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Marijuana: Medical and Retail— An Abbreviated View of Selected Legal Issues

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Summary

The federal Controlled Substances Act (CSA) outlaws the possession, cultivation, or distribution of marijuana except for authorized research. Twenty states have regulatory schemes that allow possession, cultivation, or distribution of marijuana for medicinal purposes. Two have revenue regimes that allow possession, cultivation, or sale generally. The U.S. Constitution's Supremacy Clause preempts any state law that conflicts with federal law. Although there is some division, the majority of state courts have concluded that the federal-state marijuana law conflict does not require preemption of state medical marijuana laws. The legal consequences of a CSA violation, however, remain in place. Nevertheless, current federal criminal enforcement guidelines counsel confining investigations and prosecutions to the most egregious affront to federal interests.

Legal and ethical considerations limit the extent to which an attorney may advise and assist a client intent on participating in his or her state's medical or recreational marijuana system. Bar associations differ on the precise boundaries of those limitations.

State medical marijuana laws grant registered patients, their doctors, and providers immunity from the consequences of state law. The Washington and Colorado retail marijuana regimes authorize the commercial exploitation of the marijuana market in small taxable doses.

The present and potential consequences of a CSA violation can be substantial. Cultivation or sale of marijuana on all but the smallest scale invites a five-year mandatory minimum prison term. Revenues and the property used to generate them may merely be awaiting federal collection under federal forfeiture laws. Federal tax laws deny marijuana entrepreneurs the benefits available to other businesses. Banks may afford marijuana merchants financial services only if the bank files a suspicious activity report (SAR) for every marijuana-related transaction and only if it conducts a level of due diligence into its customers' activities sufficient to unearth any affront to federal interests.

Marijuana users may not possess a firearm or ammunition. They may not hold federal security clearances. They may not operate commercial trucks, buses, trains, or planes. Federal contractors and private employers may be free to refuse to hire them and to fire them. If fired, they may be ineligible for unemployment compensation. They may be denied federally assisted housing.

At the heart of the federal-state conflict lies a disagreement over dangers and benefits inherent in marijuana use. The CSA authorizes research on controlled substances, including those in Schedule I such as marijuana, that may speak to those questions. Members have introduced a number of bills in the 113th Congress that address the conflict. Only the proposals found in the farm bill (P.L. 113-79 (H.R. 2642)) have been enacted thus far.

This report is available in an abridged form, without footnotes or citations to authority, as CRS Report R43435, *Marijuana: Medical and Retail—Selected Legal Issues*, by Todd Garvey and Charles Doyle. Portions of this report have been borrowed from CRS Report R43034, *State Legalization of Recreational Marijuana: Selected Legal Issues*, by Todd Garvey and Brian T. Yeh.

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Introduction

Federal law classifies marijuana as a Schedule I Controlled Substance. As a result, it is a federal crime to grow, sell or merely possess the drug. In addition to facing the prospect of a federal criminal prosecution, those who violate the federal Controlled Substances Act (CSA) may suffer a number of additional adverse consequences under federal law. For example, federal authorities may confiscate any property used to grow marijuana or facilitate its sale or use; marijuana users may lose their jobs, their homes, or their right to possess a firearm or ammunition; and sellers of marijuana may lose the tax benefits and banking services that other merchants enjoy, and ultimately their businesses. Nevertheless, without federal statutory sanction, 20 states have established medical marijuana regulatory regimes. Two have gone further and “legalized” marijuana under state recreational marijuana laws. State officials lack the constitutional authority necessary to trump conflicting federal law. Federal officials, however, lack the unlimited resources necessary to trump the impact of conflicting state law. The following is an analysis of some of the legal issues the situation has generated and some of the proposals to resolve them.

Controlled Substance Act. Congress enacted the CSA as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The purpose of the CSA is to regulate and facilitate the manufacture, distribution, and use of controlled substances for legitimate medical, scientific, research, and industrial purposes, and to prevent these substances from being diverted for illegal purposes. The CSA places various plants, drugs, and chemicals (such as narcotics, stimulants, depressants, hallucinogens, and anabolic steroids) into one of five schedules based on the substance’s medical use, potential for abuse, and safety or dependence liability. Schedule I substances are deemed to have no currently accepted medical use in treatment and can be used only in very limited circumstances, whereas substances classified in Schedules II, III, IV, and V have recognized medical uses and may be manufactured, distributed, and used in accordance with the CSA. Because controlled substances classified as Schedule I drugs have “a high potential for abuse” with “no currently accepted medical use in treatment in the United States” and lack “accepted safety for use of the drug [] under medical supervisions,” they may not be dispensed under a prescription, and such substances may be used only for bona fide, federal government-approved research studies. Under the CSA, only doctors licensed by the Drug Enforcement Administration (DEA) are allowed to prescribe controlled substances listed in Schedules II-V to patients. Federal regulations stipulate that a lawful prescription for a controlled substance may be issued only “for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”

The CSA establishes an administrative mechanism for substances to be controlled (added to a schedule); decontrolled (removed from the scheduling framework altogether); and rescheduled or transferred from one schedule to another. Federal rulemaking proceedings to add, delete, or change the schedule of a drug or substance may be initiated by the DEA, the U.S. Department of Health and Human Services (HHS), or by petition by any interested person. Petitions for rescheduling marijuana have been largely unsuccessful. Congress may also change the scheduling status of a drug or substance through legislation.

Federal civil and criminal penalties are available for anyone who manufactures, distributes, imports, or possesses controlled substances in violation of the CSA (both “regulatory” offenses as well as illicit drug trafficking and possession). When Congress enacted the CSA in 1970, marijuana was classified as a Schedule I drug. Today, marijuana is still categorized as a Schedule I controlled substance, and is therefore subject to the most severe restrictions contained within the

CSA. Pursuant to the CSA, the unauthorized cultivation, distribution, or possession of marijuana is a federal crime. Although various factors contribute to the ultimate sentence received, the mere possession of marijuana generally constitutes a misdemeanor subject to up to one year imprisonment and a minimum fine of \$1,000. On the other hand, the cultivation or distribution of marijuana, or the possession of marijuana with the intent to distribute, is subject to more severe penalties, ranging from imprisonment for five years to imprisonment for life.

Either in addition to, or in lieu of, bringing criminal prosecutions, the Department of Justice (DOJ) may choose to rely more heavily on the civil forfeiture provisions of the CSA in order to disrupt the operation of marijuana dispensaries and production facilities. Forfeiture is a penalty associated with a particular crime in which property is confiscated or otherwise divested from the owner and forfeited to the government, in accordance with constitutionally required due process procedures. Property forfeiture is used both to enforce criminal laws and to deter crime. Forfeitures are classified as civil or criminal, depending on the nature of the judicial procedure which ends in confiscation. Civil forfeiture is ordinarily the product of a civil, *in rem* (against the property) proceeding in which the property is treated as the offender. No criminal charges are necessary against the owner, landlord, or mortgage holder because the guilt or innocence of the property owner, landlord, mortgage holder, or anyone else with a secured interest in the property is irrelevant; it is enough that the property was involved in, or otherwise connected to, an illegal activity (in which forfeiture is authorized). Criminal forfeiture proceedings, on the other hand, are *in personam* (against the person) actions, and confiscation is possible only upon the conviction of the owner of the property and only to the extent of the defendant's interest in the property. Property that is subject to forfeiture includes both the direct and indirect proceeds of illegal activities, as well as any property used, or intended to be used, to facilitate that crime.

Section 511 of the CSA (21 U.S.C. §881) makes a wide array of property associated with violations of the CSA subject to seizure by the Attorney General and forfeiture to the United States. Property subject to the CSA's civil forfeiture provision includes any controlled substance that has been manufactured, distributed, dispensed, acquired, or possessed in violation of federal law, as well as any equipment, firearm, money, mode of transportation, or real property *used or intended to be used to facilitate a violation of the CSA*. In order to seize the covered property, the government need show only that the property is subject to forfeiture by a preponderance of the evidence. Once forfeited, the Attorney General may destroy the controlled substances seized, and sell the other property at public auction. After expenses of the forfeiture proceeding are recouped, excess funds are forwarded to the DOJ Asset Forfeiture Fund.

Developments in the States. Most of the states have legislation modeled after the federal CSA. Over the years, some have reduced possession of small amounts of marijuana to a civil offense under state law. Several have also created a state law exception for medical marijuana. Colorado and Washington have enacted legislation authorizing the growth, sale, and possession of marijuana under state law.

State medical marijuana laws are predicated upon a doctor's recommendation rather than a prescription, and the medicine is dispensed other than through a pharmacy. In addition, the laws afford registered patients, caregivers, cultivators, and distributors immunity from the consequences of state criminal laws. Physicians may recommend medical marijuana only for patients suffering from one or more statutorily defined "debilitating," or "qualifying" medical conditions. The list usually includes a condition such as "severe pain" or "chronic pain" or "severe and chronic pain" that is easy to claim, difficult to diagnose, and grounds for potential abuse. Some states seek to limit the scope of the term by statute or by regulation. In many

jurisdictions, a qualified patient must be a resident of the jurisdiction. Most states and the District of Columbia restrict the amount of marijuana a patient may possess for medical purposes. The limit is usually an amount less than three ounces. Medical marijuana statutes ordinarily do not allow patients to use marijuana in public. Caregivers must register and have been designated by one or more registered medical marijuana patients. Medical marijuana laws afford caregivers the same immunity and impose the same limitations upon them as apply to patients. Some state medical marijuana laws contemplate cultivation exclusively by the patient or his or her caregiver. Most, however, establish a regulatory scheme for dispensaries.

Two states, Washington and Colorado, have established retail marijuana regimes. Both regulate the distribution of marijuana without a necessary medical nexus, but raise many of the same federal-state conflict issues found in the medical marijuana statutes. Washington Initiative 502 amends state law to provide that the possession of small amounts of marijuana “is not a violation of ... Washington law.” Under the Initiative, individuals over the age of 21 may possess up to one ounce of dried marijuana, 16 ounces of marijuana infused product in solid form, or 72 ounces of marijuana infused product in liquid form. However, marijuana must be used in private. In addition to legalizing possession, the Initiative provides that the “possession, delivery, distribution, and sale” by a validly licensed producer, processor, or retailer, in accordance with the newly established regulatory scheme administered by the state Liquor Control Board (LCB), “shall not be a criminal or civil offense under Washington state law.” The Initiative establishes a three-tiered production, processing, and retail licensing system that permits the state to retain regulatory control over the commercial life cycle of marijuana. Qualified individuals must obtain a producer’s license to grow or cultivate marijuana, a processor’s license to process, package, and label the drug, or a retail license to sell marijuana to the general public.

Washington will impose an excise tax of 25% of the selling price on each marijuana sale within the established distribution system: the sale of marijuana from producer to processor, from processor to retailer, and from retailer to consumer. The Initiative specifically provides that operation of a motor vehicle while under the influence of marijuana remains a crime. As of the date of this report, recreational marijuana retail stores have yet to open in Washington under the Initiative, although the LCB has received well over 3,000 applications to grow, process, or sell marijuana.

Unlike the relatively specific Washington Initiative 502, Colorado Amendment 64 provides only a general framework for the legalization, regulation, and taxation of marijuana in Colorado—leaving regulatory implementation to the Colorado Department of Revenue. In November 2012, Colorado voters approved an amendment to the Colorado Constitution to ensure that it “shall not be an offense under Colorado law or the law of any locality within Colorado” for an individual 21 years of age or older to possess, use, display, purchase, consume, or transport one ounce of marijuana; or possess, grow, process, or transport up to six marijuana plants. Unlike Initiative 502, which permits only state-licensed facilities to grow marijuana, Amendment 64 allows any individual over the age of 21 to grow small amounts of marijuana (up to six plants) for personal use. Marijuana may not, however, be consumed “openly and publicly or in a manner that endangers others.”

In addition, the amendment also provides that it shall not be unlawful for a marijuana-related facility to purchase, manufacture, cultivate, process, transport, or sell larger quantities of marijuana so long as the facility obtains a current and valid state-issued license. However, the amendment expressly permits local governments within Colorado to regulate or prohibit the operation of such facilities. By comparison, Washington’s Initiative 502 does not expressly allow

Washington cities to ban marijuana stores from opening within their borders, and there is uncertainty about the degree to which such local prohibitions or moratoriums on the operation of recreational marijuana businesses may be enforced.

Amendment 64 appears to envision a three-tier distribution and regulatory system, similar to that established in Washington, involving the licensing of marijuana cultivation facilities, marijuana product manufacturing facilities, and retail marijuana stores. On September 9, 2013, the Colorado Department of Revenue and State Licensing Authority adopted regulations to implement licensing qualifications and procedures for retail marijuana facilities. The regulations establish procedures for the issuance, renewal, suspension, and revocation of licenses; provide a schedule of licensing and renewal fees; and specify requirements for licensees to follow regarding physical security, video surveillance, labeling, health and safety precautions, and product advertising. On November 5, 2013, Colorado voters approved a 25% tax on retail marijuana transactions (a 15% excise tax that would raise revenues to be used for public school capital construction, and an additional 10% sales tax that would generate revenues to fund the enforcement of the retail marijuana regulations). On December 23, 2013, the Colorado Marijuana Enforcement Division issued its first recreational marijuana licenses to 348 businesses (136 retail stores, 31 product companies, 178 growing facilities, and 3 testing laboratories). While these businesses have been granted state approval to produce and sell marijuana, they may also have to gain the licensing approval from local governments prior to their operation. On January 1, 2014, 40 licensed retail marijuana stores opened their doors to sell marijuana to anyone 21 years of age or over.

Justice Department Memoranda. The Department of Justice is not required, and realistically lacks the resources, to prosecute every single violation of the CSA. Indeed, pursuant to the doctrine of “prosecutorial discretion,” federal law enforcement officials have “broad discretion” as to when, whom, and whether to prosecute for violations of the CSA. Courts have recognized that the “decision to prosecute is particularly ill-suited to judicial review,” as it involves the consideration of factors, such as the strength of evidence, deterrence value, and existing enforcement priorities, “not readily susceptible to the kind of analysis the courts are competent to undertake.” Through the exercise of prosecutorial discretion, DOJ is able to develop a policy outlining what marijuana-related activities will receive the most attention from federal authorities. Indeed, DOJ has issued four memoranda since 2009 that explain the Obama Administration’s position regarding state-authorized marijuana activities, as described in the following sections.

In 2009, Deputy Attorney General David W. Ogden provided guidance to federal prosecutors in states that have authorized the use of medical marijuana. Citing a desire to make “efficient and rational use of its limited investigative and prosecutorial resources,” the memorandum stated that while the “prosecution of significant traffickers of illegal drugs, including marijuana ... continues to be a core priority,” federal prosecutors “should not focus federal resources [] on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.” The memorandum made clear, however, that “this guidance [does not] preclude investigation or prosecution, even where there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests.” Nevertheless, the Ogden Memorandum was widely considered an assurance that DOJ would not prosecute any marijuana cultivation, distribution, or possession, as long as those activities complied with state law.

At about the same time, it became apparent the state medical marijuana programs had consequences that were perhaps unintended. In some states, the affliction most easily claimed and most difficult to diagnose—chronic pain—accounted for 90% of all physicians’

recommendations. It was said that Los Angeles alone had somewhere between 500 and 1000 medical marijuana dispensaries. No one knew how many for sure, but all agreed there were more dispensaries than there were Starbucks coffee shops. Rather than the old and infirm, “[r]emarkably the age distribution of medical marijuana users seem[ed] to mimic that of recreational users in its concentration of young persons.” “After Colorado legalized medical marijuana, the state went from the healthiest in the nation to one with thousands of mostly young adults in need of medical treatment.”

DOJ reiterated and clarified its position in a 2011 memorandum, by Deputy Attorney General James M. Cole, drawing a clear distinction between the potential prosecutions of individual patients who require marijuana in the course of medical treatment and “commercial” dispensaries. The surge in enforcement activity proximate to the release of the 2011 Cole Memorandum caught unawares many of those who considered the Ogden Memorandum a green light for marijuana entrepreneurship.

The Obama Administration’s official response to the Colorado and Washington initiatives was a second Cole Memorandum intended to guide the “exercise of investigative and prosecutorial discretion” for civil and criminal enforcement of the federal Controlled Substances Act within all states. The memorandum expresses DOJ’s position that, although marijuana is a dangerous drug that remains illegal under federal law, the federal government will not pursue legal challenges against jurisdictions that authorize marijuana in some fashion, assuming those state and local governments maintain strict regulatory and enforcement controls on marijuana cultivation, distribution, sale, and possession that limit the risks to “public safety, public health, and other law enforcement interests.” The memorandum instructs federal prosecutors to prioritize their “limited investigative and prosecutorial resources to address the most significant [marijuana-related] threats” and identified the following eight activities as those that the federal government wants most to prevent: (1) distributing marijuana to children; (2) revenue from the sale of marijuana going to criminal enterprises, gangs, and cartels; (3) diverting marijuana from states that have legalized its possession to other states that prohibit it; (4) using state-authorized marijuana activity as a pretext for the trafficking of other illegal drugs; (5) using firearms or violent behavior in the cultivation and distribution of marijuana; (6) exacerbating adverse public health and safety consequences due to marijuana use, including driving while under the influence of marijuana; (7) growing marijuana on the nation’s public lands; and (8) possessing or using marijuana on federal property. The memorandum advises U.S. Attorneys and federal law enforcement to devote their resources and efforts toward any individual or organization involved in any of these activities, regardless of state law. Furthermore, the memorandum recommends that jurisdictions that have legalized some form of marijuana activity “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.” However, the memorandum cautions that, to the extent that state enforcement efforts fail to sufficiently protect against the eight harms listed above, the federal government retains the right to challenge those states’ marijuana laws.

A third Cole Memorandum in 2014 recited the eight priority points listed in the 2013 memorandum and explained that the same considerations should guide the allocation of investigation and prosecution resources to marijuana-related offenses involving financial transactions—money laundering, money transfers, and Bank Secrecy Act transgressions, discussed later in this report.

Preemption

To what extent does the CSA trump or preempt state medical and recreational marijuana laws? The Supremacy Clause of the U.S. Constitution states that “[t]he Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made ... under the Authority of the United States, shall be the supreme Law of the Land.” The Supremacy Clause, therefore, “elevates” the U.S. Constitution, federal statutes, federal regulations, and treaties above the laws of the states. As a result, where federal and state law are in conflict, the state law is generally preempted, leaving it void and without effect. Preemption is a matter of Congress’s choice when Congress operates within its constitutionally enumerated powers. When Congress prefers the co-existence of state and federal law, state law must give way only when it conflicts with federal law in either of two ways: (1) if it is “physically impossible” to comply with both the state and federal law (“impossibility preemption”); or (2) if the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (“obstacle preemption”). What constitutes an obstacle for preemption purposes is a matter “to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.” When Congress acts within an area traditionally within the purview of the states, it will be assumed not to have intended to give its words preemptive force unless a contrary purpose is manifestly clear.

The Controlled Substances Act contains an explicit statement of the extent of Congress’s preemptive intent. Section 903 provides that “No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.”

The Colorado case, *People v. Crouse*, arose when a defendant, acquitted of cultivation charges on the basis of immunity under the state medical marijuana law, petitioned the trial court to order police to return of the marijuana plants they had seized in connection with his prosecution. The state questioned whether the CSA precluded such an action. The Court of Appeals of Colorado determined that a state marijuana law is only in “positive conflict” with the CSA when it is “physically impossible” to simultaneously comply with the state and federal law. It held that in order to preempt the CSA Section 903 “demands more than that the state law ‘stands as an obstacle to the accomplishment and execution’ of the federal law.” Thus, the language of the CSA “cannot be used to preempt a state law under the obstacle preemption doctrine.” The decision in *Crouse* adopted the reasoning of *County of San Diego v. San Diego NORML*, a California state court decision that also determined that obstacle preemption should not be applied in determining whether a state marijuana law is preempted by the CSA. Under this line of reasoning, a state marijuana law is only in “positive conflict” with the CSA when it is “physically impossible” to simultaneously comply with the state and federal law. In both instances, however, the court supplied an alternative, obstacle preemption explanation. In *Crouse*, the court noted Section 885(d) of the CSA “carves out a specific exemption for distribution of controlled substances by law enforcement officers.” Thus, if the officers returned (“distributed”) the marijuana to Crouse they would not be obstructing the CSA but acting in a manner which it authorized. In *San Diego NORML*, the California law required local governments to issue medical marijuana cards to qualified applicants. In the eyes of the California appellate court, the medical

marijuana statute posed no obstacle to the CSA, because “[t]he purpose of the CSA is to combat recreational drug use, not to regulate a state’s medical practices.”

The Michigan case, *Beek v. City of Wyoming*, involved a Wyoming City property owner and medical marijuana registrant who sought a declarative judgment against a city ordinance which proscribed the use of his property in a manner contrary to federal law including the CSA. The Michigan Supreme Court held that the CSA did not preempt the Michigan Medical Marijuana Act (MMMA). As understood by the court, the MMMA escaped impossibility preemption because it was permissive and therefore did not command the performance of an act prohibited by federal law: “impossibility results when state law requires what federal law forbids, or vice versa.” The MMMA escaped obstacle preemption because it merely conveyed immunity from the consequences of state law: “the MMMA’s limited state-law immunity for [medical marijuana] use does not frustrate the CSA’s operation nor refuse its provisions their nature effect, such that its purpose cannot otherwise be accomplished.... [T]his immunity does not purport to alter the CSA’s federal criminalization of marijuana, or to interfere with or undermine federal enforcement of that prohibition.”

The Oregon Supreme Court understood obstacle preemption a little differently in *Emerald Steel*. State regulators had charged Emerald Steel with disability discrimination for firing an employee for medical marijuana use. The Oregon court concluded, based on its interpretation of U.S. Supreme Court precedent, that “[a]ffirmatively authorizing a use that federal law prohibits stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act.” Thus, “[t]o the extent that [the Oregon statute] affirmatively authorizes the use of medical marijuana, federal law preempts that subsection leaving it without effect.” The continued viability of *Emerald Steel* may be open to question. While the Oregon Supreme Court has not overturned its earlier decision, it has observed in *Willis* that *Emerald Steel*’s “affirmative authorization” obstacle preemption test may have been an overgeneralization: “*Emerald Steel* should not be construed as announcing a stand-alone rule that any state law that can be viewed as ‘affirmatively authorizing’ what federal law prohibits is preempted. Rather it reflects this court’s attempt to apply the federal rule and the logic of the most relevant federal cases to the particular preemption problem that was before it. And particularly where, as here, the issue of whether the statute contains an affirmative authorization is not straightforward, the analysis in *Emerald Steel* cannot operate as a simple stand-in for the more general federal rule.”

Other Constitutional Considerations

Preemption is only an issue when Congress acts within its legislative sphere. Colorable constitutional issues involving the CSA and state medical or recreational marijuana statutes have arisen on a number of occasions. The Supreme Court resolved one of them when it found that Congress’s constitutional authority to regulate interstate and foreign commerce enabled it to craft the CSA so as to categorically outlaw the cultivation and possession of marijuana.

Congress’s Commerce Clause authority, however, does not include the power to compel a state legislature to act at its bidding or a state official to enforce its will. From time to time, medical marijuana litigants have invoked this limitation in an effort to shield themselves from the CSA. Because the CSA makes no demands of state legislatures or officials, those efforts have been to no avail. The related Tenth Amendment argument that the CSA intrudes upon those police powers reserved to the states has enjoyed no greater success.

Due process and equal protection challenges have surfaced both in cases questioning the CSA and those contesting application of the various state marijuana laws. At the federal level, several courts have rejected the suggestion that the government is estopped from enforcing the CSA by virtue of misleading or inconsistent statements in the Ogden Memorandum and elsewhere. Some of these same cases have rejected the contention that placement of marijuana in Schedule I of the CSA is irrational and consequently constitutes a violation of equal protection. Municipal zoning or land use ordinances set the stage for most of the state marijuana-related due process cases. State laws vary as to whether municipalities may ban or restrict marijuana-related activities within their jurisdictions. Where they may do so, the regulatory scheme must comply with due process requirements.

Banking

The federal banking laws are designed to shield financial institutions from individuals and entities that deal in controlled substances. In fact, Congress has crafted several of them to enlist financial institutions in the investigation and prosecution of those who violate the CSA. As a consequence, medical marijuana providers have experienced difficulty securing banking services. On February 14, 2012, the Department of Justice and the Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued guidance with respect to marijuana-related financial crimes. FinCEN's guidance specifically addresses the obligations to file suspicious activity reports. Banks must file suspicious activity reports (SARs) relating to any transaction involving \$5,000 or more that they have reason to suspect are derived from illegal activity. Willful failure to do so is punishable by imprisonment for not more than five years (not more than 10 years in cases of a substantial pattern of violations or transaction involving other illegal activity). Breaking up a transaction into two or more transactions to avoid the reporting requirement subjects the offender to the same 5/10 year maximum terms of imprisonment. Banks must also establish and maintain anti-money laundering programs, designed to ensure that bank officers and employees will have sufficient knowledge of the banks' customers and of the business of those customers to identify the circumstances under which filing SARs is appropriate. Suspicion aside, banks must file currency transaction reports (CTRs) relating to transactions involving \$10,000 or more in cash. Willful failure to do so is punishable by imprisonment for not more than five years (not more than 10 years in cases of a substantial pattern of violations or transaction involving other illegal activity). Again, structuring a transaction to avoid the reporting requirement exposes the offender to the same 5/10 year maximum terms of imprisonment.

In its recent guidance, FinCEN addressed banks' SAR reporting requirements. FinCEN began its guidance by emphasizing the point made in the 2014 Cole Memorandum, that the Justice Department's investigation and prosecution of financial crimes would be focused on activities that conflicted with any of several federal priorities. FinCEN advised financial institutions that in providing services to a marijuana-related business they must file one of three forms of special SARs: a marijuana limited SAR, a marijuana priority SAR; or a marijuana termination SAR. The marijuana limited SAR is appropriate when the bank determines, after the exercise of due diligence, that its customer is not engaged in any of the activities that violate state law or that would implicate any of the Justice Department investigation and prosecution priorities listed in the 2014 Cole Memorandum. A marijuana priority SAR must be filed when the bank believes its customer is engaged in such activities. A bank files a marijuana termination SAR when it finds it necessary to sever its relationship with a customer in order to maintain an effective anti-money laundering program.

FinCEN also provides examples of “red flags” that may indicate that a marijuana priority SAR is appropriate: “[1] The business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law; [2] The business is unable to demonstrate the legitimate source of significant outside investments; [3] 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; [4] 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; [5] 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; [6] 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; [7] The owner(s) or manager(s) of a marijuana-related business reside outside the state in which the business is located; [8] A marijuana-related business is located on federal property or the marijuana sold by the business was grown on federal property; [9] A marijuana-related business’s proximity to a school is not compliant with state law; [10] 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); [11] 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.”

The FinCEN guidance ends with the observation that a bank is not absolved of its obligation to file a currency transaction report for any financial transaction involving more than \$10,000 in cash, regardless of how it resolves its marijuana SAR obligations.

Other Consequences of a CSA Violation

Employment. The use of marijuana, medicinal or otherwise, may have adverse employment consequences. Both state and federal courts have upheld firing an employee for medical marijuana use. Employee challenges have cited in vain state medical marijuana laws as well as federal and state anti-discrimination laws. The state medical marijuana laws ordinarily immunize medical marijuana users from the adverse consequences of the law but in most instances do not give them a right that can be used affirmatively against a private entity. The Americans with Disabilities Act (ADA) and similar state anti-discrimination in employment statutes are predicated upon discrimination based on *lawful* activity and the CSA has consequently proven to be an insurmountable obstacle.

They differ somewhat in the case of nongovernment employees, because, among other things, federal, state, and local government employees enjoy Fourth Amendment protections. The Fourth Amendment, binding on government employers, does not give employees the right to use marijuana, medical or otherwise, but it limits the likelihood that their employers will discover their use. The Fourth Amendment’s proscription on unreasonable governmental searches means that federal, state, or local entities must have either reasonable suspicion or a constitutionally

recognized special need in order to conduct employee drug testing. A significant number of government employees, however, must undergo random drug testing because the nature of their duties places them in a “special needs” category. For example, random drug testing is a fact of life and continued condition of employment for anyone with access to classified or similarly sensitive information. In the case of employees of state or local governmental entities, the “lower courts have allowed drug testing in other safety-sensitive occupation” such as “aviation personnel, railroad safety inspectors, highway and motor carrier safety specialists, lock and dam operators, forklift operators, tractor operators, engineering operators, and crane operators.”

More generally, federal contractors may face the loss of federal funding or could be subject to administrative fines if they do not maintain and enforce policies aimed at achieving a drug-free, safe workplace. The federal Drug-Free Workplace Act of 1988 (DFWA) imposes a drug-free workplace requirement on any entity that receives federal contracts with a value of more than \$150,000 or that receives any federal grant. DFWA requires these entities to make ongoing, good faith efforts to comply with the drug-free workplace requirement in order to qualify, and remain eligible, for federal funds.

Absent status as a federal contractor and grantee status or some other federal influence, employers are relatively free to establish their own drug free workplace and to fire employees who test positive for marijuana use, medical or otherwise. Although an occasional medical marijuana statute will shield employees, more often the statute is silent and thought not to cabin at will employment status, as noted earlier. Moreover, depending upon the factual situation and the state unemployment statute in play, employees fired for marijuana use may also be ineligible for unemployment benefits.

Taxation. Income from whatever source is ordinarily subject to federal taxation. This is so even when the activity that generates the income is unlawful. Marijuana merchants, however, operate under a special federal tax disadvantage. They cannot deduct their operating expenses. Most businesses, similarly situated, arrive at their taxable income after deducting the cost of things like employee salaries, rent or mortgage payments, legal services, state taxes, and equipment depreciation. Marijuana merchants may take no such deductions. Several Members of Congress asked for Internal Revenue Service (IRS) guidance in order to allow marijuana merchants operating in a medical marijuana state to deduct their business expenses. The IRS responded that they would be unable to do so until Congress amended either the Internal Revenue Code or the CSA. Moreover, the customers of a medical marijuana merchant may be unable to treat their purchases as deductible medical expenses.

Possession of Firearms. It is a federal crime punishable by imprisonment for not more than 10 years for an unlawful user of a controlled substance to possess a firearm or ammunition. Federal regulations define an “unlawful user” to include “any person who is a current user of a controlled substance in a manner other than as prescribed by a licensed physician.” The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) has made it clear that “any person who uses ... marijuana, regardless of whether his or her State has passed legislation authorizing marijuana use for medicinal purposes, is an unlawful user of ... a controlled substance, and is prohibited by Federal law from possessing firearms or ammunition.”

Federally Assisted Housing. “Illegal drug users” are ineligible for federally assisted housing. Public housing agencies and owners of federally assisted housing must establish standards that would allow the agency or owner to prohibit admission to, or terminate the tenancy or assistance of, any applicant or tenant who is an illegal drug user. An agency or an owner can take these

actions if a determination is made, pursuant to the standards established, that an individual is “illegally using a controlled substance,” or if there is reasonable cause to believe that an individual has a “pattern of illegal use” of a controlled substance that could “interfere with the health, safety, or right to a peaceful enjoyment of the premises by other residents.” Thus, any individual whom the housing authority reasonably believes is using marijuana could be denied access to, or evicted from, federally assisted housing. With respect to medical marijuana, the Department of Housing and Urban Development previously concluded that public housing agencies or owners “must deny *admission*” to applicants who are using medical marijuana, but “have statutorily-authorized discretion with respect to evicting or refraining from evicting *current residents* on account of their use of medical marijuana.” The question of whether marijuana users may be excluded from federally assisted housing is not the same as whether applicants for such housing may be required to undergo drug testing. The Eleventh Circuit’s *Labron* decision in another context would seem to preclude such a preliminary in the absence of some individualized suspicion.

Ethical Considerations

Rule 1.2(d) of the American Bar Association’s Model Rules of Professional Conduct, adopted in virtually every jurisdiction, states that “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law.”

Bar officials in several states—Arizona, Colorado, Connecticut, Maine, and Washington, among them—have issued ethics opinions addressing ethical constraints arising out of the conflict between state and federal marijuana laws. The Arizona State Bar concluded in Opinion 11-01 that the Ogden Memorandum had created a “safe harbor” for those that operated within the confines of the state’s medical marijuana statute. In its view, Arizona lawyers may counsel and assist their clients in any activity permitted under the Arizona medical marijuana law as long as their clients were made fully aware of the consequences under federal law.

In contrast, Opinion 199 of the Maine Professional Ethics Commission advised attorneys that, absent an amendment to either the Rules of Professional Conduct or the CSA, a member of the Maine bar “may counsel or assist a client in making good faith efforts to determine the validity, scope, meaning or application of the law,” but “the Rule forbids attorneys from counseling a client to engage in the [marijuana] business or to assist the a client in doing so.” The Commission declined to provide more specific advice, but warned that significant risks attended practice in the area. The Connecticut Bar Association offered much the same advice. Lawyers may advise their clients about the features of the state medical marijuana statute, but they may not assist clients in a violation of the CSA.

While the Arizona, Maine, and Connecticut opinions are relatively general and relatively terse, the Colorado opinion provides far more examples of its view of the permissible and impermissible. It concluded that, consist with Rule 1.2(d) and CSA, a Colorado attorney might (1) represent and advise a client concerning the consequences of marijuana-related activities for purposes of criminal law, family law, or labor law; (2) as a government attorney advise a client in a matter involving the establishing, interpreting, enforcing, or amending zoning relations, local ordinances, or legislation; or (3) advise a client on the tax obligations incurred when cultivating

or selling marijuana. It concluded, on the other hand, that a Colorado attorney may not (1) draft or negotiate contracts, leases, or other agreements to facilitate the cultivate, distribution, or consumption of marijuana; or (2) provide tax planning assistance with an eye to violating federal law. Moreover, the Opinion points out that providing such assistance while aware of a client's intent is "likely to constitute aiding and abetting the violation of or conspiracy to violate federal law." The Opinion contains an addendum that indicates that the Colorado Supreme Court has been asked to amend the Rules of Professional Conduct to remove the shadow of the CSA from the application of the Rules to legal services provided within the confines of the state marijuana laws.

Washington State attorneys have the advantage of not one, but two bar advisories. Both take a position similar to the Arizona opinion: attorneys transgress no ethical boundaries if their professional conduct is consistent with state law and perhaps with federal enforcement priorities. The Bar Association of King County (Seattle and environs) opined that an attorney, who advises and assists a client to establish and maintain a marijuana dispensary, is not subject to discipline as long as his client's conduct is permitted under state marijuana law and as long as he makes his client aware of the provisions of the CSA including the Cole Memorandum. Moreover, in the opinion of the King County Bar Association, an attorney is likewise not subject to discipline merely because he owns an interest in a marijuana dispensary. Although such activity may constitute a crime under the CSA, it is not "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer," in the eyes of the County Bar Association.

The second Washington opinion is a proposed advisory opinion which the Washington State Bar Association submitted to the Washington Supreme Court along with a proposal to add a comment to Rule 1.2 of the Washington Rules of Professional Conduct. In its proposed opinion, a lawyer would be free to advise a client as to the nuances of state marijuana law as long as he did not do so in furtherance of an effort to violate or mask a violation of state marijuana law. A lawyer would also be free to advise and assist a client to establish and maintain a dispensary within the bounds of state law at least until such time as federal enforcement policies change. Finally under the proposed opinion and accompanying proposed comment, a lawyer would be free to engage in a marijuana business without offending the Rule that condemns criminal conduct that reflects adversely on a lawyer's fitness to practice.

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