suggest that prosecutors and bank regulators can ignore federal law, a federal court cannot.⁵⁷ As such, a requested injunction to require the Federal Reserve Bank of Kansas City to grant the plaintiff credit union a “master account” to permit access to the Federal Reserve payments system in conjunction with its banking services to marijuana-related businesses, was denied. The Tenth Circuit vacated the district court decision, and remanded with instructions to dismiss the complaint without prejudice. The credit union then amended its complaint and took a position that it would not do business with marijuana facilities if such facilities' actions were contrary to law. Ultimately, the Federal Reserve Bank of Kansas City granted a limited master account subject to satisfaction of a number of conditions, including obtaining share deposit insurance from the National Credit Union Association (“NCUA”). Share deposit insurance is a standard requirement for any credit union chartered under Colorado law, but The Fourth Corner Credit Union was rejected by NCUA. As a result, The Fourth Corner Credit Union currently is suing NCUA in federal district court to overturn that decision.⁵⁸

Filings by a marijuana-related business for protection under the federal Bankruptcy Code has also witnessed some interesting results. In *In re Rent-Rite Super Kegs W. Ltd.*,⁵⁹ the debtor leased part of a warehouse located in Denver, Colorado to tenants engaged in the business of growing marijuana. The matter came before the court on a motion to dismiss by a mortgage holder. The motion was predicated on the fact that the activities of the debtor were illegal under federal law and therefore, relying on the clean hands doctrine, the debtor should not be entitled to the equitable protection of the Bankruptcy Court. The court held that the debtor violated the clean hands doctrine, resulting in a dismissal of the case.

Consolidated Appropriations Act, 2016, Pub. L. No. 114-113 (2015), that included in § 542 the same rider. This provision, initially known as the Rohrabacher-Farr Amendment, and now known as the Rohrabacher-Blumenauer Amendment, also was in the Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 537 (2017). The amendment was extended until December 8, 2017 as a part of an emergency aid package passed by Congress September 8, 2017. See John Schroyer. *Rohrabacher-Bulmenauer Amendment extended until December*. Marijuana Business Daily, September 8, 2017. Thereafter the amendment was extended to its current expiration date of March 23, 2018. Bipartisan Budget Act of 2018, Public Law No: 115-123 (For text see H.R.1892 — 115th Congress (2017-2018); See *US senator gives ground in fight over Sessions Memo, marijuana policy*. Marijuana Business Daily, February 15, 2018.

⁵⁵ *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016).

⁵⁶ 154 F. Supp. 3d 1185 (Dist. Ct. Colo. 2016), *vacated* 861 F.3d 1052 (10th Cir. 2017).

⁵⁷ *Id.*

⁵⁸ *The Fourth Corner Credit Union v. National Credit Union Administration*, U.S. District Court, District of Colorado, Case No.: 1:15-CV-01634.

⁵⁹ 484 B.R. 799 (Bankr. D. Colo. 2012).

In *In re Arenas*⁶⁰ the debtors jointly owned a commercial building in Denver, Colorado, one unit of which was leased to a marijuana dispensary. In addition, one of the debtors was licensed to grow and dispense medical marijuana. The U.S. Trustee moved to dismiss the case for cause under 11 U.S.C. §707(a), relying in large part on the decision in *In re Rent-Rite Super Kegs W. Ltd.* In both cases the courts were persuaded that the trustee could not administer the assets without himself violating federal law. Somewhat in contrast, in *In re McGinnis*,⁶¹ the court did not dismiss the case, but did determine that the debtor's Chapter 13 Plan for Reorganization could not be confirmed and required the filing of an amended plan. The determination relied on the fact that, in part, revenue to implement the plan would come from the debtor's own medical marijuana business and rent from the letting of space to medical marijuana growers, all illegal under federal law. Thus, while the case was not dismissed, the relief was denied for reasons similar to those expressed in each of *In re Arenas* and *In re Rent-Rite Super Kegs W. Ltd.* This conflict in approach (but effort to achieve a similar result) has been somewhat formalized by a letter from Clifford J. White III, Director, Executive Office for United States Trustees, U.S. Department of Justice, dated April 26, 2017, wherein Mr. White advises that the policy of the U.S. Trustee Program is for the U.S. Trustees to move to dismiss or object to all matters involving marijuana assets. A copy of the April 26, 2017 letter is annexed to this article as **Exhibit I**.⁶²

Tax Issues

Although the medical marijuana business is illegal under federal law, such businesses are still required to pay federal income taxes. Income for purposes of taxation includes income from illegal sources.⁶³ Most businesses are entitled to claim deductions against their gross income in order to arrive at their respective taxable net income. Tax deductions for a marijuana business, however, becomes a much more complicated problem due to the fact that, as previously mentioned, a marijuana-related business is illegal under federal law, notwithstanding its authorization and permissibility under state law.

The biggest problem for a marijuana business is §280E of the Internal Revenue Code of 1986, as amended (the "Code"). This section disallows deductions for expenses incurred in the business of producing or selling marijuana by providing that "[n]o deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted." Given marijuana's status as a Schedule 1 drug in the Controlled Substances Act, marijuana businesses are affected by the prohibition on deductions

⁶⁰ 514 B.R.887 (Bankr. D. Colo. 2014), *aff'd* 535 B.R. 845 (10th Cir. BAP 2015).

⁶¹ 453 B.R. 770 (Bankr. D. Or. 2011).

⁶² Similar issues face a receiver in a state court receivership action. For an excellent discussion of the issues, See Samuel Levine. *Lying in the Weed-Receiverships and Marijuana Grow Centers and Dispensaries*, ACREL News Vol. 32, No. 1, March 2014.

⁶³ *James v. United States*, 366 U.S. 213 (1961).

espoused by Code §280E. The prohibition extends to all of the businesses' deductions, even those that are not illegal per se such as rent, telephone, salaries, etc.⁶⁴

While a marijuana business cannot currently take a deduction for its business expenses, the prohibition on deductions of § 280E does not extend to limit the ability of a marijuana business from offsetting its gross receipts by the costs of the goods it sells (i.e., the “costs of goods sold”). It is a well-established principle in tax law that the U.S Government cannot tax the return of capital and that the cost of the goods sold represents a return of the taxpayer's capital. Indeed, the Senate Report, being wary of the impropriety of disallowing the cost of goods sold and taxing the return of capital, in enacting §280E stated the following:

All deductions and credit for amounts paid or incurred in illegal trafficking in drugs listed in the Controlled Substances Act are disallowed. To preclude possible challenges on constitutional grounds, the adjustment to gross receipts with respect to effective costs of goods sold is not affected by this provision of the bill.⁶⁵

In fact, the Government, in a Tax Court case involving a medical marijuana business, has conceded that Code §280E does not prohibit the taxpayer from claiming costs of goods sold.⁶⁶ Also, in early 2015, an IRS Chief Counsel Advice Memorandum, CCA 201504011, clarified that although deductions may not be claimed, a marijuana business is allowed the cost of goods sold for production-related business expenses. Thus, until Code §280E is amended to allow for a current deduction of expenses, marijuana businesses can at least use costs of goods sold to offset their gross receipts in arriving at their taxable net income.⁶⁷

On December 22, 2017 the Tax Cuts and Jobs Act, or Public Law No. 115-97,⁶⁸ was signed into law. As a result of the lower corporate rates, entity selection by those entering the cannabis industry will be important. Under the new law, the top tax rate for C corporations has dropped to 21%. While double taxation associated with C corporations previously deterred the use of a C corporation, the new corporate tax rate, combined with the corporate dividend rate of 20%, may nevertheless yield a more beneficial structure from a tax standpoint (even when taking into account the 3.8% net investment income tax). Although the new law also affords a deduction of 20% of a taxpayer's business income when operating by way of a pass-through entity, Code §280E bars business expense deductions. Thus a taxpayer may enjoy a lower tax rate through the use of a C corporation business structure.

⁶⁴ See *Olive v. Commissioner of Internal Revenue*, 139 T.C. 19 (Aug. 2, 2012), *aff'd* 792 F.3d 1146 (9th Cir. 2015). See also *The Green Solution Retail, Inc. v. United States*, 855 F.3d 1111 (10th 2017) [petition for certification filed No. 17-663, Nov. 3, 2017].

⁶⁵ S. Rep. No. 97-494 (Vol. I), at 309 (1982).

⁶⁶ *Californians Helping to Alleviate Medical Problems, Inc. v. Commissioner*, 128 T.C. 173 (2007).

⁶⁷ See *Jabari v. Commissioner of Internal Revenue*, T.C. Memo. 2017-238 (Docket No. 11331-14, November 28, 2017).

⁶⁸ H.R. 1-115th Congress (2017-2018).

New Jersey Compassionate Use Medical Marijuana Act

New Jersey's Compassionate Use Medical Marijuana Act⁶⁹ (the "Compassionate Use Act"), became effective October 1, 2010. Pursuant to N.J.S.A. §24:6I-4, the Department of Health ("Department"), is required to set up a registry of qualifying patients and their primary caregiver, and to issue a registry identification card, which identifies the person as either a registered qualifying patient or a primary caregiver. A registry identification card is valid for two years. Subpart (b) of N.J.S.A. §24:6I-4 makes it clear that the Department may only deny an application for a registry identification card if the applicant fails to provide the required information, or the Department determines the information is incorrect, falsified or does not meet the requirements of the Compassionate Use Act. If an application is denied, the decision of the Department is final; subject, however, to review by the Superior Court, Appellate Division.

In order to become a primary caregiver, the applicant must submit to being fingerprinted and undergoing a criminal history record background check.⁷⁰ Such party will be denied a registry identification card if they were convicted of a crime involving any controlled dangerous substance or controlled dangerous substance analog.

Pursuant to the Compassionate Use Act, a physician must issue a certification authorizing the qualified patient's use of medical marijuana.⁷¹ The physician must be licensed and in good standing to practice in New Jersey, and must have a bona fide physician-patient relationship with the qualifying patient.⁷² This requires more than just a transitory relationship. Rather, the physician must have "ongoing responsibility for the assessment, care, and treatment of a patient's debilitating medical condition."⁷³ In the event that the qualifying patient is a minor, then the custodial parent, guardian, or legal custodian must receive an explanation of the potential risks and benefits, grant their consent and agree to control the acquisition and possession of the medical marijuana.⁷⁴

The Compassionate Use Act provides broad protections with respect to potential criminal liability and professional disciplinary action. The act insulates a "qualifying patient, primary caregiver, alternative treatment center, physician, or any other person acting in accordance with the provisions of" the act from criminal liability and civil penalty or disciplinary action by a professional licensing board.⁷⁵ Neither applying for nor possessing a registry identification card will serve as probable cause for a search of either property or the individual. In addition, a criminal action cannot be brought against someone for being in the presence or vicinity of the medical use of marijuana, or against a parent, guardian or legal custodian assisting a minor's authorized use of medical marijuana.⁷⁶

⁶⁹ N.J.S.A. §24:6I-1 *et. seq.*

⁷⁰ N.J.S.A. §24:6I-4.b.

⁷¹ N.J.S.A. §24:6I-5.

⁷² N.J.S.A. §§24:6I-3 and -5.

⁷³ N.J.S.A. §24:6I-3.

⁷⁴ N.J.S.A. §24:6I-5.

⁷⁵ N.J.S.A. 24:6I-6.

⁷⁶ *Id.*

The act sets out detailed requirements for applying for a permit to operate, and operating an alternative treatment center.⁷⁷ The Department is required to ensure that there are an adequate number of centers throughout the State, and that at least two centers exist in each of the northern, central and southern regions of the State.⁷⁸ The first two centers in each region are required to be nonprofit entities. A center is permitted to acquire and maintain a reasonable inventory of marijuana seeds, seedlings and paraphernalia in order to “possess, cultivate, plant, grow, harvest, process, display, manufacture, deliver, transfer, transport, distribute, supply, [and] sell” marijuana and related supplies to qualifying patients or their primary caregiver.⁷⁹ Edible forms of marijuana are only available to qualifying patients who are minors. In order to qualify as a nonprofit entity, the entity must meet the requirements of the New Jersey laws governing nonprofit entities; however, the entity is not required to be recognized as a 501(c)(3) entity by the Internal Revenue Service.

Pursuant to §7 of the Compassionate Use Act, a criminal history record background check must be conducted on all persons that may be an owner, director, officer or employee of an alternative treatment center, and they each must submit to being fingerprinted.⁸⁰ In addition, if convicted of a crime involving any controlled dangerous substance or controlled substance analog (other than a conviction for a violation of federal law after the effective date of the act for conduct permitted under the act), then such person may not serve as an owner, director, officer or employee of an alternative treatment center, unless the individual can show by clear and convincing evidence they have been rehabilitated. The Department is required to pass on an application within sixty days of receipt, and an unfavorable decision may be reviewed by the Appellate Division of the Superior Court. The Department also has authority to suspend or revoke a permit, which action also is subject to review by the Appellate Division of the Superior Court. Finally, §7 authorizes the Commissioner of Health (“Commissioner”) to adopt regulations to implement that act.⁸¹

Section 8 of the act makes clear that a person under the influence of marijuana may not operate a train, plane, vehicle or heavy equipment, and that smoking marijuana in a school bus, or other form of public transportation, private vehicle in operation, public park or beach, on a

⁷⁷ See N.J.S.A. 24:6I-7.

⁷⁸ See *Natural Medical, Inc. v. New Jersey Dept. of Health & Sr. Services*, 428 N.J. Super. 259 (App. Div. 2012), upholding the Department’s determination to initially accept only six applications for alternative treatment centers, from only non-profit entities. The last of the six facilities to receive a medicinal license was awarded in 2017. See *New Jersey awards state’s final medical marijuana license*, Marijuana Business Daily, July 31, 2017.

⁷⁹ *Id.*

⁸⁰ N.J.S.A. 24:6I-7. Pursuant to N.J.S.A. 24:6I-13, the Department is authorized to exchange fingerprint data with, and receive information from the Division of State Police and the Federal Bureau of Investigation, and the State Police are required to notify the Department if it determines an applicant as a primary caregiver or for involvement with an alternative treatment center, has been convicted of a crime involving a controlled dangerous substance.

⁸¹ Pursuant to N.J.S.A. §24:6I-16, the Commissioner is required to promulgate rules and regulations in consultation with the Department of Law and Public Safety.

school ground, or in a place where smoking is prohibited per N.J.S.A. §2C:33-13, continues to be unlawful.⁸²

Section 9 of the act makes it a crime of the third degree to sell, or offer for sale, a registration card issued pursuant to the act or one that has been altered, and a crime of the fourth degree for presenting an altered card to law enforcement.⁸³

Section 10 of the act establishes the procedure for a physician to issue written instructions for a registered qualifying patient or his caregiver to obtain medical marijuana. In no event can more than two ounces of marijuana be dispensed in any thirty day period.⁸⁴ Section 12 of the act establishes certain reporting requirements for the Commissioner on an annual and biennial basis.⁸⁵ Section 14 makes it clear that medical insurance is not required to reimburse a person for the costs of any medical marijuana, and that an employer need not accommodate use of medical marijuana in the workplace.⁸⁶ Interestingly, § 15 of the act grants immunity to the State and its employees and agents “for any deleterious outcomes from the medical use of marijuana by any registered qualifying patient.”⁸⁷

Regulations for the implementation and administration of the Compassionate Use Act can be found at N.J.A.C. §8:64 *et seq.*, (the “Regulations”).⁸⁸ Subchapter 1 provides a detailed set of definitions.⁸⁹ Subchapter 2 establishes fees, delineates the application process for a qualifying patient, primary caregiver and physician, sets forth the requirements for a physician’s certification (which is the physician’s authorization for a qualifying patient’s use of medical marijuana).⁹⁰ Subchapter 3 addresses registry identification cards for qualifying patients and primary caregivers, including the issuance of temporary and replacement registry identification cards.⁹¹ Subchapter 4 establishes the reporting requirements for qualifying patients, primary caregivers, physicians, the Department, alternative treatment centers, and the confidentiality requirements imposed on the Department with respect to information provided to the Department.⁹²

Under the Compassionate Use Act and the Regulations, in order to use medical marijuana, a qualifying patient must have a debilitating medical condition. Subchapter 5

⁸² N.J.S.A. §24:6I-8. Note that N.J.S.A. §18A:40-12.22, which became effective November 9, 2015, permits “parents, guardians, and primary caregivers to administer medical marijuana to a student while the student is on school grounds, aboard a school bus or attending school sponsored events.”

⁸³ N.J.S.A. §24:6I-9.

⁸⁴ N.J.S.A. §24:6I-10.

⁸⁵ N.J.S.A. §24:6I-12.

⁸⁶ N.J.S.A. §24:6I-14.

⁸⁷ N.J.S.A. §24:6I-15.

⁸⁸ The Regulations expire on December 19, 2018.

⁸⁹ N.J.A.C. §8:64-1.2.

⁹⁰ N.J.A.C. §§8:64-2.1–2.6.

⁹¹ N.J.A.C. §§8:64-3.1-3.4.

⁹² N.J.A.C. §§8:64-4.1-4.3.

provides a process for approving debilitating medical conditions not otherwise set forth in the act or Regulations.⁹³

Subchapter 6 provides a process for the Department to request applications for entities to seek authority to apply for a permit to operate an alternative treatment facility. The permit application process involves the payment of a non-refundable fee of \$2,000 and a fee of \$18,000, that will be refunded if an application is denied. An applicant may apply for a permit for more than one region; however, a separate application must be submitted for each region in which a permit is sought.⁹⁴

Subchapter 7 establishes the general procedures for applying for an alternative treatment center permit, a renewal of an expiring permit, and amendments to an existing permit (including changes to location, ownership, name, capacity or modification to the physical plant), and sets certain fees.⁹⁵ Interestingly, applications must include information on all persons and entities having a 5% or greater ownership interest in the center, “whether direct or indirect and whether the interest is in profits, land or building, including owners of any business entity that owns all or part of the land or building” and must identify all creditors holding a security interest in the premises, if any.⁹⁶ In addition, evidence of municipal approval is required.⁹⁷

Subchapter 8 provides for a set of rules relating to the issuance, expiration and surrender of alternative treatment center identification cards.⁹⁸ Subchapter 9 establishes the general administrative requirements for operation of an alternative treatment center, including employee training, security controls, inventory controls, and disposal requirements.⁹⁹ Subchapter 10 sets out requirements and limitations pertaining to plant cultivation, including information on the different potencies, effects and forms for each usable marijuana package.¹⁰⁰ An alternative treatment center may only cultivate three strains of medical marijuana, and in any event, the maximum THC content may not exceed 10 percent.¹⁰¹ In no event may a center use pesticides in the cultivation process.¹⁰² And a center may not provide home delivery service.¹⁰³

Subchapter 11 requires that each center establish policies to inform qualifying patients and caregivers as to possession and use of medical marijuana, product strength, and signs of abuse, as well as other record keeping and dispensing requirements and inventory supply limitations.¹⁰⁴ Subchapter 12 establishes regulations with respect to marketing and

⁹³ N.J.A.C. §§8:64-5.1-5.4.

⁹⁴ N.J.A.C. §§8:64-6.1-6.5.

⁹⁵ N.J.A.C. §§8:64-7.1-7.11.

⁹⁶ N.J.A.C. §8:64-7.1.

⁹⁷ *Id.*

⁹⁸ N.J.A.C. §§8:64-8.1-8.3.

⁹⁹ N.J.A.C. §§8:64-9.1-9.10.

¹⁰⁰ N.J.A.C. §§8:64-10.1-10.12.

¹⁰¹ N.J.A.C. §8:64-10.7.

¹⁰² N.J.A.C. §8:64-10.9.

¹⁰³ N.J.A.C. §8:64-10.12.

¹⁰⁴ N.J.A.C. §§8:64-11.1-11.6.

advertising.¹⁰⁵ Subchapter 13 provides for monitoring, inspections, quality control procedures, reporting, notice of violations, enforcement actions, including permit suspension and revocation, and exemption from State criminal and civil penalties.¹⁰⁶

Retail sales of medical marijuana are subject to a general sales tax, which for 2018 has decreased to 6.625%. There are various exemptions available to the medical marijuana alternative treatment centers with respect to the purchase of production equipment, tangible personal property associated with a facility's operation as a farming enterprise (e.g., growing and cultivating plants), and purchases of wrapping supplies.¹⁰⁷

On January 23, 2018, Governor Murphy signed Executive Order No. 6. The order requires the Department of Health and the Board of Medical Examiners to review New Jersey's medical marijuana program, including an evaluation of its current rules, a review of the current process for obtaining a license, an examination of the conditions for physician participation, an analysis of the medical conditions for which medical marijuana may be authorized, and a review of the forms for ingesting medical marijuana. The order requires the department and board conclude their analysis within sixty days, and then commence rulemaking in order to effect appropriate reforms.

Pending Legislation

Federal Legislation

Stemming back to at least the early 1970s, bills targeting marijuana reform on the federal level have been presented in both the House of Representatives and the Senate. These bills were proposed by notable elected officials such as Rep. Edward Koch [D-NY-18], Sen. Jacob Javits [R-NY], Rep. Stewart McKinney [R-CT-4] and Rep. Barney Frank [D-MA-4].¹⁰⁸

More recently, and during the 114th Congress (2015-2016), Sen. Ron Wyden [D-OR] and his counterpart Rep. Earl Blumenauer [D-OR-3] introduced the Small Business Tax Equity Act of 2015, in the Senate (S. 987) and House of Representatives (H.R. 1855), respectively.¹⁰⁹ Wyden and Blumenauer each sought to amend Code § 280E to permit trades and businesses that conduct marijuana sales in accordance with state law to benefit from tax credits or deductions for certain expenses related to the distribution and sale of marijuana.¹¹⁰ As discussed above, §280E currently prohibits such tax credits or deductions for businesses that traffic Schedule I (which, as previously noted, marijuana falls under) and Schedule II controlled substances.¹¹¹ There is presently a Congressional bill sponsored by Rep. Carlos Curbelo [R – FL – 26] – H.R. 1810 – which would change this. This bill exempts state-licensed marijuana companies from the impact

¹⁰⁵ N.J.A.C. §8:64-12.1.

¹⁰⁶ N.J.A.C. §§8:64-13.1-13.11.

¹⁰⁷ See New Jersey Division of Taxation Technical Bulletin TB-68 Medical Marijuana Alternative Treatment Centers, Issued 11-30-12.

¹⁰⁸ See generally Congress.Gov (2017), <https://www.congress.gov>.

¹⁰⁹ Summary: S. 987– Small Business Tax Equity Act, 114th Congress (2015- 2016). <https://www.congress.gov/bill/114th-congress/senate-bill/987>; Summary: H.R.1855 – Small Business Tax Equity Act, 114th Congress (2015- 2016) <https://www.congress.gov/bill/114th-congress/house-bill/1855>.

¹¹⁰ *Id.*; See also S. 987, 114th Congress, 1st Session (2015-2016); H.R.1855, 114th Congress, 1st Session (2015-2016).

¹¹¹ 26 U.S.C. §280E.

of Code §280E (as long as they are in compliance with the laws in their respective states). As of November 13, 2017, the bill has gained the support of 42 co-sponsors.¹¹² The bill is currently in the House Ways and Means Committee.¹¹³

Wyden and Blumenauer have current bills (S. 776 and H.R.1823) titled the Marijuana Revenue and Regulation Act, intended to legalize marijuana on a federal level while allowing states to retain rights over the legality within their respective borders.¹¹⁴ They provide for: (1) amending the Code by creating an excise tax on marijuana product imported into or produced within the United States and an occupation tax on marijuana facilities; (2) creating an exemption to the excise tax for marijuana products that are utilized by government entities or for research, specifically for what the bills refer to as “nonconsumption purposes,” and an exemption for the transfer of product between certain marijuana facilities; (3) issuing a tax credit or refund for any lost or destroyed product or product removed from the market; (4) defining the term marijuana product as exclusive of Food and Drug Administration-approved goods containing marijuana for therapeutic purposes and industrial hemp; (5) establishing requirements for producers/importers/exporters of marijuana products; and (6) fleshing out penalties for violations of these laws and limiting the quantity of marijuana sold in a single transaction (no more than one ounce).¹¹⁵

Sen. Wyden’s bill goes further in mandating that the Department of Justice remove marijuana from all controlled substances schedules that fall under the Controlled Substances Act (CSA). It also amends the CSA to provide for penalties for the transportation of marijuana products into any states/jurisdictions where marijuana is still unlawful.¹¹⁶

This congressional session has also seen the introduction of several other bills. Rep. Jared Polis [D-CO-2] introduced H.R.1841 (related to S. 776), the “Regulate Marijuana Like Alcohol Act,” which enumerates additional regulations of marijuana products, including decriminalization at the federal level, guidance as to federal licensing, guidance as to unfair advertising practices, and renaming of agencies whereby marijuana regulation will fall under its auspices (e.g. Bureau of Alcohol, Tobacco, Firearms and Explosives to be renamed Bureau of Alcohol, Tobacco, Marijuana, Firearms and Explosives).¹¹⁷

Polis, along with Rep. Tom McClintock [R-CA-4] and 40 other bi-partisan representatives co-sponsored Rep. Dana Rohrabacher’s [R-CA-48] bill, H.R.975 – Respect State Marijuana Laws Act of 2017, introduced in February 2017.¹¹⁸ The intent of this bill is to

¹¹² *Summary: H.R. 1810 – Small Business Tax Equity Act of 2017*, 115th Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/house-bill/1810>.

¹¹³ See Marijuana Business Daily, *Possible Repeal of 280E for Marijuana Businesses: Q&A with Rep. Carlos Curbelo* (October 5, 2017).

¹¹⁴ *Summary: S.776 – Marijuana Revenue and Regulation Act*, 115th Congress (2017-2018) <https://www.congress.gov/bill/115th-congress/senate-bill/776> and *Summary: H.R.1823 – Marijuana Revenue and Regulation Act*, 115th Congress (2017-2018,) <https://www.congress.gov/bill/115th-congress/house-bill/1823>.

¹¹⁵ *Id.*

¹¹⁶ *Summary: S.776 – Marijuana Revenue and Regulation Act*, 115th Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/senate-bill/776>.

¹¹⁷ *Summary: H.R.1841 – Regulate Marijuana Like Alcohol Act*, 115th Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/house-bill/1841>.

¹¹⁸ *Cosponsors: H.R.975 – Respect State Marijuana Laws Act of 2017*, 115th Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/house-bill/975/cosponsors>.

exempt people who produce, possess, distribute, dispense, administer or deliver marijuana in compliance with state law from penalties under the Controlled Substances Act.¹¹⁹ This bill is of particular import to marijuana advocates given Attorney General Jeff Sessions' hard stance on medical marijuana and request that Congress provide funds to the Department of Justice to prosecute medical marijuana in states where marijuana is legal.¹²⁰ Along a similar vein, S.1152, introduced May 17, 2017, and titled the "Secure and Fair Enforcement Banking Act" or the "SAFE Banking Act" would establish protections for depository institutions providing banking services to cannabis related businesses.¹²¹

More recently, Sen. Cory Booker [D-NJ] introduced a bill that would not only terminate the federal prohibition on marijuana via a multi-faceted approach but would, according to Sen. Booker, directly tackle drug policies that have disproportionately impacted communities of color.¹²² In his bill, Sen. Booker removes marijuana from the schedule of controlled substances in the Controlled Substances Act, removes the prohibition on importing and exporting marijuana as per the Controlled Substances Import and Export Act, and conforms amendments to the Controlled Substances Act, National Forest System Drug Control Act of 1986 and Interception of Communications, accordingly (e.g. removing references to marijuana).¹²³ Moreover, this bill incentivizes states to adjust their marijuana laws by making certain federal funds unavailable to states where marijuana-related offenses disproportionately arrest or incarcerate minorities or low-income individuals.¹²⁴ A Community Reinvestment Fund would also be created, whereby the funding would be reinvested in communities most affected by the war on drugs through job training programs, reentry services, health education programs, community centers and other community programs.¹²⁵ The funds would consist of amounts not provided to states whose laws still disproportionately affect the aforementioned communities and individuals and "any amounts otherwise appropriated to the Fund."¹²⁶ This legislation would be retroactive, providing for federal courts to "issue an order expunging each conviction for a marijuana use or possession offense entered by the court before the date of enactment" and enabling courts to rehear and reduce sentencing for current inmates incarcerated for marijuana offenses.¹²⁷ There is a House companion bill introduced January 17, 2017, whose main sponsor is Barbara Lee (D-CA), that has 24 cosponsors.¹²⁸

On January 11, 2018, H.R. 4779 was introduced.¹²⁹ The bill is titled the "Restraining Excessive Federal Enforcement & Regulations of Cannabis Act of 2018" or the "REFER Act of

¹¹⁹ *Summary: H.R.975 – Respect State Marijuana Laws Act of 2017*, 115th Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/house-bill/975>.

¹²⁰ Jonathan Blanks, *Trump and Sessions Are at Odds Over Prosecuting Legal Marijuana States*, Newsweek, September 8, 2017, <http://www.newsweek.com/trump-and-sessions-are-odds-over-prosecuting-legal-marijuana-states-661925>.

¹²¹ S.1152, 115th Congress, 1st Session (2017-2018).

¹²² *Booker Introduces Landmark Bill to End the Federal Prohibition on Marijuana*, (August 4, 2017), https://www.booker.senate.gov/?p=press_release&id=638.

¹²³ S. 1689, 115th Congress, 1st Session (2017-2018).

¹²⁴ *Booker Introduces Landmark Bill to End the Federal Prohibition on Marijuana*, (August 4, 2017), https://www.booker.senate.gov/?p=press_release&id=638.

¹²⁵ S. 1689, 115th Congress, 1st Session (2017-2018).

¹²⁶ S. 1689, 115th Congress, 1st Session (2017-2018).

¹²⁷ S. 1689, 115th Congress, 1st Session (2017-2018).

¹²⁸ H.R. 4815, 115th Congress, 2nd Session (2017-2018).

¹²⁹ H.R. 4779 115th Congress, 2nd Session (2017-2018).

2018.” The legislation would prevent any department or agency of the United States from utilizing funds to prevent a State or local government from implementing its State law or regulation authorizing the use, distribution, possession, or cultivation of cannabis, to commence any action against any person or entity involved in a cannabis related business consistent with State or local law, or to penalize a financial institution that provides financial services to any person or entity involved in a cannabis related business consistent with State or local law.

While all of these bills have been introduced, there has been little to no traction as of the publication of this article.¹³⁰

State Legislation

On May 18, 2017, New Jersey State Senator Nicholas Scutari [D-Union] introduced a comprehensive bill (S3195) to legalize recreational marijuana within the state.¹³¹ The same bill was pre-filed on January 9, 2018 as S. 830 for introduction in the 2018 Session. The bill acknowledges in its findings the overall intent to adjust marijuana policies through the legalization, taxation, and control of marijuana in a similar manner as alcohol.¹³² The act aims to eliminate the issues that come with an unregulated marijuana industry, such as the movement of funds to illegal enterprises, and looks to solve the disproportionate incarceration of minority New Jerseyans through legalization and relatedly, by freeing up the approximate \$127 million that New Jersey spends per year on marijuana possession enforcement costs.¹³³ The bill is designed to tax revenue generated from a legal marijuana industry to then generate hundreds of millions of dollars that would in turn be reinvested in communities and bolster “effective, evidence-based drug treatment and education.”¹³⁴

If passed, the legislation, although effective one-year following enactment, would immediately decriminalize the possession of up to 50 grams of marijuana and would allow alternative treatment centers to immediately apply for a retail license.¹³⁵ Once effective, persons 21 years old and older would be entitled to possess, use, purchase or transport: “marijuana paraphernalia; one ounce or less of [dried] marijuana; 16 ounces or less of marijuana infused product in solid form; 72 ounces or less in liquid form; 7 grams or less of marijuana concentrate; and up to 6 immature marijuana plants.”¹³⁶ The public consumption of marijuana products is not permitted, however.¹³⁷

¹³⁰ See generally Summary: S.776 – Marijuana Revenue and Regulation Act, 115th Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/senate-bill/776>; Summary: H.R.1823 – Marijuana Revenue and Regulation Act, 115th Congress (2017- 2018), <https://www.congress.gov/bill/115th-congress/house-bill/1823>; Summary: H.R.1841 – Regulate Marijuana Like Alcohol Act, 115th Congress (2017-2018) <https://www.congress.gov/bill/115th-congress/house-bill/1841>; Summary: H.R.975 – Respect State Marijuana Laws Act of 2017, 115th Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/house-bill/975>; Summary: H.R.1841 – Regulate Marijuana Like Alcohol Act, 115th Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/house-bill/1841>; Summary: S.1689 – Marijuana Justice Act of 2017, 115th Congress (2017-2018), <https://www.congress.gov/bill/115th-congress/senate-bill/776>.

¹³¹ State of New Jersey, *Senate, No. 3195*, 217th Legislature, May 18, 2017.

¹³² *Id.*

¹³³ *Id.* at §1.

¹³⁴ *Id.*

¹³⁵ *Id.* at §40; *Id.* at §22.

¹³⁶ *Id.* at §3.

¹³⁷ *Id.*

The bill, which carves marijuana offenses out of multiple parts of the New Jersey Code of Criminal Justice, also explicitly provides for the legality of operating marijuana establishments (e.g. manufacturing, transporting, cultivating, harvesting, packaging and processing marijuana or marijuana products).¹³⁸ The bill also makes it legal to lease or otherwise allow the use of property for activities authorized by the bill. Similar to alcohol regulation, this bill sets out violations and punishments to those who serve, sell or offer to sell marijuana to persons under the age of 21, as well as the underage purchaser/attempted purchaser.¹³⁹ The bill provides for exceptions for both a seller and an underage person, such as an underage person falsely representing to a seller his/her age as being legal through identification (passport, driver's license) and an underage person in need of medical assistance because he/she consumed marijuana and subsequently contacts emergency medical services.¹⁴⁰ Section 23 of the bill allows any person that was previously convicted of a marijuana possession offense pursuant to paragraph (4) of N.J.S.A. §2C:35-10 ("possession of 50 grams or less of marijuana, including adulterants or dilutants, or five grams or less of hashish") to put forward an application for expungement.¹⁴¹ The bill also modifies various sections of the Comprehensive Drug Reform Act (N.J.S.A. §2C:35-1, *et seq.*), and other sections of the New Jersey Statutes that cover marijuana.¹⁴²

In §§6 through 9, Sen. Scutari's bill establishes the Division of Marijuana Enforcement (the "Division") and lays out the duties and powers vested within the Division for the regulation of marijuana.¹⁴³ For example, the Division is required to create a tracking system for the transferring of marijuana products amongst licensed premises, establish implementation and licensing procedures, create licensing goals for minority owned and female owned businesses, and provide health and safety regulations and advertising regulations.¹⁴⁴

One of the key components of the bill is the taxation system of §10, which imposes an escalating excise tax on recreational marijuana in the form of 7% in year one, 10% in year two, 15% in year three, 20% in year four, and 25% in years five and beyond.¹⁴⁵ It also provides that the tax assessed by the bill will not be levied on sales of medical marijuana.¹⁴⁶ The lien of the tax is a super-priority lien, paramount to all private liens and encumbrances.¹⁴⁷ The bill also provides for a sharing of tax revenues with local governments that have marijuana establishments within their municipality – 1% in year 1; 2% in year 2; and 3% in year 3 and

¹³⁸ State of New Jersey, *Senate, No. 3195*, 217th Legislature at §4.

¹³⁹ *Id.* at §5.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at §23; N.J.S.A. §2C:35-10.

¹⁴² *Id.* at §25-32.

¹⁴³ *Id.* at §§6-9.

¹⁴⁴ *Id.*

¹⁴⁵ State of New Jersey, *Senate, No. 3195*, 217th Legislature at §10.

¹⁴⁶ *Id.* Under that Compassionate Use Act, retail sales of medical marijuana are subject to tax at the general sales tax rate (which has historically been 7% and for 2018 has been reduced to 6.625%). In addition, alternative treatment centers organized as a non-profit entity receive exempt status for sales and use tax on purchases that are directly related to the organization's purpose.

¹⁴⁷ *Id.* at §10.e.

thereafter.¹⁴⁸ The bill prohibits the retail sale of medical and recreational marijuana from the same property.¹⁴⁹

The bill provides for an application process, excludes employees of the Division from having any interest in the production, process or sale in marijuana industries, and lays out the license classes required for production, manufacturing, wholesale, retail, and transport.¹⁵⁰ No person who was convicted of a crime involving a controlled dangerous substance or controlled substance under N.J.S.A. §2C:35-10 can obtain a license, unless the conviction fell under paragraph (4) of the statute.¹⁵¹ Section 19 provides for permits for handlers who work for a person who holds one of the aforementioned licenses. Such permits are not subject to the N.J.S.A. §2C:35-10 carve out.¹⁵²

The act also lays out marketplace regulations, which prohibits owners, stockholders, or other persons interested in any marijuana cultivation/testing/product manufacturing facility or wholesaler to “conduct, own either in whole or in part, or be directly or indirectly interested in the retailing of any marijuana in New Jersey, *and such interest shall include any payments or delivery of money or property by way of loan or otherwise accompanied by an agreement to sell the product of said*” marijuana facility.¹⁵³ It also prohibits owners, part owners, stockholders, or other persons “interested in the retailing of marijuana to conduct, own either whole or in part” from being a shareholder, officer or director of a corporation that is directly or indirectly involved in marijuana cultivation/testing/product manufacturing facilities.¹⁵⁴ Additionally, “no person, partnership, employee cooperative, association, nonprofit corporation, corporation, or the agents thereof, shall hold more than three marijuana establishment licenses at any time.”¹⁵⁵

The legislation makes it clear that a property owner may prohibit or otherwise regulate the “consumption, use, display, transfer, distribution, sale, transportation or growing of marijuana items on or in that property” and that a party to a federal contract or a recipient of a federal grant may prohibit the “manufacture, delivery, possession or use of marijuana” in order to satisfy the terms of such a contract or grant.¹⁵⁶ The bill sets forth consumer protections, protecting individuals and establishments from arrest, prosecution or penalty for conduct permitted under the act and states that the presence of cannabinoid metabolites in the body shall not: (1) be the grounds for dismissal from employment or refusal to enroll a student and (2) “constitute the use of an illicit substance resulting in denial of medical care.”¹⁵⁷ Moreover, law enforcement agencies in New Jersey are expressly barred from providing assistance to the federal government or any federal agency in an attempt to enforce the Controlled Substances Act.¹⁵⁸ The bill also creates boundaries for law enforcement, whereby an “articulable suspicion of a crime” shall not include the smell of marijuana/burnt marijuana, “the possession of or

¹⁴⁸ *Id.* at §10.g.

¹⁴⁹ *Id.* at §22.

¹⁵⁰ *Id.* at §§13, 15-18.

¹⁵¹ *Id.*

¹⁵² *Id.* at §19.

¹⁵³ *Id.* at §20 (emphasis added).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at §§21 and 24.

¹⁵⁷ State of New Jersey, *Senate, No. 3195*, 217th Legislature at §34.

¹⁵⁸ *Id.* at §35.

suspicion of possession of marijuana without evidence” of more than one ounce, or the possession of marijuana without evidence of more than one ounce in proximity to any cash or currency.¹⁵⁹ This does not apply to an officer’s investigation of whether a person is under the influence of marijuana.¹⁶⁰

An important provision to take particular note of is the “Contract Enforceability” section, which explicitly states:

No contract shall be unenforceable on the basis that manufacturing, distributing, dispensing, possessing, or using marijuana is prohibited by federal law. No contract entered into by a licensee, its employees, or its agents as permitted pursuant to a valid license issued by the division or by those who allow property to be used by a licensee, its employees, or its agents as permitted pursuant to a valid license issued by the division, shall be deemed unenforceable on the basis that the actions or conduct permitted pursuant to the license are prohibited by federal law.¹⁶¹

The bill sets forth the Marijuana Control and Regulation Fund, which shall be funded by all fees and penalties collected by the State Treasurer from the Director of the Division of Marijuana Enforcement.¹⁶² Finally, the act lays out a Marijuana Regulation Review Commission to review and approve regulations developed by the Division.¹⁶³

Assemblyman Reed Gusciora also pre-filed a bill (A. 1348) on January 9, 2018 for introduction in the 2018 Session. The bill presently is identical to the Scutari bill; however, it has been reported that the assemblyman will be introducing a bill with a number of modifications from the Scutari proposal, including providing a limited home grow provision, limiting the number of marijuana businesses to two in each legislative district (thus 80 facilities), and reducing the tax rate on sales.¹⁶⁴

In addition to A. 1348, Assemblyman Gusciora also pre-filed A. 1330 for introduction in the 2018 Session. This proposed legislation will legalize the planting, growing, harvesting, possessing, processing, distribution, purchasing and selling of industrial hemp in the State, so long as done so per the terms of the bill.¹⁶⁵

More recently Senators Rice and Singer filed S 1926 to decriminalize the possession of certain limited quantities of marijuana.

Selected Real Estate Issues

Although marijuana-related businesses have been legal for medicinal or recreational purposes for some time now, the field remains in its infancy and it is not yet clear the full panoply of issues that parties will need to address (and how) in commercial and industrial real estate transactions.

¹⁵⁹ *Id.* at §36.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at §38.

¹⁶³ State of New Jersey, *Senate, No. 3195*, 217th Legislature at §39.

¹⁶⁴ Payton Guion. *New N.J. weed bill: You might be able to buy sooner AND grow pot at home.* NJ Advance Media, January 14, 2018.

¹⁶⁵ State of New Jersey, *Assembly, No. 1330*, 218th Legislature.

To begin, there are title insurance issues pertaining to cannabis-related businesses. Anecdotally, in one author's discussions with title company underwriting counsel, it has been learned that none of the title companies will insure a marijuana farm or commercial sale operation, and will not provide a lender or tenant with coverage. In this respect, on June 7, 2017, First American Title Insurance Company issued an Underwriting Communication advising its title issuing offices, title insurance agents, and approved attorneys of First American Title Insurance Company in New Jersey to contact the local First American Underwriter if contacted to provide title insurance on or to serve as the escrow/closing agent for a transaction in which there is actual knowledge that the property currently is or will be used for a marijuana-related business. A copy of the June 7, 2017 Underwriting Communication is annexed to this article as **Exhibit H**. In addition, recent title commitments reviewed by one author contain a new Schedule B, Part I notice, as follow:

“Notice: Please be aware that due to the conflict between federal and state laws concerning the cultivation, distribution, manufacture or sale of marijuana, the Company is not able to close or insure any transaction involving Land that is associated with these activities.”

In addition to examining whether title insurance coverage will be available upon an acquisition of property or a letting of property, all parties to a transaction (purchaser, tenant and lender) must examine existing beneficial easements and Covenants, Conditions and Restrictions affecting a property to determine whether there are any terms that impact, or are impacted by, a cannabis operation at the property.

Depending on the particular processing operation of medicinal cannabis at a property, the business may be classified as an industrial establishment subject to the Industrial Site Recovery Act.¹⁶⁶ Pharmaceutical and medicine manufacturing has a NAICS number 32541, and wholesale distribution of drugs and druggist sundries has a NAICS number 424210. Both NAICS numbers are subject to the Industrial Site Recovery Act.

There also are a host of banking issues facing any cannabis related business. Traditional institutional lending has been problematic. Some within the traditional lending community are concerned by the potential of federal money laundering charges if they provide banking services to cannabis related businesses.¹⁶⁷ Many businesses lack a sufficient management track record, earnings history based on audited financial statements and, most importantly, viable collateral – a lender cannot take possession of growing plants and finished product and sell such collateral to satisfy the business debt. As such, the industry has, in part, turned to private debt and equity sources of capital, and credit unions.¹⁶⁸ Nevertheless, it has been reported that California tax authorities have been in discussion with Bank of America to provide services to the cannabis industry in order to facilitate payment of state tax obligations.¹⁶⁹

¹⁶⁶ N.J.S.A. 13:IK-6 *et. seq.*

¹⁶⁷ See generally, Robb Mandelbaum. *The Legal Marijuana Industry Has A Problem: Few Banks Will Touch Its Cash. But One Small Colorado Credit Union Is Daring To Try.* The New York Times Magazine, January 7, 2018.

¹⁶⁸ *Id.*

¹⁶⁹ Wesley Elmore and Paul Jones. *California Pot Money Takes Long, Strange Trip to Bank.* Tax Analysis, January 31, 2018.

In addition, there are a host of issues a landlord and tenant must address when undertaking a lease transaction involving a cannabis related business. There are some themes that have developed.¹⁷⁰ Below is a very general discussion of a limited number of issues to evaluate in a lease transaction.

Permitted Use.

Presently New Jersey limits marijuana-related businesses to medicinal purposes. Therefore, the use clause should delineate with some specificity the limitation on the use, and tie the use into the permits required for, and issued to, the alternative treatment center.

It is also advisable to confirm that the municipality will permit the use and what zoning restrictions may exist with respect to location, hours of operation and advertising, by way of example. Such evidence is required to be included within the license application of the alternative treatment center.¹⁷¹

Also, each of the landlord and tenant should evaluate the title. Are there beneficial easements or covenants, conditions and restrictions that are necessary for the operation of the business (e.g., ingress and egress), but would be violated due to the operation's contravention of federal law.

Finally, consider odors that may be emitted, particularly if a multi-tenant facility, and appropriate mitigation methods that should be required (such as air scrubbers), as well as certain processes that are highly flammable, and whether they should be permitted, even if licensed.

Compliance with Law.

Operation of an alternative treatment center is illegal under federal law.¹⁷² Consequently, there should be a carve-out from any federal law compliance obligation, limited to this finite situation. While it is illegal to operate an alternative treatment center under federal law, there are, however, a multitude of other, and unrelated, federal laws, with respect to which on-going compliance should be required.

¹⁷⁰ For an excellent article addressing issues affecting lease transactions involving marijuana-related businesses See Glenn S. Demby, Esq. *Get 10 Protections When Leasing to a Marijuana Business*. Commercial Lease Law Insider, November 2014. Two additional articles on the topic include Mark S. Hennigh and Bret D. Kravitz *Real Estate and Marijuana: Financial Opportunity or Unmanageable Risk?* [a copy was published with this article, in connection with the New Jersey Institute for Continuing Legal Education program titled: *Commercial Leasing 2017: A Focus on Leasing, Insurance and Ethical Issues*, held on December 6, 2017] and Tanya D. Marsh (Professor of Law, Wake Forest University School of Law), *What Real Estate Lawyers Need to Know in an Age of Legalization*, published in conjunction with the 2017 ABA RPTE Spring Symposia, Community Outreach Committee Program.

¹⁷¹ N.J.A.C. §8:64-7.1. In *The Kind Compassionate v. City of Long Beach*, the court upheld the lower court's ruling that a municipal regulation and ban on medical marijuana dispensaries operations did not discriminate against persons with disabilities, because the Compassionate Use Act ("CUA") and the Medical Marijuana Program ("MMP") did not grant any right to convenient access to patients for medical marijuana use. See *The Kind Compassionate v. City of Long Beach*, 2 Cal. App. 5th 116, 127 (2016). The court also upheld that the CUA and MMP do not expressly or impliedly preempt a municipality's zoning provisions regarding prohibition of a medical marijuana dispensary. *Id.* at 126. See also *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.*, 56 Cal. 4th 729 (2013).

¹⁷² See *Green Cross Medical, Inc. v. Gally*, 395 P.3d 302 (Ariz. App. Div. 1 2017) and *Mann v. Gullickson*, 2016 WL 6473215 (N.D. Calif. 2016), wherein a landlord, in each case, was denied in its effort to have a lease declared *void ab initio* because the operation of a medical marijuana facility violated federal law.

In addition, similar to the permitted use clause discussed above, the obligation of the alternative treatment center to comply with all of the relevant provisions of the Compassionate Use Act and the related regulations, should be delineated clearly and unambiguously. A tenant's obligation to comply with these laws and regulations must include any capital expenses required in connection with such compliance. This may arise from security and ventilation requirements, among others. Furthermore, notwithstanding the Sessions' memo, a landlord should require that the alternative treatment center comply with the Ogden and Cole memoranda. A landlord also should consider on-going evaluation of the tenant's operations consistent with the standards of the FinCEN guidance, and whether a banking institution doing business with the alternative treatment center would be able to file a "Marijuana Limited" SAR. The compliance with law obligation should also include future memoranda or guidance.

It is beyond the scope of this article to address the issues a landlord may face vis-à-vis its lender/mortgagee, by letting to a marijuana-related business, and vis-à-vis its own banking institution. Nevertheless, in line with the FinCEN guidance discussed above, a landlord should consider requiring a copy of the filings made by its tenant pursuant to the Compassionate Use Act and the related regulations, as well as any other federal, state or banking related filings, in order to facilitate the landlord's bank's customer due diligence (referred to in the FinCEN guidance discussed above) if and to the extent required of the landlord's bank.

Controlling Law/Jurisdiction.

The lease should spell out that all disputes will be governed by state law, and that the state courts will have exclusive jurisdiction so that matters do not end up before a federal court that likely will not recognize the legality of a state authorized cannabis operation.

Maintenance, Repair and Replacement.

The Compassionate Use Act and the related regulations impose specific obligations of maintenance. These obligations should also be included in the lease as a maintenance obligation of the tenant. In addition, due to the specific nature of operations of a marijuana-related business, a tenant must have a very clear restoration obligation, and consideration should be given to a separate security deposit for the restoration obligation.

Utilities.

Marijuana-related businesses place a high demand on water and other utilities. If not separately metered, consider separate metering at the tenant's expense, or provide for an estimate by the landlord, in its discretion.

Signage.

The Compassionate Use Act and the related regulations have specific signage limitations. While this should be covered by the compliance with law provisions, and permitted use clause, it would be prudent to also expressly tie in signage rights of the tenant with the act and regulations.

Common Areas.

While a landlord may control the common areas in a multi-tenanted facility, a landlord should avoid any liability for a failure of another tenant or any third party to abide by any restrictions that may be imposed upon the tenant under the Compassionate Use Act and the

related regulations. For example, what if a third party engages in unlawful drug activity impacting the tenant's license?

Default and Termination.

A landlord should have a right to declare a default, or at least reserve a right of termination, in the event federal law enforcement priorities change, a federal enforcement action is commenced against the landlord or its property,¹⁷³ insurance requirements cannot be satisfied, or a necessary license or permit is suspended or revoked. A tenant should have the same concerns and negotiate for similar termination rights.

A landlord also should carefully consider its rights upon a default, since it may not want to re-enter by way of a warrant of removal, unless and until all of the marijuana product is removed.

Indemnification.

Because of the continuing illegal nature of a marijuana-related business at the federal level, high security risks and potential criminal and civil forfeiture, a landlord's need for a broad and well-funded indemnity is essential. In addition, opponents of marijuana-related businesses have used theories of common law nuisance and the federal RICO law, and are becoming increasingly more creative.¹⁷⁴ It may well be that a landlord is made a party to such litigation, potentially, materially and adversely affecting the landlord's own business investment. An indemnity that appropriately addresses such potential future issues is warranted and should be given careful consideration, along with meaningful collateral to backstop the indemnity.

Conclusion

While the trend appears to favor the continued growth of the marijuana-related industry, any number of events at the federal level could bring a swift end to both the recreational and medical sectors of the industry. Only time will tell whether the increasing body of research, revealing the medical benefits of marijuana, and the economic benefits that accrue at both the state and municipal levels, will prevail over the inclination of the current administration to enforce the federal laws. One would reasonably expect that states' rights would prevail in a Republican administration, however, we will have to wait and see.

¹⁷³ See, *United States v. 1840 Embarcadero*, 932 F. Supp. 2d 1064 (N.D. Calif. 2013), wherein a landlord sought to terminate a lease after a civil *in rem* forfeiture action was commenced by the federal government based on the medical marijuana facility operations conducted at the site. The landlord sought to terminate the lease due to the illegal activity, which effort was denied on unrelated grounds. Nevertheless, the case highlights the need for an express termination right in this circumstance.

¹⁷⁴ See e.g., *Safe Street v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017); *Quillinan v. Ainsworth*, Slip Copy 2017 WL 4419225 (N.D. Calif. 2017), appeal docketed, 17-17375 (9th Cir. Nov. 24, 2017); *Crimson Galleria Limited Partnership v. Nathanson & Goldberg, P.C.*, U.S. District Court, District of Massachusetts, Case No.: 1:17-CV-11696. Lorelei Laird. *Noxious neighbors? To Colorado, marijuana is a business - to the federal government, it's a criminal conspiracy.* ABA Journal, November 2017.

Exhibit A

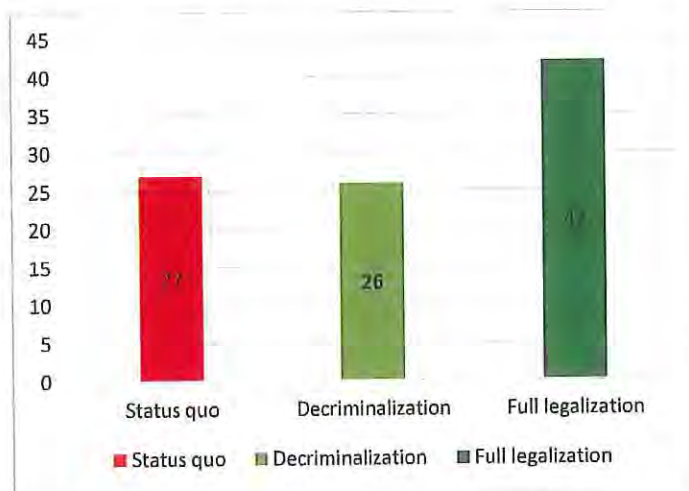
February 1, 2018 Fairleigh Dickinson Poll Results

Recreational Weed Not a Slam Dunk Among Garden Staters

RECREATIONAL WEED NOT A SLAM DUNK AMONG GARDEN STATERS

Fairleigh Dickinson University, February 1, 2018 – With the prospect of legalized marijuana heating up in the Garden State, the Fairleigh Dickinson University Poll finds public preferences have important gradations. A majority support some degree of change to existing laws, with less than majority support for full legalization. If marijuana does become legal, a minority of New Jerseyans say they will become paying customers, while the majority favor revisiting the charges against those previously convicted of marijuana offenses.

When asked about a number of options for how the state should treat the use and sale of marijuana, 42 percent believe the state should make it legal for its sale and use. A quarter support keeping recreational marijuana illegal while maintaining the legality of medicinal marijuana (27%) and 26 percent favor decriminalization. In total, 53 percent provide support for something other than the legalized sale and use of the drug. However, two-thirds (68%) favor some degree of change to existing laws (26% decriminalization and 42% full legalization).



Democrats (53%), men (51%) and the under 35 crowd (65%) are the strongest proponents of recreational legalization. Republicans (24%), women (34%), and those aged 60 and older (29%) are the least supportive.

“When given choices, opinion is clearly divided. Anyone who expected legalization to happen quickly and easily might reconsider given these findings,” said Krista Jenkins, professor of political science and director of the FDU Poll.

FDU has asked a [similar question](#) in years’ past, although this is the first time the choice was not binary, with options other than the status quo versus full legalization being offered. In 2014, 41 percent said they favored the legalization of marijuana with 52 percent opposed. And in 2015, the same question yielded a favorability rating for legalization of 49 percent with 46 percent opposed.

Attitudes toward Governor Murphy are also helpful in distinguishing between those who support legalization versus other options. Murphy, as many will recall, campaigned heavily on a pledge to usher in recreational sale and use. A majority of those who approve of the governor’s job performance also support full legalization (57%). Conversely, 70 percent of those who disapprove of the governor support the status quo (40%) or decriminalization (30%).

Although over half (57%) reportedly have tried marijuana in the past, few say they would pay for pot should its sale and use become legal. A fifth (22%) said yes to the question of an impending purchase, with 75 percent saying they would be unlikely to do the same.

Should legalized pot become the law, stores could begin popping up across the state. The FDU Poll asked adults how they would feel if a store selling marijuana opened close by their home. On this question, opinion is about evenly divided, with 49 percent saying they would favor a store like this opening, and 43 percent who would oppose it. As with the question concerning legalization versus other options, partisan leanings offer a clear dividing line in attitudes. More than half of Democrats (61%), men (58%), and those between the ages of 18 and 34 would welcome a pot dispensing store in their backyard, with Republicans (63%), women (52%), and the oldest cohort the most opposed (54%).

“One of the reasons proponents of legalized marijuana offer is increased tax revenue for the state. Although many across the state are supportive of that revenue coming from their neighborhoods, others approach the issue from a NIMBY – or not in my backyard - perspective,” said Jenkins.

Policy discussions about what would happen if marijuana becomes legal in the Garden State also involve questions of criminal justice. The FDU Poll asked respondents what they think should happen to those serving time for marijuana violations and those with past convictions. It is here that opinion is decisive. Sixty-nine percent favor allowing low level marijuana offenders to have their records cleared, and 65 percent favor modifying sentences for all inmates who are currently in prison for marijuana violations. The only group who appears divided over these questions are Republicans, as half (52%) favor record modifications and 45 percent favor sentence modifications.

“If pot is legalized, the public thinks the fair thing to do is forgive those who have found themselves on the wrong side of the law. They would not enforce an old standard under a new law,” said Jenkins.

Methodology, questions, and tables on the web at: <http://publicmind.fdu.edu>

Radio actualities at 201.692.2846

For more information, please call 201.692.7032

Methodology - The Fairleigh Dickinson University poll was conducted by landline and cellular telephone January 24-28, 2018 among a random sample of 810 adults in New Jersey. Results have a margin of sampling error of +/- 3.8 percentage points, including the design effect.

Survey results are also subject to non-sampling error. This kind of error, which cannot be measured, arises from a number of factors including, but not limited to, non-response (eligible individuals refusing to be interviewed), question wording, the order in which questions are asked, and variations among interviewers.

PublicMind interviews are conducted by Key Research of Provo, Utah with professionally trained interviewers using a CATI (Computer Assisted Telephone Interviewing) system. Random selection is achieved by computerized random-digit dialing. This technique gives every person with a landline phone number (including those with unlisted numbers) an equal chance of being selected.

The total combined sample is mathematically weighted to match known demographics of age, sex, and race. 426 interviews were conducted on landlines and 384 were conducted on cellular telephones.

The sample was purchased from Marketing Systems Group and the research was funded by Fairleigh Dickinson University.

The FDU Poll received an “A” rating from statistician Nate Silver’s FiveThirtyEight blog. The ratings measure both accuracy and bias for all major polling services in the United States, providing an update to similar research the poll watchers conducted in 2014. The FDU Poll’s “A” rating puts it in the top 14 of the more than 380 polling institutes reviewed and graded from A+ through F. The FDU Poll was found to have a 94 percent accuracy rate for predicting election results, and is one of only two A-rated polling institutes with zero bias to their rankings.

Tables

And what do YOU think is the best decision for New Jersey? Which of the following do you favor? [Rotate choices] Keep the sales and use of marijuana illegal while keeping medical marijuana legal; Decriminalize small amounts and treat possession like a traffic ticket while keeping medical marijuana legal; Make it legal for use and sales in stores

	PID				Gender		Race		Education		Age		
	All	Dem	Ind	Repub	Male	Female	White	Non-white	HS/Some college	College+	18-34	35-59	60+
Keep it illegal	27	18	27	42	19	34	30	21	26	27	8	30	38
Decriminalize	26	25	25	27	23	28	26	23	25	26	24	28	25
Make it legal	42	53	44	24	51	34	39	50	43	43	65	39	29
DK (vol)	4	3	2	5	5	3	4	6	6	3	3	3	7
Ref. (vol)	1	1	1	1	2	0	1	1	1	1	0	1	2

	All	Tried marijuana		Intends to purchase		Murphy approval	
		Yes	No	Yes	No	Approve	Disapprove
Keep it illegal	27	16	42	2	35	18	40
Decriminalize	26	25	26	18	28	23	30
Make it legal	42	56	24	78	31	57	21
DK (vol)	4	2	7	1	5	1	6
Ref. (vol)	1	0	2	0	1	0	2

If New Jersey legalizes marijuana, would you favor or oppose [rotate] having a store selling marijuana in your town?

	PID				Gender		Race		Education		Age		
	All	Dem	Ind	Repub	Male	Female	White	Non-white	HS/Some college	College+	18-34	35-59	60+
Favor	49%	61	47	31	58	39	50	48	51	48	69	45	38
Oppose	43%	31	41	63	35	52	43	44	45	42	24	48	54
DK (vol)	6%	7	10	4	5	7	5	8	4	8	5	7	7
Ref. (vol)	2%	2	2	2	2	1	2	1	1	2	2	1	2

	All	Tried marijuana		Intends to purchase		Murphy approval	
		Yes	No	Yes	No	Approve	Disapprove
Favor	49%	63	30	91	35	67	27
Oppose	43%	31	60	6	55	29	69
DK (vol)	6%	5	8	2	8	3	3
Ref. (vol)	2%	1	2	1	2	1	1

If New Jersey legalizes marijuana, would you favor or oppose [rotate] allowing low level marijuana offenders to have their records cleared?

	PID				Gender		Race		Education		Age		
	All	Dem	Ind	Repub	Male	Female	White	Non-white	HS/Some college	College+	18-34	35-59	60+
Favor	69	83	62	52	70	68	69	69	66	71	82	69	58
Oppose	28	14	36	44	27	29	28	29	31	26	18	28	35
DK (vol)	2	2	2	3	2	3	3	1	2	2	1	1	5
Ref. (vol)	1	1	1	1	1	1	1	1	1	1	0	1	1

	All	Tried marijuana		Intends to purchase		Murphy approval	
		Yes	No	Yes	No	Approve	Disapprove
Favor	69	80	53	93	61	84	52
Oppose	28	17	43	7	34	14	44
DK (vol)	2	1	3	0	3	2	3
Ref. (vol)	1	1	1	0	1	1	2

If New Jersey legalizes marijuana, would you favor or oppose [rotate] modifying sentences for all inmates who are currently in prison for marijuana violations?

	PID				Gender		Race		Education		Age		
	All	Dem	Ind	Repub	Male	Female	White	Non-white	HS/Some college	College+	18-34	35-59	60+
Favor	65	80	62	45	65	65	64	68	62	68	80	65	54
Oppose	29	16	32	47	28	31	29	29	30	28	18	30	36
DK (vol)	5	3	5	7	6	4	6	3	7	3	1	4	8
Ref. (vol)	1	1	1	1	1	1	1	0	1	1	0	1	1

	All	Tried marijuana		Intends to purchase		Murphy approval	
		Yes	No	Yes	No	Approve	Disapprove
Favor	65	77	49	89	58	79	45
Oppose	29	17	46	7	36	17	47
DK (vol)	5	5	4	2	6	2	7
Ref. (vol)	1	1	0	1	1	1	1

If New Jersey legalizes the sale of marijuana, would you purchase some?

	PID				Gender		Race		Education		Age		
	All	Dem	Ind	Repub	Male	Female	White	Non-white	HS/Some college	College+	18-34	35-59	60+
Favor	22	26	22	13	30	14	20	25	27	18	39	16	14
Oppose	75	69	75	86	66	83	76	72	70	78	55	81	83
DK (vol)	3	4	3	1	2	3	3	2	2	4	4	3	2
Ref. (vol)	1	1	0	0	1	0	1	1	1	0	2	0	0

	All	Tried marijuana		Murphy approval	
		Yes	No	Approve	Disapprove
Favor	22	35	3	33	12
Oppose	75	61	94	62	85
DK (vol)	3	3	2	4	3
Ref. (vol)	1	0	1	1	0

<i>Tried marijuana in past</i>													
	PID				Gender		Race		Education		Age		
	All	Dem	Ind	Repub	Male	Female	White	Non-white	HS/Some college	College+	18-34	35-59	60+
Yes	57	64	44	51	65	49	58	54	56	57	66	62	48
No	42	35	52	48	35	49	41	44	43	41	34	37	51
DK (vol)	2	1	4	1	2	2	1	2	1	2	1	2	1
Ref. (vol)	0	0	0	0	0	0	0	0	0	0	0	0	0

<i>There is a proposal in the legislature to legalize marijuana in New Jersey. How much have you heard or read about this proposed legislation?</i>													
	PID				Gender		Race		Education		Age		
	All	Dem	Ind	Repub	Male	Female	White	Non-white	HS/Some college	College+	18-34	35-59	60+
A lot	34	29	34	42	38	31	38	28	36	33	28	34	41
Some	31	33	33	28	30	33	32	30	32	31	37	30	29
Just a little	24	27	23	22	22	26	22	28	20	26	26	25	21
Nothing at all	9	10	10	7	9	9	7	14	11	8	10	10	7
DK (vol)	1	1	1	1	1	1	1	0	0	1	0	1	1
Ref. (vol)	0	0	1	0	0	0	0	0	0	0	0	0	0

	Tried marijuana		Intends to purchase		Murphy approval		
	All	Yes	No	Yes	No	Approve	Disapprove
A lot	34	37	32	44	32	33	50
Some	31	32	30	35	30	35	23
Just a little	24	25	23	16	27	25	21
Nothing at all	9	5	14	5	10	7	5
DK (vol)	1	0	1	1	1	0	1
Ref. (vol)	0	0	0	0	0	0	0

Question wording and order

US1 through NJ4 released January 30, 2017

MJ1 There is a proposal in the legislature to legalize marijuana in New Jersey. How much have you heard or read about this proposed legislation?

- 1 A lot
- 2 Some
- 3 Just a little
- 4 Nothing at all
- 8 Dk (vol)
- 9 Refused (vol)

MJ2 And what do YOU think is the best decision for New Jersey? Which of the following do you favor? [Rotate options]

- 1 Keep the use and sales of marijuana illegal while keeping medical marijuana legal
- 2 Decriminalize small amounts and treat possession like a traffic ticket while keeping medical marijuana legal
- 3 Make it legal for use and sales in stores
- 8 Dk (vol)
- 9 Refused (vol)

MJ3 withheld

MJ4 If New Jersey does legalize marijuana, would you favor or oppose [rotate] having a store selling marijuana in your town?

- 1 Favor
- 2 Oppose
- 8 DK (vol)
- 9 Refused (vol)

MJ5 If New Jersey legalizes marijuana, would you favor or oppose [rotate] allowing low level marijuana offenders to have their records cleared?

- 1 Favor
- 2 Oppose
- 8 DK (vol)
- 9 Refused (vol)

MJ6 If New Jersey legalizes marijuana, would you favor or oppose [rotate] modifying sentences for all inmates who are currently in prison for marijuana violations?

- 1 Favor
- 2 Oppose
- 8 DK (vol)
- 9 Refused (vol)

MJ7 If New Jersey legalizes the sale of marijuana, would you purchase some?

- 1 Yes
- 2 No
- 8 DK (vol)
- 9 Refused (vol)

Sample characteristics

Male 49%
Female 51%

Democrat (with leaners) 51%
Republican (with leaners) 30%
Independent 15%

18-34 27%
35-59 43%
60+ 29%

White 64%
African-American 13%
Latino 15%
Asian 5%
Other/refused 3%

Exhibit A-1

July 31, 2015 Fairleigh Dickinson Poll Results

Support for Marijuana Legalization in NJ Reaches New High in Fairleigh Dickinson University Poll



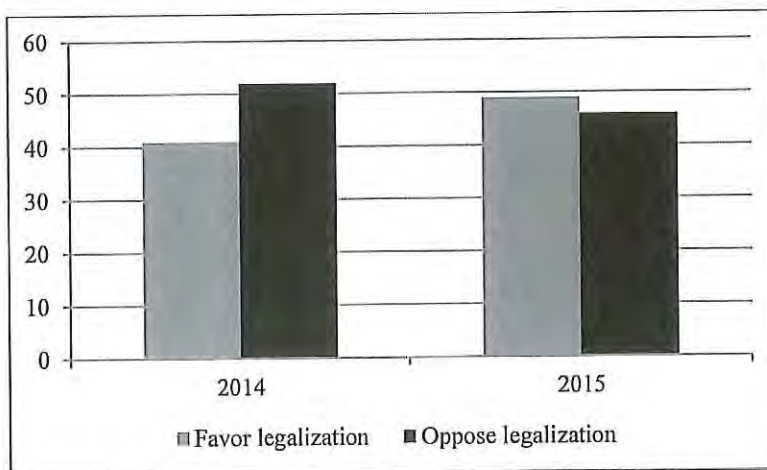
For immediate release Friday, July 31, 2015

Contact: Krista Jenkins 973.443.8390 kjenkins@fdu.edu
Deborah Howlett, Communications director, ACLU-NJ, 973-854-1728,
dhowlett@aclu-nj.org

SUPPORT FOR MARIJUANA LEGALIZATION IN NJ REACHES NEW HIGH IN FAIRLEIGH DICKINSON UNIVERSITY POLL

Opinion is divided in the Garden State over the legalization of marijuana, but the overtime trend indicates the public is leaning toward supporting marijuana reform. The most recent statewide survey of registered voters from Fairleigh Dickinson University's PublicMind finds 49 percent favor legalization of the substance for personal use, with 46 percent opposed. This represents an eight-point swing since when the question was last asked in January 2014. At that time, 41 percent favored legalization with 52 percent opposed.

"With national momentum building for the legalization of marijuana, it looks like the pendulum in New Jersey is swinging in the direction of legalization," said Krista Jenkins, professor of political science and director of PublicMind. "A little more than a year ago, a majority was clearly opposed. Today, that's just not the case."



One of the determinative characteristics of those who favor legalization is past experience. Of those surveyed, 44 percent say they have tried marijuana, comparable to the 42 percent who reported use in January 2014. Of those who report trying marijuana, seven in ten favor legalization, as compared with 29 percent who have never used.

Other groups to show demonstrably more support include men, whites, and millennials. Among men, 56 percent favor legalization as compared with 41 percent of women. A majority of white respondents (53%) support legalization. Approval among non-whites was lower (39%). Millennials offer

some of the most robust support for legalization as compared with other age groups. Nearly two-thirds (62%) favor legalization.

Strict regulations to protect children also had an impact on favorability. Twelve percent who opposed legalization said they would change their minds if such safeguards were in place. Significantly more (83%) say regulations would make no difference.

The same survey found that how questions regarding legalization are asked makes little difference to public opinion. Asking about legalization for personal use yields virtually the same results as a more detailed question that asks “Do you favor or oppose taxing, regulating, and legalizing small quantities of marijuana for personal use by adults, just like alcohol?”

“Raising the specter of not only legalization, but taxation and regulation doesn’t do anything to move the needle. You can liken it to alcohol, but few are persuaded either way,” said Jenkins.

PublicMind worked with the New Jersey affiliate of the American Civil Liberties Union on questions related to marijuana use and legalization. According to Udi Ofer, Executive Director of the ACLU of New Jersey and a founding steering committee member of New Jersey United for Marijuana Reform, “Support for legalizing marijuana in New Jersey is clearly growing, as more and more New Jerseyans back taxing and regulating marijuana for personal use by adults. It’s time we stopped making tens of thousands of arrests per year in New Jersey for an activity that the last 23 years of U.S. presidents have engaged in. It’s time to end the failed status quo and replace it with a safe, controlled and regulated system of marijuana legalization.”

Methodology - The Fairleigh Dickinson University PublicMind survey was conducted by landline and cellular telephone June 15-21, 2015 among a random statewide sample of 792 self-identified registered voters. Results have a margin of sampling error of +/- 3.7 points, including the design effect.

Methodology, questions, and tables on the web at: <http://publicmind.fdu.edu>

Radio actualities at 201.692.2846

For more information, please call 201.692.7032

Methodology

The most recent survey by Fairleigh Dickinson University’s PublicMind was conducted by telephone from June 15 through 21 using a randomly selected sample of 792 self-identified registered voters in New Jersey. One can be 95 percent confident that the error attributable to sampling has a range of +/- 3.7 percentage points, including the design effect. The margin of error for subgroups is larger and varies by the size of that subgroup. Survey results are also subject to non-sampling error. This kind of error, which cannot be measured, arises from a number of factors including, but not limited to, non-response (eligible individuals refusing to be interviewed), question wording, the order in which questions are asked, and variations among interviewers.

PublicMind interviews are conducted by Opinion America of Cedar Knolls, NJ, with professionally trained interviewers using a CATI (Computer Assisted Telephone Interviewing) system. Random selection

is achieved by computerized random-digit dialing. This technique gives every person with a landline phone number (including those with unlisted numbers) an equal chance of being selected.

Landline households are supplemented with a separate, randomly selected sample of cell-phone respondents interviewed in the same time frame. The total combined sample is mathematically weighted to match known demographics of gender, age, education, and race. 440 interviews were conducted on landlines and 352 were conducted on cellular telephones.

The sample was purchased from Marketing Systems Group and the research was funded by Fairleigh Dickinson University and the New Jersey affiliate of the American Civil Liberties Union. The New Jersey affiliate worked with PublicMind on the development of questions related to the legalization of marijuana only.

Tables

Here in New Jersey, do you favor or oppose [rotate] legalizing small quantities of marijuana for personal use? N = 403

	PID				Gender		Race		Tried marijuana?		Age		
	All	Dem	Ind	Rep	Men	Women	White	Non-white	Yes	No	18-34	35-59	60+
Favor	48%	60	40	40	57	39	52	37	67	30	66	49	34
Oppose	45%	31	52	56	37	53	43	51	29	61	26	43	59
DK/Ref (vol)	7%	9	8	4	6	8	6	12	4	9	9	8	7

Here in New Jersey, do you favor or oppose [rotate] taxing, regulating, and legalizing small quantities of marijuana for personal use by adults, just like alcohol? N = 389

	PID				Gender		Race		Tried marijuana?		Age		
	All	Dem	Ind	Rep	Men	Women	White	Non-white	Yes	No	18-34	35-59	60+
Favor	49%	56	49	41	55	44	54	42	73	29	58	51	42
Oppose	46%	39	45	56	42	50	43	50	24	65	35	44	55
DK/Ref (vol)	5%	5	5	3	4	6	4	8	4	6	6	6	4

Legalization: Combined responses to above two tables

	PID				Gender		Race		Tried marijuana?		Age		
	All	Dem	Ind	Rep	Men	Women	White	Non-white	Yes	No	18-34	35-59	60+
Favor	49%	54	46	40	56	41	53	39	70	29	62	50	38
Oppose	46%	35	48	56	39	52	43	51	27	63	30	44	57
DK/Ref (vol)	5%	7	6	4	5	7	4	10	4	88	7	7	5

The preceding tables reflect responses to an experiment sponsored by the New Jersey affiliate of American Civil Liberties Union. Half of the sample was asked about legalization using a similar question that was used in January 2014; the remaining half was asked using a slightly different question.

January 2014
Here in New Jersey, do you favor or oppose [rotate] legalizing small quantities of marijuana for recreational use?

	PID				Gender		Race		Tried marijuana?	
	All	Dem	Ind	Rep	Men	Women	White	Non-white	Yes	No
Favor	41%	50	42	30	50	34	44	34	62	25
Oppose	52%	44	49	66	46	59	50	60	35	66
DK/Ref (vol)	6%	6	9	4	4	7	5	7	3	8

Would strict government regulations designed to prevent kids from accessing marijuana make you change your mind and favor taxing, regulating, and legalizing small quantities of marijuana for personal use by adults, just like alcohol, or would

regulations make no difference? N = 361

	PID				Gender		Race		Tried marijuana?		Age		
	All	Dem	Ind	Rep	Men	Women	White	Non-white	Yes	No	18-34	35-59	60+
Change mind	12%	13	11	12	8	15	9	17	12	11	14	13	11
No difference	83%	84	82	84	89	78	86	79	85	83	80	82	84
Depends (vol)	2%	0	3	2	0	3	1	2	1	2	4	1	2
DK/Ref (vol)	3%	3	4	2	2	4	3	3	2	4	2	4	3

Many people have tried marijuana at some point in their life. What about you/ Have you ever tried marijuana?

	PID				Gender		Race		Age		
	All	Dem	Ind	Rep	Men	Women	White	Non-white	18-34	35-59	60+
Yes	44%	46	39	45	46	42	48	37	49	49	36
No	51%	50	56	49	49	54	48	60	49	46	59
DK/Ref (vol)	4%	4	4	6	5	5	5	3	2	5	5

January 2014
Many people have tried marijuana at some point in their life. What about you/ Have you ever tried marijuana?

	PID				Gender		Race	
	All	Dem	Ind	Rep	Men	Women	White	Non-white
Yes	42%	46	41	37	45	38	45	35
No	52%	49	52	57	48	57	49	62
DK/Ref (vol)	6%	5	6	6	7	5	6	4

Weighted sample characteristics

		Registered voters N = 792; MoE = +/- 3.7
Gender	<i>Male</i>	49%
	<i>Female</i>	51%
Age	<i>18-34</i>	24%
	<i>35-59</i>	41%
	<i>60+</i>	33%
	<i>Refused</i>	2%
Race	<i>White</i>	66%
	<i>African American</i>	11%
	<i>Hispanic</i>	15%
	<i>Asian</i>	3%
	<i>Other/Refused</i>	5%
	<i>Refused</i>	2%
Union household	<i>Self</i>	13%
	<i>Someone else</i>	11%
	<i>No/Refused/DK</i>	76%
Party (with leaners)	<i>Dem</i>	44%
	<i>Ind/DK/Refused</i>	23%
	<i>Repub</i>	34%

Exhibit B

Memorandum of Attorney General Jeffrey B. Sessions, III



Office of the Attorney General
Washington, D. C. 20530

January 4, 2018

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: Jefferson B. Sessions, III
Attorney General

SUBJECT: Marijuana Enforcement

In the Controlled Substances Act, Congress has generally prohibited the cultivation, distribution, and possession of marijuana. 21 U.S.C. § 801 *et seq.* It has established significant penalties for these crimes. 21 U.S.C. § 841 *et seq.* These activities also may serve as the basis for the prosecution of other crimes, such as those prohibited by the money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act. 18 U.S.C. §§ 1956-57, 1960; 31 U.S.C. § 5318. These statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime.

In deciding which marijuana activities to prosecute under these laws with the Department's finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions. Attorney General Benjamin Civiletti originally set forth these principles in 1980, and they have been refined over time, as reflected in chapter 9-27.000 of the U.S. Attorneys' Manual. These principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.

Given the Department's well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.¹ This memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion in accordance with all applicable laws, regulations, and appropriations. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

¹ Previous guidance includes: David W. Ogden, Deputy Att'y Gen., Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009); James M. Cole, Deputy Att'y Gen., Memorandum for United States Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011); James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013); James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014); and Monty Wilkinson, Director of the Executive Office for U.S. Att'ys, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014).

Exhibit C

Memorandum of Deputy Attorney General David W. Ogden, dated October 19, 2009



U.S. Department of Justice

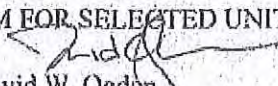
Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 19, 2009

MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS

FROM: 
David W. Ogden
Deputy Attorney General

SUBJECT: Investigations and Prosecutions in States
Authorizing the Medical Use of Marijuana

This memorandum provides clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana. These laws vary in their substantive provisions and in the extent of state regulatory oversight, both among the enacting States and among local jurisdictions within those States. Rather than developing different guidelines for every possible variant of state and local law, this memorandum provides uniform guidance to focus federal investigations and prosecutions in these States on core federal enforcement priorities.

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. One timely example underscores the importance of our efforts to prosecute significant marijuana traffickers: marijuana distribution in the United States remains the single largest source of revenue for the Mexican cartels.

The Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources. In general, United States Attorneys are vested with "plenary authority with regard to federal criminal matters" within their districts. USAM 9-2.001. In exercising this authority, United States Attorneys are "invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority." *Id.* This authority should, of course, be exercised consistent with Department priorities and guidance.

The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on

Subject: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana

individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department. To be sure, claims of compliance with state or local law may mask operations inconsistent with the terms, conditions, or purposes of those laws, and federal law enforcement should not be deterred by such assertions when otherwise pursuing the Department's core enforcement priorities.

Typically, when any of the following characteristics is present, the conduct will not be in clear and unambiguous compliance with applicable state law and may indicate illegal drug trafficking activity of potential federal interest:

- unlawful possession or unlawful use of firearms;
- violence;
- sales to minors;
- financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law;
- amounts of marijuana inconsistent with purported compliance with state or local law;
- illegal possession or sale of other controlled substances; or
- ties to other criminal enterprises.

Of course, no State can authorize violations of federal law, and the list of factors above is not intended to describe exhaustively when a federal prosecution may be warranted. Accordingly, in prosecutions under the Controlled Substances Act, federal prosecutors are not expected to charge, prove, or otherwise establish any state law violations. Indeed, this memorandum does not alter in any way the Department's authority to enforce federal law, including laws prohibiting the manufacture, production, distribution, possession, or use of marijuana on federal property. This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

Subject: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana

Finally, nothing herein precludes investigation or prosecution where there is a reasonable basis to believe that compliance with state law is being invoked as a pretext for the production or distribution of marijuana for purposes not authorized by state law. Nor does this guidance preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests.

Your offices should continue to review marijuana cases for prosecution on a case-by-case basis, consistent with the guidance on resource allocation and federal priorities set forth herein, the consideration of requests for federal assistance from state and local law enforcement authorities, and the Principles of Federal Prosecution.

cc: All United States Attorneys

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Criminal Division

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Chair, Attorney General's Advisory Committee

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Exhibit D

Memorandum of Deputy Attorney General James M. Cole, dated June 29, 2011




U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

June 29, 2011

MEMORANDUM FOR UNITED STATES ATTORNEYS

FROM: James M. Cole 
Deputy Attorney General

SUBJECT: Guidance Regarding the Ogden Memo in Jurisdictions
Seeking to Authorize Marijuana for Medical Use

Over the last several months some of you have requested the Department's assistance in responding to inquiries from State and local governments seeking guidance about the Department's position on enforcement of the Controlled Substances Act (CSA) in jurisdictions that have under consideration, or have implemented, legislation that would sanction and regulate the commercial cultivation and distribution of marijuana purportedly for medical use. Some of these jurisdictions have considered approving the cultivation of large quantities of marijuana, or broadening the regulation and taxation of the substance. You may have seen letters responding to these inquiries by several United States Attorneys. Those letters are entirely consistent with the October 2009 memorandum issued by Deputy Attorney General David Ogden to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana (the "Ogden Memo").

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large scale criminal enterprises, gangs, and cartels. The Ogden Memorandum provides guidance to you in deploying your resources to enforce the CSA as part of the exercise of the broad discretion you are given to address federal criminal matters within your districts.

A number of states have enacted some form of legislation relating to the medical use of marijuana. Accordingly, the Ogden Memo reiterated to you that prosecution of significant traffickers of illegal drugs, including marijuana, remains a core priority, but advised that it is likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers. The term "caregiver" as used in the memorandum meant just that: individuals providing care to individuals with cancer or other serious illnesses, not commercial operations cultivating, selling or distributing marijuana.

The Department's view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed. There has, however, been an increase in the scope of

Memorandum for United States Attorneys
Subject: Guidance Regarding the Ogden Memo in Jurisdictions
Seeking to Authorize Marijuana for Medical Use

Page 2

commercial cultivation, sale, distribution and use of marijuana for purported medical purposes. For example, within the past 12 months, several jurisdictions have considered or enacted legislation to authorize multiple large-scale, privately-operated industrial marijuana cultivation centers. Some of these planned facilities have revenue projections of millions of dollars based on the planned cultivation of tens of thousands of cannabis plants.

The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA. Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws.

The Department of Justice is tasked with enforcing existing federal criminal laws in all states, and enforcement of the CSA has long been and remains a core priority.

cc: Lanny A. Breuer
Assistant Attorney General, Criminal Division.

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Exhibit E

Memorandum of Deputy Attorney General James M. Cole, dated August 29, 2013



U.S. Department of Justice


Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole 
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.¹

Outside of these enforcement 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. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

¹ These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

cc: Mythili Raman
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Exhibit F

Memorandum of Deputy Attorney General James M. Cole, dated February 14, 2014



U.S. Department of Justice


Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

February 14, 2014

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole 
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Related Financial Crimes

On August 29, 2013, the Department issued guidance (August 29 guidance) to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). The August 29 guidance reiterated the Department's commitment to enforcing the CSA consistent with Congress' determination that marijuana is a dangerous drug that serves as a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. In furtherance of that commitment, the August 29 guidance instructed Department attorneys and law enforcement to focus on the following eight priorities in enforcing the CSA against marijuana-related conduct:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

Under the August 29 guidance, whether marijuana-related conduct implicates one or more of these enforcement priorities should be the primary question in considering prosecution

Subject: Guidance Regarding Marijuana Related Financial Crimes

under the CSA. Although the August 29 guidance was issued in response to recent marijuana legalization initiatives in certain states, it applies to all Department marijuana enforcement nationwide. The guidance, however, did not specifically address what, if any, impact it would have on certain financial crimes for which marijuana-related conduct is a predicate.

The provisions of the money laundering statutes, the unlicensed money remitter statute, and the Bank Secrecy Act (BSA) remain in effect with respect to marijuana-related conduct. Financial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under the money laundering statutes (18 U.S.C. §§ 1956 and 1957), the unlicensed money transmitter statute (18 U.S.C. § 1960), and the BSA. Sections 1956 and 1957 of Title 18 make it a criminal offense to engage in certain financial and monetary transactions with the proceeds of a "specified unlawful activity," including proceeds from marijuana-related violations of the CSA. Transactions by or through a money transmitting business involving funds "derived from" marijuana-related conduct can also serve as a predicate for prosecution under 18 U.S.C. § 1960. Additionally, financial institutions that conduct transactions with money generated by marijuana-related conduct could face criminal liability under the BSA for, among other things, failing to identify or report financial transactions that involved the proceeds of marijuana-related violations of the CSA. *See, e.g.*, 31 U.S.C. § 5318(g). Notably for these purposes, prosecution under these offenses based on transactions involving marijuana proceeds does not require an underlying marijuana-related conviction under federal or state law.

As noted in the August 29 guidance, the Department is committed to using its limited investigative and prosecutorial resources to address the most significant marijuana-related cases in an effective and consistent way. Investigations and prosecutions of the offenses enumerated above based upon marijuana-related activity should be subject to the same consideration and prioritization. Therefore, in determining whether to charge individuals or institutions with any of these offenses based on marijuana-related violations of the CSA, prosecutors should apply the eight enforcement priorities described in the August 29 guidance and reiterated above.¹ For example, if a financial institution or individual provides banking services to a marijuana-related business knowing that the business is diverting marijuana from a state where marijuana sales are regulated to ones where such sales are illegal under state law, or is being used by a criminal organization to conduct financial transactions for its criminal goals, such as the concealment of funds derived from other illegal activity or the use of marijuana proceeds to support other illegal activity, prosecution for violations of 18 U.S.C. §§ 1956, 1957, 1960 or the BSA might be appropriate. Similarly, if the financial institution or individual is willfully blind to such activity by, for example, failing to conduct appropriate due diligence of the customers' activities, such prosecution might be appropriate. Conversely, if a financial institution or individual offers

¹ The Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) is issuing concurrent guidance to clarify BSA expectations for financial institutions seeking to provide services to marijuana-related businesses. The FinCEN guidance addresses the filing of Suspicious Activity Reports (SAR) with respect to marijuana-related businesses, and in particular the importance of considering the eight federal enforcement priorities mentioned above, as well as state law. As discussed in FinCEN's guidance, a financial institution providing financial services to a marijuana-related business that it reasonably believes, based on its customer due diligence, does not implicate one of the federal enforcement priorities or violate state law, would file a "Marijuana Limited" SAR, which would include streamlined information. Conversely, a financial institution filing a SAR on a marijuana-related business it reasonably believes, based on its customer due diligence, implicates one of the federal priorities or violates state law, would label the SAR "Marijuana Priority," and the content of the SAR would include comprehensive details in accordance with existing regulations and guidance.

services to a marijuana-related business whose activities do not implicate any of the eight priority factors, prosecution for these offenses may not be appropriate.

The August 29 guidance rested on the expectation that states that have enacted laws authorizing marijuana-related conduct will implement clear, strong and effective regulatory and enforcement systems in order to minimize the threat posed to federal enforcement priorities. Consequently, financial institutions and individuals choosing to service marijuana-related businesses that are not compliant with such state regulatory and enforcement systems, or that operate in states lacking a clear and robust regulatory scheme, are more likely to risk entanglement with conduct that implicates the eight federal enforcement priorities.² In addition, because financial institutions are in a position to facilitate transactions by marijuana-related businesses that could implicate one or more of the priority factors, financial institutions must continue to apply appropriate risk-based anti-money laundering policies, procedures, and controls sufficient to address the risks posed by these customers, including by conducting customer due diligence designed to identify conduct that relates to any of the eight priority factors. Moreover, as the Department's and FinCEN's guidance are designed to complement each other, it is essential that financial institutions adhere to FinCEN's guidance.³ Prosecutors should continue to review marijuana-related prosecutions on a case-by-case basis and weigh all available information and evidence in determining whether particular conduct falls within the identified priorities.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA, the money laundering and unlicensed money transmitter statutes, or the BSA, including the obligation of financial institutions to conduct customer due diligence. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct of a person or entity threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

² For example, financial institutions should recognize that a marijuana-related business operating in a state that has not legalized marijuana would likely result in the proceeds going to a criminal organization.

³ Under FinCEN's guidance, for instance, a marijuana-related business that is not appropriately licensed or is operating in violation of state law presents red flags that would justify the filing of a Marijuana Priority SAR.

Exhibit G

FinCEN Guidance to clarify Bank Secrecy Act expectations for financial institutions seeking to provide services to marijuana-related businesses, dated February 14, 2014



Department of the Treasury Financial Crimes Enforcement Network

Guidance

FIN-2014-G001

Issued: February 14, 2014

Subject: BSA Expectations Regarding Marijuana-Related Businesses

The Financial Crimes Enforcement Network (“FinCEN”) is issuing guidance to clarify Bank Secrecy Act (“BSA”) expectations for financial institutions seeking to provide services to marijuana-related businesses. FinCEN is issuing this guidance in light of recent state initiatives to legalize certain marijuana-related activity and related guidance by the U.S. Department of Justice (“DOJ”) concerning marijuana-related enforcement priorities. This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations, and aligns the information provided by financial institutions in BSA reports with federal and state law enforcement priorities. This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.

Marijuana Laws and Law Enforcement Priorities

The Controlled Substances Act (“CSA”) makes it illegal under federal law to manufacture, distribute, or dispense marijuana.¹ Many states impose and enforce similar prohibitions. Notwithstanding the federal ban, as of the date of this guidance, 20 states and the District of Columbia have legalized certain marijuana-related activity. In light of these developments, U.S. Department of Justice Deputy Attorney General James M. Cole issued a memorandum (the “Cole Memo”) to all United States Attorneys providing updated guidance to federal prosecutors concerning marijuana enforcement under the CSA.² The Cole Memo guidance applies to all of DOJ’s federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

The Cole Memo reiterates Congress’s determination that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Cole Memo notes that DOJ is committed to enforcement of the CSA consistent with those determinations. It also notes that DOJ is committed to using its investigative and prosecutorial resources to address the most

¹ Controlled Substances Act, 21 U.S.C. § 801, *et seq.*

² James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement* (August 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, the Cole Memo provides guidance to DOJ attorneys and law enforcement to focus their enforcement resources on persons or organizations whose conduct interferes with any one or more of the following important priorities (the “Cole Memo priorities”).³

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

Concurrently with this FinCEN guidance, Deputy Attorney General Cole is issuing supplemental guidance directing that prosecutors also consider these enforcement priorities with respect to federal money laundering, unlicensed money transmitter, and BSA offenses predicated on marijuana-related violations of the CSA.⁴

Providing Financial Services to Marijuana-Related Businesses

This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations. In general, the decision to open, close, or refuse any particular account or relationship should be made by each financial institution based on a number of factors specific to that institution. These factors may include its particular business objectives, an evaluation of the risks associated with offering a particular product or service, and its capacity to manage those risks effectively. Thorough customer due diligence is a critical aspect of making this assessment.

In assessing the risk of providing services to a marijuana-related business, a financial institution should conduct customer due diligence that includes: (i) verifying with the appropriate state authorities whether the business is duly licensed and registered; (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) requesting from state licensing and enforcement authorities available information about the business and related parties; (iv) developing an understanding of the normal and expected activity for the business, including the types of

³ The Cole Memo notes that these enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA.

⁴ James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes* (February 14, 2014).

products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and (vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk. With respect to information regarding state licensure obtained in connection with such customer due diligence, a financial institution may reasonably rely on the accuracy of information provided by state licensing authorities, where states make such information available.

As part of its customer due diligence, a financial institution should consider whether a marijuana-related business implicates one of the Cole Memo priorities or violates state law. This is a particularly important factor for a financial institution to consider when assessing the risk of providing financial services to a marijuana-related business. Considering this factor also enables the financial institution to provide information in BSA reports pertinent to law enforcement's priorities. A financial institution that decides to provide financial services to a marijuana-related business would be required to file suspicious activity reports ("SARs") as described below.

Filing Suspicious Activity Reports on Marijuana-Related Businesses

The obligation to file a SAR is unaffected by any state law that legalizes marijuana-related activity. A financial institution is required to file a SAR if, consistent with FinCEN regulations, the financial institution knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (ii) is designed to evade regulations promulgated under the BSA, or (iii) lacks a business or apparent lawful purpose.⁵ Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, a financial institution is required to file a SAR on activity involving a marijuana-related business (including those duly licensed under state law), in accordance with this guidance and FinCEN's suspicious activity reporting requirements and related thresholds.

One of the BSA's purposes is to require financial institutions to file reports that are highly useful in criminal investigations and proceedings. The guidance below furthers this objective by assisting financial institutions in determining how to file a SAR that facilitates law enforcement's access to information pertinent to a priority.

"Marijuana Limited" SAR Filings

A financial institution providing financial services to a marijuana-related business that it reasonably believes, based on its customer due diligence, does not implicate one of the Cole Memo priorities or violate state law should file a "Marijuana Limited" SAR. The content of this

⁵ See, e.g., 31 CFR § 1020.320. Financial institutions shall file with FinCEN, to the extent and in the manner required, a report of any suspicious transaction relevant to a possible violation of law or regulation. A financial institution may also file with FinCEN a SAR with respect to any suspicious transaction that it believes is relevant to the possible violation of any law or regulation but whose reporting is not required by FinCEN regulations.

SAR should be limited to the following information: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) the fact that the filing institution is filing the SAR solely because the subject is engaged in a marijuana-related business; and (iv) the fact that no additional suspicious activity has been identified. Financial institutions should use the term “MARIJUANA LIMITED” in the narrative section.

A financial institution should follow FinCEN’s existing guidance on the timing of filing continuing activity reports for the same activity initially reported on a “Marijuana Limited” SAR.⁶ The continuing activity report may contain the same limited content as the initial SAR, plus details about the amount of deposits, withdrawals, and transfers in the account since the last SAR. However, if, in the course of conducting customer due diligence (including ongoing monitoring for red flags), the financial institution detects changes in activity that potentially implicate one of the Cole Memo priorities or violate state law, the financial institution should file a “Marijuana Priority” SAR.

“Marijuana Priority” SAR Filings

A financial institution filing a SAR on a marijuana-related business that it reasonably believes, based on its customer due diligence, implicates one of the Cole Memo priorities or violates state law should file a “Marijuana Priority” SAR. The content of this SAR should include comprehensive detail in accordance with existing regulations and guidance. Details particularly relevant to law enforcement in this context include: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) details regarding the enforcement priorities the financial institution believes have been implicated; and (iv) dates, amounts, and other relevant details of financial transactions involved in the suspicious activity. Financial institutions should use the term “MARIJUANA PRIORITY” in the narrative section to help law enforcement distinguish these SARs.⁷

“Marijuana Termination” SAR Filings

If a financial institution deems it necessary to terminate a relationship with a marijuana-related business in order to maintain an effective anti-money laundering compliance program, it should

⁶ Frequently Asked Questions Regarding the FinCEN Suspicious Activity Report (Question #16), available at: http://fincen.gov/whatsnew/html/sar_faqs.html (providing guidance on the filing timeframe for submitting a continuing activity report).

⁷ FinCEN recognizes that a financial institution filing a SAR on a marijuana-related business may not always be well-positioned to determine whether the business implicates one of the Cole Memo priorities or violates state law, and thus which terms would be most appropriate to include (i.e., “Marijuana Limited” or “Marijuana Priority”). For example, a financial institution could be providing services to another domestic financial institution that, in turn, provides financial services to a marijuana-related business. Similarly, a financial institution could be providing services to a non-financial customer that provides goods or services to a marijuana-related business (e.g., a commercial landlord that leases property to a marijuana-related business). In such circumstances where services are being provided indirectly, the financial institution may file SARs based on existing regulations and guidance without distinguishing between “Marijuana Limited” and “Marijuana Priority.” Whether the financial institution decides to provide indirect services to a marijuana-related business is a risk-based decision that depends on a number of factors specific to that institution and the relevant circumstances. In making this decision, the institution should consider the Cole Memo priorities, to the extent applicable.

file a SAR and note in the narrative the basis for the termination. Financial institutions should use the term "MARIJUANA TERMINATION" in the narrative section. To the extent the financial institution becomes aware that the marijuana-related business seeks to move to a second financial institution, FinCEN urges the first institution to use Section 314(b) voluntary information sharing (if it qualifies) to alert the second financial institution of potential illegal activity. See *Section 314(b) Fact Sheet* for more information.⁸

Red Flags to Distinguish Priority SARs

The following red flags indicate that a marijuana-related business may be engaged in activity that implicates one of the Cole Memo priorities or violates state law. These red flags indicate only possible signs of such activity, and also do not constitute an exhaustive list. It is thus important to view any red flag(s) in the context of other indicators and facts, such as the financial institution's knowledge about the underlying parties obtained through its customer due diligence. Further, the presence of any of these red flags in a given transaction or business arrangement may indicate a need for additional due diligence, which could include seeking information from other involved financial institutions under Section 314(b). These red flags are based primarily upon schemes and typologies described in SARs or identified by our law enforcement and regulatory partners, and may be updated in future guidance.

- A customer appears to be using a state-licensed marijuana-related business as a front or pretext to launder money derived from other criminal activity (i.e., not related to marijuana) or derived from marijuana-related activity not permitted under state law. Relevant indicia could include:
 - The business receives substantially more revenue than may reasonably be expected given the relevant limitations imposed by the state in which it operates.
 - The business receives substantially more revenue than its local competitors or than might be expected given the population demographics.
 - The business is depositing more cash than is commensurate with the amount of marijuana-related revenue it is reporting for federal and state tax purposes.
 - The business is unable to demonstrate that its revenue is derived exclusively from the sale of marijuana in compliance with state law, as opposed to revenue derived from (i) the sale of other illicit drugs, (ii) the sale of marijuana not in compliance with state law, or (iii) other illegal activity.
 - The business makes cash deposits or withdrawals over a short period of time that are excessive relative to local competitors or the expected activity of the business.

⁸ Information Sharing Between Financial Institutions; Section 314(b) Fact Sheet, available at: http://fincen.gov/statutes_regs/patriot/pdf/314bfactsheet.pdf.

- Deposits apparently structured to avoid Currency Transaction Report (“CTR”) requirements.
 - Rapid movement of funds, such as cash deposits followed by immediate cash withdrawals.
 - Deposits by third parties with no apparent connection to the account holder.
 - Excessive commingling of funds with the personal account of the business’s owner(s) or manager(s), or with accounts of seemingly unrelated businesses.
 - Individuals conducting transactions for the business appear to be acting on behalf of other, undisclosed parties of interest.
 - Financial statements provided by the business to the financial institution are inconsistent with actual account activity.
 - A surge in activity by third parties offering goods or services to marijuana-related businesses, such as equipment suppliers or shipping servicers.
- The business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law.
 - The business is unable to demonstrate the legitimate source of significant outside investments.
 - A customer seeks to conceal or disguise involvement in marijuana-related business activity. For example, the customer may be using a business with a non-descript name (e.g., a “consulting,” “holding,” or “management” company) that purports to engage in commercial activity unrelated to marijuana, but is depositing cash that smells like marijuana.
 - Review of publicly available sources and databases about the business, its owner(s), manager(s), or other related parties, reveal negative information, such as a criminal record, involvement in the illegal purchase or sale of drugs, violence, or other potential connections to illicit activity.
 - The business, its owner(s), manager(s), or other related parties are, or have been, subject to an enforcement action by the state or local authorities responsible for administering or enforcing marijuana-related laws or regulations.
 - A marijuana-related business engages in international or interstate activity, including by receiving cash deposits from locations outside the state in which the business operates, making or receiving frequent or large interstate transfers, or otherwise transacting with persons or entities located in different states or countries.

- The owner(s) or manager(s) of a marijuana-related business reside outside the state in which the business is located.
- A marijuana-related business is located on federal property or the marijuana sold by the business was grown on federal property.
- A marijuana-related business's proximity to a school is not compliant with state law.
- A marijuana-related business purporting to be a "non-profit" is engaged in commercial activity inconsistent with that classification, or is making excessive payments to its manager(s) or employee(s).

Currency Transaction Reports and Form 8300's

Financial institutions and other persons subject to FinCEN's regulations must report currency transactions in connection with marijuana-related businesses the same as they would in any other context, consistent with existing regulations and with the same thresholds that apply. For example, banks and money services businesses would need to file CTRs on the receipt or withdrawal by any person of more than \$10,000 in cash per day. Similarly, any person or entity engaged in a non-financial trade or business would need to report transactions in which they receive more than \$10,000 in cash and other monetary instruments for the purchase of goods or services on FinCEN Form 8300 (Report of Cash Payments Over \$10,000 Received in a Trade or Business). A business engaged in marijuana-related activity may not be treated as a non-listed business under 31 C.F.R. § 1020.315(e)(8), and therefore, is not eligible for consideration for an exemption with respect to a bank's CTR obligations under 31 C.F.R. § 1020.315(b)(6).

* * * * *

FinCEN's enforcement priorities in connection with this guidance will focus on matters of systemic or significant failures, and not isolated lapses in technical compliance. Financial institutions with questions about this guidance are encouraged to contact FinCEN's Resource Center at (800) 767-2825, where industry questions can be addressed and monitored for the purpose of providing any necessary additional guidance.

Exhibit H
FinCEN Form 8300

Report of Cash Payments Over \$10,000 Received in a Trade or Business

Department of the Treasury
Internal Revenue Service

▶ Use this form for transactions occurring after August 29, 2014. Do not use prior versions after this date.
▶ See instructions for definition of cash.
For Privacy Act and Paperwork Reduction Act Notice, see the last page.

1 Check appropriate box(es) if: a Amends prior report; b Suspicious transaction.

Part I Identity of Individual From Whom the Cash Was Received

2 If more than one individual is involved, check here and see instructions

3 Last name		4 First name		5 M.I.	6 Taxpayer identification number	
7 Address (number, street, and apt. or suite no.)				8 Date of birth (see instructions)		M M D D Y Y Y Y
9 City	10 State	11 ZIP code	12 Country (if not U.S.)		13 Occupation, profession, or business	
14 Identifying document (ID)	a Describe ID ▶ c Number ▶			b Issued by ▶		

Part II Person on Whose Behalf This Transaction Was Conducted

15 If this transaction was conducted on behalf of more than one person, check here and see instructions

16 Individual's last name or organization's name		17 First name		18 M.I.	19 Taxpayer identification number	
20 Doing business as (DBA) name (see instructions)				Employer identification number		
21 Address (number, street, and apt. or suite no.)				22 Occupation, profession, or business		
23 City	24 State	25 ZIP code	26 Country (if not U.S.)			
27 Alien identification (ID)	a Describe ID ▶ c Number ▶			b Issued by ▶		

Part III Description of Transaction and Method of Payment

28 Date cash received M M D D Y Y Y Y		29 Total cash received \$.00		30 If cash was received in more than one payment, check here <input type="checkbox"/>		31 Total price if different from item 29 \$.00	
32 Amount of cash received (in U.S. dollar equivalent) (must equal item 29) (see instructions):							
a U.S. currency	\$.00	(Amount in \$100 bills or higher \$.00)				
b Foreign currency	\$.00	(Country ▶)				
c Cashier's check(s)	\$.00	} Issuer's name(s) and serial number(s) of the monetary instrument(s) ▶ _____ _____				
d Money order(s)	\$.00					
e Bank draft(s)	\$.00					
f Traveler's check(s)	\$.00					
33 Type of transaction				34 Specific description of property or service shown in 33. Give serial or registration number, address, docket number, etc. ▶			
a <input type="checkbox"/> Personal property purchased	f <input type="checkbox"/> Debt obligations paid		_____ _____ _____				
b <input type="checkbox"/> Real property purchased	g <input type="checkbox"/> Exchange of cash						
c <input type="checkbox"/> Personal services provided	h <input type="checkbox"/> Escrow or trust funds						
d <input type="checkbox"/> Business services provided	i <input type="checkbox"/> Bail received by court clerks						
e <input type="checkbox"/> Intangible property purchased	j <input type="checkbox"/> Other (specify in item 34) ▶						

Part IV Business That Received Cash

35 Name of business that received cash				36 Employer identification number			
37 Address (number, street, and apt. or suite no.)				Social security number			
38 City	39 State	40 ZIP code	41 Nature of your business				

42 Under penalties of perjury, I declare that to the best of my knowledge the information I have furnished above is true, correct, and complete.

Signature _____ Authorized official Title _____

43 Date of signature	M M D D Y Y Y Y	44 Type or print name of contact person	45 Contact telephone number
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Multiple Parties

(Complete applicable parts below if box 2 or 15 on page 1 is checked.)

Part I Continued—Complete if box 2 on page 1 is checked

Form section for Part I containing two identical sets of fields: 3 Last name, 4 First name, 5 M.I., 6 Taxpayer identification number, 7 Address, 8 Date of birth, 9 City, 10 State, 11 ZIP code, 12 Country, 13 Occupation, 14 Identifying document (ID) with sub-fields a, b, and c.

Part II Continued—Complete if box 15 on page 1 is checked

Form section for Part II containing two identical sets of fields: 16 Individual's last name or organization's name, 17 First name, 18 M.I., 19 Taxpayer identification number, 20 Doing business as (DBA) name, 21 Address, 22 Occupation, 23 City, 24 State, 25 ZIP code, 26 Country, 27 Alien identification (ID) with sub-fields a, b, and c.

Comments - Please use the lines provided below to comment on or clarify any information you entered on any line in Parts I, II, III, and IV

Five horizontal lines provided for entering comments.

Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments

For the latest information about developments related to Form 8300 and its instructions, such as legislation enacted after they were published, go to www.irs.gov/form8300.

Important Reminders

- Section 60501 (26 United States Code (U.S.C.) 60501) and 31 U.S.C. 5331 require that certain information be reported to the IRS and the Financial Crimes Enforcement Network (FinCEN). This information must be reported on IRS/FinCEN Form 8300.
- Item 33, box I, is to be checked only by clerks of the court; box d is to be checked by bail bondsmen. See *Item 33* under *Part III*, later.
- The meaning of the word "currency" for purposes of 31 U.S.C. 5331 is the same as for the word "cash" (See *Cash* under *Definitions*, later).

General Instructions

Who must file. Each person engaged in a trade or business who, in the course of that trade or business, receives more than \$10,000 in cash in one transaction or in two or more related transactions, must file Form 8300. Any transactions conducted between a payer (or its agent) and the recipient in a 24-hour period are related transactions. Transactions are considered related even if they occur over a period of more than 24 hours if the recipient knows, or has reason to know, that each transaction is one of a series of connected transactions.

Keep a copy of each Form 8300 for 5 years from the date you file it.

Clerks of federal or state courts must file Form 8300 if more than \$10,000 in cash is received as bail for an individual(s) charged with certain criminal offenses. For these purposes, a clerk includes the clerk's office or any other office, department, division, branch, or unit of the court that is authorized to receive bail. If a person receives bail on behalf of a clerk, the clerk is treated as receiving the bail. See *Item 33* under *Part III*, later.

If multiple payments are made in cash to satisfy bail and the initial payment does not exceed \$10,000, the initial payment and subsequent payments must be aggregated and the information return must be filed by the 15th day after receipt of the payment that causes the aggregate amount to exceed \$10,000 in cash. In such cases, the reporting requirement can be satisfied by sending a single written statement with the

aggregate Form 8300 amounts listed relating to that payer. Payments made to satisfy separate bail requirements are not required to be aggregated. See Treasury Regulations section 1.60501-2.

Casinos must file Form 8300 for nongaming activities (restaurants, shops, etc.).

Voluntary use of Form 8300. Form 8300 may be filed voluntarily for any suspicious transaction (see *Definitions*, later) for use by FinCEN and the IRS, even if the total amount does not exceed \$10,000.

Exceptions. Cash is not required to be reported if it is received:

- By a financial institution required to file FinCEN Report 112, BSA Currency Transaction Report (BCTR);
- By a casino required to file (or exempt from filing) FinCEN Report 112, if the cash is received as part of its gaming business;
- By an agent who receives the cash from a principal, if the agent uses all of the cash within 15 days in a second transaction that is reportable on Form 8300 or on FinCEN Report 112, and discloses all the information necessary to complete Part II of Form 8300 or FinCEN Report 112 to the recipient of the cash in the second transaction;
- In a transaction occurring entirely outside the United States. See Publication 1544, Reporting Cash Payments of Over \$10,000 (Received in a Trade or Business), regarding transactions occurring in Puerto Rico and territories and possessions of the United States; or
- In a transaction that is not in the course of a person's trade or business.

When to file. File Form 8300 by the 15th day after the date the cash was received. If that date falls on a Saturday, Sunday, or legal holiday, file the form on the next business day.

Where to file. File the form with the Internal Revenue Service, Detroit Computing Center, P.O. Box 32621, Detroit, MI 48232.



You may be able to electronically file Form 8300 using FinCEN's Bank Secrecy Act (BSA) Electronic Filing (E-Filing) System as an alternative method to filling a paper Form 8300. To get more information, visit the BSA E-Filing System, at <http://bsaeffiling.fincen.treas.gov/main.html>.

Statement to be provided. You must give a written or electronic statement to each person named on a required Form 8300 on or before January 31 of the year following the calendar year in which the

cash is received. The statement must show the name, telephone number, and address of the information contact for the business, the aggregate amount of reportable cash received, and that the information was furnished to the IRS. Keep a copy of the statement for your records.

Multiple payments. If you receive more than one cash payment for a single transaction or for related transactions, you must report the multiple payments any time you receive a total amount that exceeds \$10,000 within any 12-month period. Submit the report within 15 days of the date you receive the payment that causes the total amount to exceed \$10,000. If more than one report is required within 15 days, you may file a combined report. File the combined report no later than the date the earliest report, if filed separately, would have to be filed.

Taxpayer identification number (TIN). You must furnish the correct TIN of the person or persons from whom you receive the cash and, if applicable, the person or persons on whose behalf the transaction is being conducted. You may be subject to penalties for an incorrect or missing TIN.

The TIN for an individual (including a sole proprietorship) is the individual's social security number (SSN). For certain resident aliens who are not eligible to get an SSN and nonresident aliens who are required to file tax returns, it is an IRS Individual Taxpayer Identification Number (ITIN). For other persons, including corporations, partnerships, and estates, it is the employer identification number (EIN).

If you have requested but are not able to get a TIN for one or more of the parties to a transaction within 15 days following the transaction, file the report and use the comments section on page 2 of the form to explain why the TIN is not included.

Exception. You are not required to provide the TIN of a person who is a nonresident alien individual or a foreign organization if that person or foreign organization:

- Does not have income effectively connected with the conduct of a U.S. trade or business;
- Does not have an office or place of business, or a fiscal or paying agent in the U.S.;
- Does not furnish a withholding certificate described in §1.1441-1(e)(2) or (3) or §1.1441-5(c)(2)(iv) or (3)(iii) to the extent required under §1.1441-1(e)(4)(vii); or
- Does not have to furnish a TIN on any return, statement, or other document as required by the income tax regulations under section 897 or 1445.

Penalties. You may be subject to penalties if you fail to file a correct and complete Form 8300 on time and you cannot show that the failure was due to reasonable cause. You may also be subject to penalties if you fail to furnish timely a correct and complete statement to each person named in a required report. A minimum penalty of \$25,000 may be imposed if the failure is due to an intentional or willful disregard of the cash reporting requirements.

Penalties may also be imposed for causing, or attempting to cause, a trade or business to fail to file a required report; for causing, or attempting to cause, a trade or business to file a required report containing a material omission or misstatement of fact; or for structuring, or attempting to structure, transactions to avoid the reporting requirements. These violations may also be subject to criminal prosecution which, upon conviction, may result in imprisonment of up to 5 years or fines of up to \$250,000 for individuals and \$500,000 for corporations or both.

Definitions

Cash. The term "cash" means the following.

- U.S. and foreign coin and currency received in any transaction; or
- A cashier's check, money order, bank draft, or traveler's check having a face amount of \$10,000 or less that is received in a designated reporting transaction (defined below), or that is received in any transaction in which the recipient knows that the instrument is being used in an attempt to avoid the reporting of the transaction under either section 60501 or 31 U.S.C. 5331.

Note. Cash does not include a check drawn on the payer's own account, such as a personal check, regardless of the amount.

Designated reporting transaction. A retail sale (or the receipt of funds by a broker or other intermediary in connection with a retail sale) of a consumer durable, a collectible, or a travel or entertainment activity.

Retail sale. Any sale (whether or not the sale is for resale or for any other purpose) made in the course of a trade or business if that trade or business principally consists of making sales to ultimate consumers.

Consumer durable. An item of tangible personal property of a type that, under ordinary usage, can reasonably be expected to remain useful for at least 1 year, and that has a sales price of more than \$10,000.

Collectible. Any work of art, rug, antique, metal, gem, stamp, coin, etc.

Travel or entertainment activity. An item of travel or entertainment that pertains to a single trip or event if the combined sales price of the item and all other items relating to the same trip or event that are sold in the same transaction (or related transactions) exceeds \$10,000.

Exceptions. A cashier's check, money order, bank draft, or traveler's check is not considered received in a designated reporting transaction if it constitutes the proceeds of a bank loan or if it is received as a payment on certain promissory notes, installment sales contracts, or down payment plans. See Publication 1544 for more information.

Person. An individual, corporation, partnership, trust, estate, association, or company.

Recipient. The person receiving the cash. Each branch or other unit of a person's trade or business is considered a separate recipient unless the branch receiving the cash (or a central office linking the branches), knows or has reason to know the identity of payers making cash payments to other branches.

Transaction. Includes the purchase of property or services, the payment of debt, the exchange of cash for a negotiable instrument, and the receipt of cash to be held in escrow or trust. A single transaction may not be broken into multiple transactions to avoid reporting.

Suspicious transaction. A suspicious transaction is a transaction in which it appears that a person is attempting to cause Form 8300 not to be filed, or to file a false or incomplete form.

Specific Instructions

You must complete all parts. However, you may skip Part II if the individual named in Part I is conducting the transaction on his or her behalf only. For voluntary reporting of suspicious transactions, see *Item 1*, next.

Item 1. If you are amending a report, check box 1a. Complete the form in its entirety (Parts I-IV) and include the amended information. Do not attach a copy of the original report.

To voluntarily report a suspicious transaction (see *Suspicious transaction* above), check box 1b. You may also telephone your local IRS Criminal Investigation Division or call the FinCEN Financial Institution Hotline at 1-866-556-3974.

Part I

Item 2. If two or more individuals conducted the transaction you are reporting, check the box and complete Part I on page 1 for any one of the individuals. Provide the same

information for the other individual(s) by completing Part I on page 2 of the form. If more than three individuals are involved, provide the same information in the comments section on page 2 of the form.

Item 6. Enter the taxpayer identification number (TIN) of the individual named. See *Taxpayer identification number (TIN)*, earlier, for more information.

Item 8. Enter eight numerals for the date of birth of the individual named. For example, if the individual's birth date is July 6, 1960, enter "07" "06" "1960."

Item 13. Fully describe the nature of the occupation, profession, or business (for example, "plumber," "attorney," or "automobile dealer"). Do not use general or nondescriptive terms such as "businessman" or "self-employed."

Item 14. You must verify the name and address of the named individual(s). Verification must be made by examination of a document normally accepted as a means of identification when cashing checks (for example, a driver's license, passport, alien registration card, or other official document). In item 14a, enter the type of document examined. In item 14b, identify the issuer of the document. In item 14c, enter the document's number. For example, if the individual has a Utah driver's license, enter "driver's license" in item 14a, "Utah" in item 14b, and the number appearing on the license in item 14c.

Note. You must complete all three items (a, b, and c) in this line to make sure that Form 8300 will be processed correctly.

Part II

Item 15. If the transaction is being conducted on behalf of more than one person (including husband and wife or parent and child), check the box and complete Part II for any one of the persons. Provide the same information for the other person(s) by completing Part II on page 2. If more than three persons are involved, provide the same information in the comments section on page 2 of the form.

Items 16 through 19. If the person on whose behalf the transaction is being conducted is an individual, complete items 16, 17, and 18. Enter his or her TIN in item 19. If the individual is a sole proprietor and has an employer identification number (EIN), you must enter both the SSN and EIN in item 19. If the person is an organization, put its name as shown on required tax filings in item 16 and its EIN in item 19.

Item 20. If a sole proprietor or organization named in items 16 through 18 is doing business under a name other than that entered in item 16 (for example, a "trade" or "doing business as (DBA)" name), enter it here.

Item 27. If the person is not required to furnish a TIN, complete this item. See *Taxpayer identification number (TIN)*, earlier. Enter a description of the type of official document issued to that person in item 27a (for example, a "passport"), the country that issued the document in item 27b, and the document's number in item 27c.

Note. You must complete all three items (a, b, and c) in this line to make sure that Form 8300 will be processed correctly.

Part III

Item 28. Enter the date you received the cash. If you received the cash in more than one payment, enter the date you received the payment that caused the combined amount to exceed \$10,000. See *Multiple payments*, earlier, for more information.

Item 30. Check this box if the amount shown in item 29 was received in more than one payment (for example, as installment payments or payments on related transactions).

Item 31. Enter the total price of the property, services, amount of cash exchanged, etc. (for example, the total cost of a vehicle purchased, cost of catering service, exchange of currency) if different from the amount shown in item 29.

Item 32. Enter the dollar amount of each form of cash received. Show foreign currency amounts in U.S. dollar equivalent at a fair market rate of exchange available to the public. The sum of the amounts must equal item 29. For cashier's check, money order, bank draft, or traveler's check, provide the name of the issuer and the serial number of each instrument. Names of all issuers and all serial numbers involved must be provided. If necessary, provide this information in the comments section on page 2 of the form.

Item 33. Check the appropriate box(es) that describe the transaction. If the transaction is not specified in boxes a–i, check box j and briefly describe the transaction (for example, "car lease," "boat lease," "house lease," or "aircraft rental"). If the transaction relates to the receipt of bail by a court clerk, check box i, "Bail received by court clerks." This box is only for use by court clerks. If the transaction relates to cash received by a bail bondsman, check box d, "Business services provided."

Part IV

Item 36. If you are a sole proprietorship, you must enter your SSN. If your business also has an EIN, you must provide the EIN as well. All other business entities must enter an EIN.

Item 41. Fully describe the nature of your business, for example, "attorney" or "jewelry dealer." Do not use general or nondescriptive terms such as "business" or "store."

Item 42. This form must be signed by an individual who has been authorized to do so for the business that received the cash.

Comments

Use this section to comment on or clarify anything you may have entered on any line in Parts I, II, III, and IV. For example, if you checked box b (Suspicious transaction) in line 1 above Part I, you may want to explain why you think that the cash transaction you are reporting on Form 8300 may be suspicious.

Privacy Act and Paperwork Reduction Act Notice

Except as otherwise noted, the information solicited on this form is required by the IRS and FinCEN in order to carry out the laws and regulations of the United States. Trades or businesses and clerks of federal and state criminal courts are required to provide the information to the IRS and FinCEN under section 6050I and 31 U.S.C. 5331, respectively. Section 6109 and 31 U.S.C. 5331 require that you provide your identification number. The principal purpose for collecting the information on this form is to maintain reports or records which have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counter-intelligence activities, by directing the federal government's attention to unusual or questionable transactions.

You are not required to provide information as to whether the reported transaction is deemed suspicious. Failure to provide all other requested information, or providing fraudulent information, may result in criminal prosecution and other penalties under 26 U.S.C. and 31 U.S.C.

Generally, tax returns and return information are confidential, as stated in section 6103. However, section 6103

allows or requires the IRS to disclose or give the information requested on this form to others as described in the Internal Revenue Code. For example, we may disclose your tax information to the Department of Justice, to enforce the tax laws, both civil and criminal, and to cities, states, the District of Columbia, and U.S. commonwealths and possessions, to carry out their tax laws. We may disclose this information to other persons as necessary to obtain information which we cannot get in any other way. We may disclose this information to federal, state, and local child support agencies; and to other federal agencies for the purposes of determining entitlement for benefits or the eligibility for and the repayment of loans. We may also provide the records to appropriate state, local, and foreign criminal law enforcement and regulatory personnel in the performance of their official duties. We may also disclose this information to other countries under a tax treaty, or to federal and state agencies to enforce federal nontax criminal laws and to combat terrorism. In addition, FinCEN may provide the information to those officials if they are conducting intelligence or counter-intelligence activities to protect against international terrorism.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any law under 26 U.S.C. or 31 U.S.C.

The time needed to complete this form will vary depending on individual circumstances. The estimated average time is 21 minutes. If you have comments concerning the accuracy of this time estimate or suggestions for making this form simpler, we would be happy to hear from you. You can send us comments from www.irs.gov/formspubs. Click on *More Information* and then click on *Give us feedback*. Or you can send your comments to Internal Revenue Service, Tax Forms and Publications Division, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send Form 8300 to this address. Instead, see *Where to file*, earlier.

Exhibit I

Letter from Clifford J. White III, Director, Executive Office for United States Trustees,
U.S. Department of Justice, dated April 26, 2017



U.S. Department of Justice

Executive Office for United States Trustees

Office of the Director

Washington, DC 20530

April 26, 2017

Dear Chapter 7 and Chapter 13 Trustees:

Your role in administering bankruptcy estates is indispensable to the effective and lawful functioning of the entire bankruptcy system. I know that in the past few years, the United States Trustees have reached out to you to ensure that we are informed about all cases assigned to you that involve marijuana assets, which are proscribed under federal law and may not be administered under the Bankruptcy Code.¹ This directive pertains even in cases in which such assets are not illegal under state law.

In recent months, we have noticed an increase in the number of bankruptcy cases involving marijuana assets. This is to reiterate and emphasize the importance of prompt notification to your United States Trustee whenever you uncover a marijuana asset in a case assigned to you. Our goal is to ensure that trustees are not placed in the untenable position of violating federal law by liquidating, receiving proceeds from, or in any way administering marijuana assets. In some cases, trustees move to dismiss or object to a chapter 13 plan confirmation on grounds unrelated to the controlled substance. You should continue to file any motions or objections you deem appropriate. It is the policy of the United States Trustee Program that United States Trustees shall move to dismiss or object in all cases involving marijuana assets on grounds that such assets may not be administered under the Bankruptcy Code even if trustees or other parties object on the same or different grounds.

I appreciate your continued and heightened attention to our directive for prompt notification of all cases involving marijuana assets. I am grateful for all the work you do every day to uphold the integrity of the bankruptcy system and to satisfy the highest fiduciary standards. Your accomplishments, while not always heralded, are much appreciated.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Cliff White", is written over the typed name.

Clifford J. White III
Director

cc: Deputy Director/General Counsel
United States Trustees
Assistant United States Trustees

¹ Cases involving marijuana assets include cases in which the marijuana assets would leave the estate through exemption or abandonment.

Exhibit J

June 7, 2017 Underwriting Communication



First American Title

UNDERWRITING COMMUNICATION

Issued by

First American Title Insurance Company

NJ-2017-008-Advisory

NA-2013-010-Advisory

Title: Marijuana Decriminalization and Commercial Marijuana Operations

Issued by: New Jersey Underwriting Department**

Date: June 7, 2017

Purpose: To advise you of possible underwriting issues pertaining to providing title insurance on or serving as the escrow / closing agent with regard to properties that are or will be used for the production, sale, or distribution of marijuana.

Background: Recently, some states have passed laws which remove many of the traditional criminal penalties associated with marijuana, and which replace those criminal penalties with state licensing and regulation. **See**, for example, New Jersey's own **New Jersey Compassionate Use Medical Marijuana Act**, NJSA 24:6I-1 **et seq.** The decriminalization of marijuana in these states has created a market for the production, sale, and distribution of marijuana which was previously illegal under state law. While certain states' laws may now permit these activities in limited circumstances, it is important to remember that these activities remain illegal under federal law, regardless of any given state's law. The landscape with regard to marijuana is changing rapidly, and this creates complex constitutional, legal, and regulatory issues.

Advisory: If you receive a request to provide title insurance on or to serve as the escrow/closing agent for a transaction in which you have actual knowledge that the property is currently used or will be used for the production, sale, or distribution of marijuana, please contact your local First American Underwriter for guidance.

Contact: If you have any questions, please feel free to contact your local underwriter:

Laurence J. Usignol, Esquire	(609) 528-6872	lusignol@firstam.com
Jack E. Milkis, Esquire	(609) 528-6865	jmilkis@firstam.com
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**Re-publication of Underwriting Communication NA-2013-010-Advisory authored by the First American Corporate Underwriting Department.

NOTE: This Underwriting Communication is intended for use by title issuing offices, title insurance agents, and approved attorneys of First American Title Insurance Company and any reliance by any other person or entity is unauthorized.

NJ-2017-008-Advisory

NA-2013-010-Advisory

Title: Marijuana Decriminalization and Commercial Marijuana Operations

Date: June 7, 2017

While the scope of agency of First American Title Insurance Company agents is limited to the functions of underwriting and the issuance of title insurance policies on First American's behalf and does not include closing or escrow services,

First American sometimes provides information and recommendations with regard to its agent's ancillary closing or escrow business as a courtesy to them. Moreover, some communications, depending on whether noncompliance could impact on liability under First American's title insurance policies or closing protection letters, should be considered directives. This Communication is being provided to First American agents with those considerations in mind.

This Underwriting Communication should become a permanent part of your records to assure compliance with its requirements.
