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Marijuana: Medical and Retail—Selected Legal Issues

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Summary

The federal Controlled Substances Act (CSA) outlaws the possession, cultivation, and distribution of marijuana except for authorized research. More than 20 states have regulatory schemes that allow possession, cultivation, and distribution of marijuana for medicinal purposes. Four have revenue regimes that allow possession, cultivation, and 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, Colorado, Oregon, and Alaska 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 that exceeds certain monetary thresholds, 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 address those questions. Members have introduced a number of bills in the 114th Congress that speak to the conflict. Additionally, a few marijuana-related provisions were enacted into law late in the 113th Congress.

This report is available in an abridged form, without footnotes or citations to authority, as CRS Report R43437, *Marijuana: Medical and Retail—An Abbreviated View of 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.[1] 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, more than 20 states have established medical marijuana regulatory regimes. Four have gone further and "legalized" marijuana under state recreational marijuana laws.[2] 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.

Background

Federal regulation of the drugs, chemicals, and plants now considered controlled substances began with the Harrison Narcotics Act of 1914.[3] Relying upon its constitutional power to tax, regulate commerce, and implement the nation's treaty obligations,[4] Congress used the legislation to establish a system under which it taxed lawful medicinal use and proscribed abuse.[5]

Little more than two decades later, Congress supplemented the Harrison Act with the Marihuana Tax Act of 1937,[6] explicitly noting reliance on its tax, commerce, and territorial powers.[7] The

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[1] Section 202(c) of the Controlled Substances Act (21 U.S.C. §812(c), Sch.I(c)(10)).

[2] As of the date of this report, the retail marijuana laws in Alaska and Oregon had been enacted but were not yet operational. The terms "recreational marijuana laws" and "retail marijuana laws" are used interchangeably in this report. Some legislators, advocates, and commentators refer to the laws alternatively as "recreational marijuana laws," "retail marijuana laws," "adult social marijuana laws," or "states' rights marijuana laws." *E.g.*, Malanie, Reid, The Quagmire that Nobody in the Federal Government Wants to Talk About: Marijuana, 44 N.MEX. L.REV. 169, 171 (2014) ("Colorado and Washington have legalized marijuana use for recreational purposes"); Sam Kamin & Eli Wald, Marijuana Lawyers: Outlaws or Crusaders, 91 ORE. L. REV. 869, 878 n.35 (2013)("Many in the marijuana law reform movement dislike the term 'recreational use' and prefer the phrase 'adult use.' ... 'I don't use the term recreational, I prefer adult social use'"); H.R. 964 (Respect States' and Citizens' Rights Act of 2013); Colorado Retail Marijuana Code, COLO. REV. STAT. ANN. §§12-43.4-101, *et seq*.

[3] 38 Stat. 785 (1914).

[4] U.S. Const. Art. I, §8, cls. 1, 3, 18; Art. II, §2, cl.2.

[5] H.Rept. 63-23, at 1 (1913)("... [T]he obligations by which [the United States] is bound by virtue of the international opium convention signed at the Hague January 23, 1912, should be sufficient evidence of the necessity for the passage of Federal legislation to control our foreign and interstate traffic in opium, coca leaves, their salts, derivatives, and preparations.... But there is a real and, one might say, even desperate need of Federal legislation to control our foreign and interstate traffic in habit-forming drugs, and to aid both directly and indirectly the States more effectually to enforce their police laws designed to restrict narcotics to legitimate medical channels"), quoted in accord, S.Rept. 63-258, at 3 (1914).

[6] 50 Stat. 551 (1937).

[7] H.Rept. 75-792 at 1-3. (1937)("The purpose of H.R. 6906 is to employ the Federal taxing power to raise revenue from

Marihuana Act replicated the Harrison Act's procedures in large measure[8] and adopted by cross-reference the Harrison Act's penalty structure.[9] It became apparent over time, however, that the Marihuana Act served no real revenue purpose and in fact had "become, in effect, solely a criminal law imposing sanctions upon persons who [sold], acquire[d], or possess[ed] marihuana."[10]

This proved problematic when, in the late 1960s, the Supreme Court pointed out the Fifth Amendment difficulties inherent in a tax-based enforcement structure like that of the Harrison and Marihuana Tax Acts. The Court in *Marchetti* observed that a gambler's "obligations to register and to pay the [federal] occupational tax created ... real and appreciable ... hazards of self-incrimination" under federal and state anti-gambling laws.[11] The same day, in *Haynes,* it held that by the same token "the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm ... or for possession of an unregistered firearm" under the tax-based structure of the National Firearms Act.[12] Finally, in *Leary*, it struck closer to home. There, it held that the Fifth Amendment privilege against self-incrimination provided a full defense to a charge of transporting marijuana acquired without paying the Marihuana Tax Act transfer tax.[13]

Within months, the Senate Judiciary Committee reported out a Commerce Clause/treaty-based controlled substances proposal that featured most of the components ultimately found in the Controlled Substances Act.[14] It classified marijuana with the most tightly regulated substances in Schedule I, but punished its abuse less severely, explaining in its critique of an earlier proposal that

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the marihuana drug traffic and to discourage the widespread use of the drug by smokers and drug addicts.... This bill is modeled upon both the Harrison Narcotics Act and the National Firearms Act, which were designed to accomplish these same general objectives with respect to opium and coca leaves, and firearms, respectively.... Your committee has examined the constitutionality of this bill and is satisfied that it is a valid revenue measure. The law is well settled that a revenue measure will not be held invalid as an attempt to regulate, under the guise of the taxing power, a subject matter reserved to the States under the tenth amendment, if it appears on its face to be a revenue measure and contains no regulatory provisions except those reasonably related to the collection of the revenue.... In addition, certain provisions of the bill may be sustained under the power of Congress to regulate commerce and the power of Congress over the District of Columbia and Territories and possessions of the United States"); see also, S.Rept. 75-900, at 2-3 (1937)("The purpose of H.R. 6906 is to employ the Federal taxing power to raise revenue from the marihuana drug traffic and to discourage the widespread use of the drug by smokers an drug addicts.... This bill is modeled upon both the Harrison Narcotics Act and the National Firearms Act, which were designed to accomplish these same general objectives with respect to opium and coca leaves, and firearms, respectively")(but including no other explicit reference to constitutional authority).

[8] Marihuana Tax Act, §§2-14, 50 Stat. 551-56 (1937).

[9] *Id.* at §7(e), 50 Stat. 555 (1937)("All provisions of law (including penalties) applicable in respect of the taxes imposed by the Act of December 17, 1914 (38 Stat. 785; U.S.C. 1934 ed. title 26, §§1040-1061, 1383-1391), as amended, shall, insofar as not inconsistent with this Act, be applicable in respect of the taxes imposed by this Act").

[10] The President's Commission on Law Enforcement and Administration of Justice: Task Force on Narcotics and Drug Abuse, *Task Force Report: Narcotics and Drug Abuse*, 12 (1967).

[11] Marchetti v. United States, 390 U.S. 39, 48 (1968); see also, Grosso v. United States, 390 U.S. 62, 64-6 (1968).

[12] Haynes v. United States, 390 U.S. 85, 100 (1968).

[13] Leary v. United States, 395 U.S. 6, 29 (1969).

[14] S.Rept. 91-613 (1969). In Gonzales v. Raich, the U.S. Supreme Court ruled that Congress had the constitutional authority under the Commerce Clause to prohibit the wholly intrastate cultivation or possession of marijuana for medical purposes, despite state laws that permit such activity. 545 U.S. 1, 32-33 (2005); for more information about this decision, see CRS Report RL32844, *The Power to Regulate Commerce: Limits on Congressional Power*, by Kenneth R. Thomas.

> [T]o impose the same high mandatory minimum penalties for marihuana-related offenses as for LSD and heroin offenses is inequitable in the face of a considerable amount of evidence that marihuana is significantly less harmful and dangerous than LSD or heroin.
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> It had also become apparent that the severity of penalties including the length of sentences does not affect the extent of drug abuse and other drug-related violations. The basic consideration here was that the increasingly longer sentences that had been legislated in the past had not shown the expected overall reduction in drug law violations. The opposite had been true notably in the case of marihuana. Under Federal law and under many States laws marihuana violations carry the same strict penalties that are applicable to hard narcotics, yet marijuana violations have almost doubled in the last 2 years alone.
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> In addition, the severe drug laws specifically as applied to marihuana have helped create a serious clash between segments of the youth generation and the Government. These youths consider the marihuana laws hypocritical and unjust. Because of these laws the marihuana issue has contributed to the broader problem of alienation of youth from the general society and to a general feeling of disrespect for the law and judicial process.[15]

Consistent with this view, it called for the establishment of a study commission to examine and make recommendations on the troubling marijuana-related issues.[16] The Commission's final report recommended the legalization of possession of marijuana for private personal use, but that the Controlled Substance Act otherwise remain unchanged.[17]

Controlled Substances Act Today

Congress enacted the Controlled Substances Act[18] as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.[19] 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.[20]

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. The CSA requires persons who handle controlled substances (such as drug manufacturers, wholesale distributors, doctors, hospitals, pharmacies, and scientific researchers) to register with the Drug Enforcement Administration (DEA) in the U.S. Department of Justice (DOJ), the federal agency that administers and enforces the CSA.[21] Such registrants are

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[15] S.Rept. 91-613 at 1-2.

[16] *Id.* at 10 ("The study shall include, but need not be limited to, the following matters: 1. Identification of existing gaps in our knowledge of marihuana. 2. An intensive examination of the important medical and social aspects of marihuana use. 3. Surveys of the extent and nature of marihuana use. 4. Studies of the pharmacology and effects of marihuana. 5. Studies of the relation of marihuana use to crime and juvenile delinquency. 6. Studies of the relation between marihuana and the use of other drugs").

[17] National Commission on Marihuana and Drug Abuse, *Drug Use in America: Problem in Prospective*, 458, 466 (2d Rep. 1973).

[18] 21 U.S.C. §§801, *et seq*.

[19] P.L. 91-513, 84 Stat. 1236 (1970).

[20] 21 U.S.C. §§811-812.

[21] The Attorney General delegated his authority under the CSA to the DEA Administrator pursuant to 21 U.S.C.

subject to strict requirements regarding drug security, recordkeeping, reporting, and maintaining production quotas, in order to minimize theft and diversion.[22]

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,"[23] they may not be dispensed under a prescription, and such substances may be used only for bona fide, federal government-approved research studies.[24] Under the CSA, only doctors licensed by the Drug Enforcement Administration are allowed to prescribe controlled substances listed in Schedules II-V to patients.[25] 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."[26]

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.[27] 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.[28] Petitions for rescheduling marijuana have been largely unsuccessful.[29] Congress may also change the scheduling status of a drug or substance through legislation.

Penalties

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).[30]

When Congress enacted the CSA in 1970, marijuana was classified as a Schedule I drug.[31] 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

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§871(a); 28 C.F.R. §0.100(b).

[22] For more information about these requirements, *see* CRS Report RL34635, *The Controlled Substances Act: Regulatory Requirements*, by Brian T. Yeh.

[23] 21 U.S.C. §812(b)(1).

[24] 21 U.S.C. §823(f).

[25] *See* 21 C.F.R. §1306.03 (persons entitled to issue prescriptions).

[26] 21 C.F.R. §1306.04; United States v. Moore, 423 U.S. 122 (1975).

[27] The procedures for these actions are found at 21 U.S.C. §811.

[28] 21 U.S.C. §811(a).

[29] At one point an administrative law judge did recommend rescheduling, but that represents the high water mark for the petition efforts; *see, generally*, Americans for Safe Access v. DEA, 706 F.3d 438 (D.C. Cir. 2013); and Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131, 1133 (D.C. 1994), citing, National Organization for the Reform of Marijuana Laws v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974); National Organization for the Reform of Marijuana Laws v Drug Enforcement Admin., 559 F.2d 735 (D.C. Cir. 1977); National Organization for the Reform of Marijuana Laws v. Dept of Health, Ed. and Welfare, No. 79-1660 (D.C. Cir. Oct. 16, 1980); Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 930 F.2d 936 (D.C. Cir. 1991).

[30] For a detailed description of the CSA's civil and criminal provisions, *see* CRS Report RL30722, *Drug Offenses: Maximum Fines and Terms of Imprisonment for Violation of the Federal Controlled Substances Act and Related Laws*, by Brian T. Yeh.

[31] 21 U.S.C. §812(c).

cultivation, distribution, or possession of marijuana is a federal crime.[32] 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.[33] A violation of the federal "simple possession" statute that occurs after a single prior conviction under any federal or state drug law triggers a mandatory minimum fine of $2,500 and a minimum imprisonment term of 15 days (up to a maximum of two years); if the defendant has multiple prior drug offense convictions at the time of his or her federal simple possession offense, the sentencing court must impose a mandatory minimum fine of $5,000 and a mandatory minimum imprisonment term of 90 days (up to a maximum term of three years).[34] 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.[35] Moreover, property associated with the offense may be confiscated without or with any prior or accompanying criminal conviction.[36]

Forfeiture

Either in addition to, or in lieu of, bringing criminal prosecutions, the Department of Justice 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.[37]

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).[38] Criminal forfeiture proceedings, on the other hand,

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[32] Very narrow exceptions to the federal prohibition do exist. For example, one may legally use marijuana if participating in a U.S. Federal and Drug Administration-approved study or participating in the Compassionate Investigational New Drug program.

[33] 21 U.S.C. §844(a).

[34] *Id*

[35] The escalating terms of imprisonment for possession of various amounts of marijuana are as follows: (1) *Less than 50 kilograms (110lbs.)/fewer than 50 plants*: imprisonment for not more than 5 years, 21 U.S.C. §841(b)(1)(D); (2) *Less than 100 kilograms (220lbs) or less than 100 plants*: imprisonment for not more than 20 years, 21 U.S.C. §841(b)(1)(C); (3) *100 kilograms (220lbs) or more /100 plants or more*: imprisonment for not less than 5 years or more than 40 years, 21 U.S.C. §841(b)(1)(B); (4) *1000 kilograms or more/1000 plants or more*: imprisonment for not less than 10 years or more than life, 21 U.S.C. §841(b)(1)(A); (5) *Drug kingpin (over 5 or more others & substantial income):* imprisonment for not less than 20 years or more than life, 21 U.S.C. §848(a), (c); and (6) *Drug kingpin involving (a) 30,000 kilograms or more/30,000 plants or more, or (b) $10 million or more in annual gross receipts*: imprisonment for life, 21 U.S.C. §848(b)(2)(emphasis added).

[36] 21 U.S.C. §853 (criminal forfeiture of the proceeds and property derived from a violation as well as property used to facilitate violation); 21 U.S.C. §881 (civil/administrative forfeiture of conveyances and real property used in a violation and the proceeds of a violation and property traceable to the proceeds of a violation).

[37] U.S. CONST. amend. V ("No person shall ... be deprived of ... property, without due process of law ...").

[38] Calero-Toledo v. Pearson Yacht Leasing Co, 416 U.S. 663, 683-90 (1974)(confiscation of a yacht upon which those to whom it was leased smoke marijuana, because the owners failed to show that they had done all they possibly could

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.[39] 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.[40]

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*.[41] In order to seize the covered property, the government need only show that the property is subject to forfeiture by a preponderance of the evidence.[42] Once forfeited, the Attorney General may destroy the controlled substances seized, and sell the other property at public auction.[43] After expenses of the forfeiture proceeding are recouped, excess funds are forwarded to the DOJ Asset Forfeiture Fund.[44]

Forfeiture proceedings are generally less resource intensive than a criminal prosecution and have been used in the past against medical marijuana dispensaries.[45] In practice, DOJ would be able to seize and liquidate property, both real and personal, associated with marijuana production, distribution, or retail sale facilities, without bringing any criminal action. As explained above, a civil asset forfeiture proceeding is a civil proceeding against the property in question. Although an interested party may object to the seizure, given that such facilities are in clear violation of federal law, so long as the property is indeed being used for marijuana-related activities, it would appear unlikely that many successful challenges to these actions could be waged.[46]

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to avoid the illegal use of their property). In controlled substances cases, there is a limited statutory innocent owner defense if the owner of an interest in the property can show by a preponderance of the evidence that either he "(i) did not know of the conduct giving rise to the forfeiture; or (ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property," 18 U.S.C. §983(d).

[39] For a more extensive discussion of forfeiture generally, *see* CRS Report 97-139, *Crime and Forfeiture*, by Charles Doyle.

[40] *See, e.g.,* 21 U.S.C. §881(a)(6)(proceeds), and 21 U.S.C. §881(a)(2)(products and equipment used to facilitate the offense).

[41] 21 U.S.C. §881(a)(emphasis added).

[42] 18 U.S.C. §981(b).

[43] 21 U.S.C. §881(e).

[44] 21 U.S.C. §881(e).

[45] *See, e.g.,* U.S. Dep't of Justice, *Press Release: Federal Authorities Take Enforcement Actions Against Commercial Marijuana Stores in Orange County Cities of Anaheim and La Habra,* August 21, 2012, available at http://www.justice.gov/usao/cac/Pressroom/2012/111.html.

[46] *See* David Downs, *City of Oakland Loses Lawsuit Against Department of Justice; Harborside Forfeiture Case Proceeds,* February 15, 2013, EAST BAY EXPRESS, available at http://www.eastbayexpress.com/LegalizationNation/archives/2013/02/15/city-of-oakland-loses-lawsuit-against-department-of-justice-harborside-forfeiture-case-proceeds (describing how a federal magistrate judge dismissed the City of Oakland's lawsuit against Attorney General Eric Holder and U.S. Attorney Melinda Haag, which sought to prevent Haag from seizing the building leased by Harborside Health Center, one of the world's largest medical marijuana dispensaries. The judge held that only the dispensary and its landlords have legal standing to challenge the U.S. government's attempted seizure of the property.).

Developments in the States

Most of the states have legislation modeled after the federal Controlled Substances Act.[47] Over the years, some have reduced possession of small amounts of marijuana to a civil offense under state law,[48] while the District of Columbia went a step further and fully legalized possession of small amounts of marijuana and personal cultivation of a small number of marijuana plants.[49] More than 20 states also have established a state law exception for medical marijuana.[50] Colorado and Washington have enacted legislation authorizing the retail and personal growth, sale, and possession of marijuana under state law.[51] Alaska and Oregon have enacted similar retail

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[47] ALA. CODE §§20-2-1 to 20-2-190; ALASKA STAT. §§11.71.010 to 11.71.900, 17.30.010 to 17.30.900; ARIZ. REV. STAT. ANN. §§36-2501 to 36-2553; ARK. CODE ANN. §§5-64-101 to 5-64-608; CAL. HEALTH & SAFETY CODE §§11000 to 11657; COLO. REV. STAT. ANN. §§18-18-101 to 18-18-605; CONN. GEN. STAT. ANN. §§21a-240 to 21a-283; Del. Code Ann. tit.16 §§4701 to 47696; FLA. STAT. ANN. §§893.01 to 893.165; GA. CODE §§16-13-20 to 16-13-65; HAWAII REV. STAT. §§329-1 to 329-128; IDAHO CODE §§37-2701 to 37-2751; 720 ILL. COMP. STAT. ANN. §§570/100 to 570/603; IND. CODE ANN. §§35-48-1-1 to 35-48-7-15; IOWA CODE ANN. §§124.101 to 124.602; KAN. STAT. ANN. §§65-41-1 to 65-4166; KY. REV. STAT. ANN. §§218A.010 to 218A.993; LA. REV. STAT. ANN. §§40:961 to 40:995; ME. REV. STAT. ANN. tit.17-A §§1101 to 1118; MD. CODE ANN. Crim. Law §§5-101 to 5-1101; MASS. GEN. LAWS ANN. ch. 94C §§1 to 48; Mich. Comp. Laws Ann. §§333.7101 to 333.7545; MINN. STAT. ANN. §§152.01 to 152.20; MISS. CODE ANN. §§41-29-101 to 41-29-185; MO. ANN. STAT. §§195.010 to 195.320; MONT. CODE ANN. §§50-32-101 to 50-32-405; NEB. REV. STAT. §§28-401 to 28-457; NEV. REV. STAT. §§453.011 to 453.740; N.H. REV. STAT. ANN. §§318-B:1 to 318-E:1; N.J. STAT. ANN. §§2C:35-1 to 2C:35-24, 2c:36-1 to 2C:36-10, 24:21-1 to 24-21-54; N.MEX. STAT. ANN. §§30-31-1 to 30-31-41; N.Y. PUBLIC HEALTH LAW §§3300 to 3396; N.C. GEN. STAT. §§90-86 to 90-113.8; N.D. CENT. CODE §§19-03.1-01to 19-03.1-46; OHIO REV. CODE ANN. §§3719.01 to 3719.99; OKLA. STAT. ANN. tit.63 §§2-101 to 2-610; ORE. REV. STAT. §§475.005 to 475.295, 475.940 to 475.999; 35 PA. STAT. ANN. §§780-101 to780-144; R.I. GEN. LAWS §§21-28-1.01 to 21-28-6.02; S.C. CODE ANN. §§44-53-110 to 44-53-590; S.D. COD. LAWS §§34-20B-1 to 34-20B-114; TENN. CODE ANN. §§39-17-401 to 39-17-434, 53-11-301 to 53-11-452; TEX. HEALTH & SAFETY CODE ANN. §§481.001 to 481.005; UTAH CODE ANN. §§58-37-1 to 58-37-21; VA. CODE §§54.1-3400 to 54.1-3472; WASH. REV. CODE ANN. §§69.50.101 to 69.50.609; W.VA. CODE ANN. §§60A-1-101 to 60A-6-605; WIS. STAT. ANN. §§961.001 to 961.62; WYO. STAT. §§35-7-1001 to 35-7-1062. Vermont has a Regulated Drugs Act that roughly corresponds to the Controlled Substances Act, VT. STAT. ANN. tit.18 §§4201 to 4254.

[48] E.g., ALASKA STAT. §§11.71.190, 11.71.060, 12.55.135(j) (max. fine $500/less than 1 oz.); CAL. HEALTH & SAFETY CODE §11357(b) (max. fine $100/28.5 grams or less); CONN. GEN. STAT. ANN. §21a-279a (max. fine $150/ less than .5 oz.); ME. REV. STAT. ANN. tit. 22 §2383[1][A](max. fine $600/1.25 oz. or less); MASS. GEN. LAWS ANN. ch. 94C §32L (max. fine $100/1 oz. or less); MINN. STAT. ANN. §§152.027[subd.4(a)], 152.01 [subd. 16] (max fine $200/42.5 grams or less); MISS. CODE ANN. §41-29-139(c)(2)(A); NEB. REV. STAT. §28-416(13)(a) (max. fine $300/1 oz. or less); NEV. REV. STAT. §453.336[4](max. fine $600/1 oz. or less); N.Y. PENAL LAW §130.35; N.C. GEN. STAT. §§90-95(d)(4)(maxs. $200 fine—10 days imprisonment/.5 oz. or less); OHIO REV. CODE ANN. §§2925.11(C)(3), 2929.28(A)(2)(a)(v)(max. fine $150/100 grams or less); ORE. REV. STAT. §475.864(3)(max. fine $650/1 oz. or less); R.I. GEN. LAWS §21-28-4.01(c)(2)(iii)(max. fine $150/1 oz. or less); VT. STAT. ANN. tit.18 §4230a (max. fine $200/1 oz. or less).

[49] D.C. CODE §48-901.01(a)(1). There is some uncertainty about whether a provision of the 2015 Consolidated Appropriations Act, P.L. 113-235, prohibits the implementation of the measure during FY2015. *See* CRS Legal Sidebar WSLG1182, *The Antideficiency Act as an Impediment to D.C.'s Marijuana Legalization Initiative?*, by Brian T. Yeh.

[50] ALASKA STAT. §§17.37.010 to 17.37.080; ARIZ. REV. STAT. ANN. §§36-2801 to 36-2819; CAL. HEALTH & SAFETY CODE §§11362.5 to 11362.9; COLO. REV. STAT. ANN. §§12-43.3-101 to 12-43.3-1102; CONN. GEN. STAT. ANN. §§21a-408 to 21a-408q; DEL. CODE ANN. tit.16 §§4901A to 4926A; D.C. CODE §§7-1671.01 to 7-1671.13; HAWAII REV. STAT. §329-121 to 329-128; 410 ILL. COMP. STAT. ANN. §§130/10 to 130/140; ME. REV. STAT. ANN. tit. 22 §§2421 to 2430-B; MD. CODE ANN. HEALTH-GEN. §§13-3301 to 13-3316; MASS. GEN. LAWS ANN. ch. 94C App. §§1-1 to 1-17; MICH. COMP. LAWS ANN. §§333.26421 to 333.26430; MONT. CODE ANN. §50-46-301 to 50-46-344; NEV. REV. STAT. §§453A.010 to 453A.810; MINN. STAT. §§125.22 to 152.37; N.H. REV. STAT. ANN. §§126-X:1 to 126-X:11; N.J. STAT. ANN. §§24:61-1 to 24:61-16; N.MEX. STAT. ANN. §§26-2B-1 to 26-2B-7; ORE. REV. STAT. §§475.300 to 475.346; R.I. GEN. LAWS §21-28.6-1 to 21-28.6-13; N.Y. PUB. HEALTH §§3360 to 3369-E.; VT. STAT. ANN. tit.18 §§4471 to 4474*l*; WASH. REV. CODE ANN. §69-51A.005 to 69-51A.903. The Supreme Court in *Oakland Cannabis Buyers' Cooperative* held that the federal Controlled Substances Act does not contain an implicit medical marijuana exception, *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 495 (2001).

[51] COLO. REV. STAT. ANN. §§12-43.3-101 to 12-43.3-1102; WASH. REV. CODE ANN. §§69-50.325 to 69-50.369.

marijuana laws; however, they were not fully operational as of the publication date of this report.[52]

Medical Marijuana Laws

State medical marijuana laws follow a general pattern, although most have some individual characteristics and the manner in which they are enforced can differ considerably. Some of their features are attributable to the CSA and a case from the United States Court of Appeals for the Ninth Circuit, *Conant v. Walters.*[53]

Conant, a California physician, sought to enjoin the federal government from revoking his authority to prescribe controlled substances at all in retaliation for his recommending marijuana to some of his patients.[54] Then, as now, the CSA permits the Attorney General, acting through the Drug Enforcement Administration, to withdraw a physician's authority to prescribe controlled substances upon a failure to comply with the demands of the CSA.[55]

The Ninth Circuit acknowledged the prospect of criminal liability if the doctor were doing more than engaging in an abstract discussion with his patient: "A doctor would aid and abet by acting with the specific intent to provide a patient with the means to acquire marijuana. Similarly, a conspiracy would require that a doctor have knowledge that a patient intends to acquire marijuana, agree to help the patient acquire marijuana, and intend to help the patient acquire marijuana."[56] Yet, "[h]olding doctors responsible for whatever conduct the doctor could anticipate a patient *might* engage in after leaving the doctor's office is simply beyond the scope of either conspiracy or aiding and abetting."[57] On the other hand, such doctor-patient discussions do implicate First Amendment free speech principles. The Ninth Circuit therefore affirmed the district court's order which had enjoined any DEA enforcement action.[58]

As a consequence of the CSA and the *Conant* decision, the state medical marijuana laws are predicated upon a doctor's recommendation, rather than a prescription and the medicine is

[52] ALASKA STAT. §§17.38.010 to 17.38.900; 43.61.010 to 43.61.030; Oregon Ballot Measure 91, *Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act* (*hereinafter* Oregon Ballot Measure 91).

[53] 309 F.3d 629 (9th Cir. 2002).

[54] *Id*. at 632.

[55] 21 §823(f)("The Attorney General shall register practitioners (including pharmacies ...) to dispense ... controlled substances.... The Attorney General may deny an application for such registration ... [in] the public interest. In determining the public interest, the following factors shall be considered: ... (4) Compliance with applicable State, Federal, or local laws relating to controlled substances.... ").

[56] *Id.* at 636 (internal citations omitted).

[57] *Id.* (emphasis in the original).

[58] *Id*. at 636-39.

dispensed other than through a pharmacy.[59] In addition, the laws afford registered patients, care givers, cultivators, and distributors immunity from the consequences of state criminal laws.[60]

Patients

Physicians may recommend medical marijuana only for patients suffering from one or more statutorily defined "debilitating," or "qualifying" medical conditions. The typical list would include the following:

> "Debilitating medical condition" means one or more of the following:
>
> (a) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, hepatitis c, amyotrophic lateral sclerosis, crohn's disease, agitation of alzheimer's disease or the treatment of these conditions.
>
> (b) A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including those characteristic of epilepsy; or severe and persistent muscle spasms, including those characteristic of multiple sclerosis.
>
> (c) Any other medical condition or its treatment added by the department pursuant to section 36-2801.01.[61]

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.[62] In many jurisdictions, a qualified patient must be a resident of the jurisdiction.[63] Most states and the District of Columbia restrict the amount of marijuana a patient may possess for medical purposes. The limit is usually

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[59] ALASKA STAT. §§17.37.010 to 17.37.080; ARIZ. REV. STAT. ANN. §§36-2801 to 36-2819; CAL. HEALTH & SAFETY CODE §§11362.5 to 11362.9; CONN. GEN. STAT. ANN. §§21a-408 to 21a-408q; COLO. REV. STAT. ANN. §§12-43.3-101 to 12-43.3-1102; DEL. CODE ANN. tit.16 §§4901A to 4926A; D.C. CODE §§7-1671.01 to 7-1671.13; HAWAII REV. STAT. §§329-121 to 329-128; 410 ILL. COMP. STAT. ANN. §§130/10 to 130/140; MD. CODE ANN. HEALTH-GEN. §§13-3301 to 13-3316; ME. REV. STAT. ANN. tit. 22 §§2421 to 2430-B; MASS. GEN. LAWS ANN. ch. 94C App. §§1-1 to 1-17; MICH. COMP. LAWS ANN. §§333.26421 to 333.26430; MINN. STAT. §§125.22 to 152.37; MONT. CODE ANN. §§50-46-301 to 50-46-344; NEV. REV. STAT. §§453A.010 to 453A.810; N.H. REV. STAT. ANN. §§126-X:1 to 126-X:11; N.J. STAT. ANN. §§24:6I-1 to 24:6I-16; N.MEX. STAT. ANN. §§26-2B-1 to 26-2B-7; N.Y. PUB. HEALTH §§3360 to 3369-E.; ORE. REV. STAT. §§475.300 to 475.346; R.I. GEN. LAWS §§21-28.6-1 to 21-28.6-13; VT. STAT. ANN. tit.18 §§4471 to 4474*l*; WASH. REV. CODE ANN. §§69-51A.005 to 69-51A.903.

[60] ALASKA STAT. §17.37.030; ARIZ. REV. STAT. ANN. §36-2811; CAL. HEALTH & SAFETY CODE §§11362.71(e), 11362.765, 11362.775; CONN. GEN. STAT. ANN. §§21a-408a to 21a-408c; DEL. CODE ANN. tit.16 §4903A; D.C. CODE §7-1671.02; HAWAII REV. STAT. §329-122; 410 ILL. COMP. STAT. ANN. §130/25; MD. CODE ANN. HEALTH-GEN. §13-3313; ME. REV. STAT. ANN. tit. 22 §§2423-A to 2423-D; MASS. GEN. LAWS ANN. ch. 94C App. §§1-4, 1-5; MICH. COMP. LAWS ANN. §333.26424; MINN. STAT. §152.32; MONT. CODE ANN. §50-46-319; NEV. REV. STAT. §453A.310; N.H. REV. STAT. ANN. §126-X:2; N.J. STAT. ANN. §24:6I-6; N.MEX. STAT. ANN. §26-2B-4; N.Y. PUB. HEALTH §3369; ORE. REV. STAT. §§475.316, 475.319; R.I. GEN. LAWS §21-28.6-8; VT. STAT. ANN. tit.18 §4474b; WASH. REV. CODE ANN. §69-51A.030.

[61] ARIZ. REV. STAT. ANN. §36-2801[3].

[62] *E.g.*, DEL. CODE ANN. tit. 16 §4902A(3)[b]("... severe, debilitating pain, that has not responded to previously prescribed medication or surgical measures for more than 3 months or for which other treatment options produced serious side effects.... ").

[63] *E.g.*, CONN. GEN. STAT. ANN. §21a-408(10); D.C. CODE §7-1671.01(19); MICH. COMP. LAWS ANN. §333.264246(a)(6); MONT. CODE ANN. §50-46-307(1)(d); N.H. REV. STAT. ANN. §126-X:1[X], [XVI]; N.J. STAT. ANN. §24:6I-3; N.MEX. STAT. ANN. §26-2B-3 [G]; R.I. GEN. LAWS §21-28.6-3(10); VT. STAT. ANN. tit.18 §4472(12); *but see* NEV. REV. STAT. §453A.364 (recognition of nonresident cards).

an amount less than three ounces.[64] Medical marijuana statutes ordinarily do not allow patients to use marijuana in public.[65]

Caregivers

Typically, caregivers must register and be designated by one or more registered medical marijuana patients.[66] Many medical marijuana laws also afford caregivers the same immunity and impose the same limitations upon them as apply to patients.[67]

Dispensaries

Some state medical marijuana laws contemplate cultivation exclusively by the patient or his or her caregiver.[68] Most, however, establish a regulatory scheme for dispensaries.[69]

Retail Marijuana

Four states, Washington, Colorado, Oregon, and Alaska, have established retail marijuana regimes. Each regulates the distribution of marijuana without a necessary medical nexus, but raises many of the same federal-state conflict issues found in the medical marijuana statutes. Much like the medical marijuana regimes, each recreational marijuana regime shares general patterns, but they also each have some unique characteristics. In some instances, for example Washington, the statutory authority establishing the retail regime is fairly specific. In others, such as Colorado, the statute provides only a broad framework while authorizing a state regulatory agency to fill in the details through regulations.

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[64] *E.g.*, ALASKA STAT. §17.37.040(a)(4)(1 oz.); DEL. CODE ANN. tit.16 §4903A(a)(6 oz.); D.C. CODE §7-1671.03(a)(2 oz.); 410 ILL. COMP. STAT. ANN. §130/10(a)(1), 130/25(a)(2.5 oz.); ME. REV. STAT. ANN. tit. 22 §§2423-A[1][A](2.5 oz.); MICH. COMP. LAWS ANN. §333.26424(2.5 oz.); MONT. CODE ANN. §50-46-319 (1 oz.); NEV. REV. STAT. §453A.200 (1 oz.); N.H. REV. STAT. ANN. §126-X:2[I](2 oz.); ORE. REV. STAT. §475.320 (24 oz.); R.I. GEN. LAWS §21-28.6-4 (2.5 oz.).

[65] *E.g.*, ALASKA STAT. §17.37.040(a)(2); CONN. GEN. STAT. ANN. §21a-408a(b)(2); DEL. CODE ANN. tit.16 §4904A(3); D.C. CODE §7-1671.03; 410 ILL. COMP. STAT. ANN. §130/30(3)(F); MICH. COMP. LAWS ANN. §333.26427(b)(3)(B); N.H. REV. STAT. ANN. §126-X:3[II](c); N.MEX. STAT. ANN. §26-2B-5[A](3)(d); ORE. REV. STAT. §§475.316(1)(b).

[66] *E.g.*, ALASKA STAT. §17.37.010(e); ARIZ. REV. STAT. ANN. §36-2804.02; CONN. GEN. STAT. ANN. §21a-408b; DEL. CODE ANN. tit.16 §4909A; 410 ILL. COMP. STAT. ANN. §130/55; ME. REV. STAT. ANN. tit. 22 §§2425; MASS. GEN. LAWS ANN. ch. 94C App. §1-1; MONT. CODE ANN. §50-46-308; NEV. REV. STAT. §453A.210; N.H. REV. STAT. ANN. §126-X:4; N.J. STAT. ANN. §24:6I-4; N.MEX. STAT. ANN. §26-2B-7; ORE. REV. STAT. §§475.309, 475.312; R.I. GEN. LAWS §21-28.6-4; VT. STAT. ANN. tit.18 §4474.

[67] *E.g.*, ARIZ. REV. STAT. ANN. §36-2811; CAL. HEALTH & SAFETY CODE §§11362.77, 11362.775; CONN. GEN. STAT. ANN. §21a-408b; DEL. CODE ANN. tit.16 §4903A; 410 ILL. COMP. STAT. ANN. §130/25; MASS. GEN. LAWS ANN. ch. 94C App. §§1-4, 1-5; MICH. COMP. LAWS ANN. §333.26424; MONT. CODE ANN. §50-46-319; NEV. REV. STAT. §453A.200; N.H. REV. STAT. ANN. §126-X:2; N.J. STAT. ANN. §24:6I-6; N.MEX. STAT. ANN. §26-2B-4; ORE. REV. STAT. §§475.316, 475.319; R.I. GEN. LAWS §21-28.6-8; VT. STAT. ANN. tit.18 §4474b.

[68] *E.g.*, ALASKA STAT. §17.37.030; HAWAII REV. STAT. §329-122; MICH. COMP. LAWS ANN. §333.26424; ORE. REV. STAT. §§475.316, 475.319; R.I. GEN. LAWS §21-28.6-8.

[69] *E.g.*, ARIZ. REV. STAT. ANN. §36-2804; CAL. HEALTH & SAFETY CODE §11362.8; CONN. GEN. STAT. ANN. §21a-408h; DEL. CODE ANN. tit.16 §4914A; D.C. CODE §7-1671.06; HAWAII REV. STAT. §329-122; 410 ILL. COMP. STAT. ANN. §§130/85 to 130/130; ME. REV. STAT. ANN. tit. 22 §2428; MASS. GEN. LAWS ANN. ch. 94C App. §§1-9; MONT. CODE ANN. §§50-46-308, 5-46-309; NEV. REV. STAT. §§453A.320 to 453A.344; N.H. REV. STAT. ANN. §126-X:8; N.J. STAT. ANN. §24:6I-7; N.MEX. STAT. ANN. §26-2B-7; ORE. REV. STAT. §475.304; VT. STAT. ANN. tit.18 §4474g.

Decriminalization of Personal Possession and Consumption

Each of the retail marijuana laws decriminalizes the consumption and possession of varying amounts and forms of marijuana by individuals at least 21 years of age within the state. The laws, however, prohibit consumption of marijuana in public and maintain a prohibition on driving vehicles under the influence of marijuana, even if it was acquired and consumed in compliance with the state law.[70]

Washington Initiative 502, for example, legalizes marijuana possession by amending state law to provide that the possession of small amounts of marijuana "is not a violation of this section, this chapter, or any other provision of Washington law."[71] 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.[72] However, marijuana must be used in private, as it is unlawful to "open a package containing marijuana ... or consume marijuana ... in view of the general public."[73]

Colorado voters approved an amendment to the Colorado Constitution (Amendment 64) 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.[74] 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.[75] In similar fashion to Washington's Initiative 502, marijuana may not be consumed "openly and publicly or in a manner that endangers others" under Colorado law.[76]

Oregon Ballot Measure 91 decriminalizes personal possession, for individuals of at least 21 years old, of up to eight ounces of "homegrown marijuana," up to 16 ounces of "homegrown marijuana products in solid form," and up to 72 ounces of "homegrown marijuana in liquid form." It also decriminalizes cultivation of up to four marijuana plants.[77] Ballot Measure 91 also explicitly prohibits "the use of marijuana items in a public place,"[78] as well as the production and storage of marijuana or marijuana products where they "can be readily seen by normal unaided vision from a public place."[79]

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[70] *E.g.*, Washington Initiative 502 §31, amending RCW 69.50.4013 and 2003 c 53 s 334, available at http://sos.wa.gov/_assets/elections/initiatives/i502.pdf (*hereinafter* Washington Initiative 502).

[71] *Id*. at §20

[72] *Id*. at §15.

[73] *Id*. at §21.

[74] Colorado Amendment 64, Amending Colo. Const. Art. XVIII §16(3), available at http://www.colorado.gov/cs/Satellite?blobcol=urldata&blobheader=application/pdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1251834064719&ssbinary=true (*hereinafter* Colorado Amendment 64).

[75] *Id*.

[76] *Id*.

[77] Oregon Ballot Measure 91 §6.

[78] *Id*. at §54.

[79] *Id*. at §56.

Alaska law allows individuals of at least 21 years old to possess up to one ounce of marijuana and six (but no more than three that are mature and flowering) marijuana plants.[80] The public consumption and cultivation of marijuana is prohibited under Alaska law.[81]

Licensing Regime for Retail Production, Distribution, and Sale

Another common feature of recreational marijuana laws is the establishment of licensing regimes for the retail production, distribution, and sale of marijuana. Although the specifics vary, each retail marijuana regime establishes license application processes, qualification standards, and license maintenance standards that are to be implemented and overseen by a state regulatory agency.

Washington Initiative 502 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."[82] 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.[83]

Initiative 502 also establishes various restrictions and requirements for obtaining the proper license and directs the state LCB to adopt procedures for the issuance of such licenses. On October 16, 2013,[84] the LCB adopted detailed rules for implementing Initiative 502. These rules describe the marijuana license qualifications and application process, application fees, marijuana packaging and labeling restrictions, recordkeeping and security requirements for marijuana facilities, and reasonable time, place, and manner advertising restrictions.[85]

The licensing standards in Colorado were implemented through a combination of statutes and regulations enacted to supplement Amendment 64. The Colorado General Assembly passed three bills that were signed into law by Governor Hickenlooper on May 28, 2013.[86] 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.[87] 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.[88]

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[80] ALASKA STAT. §17.38.020.

[81] ALASKA STAT. §17.38.020 and §17.38.030.

[82] Washington Initiative 502 §4.

[83] *Id*.

[84] Joel Millman, *Washington State Sets Pot-Sales Rules,* WALL ST. JOURNAL, October 16, 2013.

[85] Washington State Liquor Control Board, Marijuana Licenses, Application Process, Requirements, and Reporting, available at https://lcb.app.box.com/adopted-rules.

[86] *See* Colorado Dep't of Revenue, *Permanent Rules Related to the Colorado Retail Marijuana Code,* September 9, 2013, available at https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D_0.pdf.

[87] *Id.*

[88] *Id.*

Alaska's recreational marijuana law establishes a licensing and registration regime for cultivation facilities, manufacturing facilities, and retail stores.[89] A state Marijuana Control Board is authorized to issue regulations to implement the licensing and registration regime, including rules that establish license application and renewal processes, qualification standards, labeling requirements, and advertising limitations.[90]

Oregon Ballot Measure 91 empowers the Oregon Liquor Control Commission to issue regulations establishing similar licensing standards.[91]

Taxation Authority

Each of the retail marijuana laws also imposes taxes on recreational marijuana. These taxing measures vary in size and applicability and establish different purposes for which the revenue generated through these taxes will be used.

For example, in accordance with adopted regulations, Washington will impose an excise tax of 25% of the selling price on each marijuana sale within the established distribution system.[92] The state excise tax will, therefore, be imposed on three separate transactions: the sale of marijuana from producer to processor, from processor to retailer, and from retailer to consumer. All collected taxes are deposited into the Dedicated Marijuana Fund and distributed, mostly to social and health services, as outlined in the Initiative.[93]

Similarly, Colorado voters approved a 25% tax on retail marijuana transactions (a 15% excise tax that would raise revenues generally to be used for public school capital construction, and an additional 10% sales tax that predominately would generate revenues to fund the enforcement of the retail marijuana regulations).[94]

Under Oregon Ballot Measure 91, marijuana producers will be taxed $5 for each immature marijuana plant, $10 for each ounce of marijuana leaves, and $35 for each ounce of flowers.[95] The revenue generated will be used first to offset the costs of implementing the state's marijuana regime and remaining monies will be distributed to a variety of existing state funds, including the state's Common School Fund and the Mental Health Alcoholism and Drug Services Account.[96]

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[89] ALASKA STAT. §17.38.70.

[90] ALASKA STAT. §17.38.90.

[91] Oregon Ballot Measure 91 §7.

[92] *See* Colorado Dep't of Revenue, *Permanent Rules Related to the Colorado Retail Marijuana Code,* September 9, 2013, available at https://www.colorado.gov/pacific/sites/default/files/Retail%20Marijuana%20Rules,%20Adopted%20090913,%20Effective%20101513%5B1%5D_0.pdf.at 20-21.

[93] Washington Initiative 502 §26.

[94] Colorado Legislative Council Staff, *Fiscal Impact Statement: Proposition AA, Retail Marijuana Taxes,* September 24, 2013, available at http://www.leg.state.co.us/LCS/Initiative%20Referendum/1314initrefr.nsf/b74b3fc5d676cdc987257ad8005bce6a/e3e37fa33a36873887257b6c0077ac93/$FILE/Retail%20Marijuana%20Taxes_FN.pdf. A provision of the Colorado Constitution may affect the disbursements of marijuana-related tax revenue. *See* Jack Healy, *In Colorado, Marijuana Taxes May Have to Be Passed Back*, N.Y. TIMES, April 1, 2015, available at http://www.nytimes.com/2015/04/02/us/colorado-lawmakers-scramble-to-keep-millions-in-marijuana-taxes.html?_r=0.

[95] Oregon Ballot Measure 91 §33.

[96] *Id*. §44.

Alaska law imposes an excise tax of $50 per ounce marijuana for each transaction between a marijuana cultivation center and either a processor or retail store.[97]

Local Control

Another issue relevant to each retail marijuana law is the question of whether local governments within the state are permitted to ban or otherwise regulate marijuana businesses within their local jurisdictions. Colorado Amendment 64 expressly permits local governments within Colorado to regulate or prohibit the operation of such facilities.[98] The Alaska recreational marijuana law also expressly provides local governments with certain authority to ban recreational marijuana businesses from operating and otherwise restrict "the time, place, manner, and number of marijuana establishment operations" with their respective jurisdictions.[99] Oregon Ballot Measure 91 also expressly authorizes localities to impose "reasonable time, place, and manner" restrictions on marijuana businesses.[100] Washington's Initiative 502, on the other hand, 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.[101]

Justice Department Memoranda

The Department of Justice is not required, and realistically lacks the resources, to prosecute every single violation of the CSA. 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.[102] 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."[103]

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. 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.

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[97] ALASKA STAT. §43.61.010.

[98] Colorado Amendment 64 §16(5)(f). *See also* Dan Frosch, *Colorado Localities Make Own Rules Before Final Decision on Marijuana Sales,* N.Y. TIMES, June 12, 2013; John Ingold, *Colorado Marijuana Stores Likely to be Concentrated in Few Cities,* THE DENVER POST, July 25, 2013.

[99] ALASKA STAT. §17.38.110.

[100] Oregon Ballot Measure 91 §58.

[101] *See Chelan County Judge Agrees with Attorney General's Opinion, Holds that Local Governments Can Ban Marijuana Businesses,* Wash. State Off. of the Attorney Gen. Press Release, Oct. 17, 2014, available at http://www.atg.wa.gov/news/news-releases/chelan-county-judge-agrees-attorney-general-s-opinion-holds-local-governments-can; Jake Ellison, *City/County Bans, Moratoriums, and Zoning Approvals for Marijuana Businesses in Washington,* SEATTLE POST INTELLIGENCER, December 12, 2013, available at http://blog.seattlepi.com/marijuana/2013/12/12/bans-moratoriums-and-zoning-approvals-for-marijuana-businesses-as-far-as-we-know/#18853101=0&18413103=0; Gene Johnson, *No Welcome Yet for Pot Shops in Many Wash. Cities,* SEATTLE POST INTELLIGENCER, January 1, 2014.

[102] United States v. Goodwin, 457 U.S. 368, 380 (1982).

[103] Wayte v. United States, 470 U.S. 598, 607 (1985).

The 2009 Ogden Memorandum

In 2009, Deputy Attorney General David W. Ogden provided guidance to federal prosecutors in states that have authorized the use of medical marijuana.[104] 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."[105] 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."[106] 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.[107]

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.[108] It was said that Los Angeles alone had somewhere between 500 and 1,000 medical marijuana dispensaries.[109] No one knew how many for sure, but all agreed there were more dispensaries than there were Starbucks coffee shops.[110] Rather than the old and infirm,

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[104] Memorandum for selected U.S. Attorneys from David W. Ogden, Deputy Attorney General, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, October 19, 2009 (hereinafter Ogden Memorandum) available at http://www.justice.gov/opa/documents/medical-marijuana.pdf.

[105] *Id.* at 1-2.

[106] *Id.* at 3.

[107] Todd Grabarsky, *Conflicting Federal and State Medical Marijuana Policies: A Threat to Cooperative Federalism*, 116 W.VA. L. REV. 1, 3 (2013)("While the Ogden Memo reaffirmed the illegality of all forms of medical marijuana at the federal level, it made clear that the federal executive policy with regards to medical marijuana permissible at the state level would be for the most part hands-off."); Karen O'Keefe, *State Medical Marijuana Implementation and Federal Policy*, 16 J. HEALTH CARE L & POL'Y 39, 51 (2013)("On October 19, 2009, Deputy Attorney General David Ogden issued a memorandum memorializing the new federal policy.... This memo was widely interpreted as meaning that the federal government would not be targeting medical marijuana providers."); Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?* 91 ORE. L. REV. 869, 881 (2013)("In states that had adopted [Medical Marijuana] provisions, the memo was seen as a green light to the open sale of marijuana."); Alex Kreit, *Reflections on Medical Marijuana Prosecutions and the Duty to Seek Justice*, 89 DENV. U. L. REV. 1027, 1037 (2012)("The *New York Times* ran a front-page article about the memo under the headline U.S. Won't Prosecute in States That Allow Medical Marijuana reporting that '[p]eople who use marijuana for medical purposes and those who distribute it to them should not face federal prosecution, provided they act according to state law, the Justice Department said Monday in a directive with far-reaching political and legal implications.'").

[108] Gerald Caplan, *Medical Marijuana: A Study of Unintended Consequences*, 43 MCGEORGE L. REV. 127, 130, 136-37 (2012)("Statewide, more than 70% of doctors recommendations were written by fewer than 15 physicians in Colorado, and severe or chronic pain, a catchall category, accounted for ninety-four percent of all reported conditions.... [In] Oregon, fewer than ten percent of the roughly 35,000 patients holding cards suffered from cancer, multiple sclerosis, glaucoma, or the other specific debilitating conditions cited in the legislation. Ninety percent of registered cardholders cited chronic pain as their qualifying debilitating disease. Nevada's percentages are nearly identical. Montana's are slightly lower, with seventy-one percent of all medical marijuana users suffering from chronic pain.").

[109] Alex Kreit, *The Federal Response to State Marijuana Legalization: Room for Compromise*, 91 ORE. L. REV. 1029, 1036 n.33 (2013).

[110] *Id.*

"[r]emarkably the age distribution of medical marijuana users seem[ed] to mimic that of recreational users in its concentration of young persons."[111]

The 2011 Cole Memorandum

DOJ reiterated and clarified its position in a subsequent memorandum in 2011 drawing a clear distinction between the potential prosecutions of individual patients who require marijuana in the course of medical treatment and "commercial" dispensaries.[112] After noting that several jurisdictions had recently "enacted legislation to authorize multiple large-scale, privately operated industrial marijuana cultivation centers," DOJ stated that

> 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 [CSA] 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.[113]

The surge in enforcement activity proximate to the release of the 2011 Cole Memorandum[114] caught unawares many of those who considered the Ogden Memorandum a green light for marijuana entrepreneurship.[115]

The 2013 Cole Memorandum

The Obama Administration's official response to the Colorado and Washington initiatives was provided on August 29, 2013, when Deputy Attorney General James M. Cole sent a memorandum to all U.S. Attorneys intended to guide the "exercise of investigative and prosecutorial discretion"

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[111] Id. at 135.

[112] Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*, June 29, 2011 (hereinafter Cole 2011 Memorandum), available at http://www.justice.gov/oip/docs/dag-guidance-2011-for-medical-marijuana-use.pdf.

[113] *Id.* at 2.

[114] Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?* 91 ORE. L. REV. 869, 881-83 (2013)("In the fall of 2011, California's four Untied States Attorneys announced that a federal grand jury had returned indictments against several marijuana cooperative owners throughout the state, charging them with violations of the CSA. In addition, the United States Attorneys sent cease and desist letters to both dispensary owners and their landlords, giving them forty-five days to move their operations or else face arrest. In addition to the clear threat of criminal prosecution, this action made clear that the threat of civil enforcement—explicit in the Cole memo—was not an empty one. For a federal government with limited enforcement resources, the specter of civil forfeiture is an incredibly powerful tool. Similar crackdowns have since taken place in Washington state, Colorado, and Montana.").

[115] *See, e.g.*, Montana Caregivers Association, LLC v. United States, 841 F.Supp.2d 1147, 1148 (D.Mont. 2012)("The plaintiffs describe themselves as 'caregivers: growers and distributors of medical marijuana to qualified patients within the State of Montana.' They filed their complaint after federal authorities raided their facilities in March 2011 and seized live marijuana plants, dried marijuana, and related equipment. The plaintiffs claim the raids were unlawful because (1) Montana law allowed them to grow and produce marijuana for medical consumption and (2) the United States Department of Justice represented that they would not actively prosecute medical marijuana caregivers."); United States v. Washington, 887 F.Supp.2d 1077, 1090-91 (D. Mont. 2012)("All of the pending motions to dismiss on estoppel grounds rely on the common underlying principle that the federal government, having stated several times that it would not initiate federal drug prosecutions of sellers or users of medical marijuana acting in compliance with the laws of their respective states, should now be estopped from pursuing this federal prosecution in contradiction of those statements. The most prominent of the federal government's various pronouncements on the topic of medical marijuana is what has become known as the 'Ogden memo.'").

when it comes to civil and criminal enforcement of the federal Controlled Substances Act within all states, including those that have legalized marijuana for medicinal or recreational use.[116] 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." This DOJ decision has received both praise[117] and criticism.[118]

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.[119] 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."[120] 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.

Two additional points made in the memorandum are worth highlighting. First, the memorandum acknowledges a change in Administration policy with respect to "large scale, for-profit commercial enterprises" that may ease the concerns of potential state-licensed marijuana distributors and retailers in Colorado and Washington.[121] In previous guidance issued to U.S. Attorneys in states with medical marijuana laws, DOJ had suggested that large-scale marijuana enterprises were more likely to be involved in marijuana trafficking, and thus could be appropriate targets for federal enforcement actions.[122] In the guidance, DOJ directs prosecutors "not to 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 ..."[123]

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[116] Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding Marijuana Enforcement*, August 29, 2013 (*hereinafter* 2013 Cole Memorandum), available at http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

[117] *See, e.g.*, New York Times Editorial, *A Saner Approach on Drug Laws*, N.Y. TIMES, September 1, 2013.

[118] *See, e.g.*, Wall Street Journal Editorial, *The Beltway Choom Gang*, WALL ST. J., September 5, 2013.

[119] 2013 Cole Memorandum, at 1-2.

[120] *Id.* at 2-3.

[121] *Id.* at 3.

[122] 2011 Cole Memorandum, at 1-2.

[123] 2013 Cole Memorandum, at 3.

The memorandum suggests that a state with a robust regulatory system for the control of recreational marijuana "is less likely to threaten [] federal priorities ..." than a state that lacks such controls. This statement may inform the long-running debate over the extent to which state marijuana regulatory and licensing laws (as opposed to mere penalty exemptions) conflict with federal law. Some courts have suggested, for example, that whereas a state is generally free to remove state penalties for marijuana use, the more robust a state's licensing and regulatory program, the more likely the law is to be preempted by federal law.[124] The Oregon Supreme Court, for instance, has suggested that states may not "affirmatively authorize" an individual to participate in conduct prohibited by federal law.[125]

The memorandum makes no statements with regard to the application of various federal money laundering and banking laws that have hampered the ability of commercial marijuana establishments to obtain the necessary financing and financial services to establish and grow their businesses.[126]

The 2014 Cole Memorandum

The 2014 Cole memorandum, however, did address banking and money laundering laws.[127] It recited 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 preemption doctrine stands at the threshold of the federal-state marijuana debate. The preemption doctrine is grounded in the Supremacy Clause of Article VI, cl. 2, which 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."[128] The Supremacy Clause, therefore, "elevates" the U.S. Constitution, federal statutes, federal regulations, and treaties[129] above the laws of the states.[130] As a result, where federal and state law are in conflict, the state law is generally preempted, leaving it void and without effect.[131]

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[124] *See* discussion *supra* pp. 14-19.

[125] Emerald Steel Fabricators, Inc., v. Bureau of Labor and Indus., 348 Ore. 159, 230 P.3d 518 (2010).

[126] For more information about this topic, *see* CRS Legal Sidebar WSLG682, *Banking Difficulties for State-Legalized Marijuana Dispensaries*, by M. Maureen Murphy; *see also* Reuters, *Easier Pot Policy Won't Relieve Dispensaries' Banking Woes*, CNBC.com, September 5, 2013, available at http://www.cnbc.com/id/101011966; Serge F. Kovaleski, *Banks Say No to Marijuana Money, Legal or Not*, N.Y. TIMES, January 11, 2014.

[127] Memorandum for U.S. Attorneys from James M. Cole, Deputy Attorney General, *Guidance Regarding Marijuana Related Financial Crimes*, February 14, 2014 (*hereinafter* 2014 Cole Memorandum), available at http://www.justice.gov/usao/wae/news/2014/2014-02-14-FinCin.html.

[128] U.S. CONST., Art. VI, cl. 2.

[129] See discussion of preemptive effect of treaties *infra*.

[130] Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1145 (8th Cir. 1971).

[131] *See, e.g.*, Mutual Pharmaceutical Co., Inc. v. Bartlett, 133 S.Ct. 2466, 2473 (2013)("Under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.").

Preemption is a matter of Congress's choice when it operates within its constitutionally enumerated powers. In some instances, Congress has exercised its authority so pervasively as to preclude the possibility of state activity within the same legislative field.[132] On the other hand, where 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").[133]

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."[134] 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.[135]

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.[136]

Several state courts have addressed the preemption challenges to state medical marijuana laws with mixed results. For example, appellate courts in Colorado, California, and Michigan have concluded that at least some aspects of the medical marijuana laws in those states survive both impossibility and obstacle preemption analysis. In two instances, they have held that the language in Section 903 evidences an intent to preempt state laws only under impossibility preemption and *not* under obstacle preemption.[137]

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 marijuana plants they had seized in connection with his prosecution.[138] 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.'"[139] Thus, the language of the

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[132] Arizona v. United States, 132 S.Ct. 2492, 2501 (2012)("[T]he States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. The intent may be inferred from a framework of regulation so pervasive ... that Congress has left no room for the states to supplement it or where there is a federal interest ... so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.").

[133] Hillman v. Maretta, 133 S.Ct. 1943, 1950 (2013).

[134] Arizona v. United States, 132 S.Ct. at 2501.

[135] Hillman v. Maretta, 133 S.Ct. 1943, 1950 (2013).

[136] 21 U.S.C. §903.

[137] *See, e.g.,* County of San Diego v. San Diego NORML, 165 Cal.App. 4th 798 (2008)(holding that a state law conflicts with the CSA only where it is impossible to comply with both the state and federal law).

[138] 2013 Colo.App. LEXIS 1971 (December 19, 2013).

[139] *Id.* at *4.

CSA "cannot be used to preempt a state law under the obstacle preemption doctrine."[140] The decision in *Crouse* adopted[141] 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.[142]

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."[143] 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.[144]

In *San Diego NORML*, the California law required local governments to issue medical marijuana cards to qualified applicants.[145] 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."[146]

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.[147] Beek argued that the Michigan Medical Marihuana Act (MMMA), which immunized an individual's cultivation of marijuana for medical purposes, invalidated the city ordinance. The City argued that the CSA preempted the MMMA. The Michigan Supreme Court held that the CSA did not preempt the MMMA, but also that the ordinance must yield to the MMMA.[148] 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."[149] 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 natural 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."[150]

The Oregon Supreme Court understood obstacle preemption a little differently in *Emerald Steel*.[151] 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

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[140] *Id.* at *11.

[141] *Id.* at *4 ("We consider County of San Diego well-reasoned and follow it here.")

[142] Cnty. of San Diego v. San Diego NORML, 165 Cal.App. 4th 798 (2008).

[143] 2013 Colo.App. LEXIS 1971 at *4.

[144] *Id.* at *5.

[145] Cnty. of San Diego v. San Diego NORML, 165 Cal.App.4th at 808.

[146] *Id.* at 826. The court also found that the California law was not vulnerable to impossibility preemption since the CSA did not outlaw the issuance of the medical marijuana cards that the California law required. Thus, it was not impossible for an individual to honor both the CSA and the California card law. *Id*. at 819-21.

[147] 495 Mich. 1, 24-25 (Mich. 2014).

[148] *Id.* at 24.

[149] *Id.* at 12.

[150] *Id.* at 14-15.

[151] Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus., 230 P.3d 518 (2010).

stands as an obstacle to the implementation and execution of the full purposes and objectives of the Controlled Substances Act."[152] 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."[153]

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."[154]

Finally, in what is one of the few reported statements by a federal court relating to preemption of state marijuana laws, in *In re: Rent-Rite Super Kegs West LTD*,[155] a bankruptcy court noted (in what was clearly dicta) that "conflict preemption is not an issue here. Colorado constitutional amendments for both medical marijuana, and the more recent amendment legalizing marijuana possession and usage generally, both make it clear that their provisions apply to state law only. Absent from either enactment is any effort to impede the enforcement of federal law."[156]

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[152] *Id.* at 529 ("To be sure, state law does not prevent the federal government from enforcing its marijuana laws against medical marijuana users in Oregon if the federal government chooses to do so. But the state law at issue in Michigan Canners did not prevent the federal government from seeking injunctive and other relief to enforce the federal prohibition in that case. Rather, state law stood as an obstacle to the enforcement of federal law in Michigan Canners because state law affirmatively authorized the very conduct that federal law prohibited, as it does in this case"), *citing*, Michigan Canners & Freezers Assoc. v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461, 478 (1984).

[153] *Id.* at 529.

[154] Willis v. Winters, 253 P.3d 1058, 1064 n.6 (2011). In *Willis*, the court held that the federal statute that outlawed firearm possession by a user of controlled substances did not preempt the Oregon statute that authorizes sheriffs to issue "concealed carry" permits to otherwise qualified applications who were users of medical marijuana. *Id.* at 1065-66.

[155] *In re:* Rent-Rite Super Kegs West Ltd., 484 B.R. 799 (December 19, 2012). Whether the debtor was engaged in criminal activity was an issue in the case because "a federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a Debtor whose activities constitute a continuing federal crime." *Id.* at 805.

[156] *Id.* at 805 ("The fact that there is a difference in legislative philosophy creates no conflict that requires an analysis of federal preemption under the Supremacy Clause."). Part of the confusion over the proper application of obstacle preemption to state marijuana laws may stem from an apparent disagreement over the nature of the obstacle that is required to trigger preemption. As previously noted, the Supreme Court has held that a state law is preempted when it "stands as an obstacle *to the accomplishment and execution of the full purposes and objectives of Congress*." Hillman v. Maretta, 133 S.Ct. at 1950 (emphasis added). Most courts that have rejected preemption challenges to state medical marijuana laws have interpreted "the full purposes and objectives of Congress" in relation to the federal government's ability to enforce federal law. As such, these courts have generally held that because the state law does not create a shield or otherwise immunize state residents from federal criminal prosecutions, the law does not constitute an obstacle to "the enforcement of federal law." To the contrary, the Oregon Supreme Court reasoned that the fact that the state law in no way inhibited federal prosecutions did not mean that the law did not otherwise create an obstacle to the Congress's chief objective in enacting the CSA; that of curtailing drug use. Emerald Steel Fabricators, Inc. v. Bureau of Labor Indus., 230 P.3d at 529.

Other Constitutional Considerations

Other 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.[157]

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.[158] 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.[159] The related Tenth Amendment argument that the CSA intrudes upon those police powers reserved to the states has enjoyed no greater success.[160]

Of course, the purported exercise of an explicit constitutional power such as the Commerce Clause will be defeated, if the exercise is beyond the scope of the asserted power or is contrary to some other explicit or implicit constitutional limitation. In the case of the fundamental rights of the people, the Tenth Amendment, the Ninth Amendment, and the substantive due process components of the Fifth and Fourteenth Amendments all impose limits on the federal or state legislative powers.[161] Here too, litigants generally have been unable to convince the courts that the limitations entitle them to relief. Tenth Amendment reservations with respect to the rights of the people disappear once it is established that the Constitution has expressly delegated a power to the United States, as in the case of the Necessary and Proper Clause and the CSA.[162] A

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[157] Gonzales v. Raich, 545 U.S. 1, 5, 22 (2005)(The question presented in this case is whether the power vested in Congress by Article I, §8, of the Constitution, '[t]o make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.... Given the enforcement difficulties that attend distinguishing between marijuana cultivated locally and marijuana grown elsewhere, ... we have no difficulty concluding that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA. Thus, as in *Wickard*, ... Congress was acting well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce ... among the several States.'").

[158] New York v. United States, 505 U.S. 144, 161 (1981)("Congress may not commandeer the legislative process of the States by directly compelling them to enact and enforce a regulatory program."). Printz v. United States, 521 U.S. 898, 935 (1997)("The Federal Government may [not] ... command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

[159] United States v. Washington, 887 F.Supp.2d 1077, 1101 (D.Mont. 2012); United States v. Stacy, 696 F.Supp.2d 1141, 1145 (S.D.Cal. 2010); Raich v. Gonzales, 500 F.3d 850, 867 n.17 (9th Cir. 2007).

[160] Sacramento Nonprofit Collective v. Holder, 855 F.Supp.2d 1100 (E.D.Cal. 2012)("[I]t is well established under United States Supreme Court authority that if a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States. Since the power to regulate the intrastate possession, manufacturing, and distribution of marijuana is delegated to Congress through the Commerce Clause, Raich I, 545 U.S. at 15, [the] allegation that the power to regulate marijuana in California was reserved to California through the Tenth Amendment is foreclosed by United States Supreme Court precedent."). Montana Caregivers Association, LLC v. United States, 841 F.Supp.2d 1147, 1149-150 (D.Mont. 2012)(to the same effect).

[161] U.S. Const. amend. X (emphasis added)("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*."); amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); amend. V ("No person shall ... be deprived of life, liberty, or property without due process of law.... "); amend. XIV, §1 ("... No State shall ... deprive any person of life, liberty, or property without due process of law.... ").

[162] Cf., Raich v. Gonzales, 500 F.3d 850, (9th Cir. 2007)("The Supreme Court held in *Gonzales v. Raich* that Congress acted within the bounds of its Commerce Clause authority when it criminalized the purely intrastate manufacture,

limitation on intrusion upon the rights of the people, however, may flow from the Ninth Amendment and the Due Process Clauses' implicit prohibition on governmental encroachment on a fundamental right.

Fundamental rights are those "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[163] The courts have thus far declined to find such a fundamental right in the possession, use, or cultivation of marijuana, even for medicinal purposes.[164]

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.[165] 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.[166]

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

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distribution, or possession of marijuana in the Controlled Substances Act, *See* 125 S.Ct. at 2215. Thus, after *Gonzales v. Raich*, it would seem that there can be no Tenth Amendment violation in this case.").

[163] Washington v. Glucksberg, 521 U.S. 702, 721 (1997)(internal citations omitted).

[164] Raich v. Gonzales, 500 F.3d at 861-66; United States v. Fry, 787 F.2d 903, 905 (4th Cir. 1986); United States v. Fogarty, 692 F.2d 542, 547 (8th Cir. 1982); Marin Alliance for Medical Marijuana v. Holder, 866 F.Supp.2d 1142, 1156-157 (N.D.Cal. 2011); Kuromiya v. United States, 37 F.Supp.2d 717, 725-27 (E.D.Pa. 1999).

[165] United States v. Washington, 887 F.Supp.2d 1077 (D.Mont. 2012)("Estoppel by official misleading statement ... applies where the defendant had a reasonable belief that his conduct was sanctioned by the government. [It] requires the accused to show that (1) an authorized government official, empowered to render the claimed erroneous advice, (2) who has been made aware of all the relevant historical facts, (3) affirmatively told him the proscribed conduct was permissible, (4) that he relied on the false information, and (5) that his reliance was reasonable. The Defendants assert the defense of estoppel by official misleading statement based on the Ogden memo; statements made to the press or to Congress by then-presidential-candidate Barack Obama, his campaign spokesman, his White House spokesman, and United States Attorney General Eric Holder; the characterizations of those statements in news media; the government's entry into the stipulation in Santa Cruz; and statements made to at least one Defendant by Flathead Tribal Police drug investigator Arlen Auld. None of these statements justifies dismissal on a theory of estoppel by official misleading statement."); Marin Alliance for Medical Marijuana v. Holder, 866 F.Supp.2d at 1155-156; Sacramento Nonprofit Collective v. Holder, 855 F.Supp.2d at 1111; United States v. Stacy, 696 F.Supp.2d at1146-148; United States v. Schafer, 625 F.3d 629, 637-38 (9th Cir. 2010).

The Second Circuit has rejected the contention that the Ogden memo constituted a rescheduling of marijuana. United States v. Canori, 737 F.3d 181, 184-85 (2d Cir. 2013).

[166] United States v. Washington, 887 F.Supp.2d at 1102-103 ("The Ninth Circuit squarely rejected a rational basis challenge to the classification of marijuana as a schedule I substance in United States v. Miroyan, 577 F.2d 489, 495 (9th Cir. 1978). Although Fleming argues that since Miroyan, additional studies and changes in state law have called into question the rationality of Congress' policy, there remains sufficient debate regarding the public benefits and potential for harmful consequences of marijuana use to find a rational basis to uphold the continued classification of marijuana as a schedule I controlled substance."); Marin Alliance for Medical Marijuana v. Holder, 866 F.Supp.2d at 1146-147 ("There is no right under the Constitution to have a law go unenforced against you, even if you are the first person against whom it is enforced, and even if you think (or can prove) you are not as culpable as some others who have gone unpunished. The law does not need to be enforced everywhere to be legitimately enforced somewhere")(responding to plaintiffs' equal protection challenge that prosecutors' threatened to take legal action against them as the landlords of marijuana dispensaries' but visited no similar threats upon the landlords of Colorado dispensaries); Sacramento Nonprofit Collective v. Holder, 855 F.Supp.2d at 1109-110 (same equal protection challenge; same result).

activities within their jurisdictions.[167] Where they may do so, the regulatory scheme must comply with due process requirements.[168]

Banking

The federal banking laws are designed to shield financial institutions from individuals and entities that deal in controlled substances. 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.[169] On February 14, 2014, the Department of Justice and the Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued guidance with respect to marijuana-related financial crimes.[170] FinCEN's guidance specifically addresses the obligations to file suspicious activity reports (SARs).

Banks must file SARs with FinCEN relating to any transaction involving $5,000 or more that they have reason to suspect are derived from illegal activity.[171] 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 transactions involving other illegal activity).[172] 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.[173] Banks must also establish and maintain anti-money laundering programs,[174] designed to ensure that bank officers and employees

[167] Beek v. City of Wyoming, 2014 Mich. LEXIS 194 (Mich. 2014)(Michigan Medical Marihuana Act precludes any absolute municipal ban on cultivating marijuana within city limits); City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc., 300 P.3d 494, 499 (Cal. 2013)(City may use its municipal powers to ban marijuana dispensaries within the city); Giuliani v. Jefferson County Board of County Commissioners, 303 P.3d 131, 135 (Colo.App. 2012)(municipal officials may ban the cultivation or sale of marijuana within the county).

[168] Santa Barbara Patients' Collective Health Coop. v. City of Santa Barbara, 911 F.Supp. 884, 892-93 (C.D.Cal. 2012)(pre-ordinance permit holder enjoyed a vested right to operate a marijuana dispensary that could not be curtailed without due process of law); Conejo Wellness Center, Inc. v. City of Agoura Hills, 214 Cal.App.4th 1534, 1562 (2013) (pre-ordinance dispensary operator had no vested liberty right requiring procedural due process to extinguish).

[169] *See, e.g.*, Deirdre Fernandes, *Banks Shun Fledgling Marijuana Firms in Mass*, THE BOSTON GLOBE ("Elsewhere in the country, legal marijuana businesses have run into the same problems ... Some marijuana businesses have found ways to get a bank account by, for example, setting up separate holding companies that avoid any reference in the names to marijuana. Even then, once banks get a whiff of where the money comes from, they close the accounts"), available at http://www.bostonglobe.com/business/2014/01/29/medical-marijuana-firms-face-cash-economy-banks-steer-clear/88ftUTUbcaYvZfA7fpuENN/story.htm; *Legal Marijuana Market Exceeds Tax Hopes, Creating Opportunities*, MARKETWATCH ("The Denver Post reported Wednesday that banks holding commercial loans on properties that lease to Colorado marijuana businesses say they don't plan to refinance those loans when they come due. Banks say property used as collateral for those loans theoretically is subject to federal drug-seizure laws, which makes the loans a risk. Colorado's two largest banks, Wells Fargo Bank and First Bank, say they won't offer new loans to landowners with preexisting leases with pot businesses. And Wells Fargo and Vestra Bank have told commercial loan clients they either have to evict marijuana business or seek refinancing elsewhere."), available at http://www.marketwatch.com/story/legal-marijuana-market-exceeds-tax-hopes-creating-opportunities-2014-02-27?/reflink=MW-news-stmp.

[170] 2014 Cole Memorandum; Department of the Treasury, *Financial Crimes Enforcement Network, BSA Expectations Regarding Marijuana-Related Business*, FIN-2014-G001 (Feb. 14, 2014)(herein after FinCEN guidance), available at http://www.fincen/gov/sstatutes_regs/guidance/pdf/FIN-2014-G002.pdf.

[171] 21 U.S.C. §5318(g); 31 C.F.R. §1020.320.

[172] 31 U.S.C. §5322.

[173] 31 U.S.C. §5324(d).

[174] 31 U.S.C. §5318(h); 12 U.S.C. §1818(s); 12 U.S.C. §1786(q)(1).

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.[175]

Suspicion aside, banks must file currency transaction reports (CTRs) with FinCEN relating to transactions involving $10,000 or more in cash.[176] 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 transactions involving other illegal activity).[177] Again, structuring a transaction to avoid the reporting requirement exposes the offender to the same 5/10 year maximum terms of imprisonment.[178]

Banks, their officers, employees, and customers may also face criminal liability under the money laundering statutes for marijuana-related financial transactions. Section 1957 makes it a federal crime to deposit or withdraw $10,000 or more in proceeds derived from the distribution of marijuana and any other controlled substances.[179] Section 1956 makes it a federal crime to engage in a financial transaction involving such proceeds conducted with an eye to promoting further offenses, for example, by withdrawing marijuana-generated funds in order to pay the salaries of medical marijuana dispensary employees.[180]

Section 1956 violations are punishable by imprisonment for not more than 20 years.[181] Section 1957 violations are punishable by imprisonment for not more than 10 years.[182] Conspiracy to violate either section carries the same maximum penalties,[183] as does aiding and abetting the commission of either offense.[184] Moreover, any real or personal property involved in, or traceable to, a transaction proscribed by either statute is subject to confiscation under either civil or criminal forfeiture.[185]

Federally insured state- and federally chartered depository institutions that engage in illegal or unsafe banking practices also run the risk of being assessed civil money penalties and even losing deposit insurance coverage, which would result in the termination of their status as an insured depository institution.[186]

In its recent guidance, FinCEN addressed banks' SAR reporting requirements. FinCEN began its guidance by emphasizing the point made in the accompanying 2014 Cole Memorandum, that the Justice Department's investigation and prosecution of financial crimes would be focused on activities that conflict with any of several federal priorities:

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[175] 31 C.F.R. §§1020.200-1020.220.

[176] 31 U.S.C. §5313; 31 C.F.R. subpt.1020C; 31 C.F.R. subpt.1010 C.

[177] 31 U.S.C. §5322.

[178] 31 U.S.C. §5324(d).

[179] 18 U.S.C. §§1957(a), (d).

[180] 18 U.S.C. §1956(a)(1)(A)(i).

[181] 18 U.S.C. §1956(a)(1).

[182] 18 U.S.C. §1957(a).

[183] 18 U.S.C. §1956(h).

[184] 18 U.S.C. §2. *E.g.*, United States v. Lyons, 740 F.3d 702, 715 (1st Cir. 2014)(internal citations omitted)("An aider and abettor is punishable as a principal if, first, someone else actually committed the offense and, second, the aider and abettor became associated with the endeavor and took part in it, intending to ensure its success. The central requirement for the second element is a showing that the defendant consciously shared the principal's knowledge of the underlying criminal act, and intended to help the principal.").

[185] 18 U.S.C. §§981(a)(1)(A), 982(a)(1).

[186] 12 U.S.C. §1818.

- preventing the distribution of marijuana to minors;
- preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;[187]
- preventing the diversion of marijuana from states where it is legal under state law in some form to other states;[188]
- 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 cultivation and distribution of marijuana;[189]
- 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 attendant public safety and environmental dangers posed by marijuana production on public lands;[190] and
- preventing marijuana possession or use on federal property.[191]

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.[192] A marijuana priority SAR must be filed when the bank believes its customer is engaged in such activities.[193] 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.[194]

FinCEN also provides examples of "red flags" that may indicate that a marijuana priority SAR is appropriate:

- 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-

[187] This presumably does not include enterprises, gangs, or cartels that possess or distribute marijuana in violation of the CSA but in compliance with applicable state law.

[188] This would seem to serve as a warning to interstate marijuana tourists and the businesses that serve them.

[189] Given the value of the product, violence may be an inescapable attribute of marijuana cultivation and sale, *see e.g.*, Benjamin B. Wagner & Jared C. Dolan, *Medical Marijuana and Federal Narcotics Enforcement in the Eastern District of California*, 43 McGeorge L. Rev. 109, 121 (2012).

[190] *Id.* at 122 ("About seventy percent or more of marijuana eradicated in California every year comes from public lands."); Marijuana Crops in California Threaten Forests and Wildlife, The New York Times, available at http://www.nytimes.com/2013/06/21/us/marijuana-crops-in-california-threaten-forests-and-wildlife.html.

[191] FinCEN guidance, at 2.

[192] *Id.* at 3-4.

[193] *Id.* at 4.

[194] *Id.* at 4-5.

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).
- 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 following:
    - 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.
    - 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."[195]

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.[196]

Other Federal Law Consequences

Employment

The use of marijuana, medicinal or otherwise, may have adverse employment consequences.[197] Both state and federal courts have upheld firing an employee for medical marijuana use.[198] 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 do not give them a right that can be used affirmatively against a private entity.[199] 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.[200]

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[195] *Id.* at 5-7.

[196] *Id.* at 7.

[197] *See, generally*, Matthew D. Macy, *Employment Law and Medical Marijuana*, 41 COLORADO LAWYER 57 (2012).

[198] Coats v. Dish Network, LLC, 303 P.3d 147 (Colo.App. 2013); Casias v. Wal-Mart Stores, Inc., 695 F.3d 428 (6th Cir. 2012); Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus., 230 P.3d at 518; Ross v. RagingWire Telecomm., Inc., 42 Cal.4th 920 (2008).

[199] Casias v. Wal-Mart Stores, Inc., 695 F.3d at 435 (internal citations omitted)(emphasis in the original)("[T]he MMMA [Michigan Medical Marihuana Act] does not regulate private employment; [r]ather the Act provides a potential defense to criminal prosecution or other adverse action *by the state*.... MMMA contains no language stating that it repeals the general rule of at-will employment in Michigan or that it otherwise limits the range of allowable private decisions by Michigan businesses"); Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus., 230 P.3d at 169 n.7, citing, Roe v. TeleTech Customer Car Management, 152 Wash.App. 388, 216 P.3d 1055 (2009); Ross v. RagingWire Telecommunications, 42 Cal.4th 920 (2008) ("Both the California and Washington courts have held that, in enacting their states' medical marijuana laws, the voters did not intend to affect an employer's ability to take adverse employment actions based on the use of medical marijuana.").

[200] Coats v. Dish Network, LLC, 303 P.3d at 149-53 (The Colorado Civil Rights Act (CCRA) outlaws firing employees for "lawful" out of work activities. Use of marijuana as permitted by the Colorado medical marijuana but in violation of the CSA was not a lawful activity for purposes of the CCRA); Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus., 230 P.3d at 535 (Because the employee was fired for illegal use of marijuana under the CSA, the state employment discrimination statute, modelled after the ADA, does not apply); *see also* James v. City of Lake Forest,

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.[201]

Government

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.[202]

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."[203]

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,

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700 F.3d 394, 397 n.3 (9th Cir. 2012)("[T]he ADA does not protect medical marijuana users who claim to face discrimination on the basis of their marijuana use.").

[201] Maryland v. King, 133 S.Ct. 1958, 1969 (2013)(internal citations and quotation marks omitted)("In giving content to the inquiry whether an intrusion is reasonable, the Court has preferred some quantum of individualized suspicion ... as a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion. In some circumstances, such as when faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual circumstances may render a warrantless search or seizure reasonable."). *See, generally*, CRS Report R42326, *Constitutional Analysis of Suspicionless Drug Testing Requirements for the Receipt of Governmental Benefits*, by David H. Carpenter.

[202] 50 U.S.C. §3343(b)("After January 1, 2008, the head of a Federal agency may not grant or renew a security clearance for a covered person who is an unlawful user of a controlled substance....); 50 U.S.C. §3343(a)(2)("The term covered person means: (A) an officer or employee of a Federal Agency; (B) a member of the Army, Navy, Air Force, or Marine Corps who is on active duty or is in an active status; and (C) an officer or employee of a contractor of a Federal Agency"); *e.g.*, 51 U.S.C. §31102(b)("(1) Employees of administration.-The Administrator shall establish a program applicable to employees of the Administration whose duties include responsibility for safety-sensitive, security, or national security functions. Such program shall provide for preemployment, reasonable suspicion, random, and post-accident testing for use, in violation of applicable law or Federal regulation, of alcohol or a controlled substance.... (2) Employees of contractors.-The Administrator shall, in the interest of safety, security, and national security, prescribe regulations. Such regulations shall establish a program that requires Administration contractors to conduct preemployment, reasonable suspicion, random, and post-accident testing of contractor employees responsible for safety-sensitive, security, or national security functions (as determined by the Administrator) for use, in violation of applicable law or Federal regulation, of alcohol or a controlled substance.... (3) Suspension, disqualification, or dismissal.-In prescribing regulations under the programs required by this subsection, the Administrator shall require, as the Administrator considers appropriate, the suspension, disqualification, or dismissal of any employee to which paragraph (1) or (2) applies, in accordance with the provisions of this section, in any instance where a test conducted and confirmed under this section indicates that such employee has used, in violation of applicable law or Federal regulation, alcohol or a controlled substance."). *See also* 49 U.S.C. §20140(Program of required preemployment, reasonable suspicion, random, and post-accident testing of all railroad employees responsible for safety-sensitive functions).

[203] Barrett v. Claycomb, 705 F.3d 315, 322 (8th Cir. 2013), referring to cases collected in Kreig v. Seybold, 481 F.3d 512, 518 (7th Cir. 2007).

safe workplace. The federal Drug-Free Workplace Act of 1988 (DFWA)[204] 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.[205] 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.[206]

Private

Absent status as a federal contractor and grantee status or some other federal influence,[207] employers are relatively free to establish their own drug-free workplaces and to fire employees who test positive for marijuana use, medical or otherwise.[208] Although an occasional medical marijuana statute will shield employees,[209] more often the statute is silent and thought not to cabin at-will employment status, as noted earlier.[210] Depending upon the factual situation and the

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[204] 41 U.S.C. §§8101, *et seq*.

[205] 41 U.S.C. §§8102, 8103; 2 C.F.R. pt.182; 48 C.F.R. §§23.500, *et seq*.; 48 C.F.R. §2.101 (simplified acquisition threshold). U.S. Dept. of Labor, *Drug-Free Workplace Act of 1988 Requirements*, available at http://www.dol.gov/elaws/asp/drugfree/screenr.htm.

[206] 41 U.S.C. §§8102, 8103. There are slightly different requirements for individuals and organizations that receive federal contracts or grants. 41 U.S.C. §§8102, 8103. *See* U.S. Dept. of Labor, *Drug-Free Workplace Act of 1988 Requirements for Individuals*, available at http://www.dol.gov/elaws/asp/drugfree/req_ind.htm ("Any individual who receives a contract or grant from the Federal government, regardless of dollar value, must agree not to engage in the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance in the performance of this contract/grant."), and U.S. Dept. of Labor, *Drug-Free Workplace Act of 1988 Requirements for Organizations*, available at http://www.dol.gov/elaws/asp/drugfree/require.htm ("All organizations covered by the Drug-Free Workplace Act of 1988 are required to provide a drug-free workplace by ... [publishing] and [giving] a policy statement to all covered employees informing them that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the covered workplace and specifying the actions that will be taken against employees who violate the policy).

[207] Due to their potential impact on public safety, commercial pilots, truckers, bus drivers and the like are subject to periodic drug testing which the United States Department of Transportation has recently made clear does not excuse a positive drug test for either medical or recreational marijuana use, U.S. Dep't of Transp., *Fact Sheet: DOT 'Medical" Marijuana Notice* (Feb. 23, 2013), citing 49 C.F.R. 40.151, available at http://www.dot.gov/sites/dot.gov/files/docs/ODAPC_medicalmarijuananotice.pdf ("The Department of Justice (DOJ) issued guidelines for Federal prosecutors in states that have enacted laws authorizing the use of 'medical marijuana.' We have had several inquiries about whether the DOJ advice to Federal prosecutors regarding pursing criminal cases will have an impact upon the Department of Transportation's longstanding regulation about the use of marijuana by safety-sensitive transportation employees—pilots, school bus drivers, truck drivers, train engineers, subway operators, aircraft maintenance personnel, transit fire-armed security personnel, ship captains, and pipeline emergency response personnel, among others. We want to make it perfectly clear that the DOJ guidelines will have no bearing on the Department of Transportation's regulated drug testing program. We will not change our regulated drug testing program based upon these guidelines to Federal prosecutors."). DOT issued a similar notice with regard to recreational marijuana, U.S. Deprtment of Transportation, *DOT 'Recreational' Marijuana Notice* (Feb. 22, 2013), available at http://www.dot.gov/odapc/dot-recreational-marijuana-notice.

[208] *See, generally, A Cruel Choice: Patients Forced to Decide Between Medical Marijuana and Employment*, 26 HOFSTRA LAB. & EMP. L.J. 619 (2008).

[209] *E.g*., R.I. GEN. LAWS §22-28.6-4(c)("No school, employer or landlord may refuse to enroll, employ or lease to or otherwise penalize a person solely for his or her status as a cardholder."); ARIZ. REV. STAT. ANN. §36-2813[B]("Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either: 1. The person's status as a cardholder. 2. A registered qualified patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment.").

[210] Casias v. Wal-Mart Stores, Inc., 695 F.3d at 435; Emerald Steel Fabricators, Inc. v. Bureau of Labor and Indus., 230

state unemployment statute in play, employees fired for marijuana use may also be ineligible for unemployment benefits.[211]

Taxation

Income from any source is ordinarily subject to federal taxation.[212] This is so even when the activity that generates the income is unlawful.[213] Marijuana merchants, however, operate under a special federal tax disadvantage.[214] Section 280E of the Internal Revenue Code provides:

> No 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.[215]

As a result of this provision, marijuana merchants, unlike most businesses,[216] may not deduct their operating expenses (e.g., general labor, rent, and utilities) when computing their federal income tax liability. Section 280E does not, however, apply to the cost of goods sold (COGS), which means marijuana sellers may subtract COGS when determining gross income.[217] Courts and the IRS have interpreted Section 280E to apply to marijuana so long as it is a controlled substance under the CSA, regardless of whether the purchase and use are allowed under state law.[218] The customers of a medical marijuana merchant cannot deduct the amounts spent on marijuana as medical expenses.[219]

P.3d at 169 n.7, citing, Roe v. TeleTech Customer Car Management, 152 Wash.App. 388, 216 P.3d 1055 (2009); Ross v. RagingWire Telecommunications, 42 Cal.4th 920 (2008).

[211] Under some state laws, eligibility for unemployment compensation turns on proof the marijuana use occurred on the job or had job-related consequences, *Compare*, Peace River Distributing, Inc. v. Florida Unemployment Appeals Commission, 80 So.3d 461, 464 (Fla.App. 2012)(discharged employee who tested positive for marijuana use was not entitled to unemployment compensation); Virginia Employment Commission v. Comty. Alternatives, Inc., 705 S.E.2d 530, (Va.App. 2011)(same); Maskerines v. Unemployment Comp. Bd. of Review, 13 A.3d 553, 560 (Pa.Comm. 2011)(employer need not show job nexus where discharged employee had agreed to comply with employer's drug free policy); Div. of Emp. Sec. v. Comer, 199 S.W.3d 915, 921 (Mo.App. 2006); *with*, Johnson v. So Others Might Eat, Inc., 53 A.3d 323, (D.C.App. 2012); Cusack v. Williams, 286 S.W.3d 180, 182 (Ark.App. 2008)(employer need not show job nexus where bus driver's off duty marijuana use made him ineligible for the commercial driver's license, a reasonable condition of employment). *See also* Desilet v. Glass Doctor, 132 P.3d 412, 415-16 (Idaho 2006)(off-duty marijuana use is presumed job-related if the employer followed state approved testing guidelines; otherwise the employer must show a job nexus).

[212] 26 U.S.C. §61.

[213] James v. United States, 366 U.S. 213, 218-20 (1961).

[214] For more information on this subject, *see* CRS Report WSLG1101, *Federal Taxation of Marijuana Sellers*, by Erika K. Lunder.

[215] 26 U.S.C. §280E. *See also* Californians Helping to Alleviate Med. Problems, Inc. v. Comm'r, 128 T.C. 173 (2007); Olive v. Comm'r, 139 T.C. 19 (2012).

[216] Taxpayers are generally allowed to deduct all "ordinary and necessary" business expenses. *See* 26 U.S.C. §162(a).

[217] *See CHAMP*, 128 T.C. at 178 n.4; *Olive*, 139 T.C. at 20 n.2; Peyton v. Comm'r, T.C. Memo 2003-146, *15 (2003); Franklin v. Comm'r, T.C. Memo. 1993-184, *28 n.3 (1993).

[218] *See CHAMP*, 128 T.C. at 182; *Olive*, 139 T.C. at 38.; I.R.S. Information Letter 2011-0005 (Mar. 25, 2011), available at http://www.irs.gov/pub/irs-wd/11-0005.pdf.

[219] *See* Rev. Rul. 97-9, 1997-1 C.B. 77. In this ruling, the IRS held that an amount paid to obtain marijuana for medical care was not a deductible medical expense even though the purchase and use was allowed under state law. This is because Treasury regulations deny a deduction for illegally procured drugs and illegal treatments. *See* 26 C.F.R. §1.213-1(e)(1)(ii) and (2). The IRS reasoned that marijuana obtained in violation of the CSA is not legally procured

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.[220] 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."[221] 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."[222]

Those associated with a marijuana-cultivation or -sales operation may incur additional firearm-related criminal liability. In addition to the penalties for growing or selling, anyone who provides security for the operation and possesses a firearm in furtherance of that enterprise is subject to a series of mandatory terms of imprisonment.[223] The offender and any accomplices face an additional five-year mandatory minimum term of imprisonment for possession of a firearm; a seven-year mandatory term if he brandishes the firearm; and a 10-year mandatory term if discharges it.[224]

Federally Assisted Housing

"Illegal drug users" are ineligible for federally assisted housing.[225] 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.[226] 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."[227] 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

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and constitutes an illegal treatment, regardless of how the purchase and use may be treated under state law, and therefore the amounts could not be deducted as medical expenses.

[220] 18 U.S.C. §§922(g)(3), 924(a)(2).

[221] 27 C.F.R. §478.11.

[222] *See* Open Letter to All Federal Firearm Licensers, September 21, 2011, available at http://www.atf.gov/files/press/releases/2011/09/092611-atf-open-letter-to-all-ffls-marijuana-for-medicinal-purposes.pdf.

[223] 18 U.S.C. §924(c), 21 U.S.C. §841.

[224] 18 U.S.C. §§924(c)(1)(A)(i) to (iii), 2. Co-conspirators are subject to imprisonment for not more than 20 years, 18 U.S.C. §924(*o*).

[225] 42 U.S.C. §§13661-13662. *See, generally, Medical Marijuana and the Effect of State Laws on Federally Subsidized Housing,* 57 WAYNE L. REV. 1437 (2011).

[226] 42 U.S.C. §§13661-13662.

[227] *Id.*

respect to evicting or refraining from evicting *current residents* on account of their use of medical marijuana."[228]

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 *Lebron* decision, decided in another context, would seem to preclude such preliminary testing in the absence of some individualized suspicion.[229]

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."[230]

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.[231]

The Arizona State Bar concluded in Opinion 11-01that the Ogden Memorandum had created a "safe harbor" for those that operated within the confines of the state's medical marijuana statute.[232] 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.[233]

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,

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[228] Memorandum from Helen R. Kanoovsky, *Medical Use of Marijuana and Reasonable Accommodation in Federal Public and Assisted Housing*, January 20, 2011, available at http://www.scribd.com/doc/47657807/HUD-policy-Memo-on-Medical-Marijuana-in-Public-Housing. *See also* Assenberg v. Anacortes Hou. Auth., 268 Fed.Appx. 643 (9th Cir. 2008)(Under the Fair Housing Act, tenant in publicly assisted housing is not entitled to medical necessity defense and termination of lease based on tenant's drug use did not violate HUD policy).

[229] In Lebron v. Sec. of the Fla. Dep't of Children and Families, 772 F.3d 1352 (11th Cir. 2014), the U.S. Court of Appeals upheld, on Fourth Amendment grounds, a challenge to a state requirement that applicants for Temporary Assistance for Needy Families (TANF) benefits submit to drug testing. *See* CRS Report R42326, *Constitutional Analysis of Suspicionless Drug Testing Requirements for the Receipt of Governmental Benefits*, by David H. Carpenter.

[230] A second Rule, Rule 8.4(b) provides that, "it is professional misconduct for a lawyer to ... (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." *See, generally*, Sam Kamin & Eli Wald, *Marijuana Lawyers: Outlaws or Crusaders?* 91 OR. L. REV. 869 (2013).

[231] A sample of ethics opinions was chosen for illustrative purposes. This report does not provide an exhaustive analysis of *all* state bar association ethics opinions on the issue.

[232] State Bar of Arizona Ethics Opinion 11-01 (Feb. 2011), available at http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=710.

[233] "• If a client or potential client requests an Arizona lawyer's assistance to undertake the specific actions that the [Arizona medical marijuana] Act expressly permits; and • The lawyer advises the client with respect to the potential federal law implications and consequences thereof or, if the lawyer is not qualified to do so, advises the client to seek other legal counsel regarding those issues and limits the scope of his or her representation; and • The client, having received full disclosure of the risks of proceeding under the state law, wishes to proceed with a course of action specifically authorized by the Act; then • The lawyer ethically may perform such legal acts as are necessary or desirable to assist the client to engage in the conduct that is expressly permissible under the Act."

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 a client in doing so."[234] 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.[235] 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.[236] It concluded that, consistent with Rule 1.2(d) and the 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;[237] 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 cultivation, distribution, or consumption of marijuana; or (2) provide tax planning assistance with an eye to violating federal law. 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."

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.[238]

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.[239] In its proposed opinion, a lawyer

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[234] Maine Professional Ethics Commission, Opinion #199 (July 7, 2010), available at http://www.mebaroverseers.org/attorney_services/opinion.html?id=110134.

[235] Connecticut Bar Association, Professional Ethics Committee, Informal Opinion 2013-02 (Jan. 16, 2003), available at http://c.ymcdn.com/sites/ctbar.site-ym.com/resource/resmgr/Ethics_Opinions/Informal_Opinion_2013-02.pdf.

[236] Colorado Bar Association Ethics Committee, Formal Opinion 125 (Oct. 21, 2013), 42 COLO. LAWYER 19 (Dec. 2013).

[237] Here, the Opinion finds support in 21 U.S.C. §885(d) which affords federal, state, and local law enforcement officers immunity for enforcement of federal, state, and local controlled substance laws.

[238] King County Bar Association, *KCBA Ethics Advisory Opinion on I-502 & Rules of Professional Conduct* (Oct. 2013), available at http://www.kcba.org/judicial/legislative/pdf/i502_ethics_advisory_opinion_october_2013.pdf.

[239] Washington State Bar Association, Committee on Professional Ethics, *Proposed Advisory Opinion 2232* (Jan. 8,

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.[240]

Marijuana Research Under Federal Law

The federal government retains strict controls over the use of marijuana for research purposes. Under the CSA, the Attorney General, as delegated to the Drug Enforcement Agency, is authorized to register "practitioners" to "dispense, or conduct research with" controlled substances.[241] In instances where the practitioner seeks to conduct research on a schedule I drug, such as marijuana, that application is forwarded to the Secretary of Health and Human Services "who shall determine the qualifications and competency of each practitioner requesting registration, as well as the merits of the research protocol."[242] The Secretary is also directed to "consult" with the Attorney General to ensure "effective procedures to adequately safeguard against diversion of such controlled substances from legitimate medical or scientific use."[243] As of May 2014, the DEA has registered approximately 237 practitioners to conduct marijuana research, including 16 "approved to conduct research with smoked marijuana on human subjects."[244]

Practitioners obtain marijuana for approved research through the National Institute on Drug Abuse (NIDA) drug supply program. Under the CSA, the Attorney General is authorized to register applicants to manufacture or grow marijuana "if he determines that such registration is consistent with the public interest and with United States obligations under international treaties ..."[245] Currently, the National Center for Natural Products Research (NCNPR) at the University of

2014), available at http://www.wsba.org/~/media/Files/Legal%20Community/Committees_Boards_Panels/Committee%20on%20Professional%20Ethics/CPE%20Report%201-8-14_Attachmts.ashx (The proposed comment would state: "Since the passage of I-502 by Washington voters in November 2012, both the federal and state government have devoted considerable resources to allowing I-502 [relating to recreational marijuana] to come into effect without regard to federal controlled substances laws, as long as certain stated federal concerns regarding matters such as sales to minors and other unlawful conduct are addressed. *See, e.g.*, Washington State Bar Association Advisory Opinion 2232 and sources cited. At least until there is a subsequent change of federal enforcement policy, a lawyer who counsels or assists a client regarding conduct permitted under I-502 does not, without more, violate RPC 1.2(d). *See also* Washington Comment [7] to RPC 8.4 [related criminal acts committed by attorneys].").

[240] *Proposed Advisory Opinion 2232*. The proposed comment to accompany Rule 8.4 would state: "A unique circumstance was presented by the November 2012 passage by Washington voters of I-502, which allows for the creation of a state-regulated system for the production and sale of marijuana for recreational purposes. At least until there is a subsequent change of federal enforcement policy, a lawyer who engages in conduct permitted under I-502, does not, without more, violate RPC 8.4(g), (i), (k), or (n). *See also* Washington Comment [18] at RPC 1.2."

[241] 21 U.S.C. §823(f).

[242] *Id.*

[243] *Id.*

[244] *See The Dangers and Consequences of Marijuana Abuse*¸ U.S. Dept. of Justice, Drug Enforcement Admin., at p. 4, May 2014, available at http://www.dea.gov/docs/dangers-consequences-marijuana-abuse.pdf. Researchers have reportedly encountered difficulties obtaining the marijuana necessary for their research. *See, e.g.*, Gardiner Harris, *Researchers Find Study of Medical Marijuana Discouraged*, N.Y. Times, January 18, 2010.

[245] 21 U.S.C. §823(a). In evaluating whether granting a registration is in the "public interest" the Attorney General must consider:

Mississippi is the only organization registered to manufacture marijuana.[246] NIDA administers the federal contract with the NCNPR and therefore acts as the "single official source" through which researchers may obtain marijuana for research purposes.[247]

Congressional Response

Several statutory provisions were enacted late in the 113th Congress and a number of legislative proposals have been introduced in the 114th concerning marijuana and state legalization initiatives.

Enacted Marijuana-Related Measures

P.L. 113-235 §809(b), 2015 Consolidated and Further Continuing Appropriations Act. This provision was enacted with the apparent attempt of preventing the implementation of Initiative 71, D.C.'s recreational marijuana law. However, there is some uncertainty regarding the legal effect of the provision.It states: "[n]one of the funds contained in this Act may be used to enact any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any schedule I substance under the Controlled Substances Act (21 U.S.C. 801, et seq.) or any tetrahydrocannabinols derivative for recreational purposes." Some argue that this provision bars D.C. employees from using FY2015 appropriated funds to implement Initiative 71 and that any employee who takes official acts to implement the law could be subject to civil or criminal liability under the Antideficiency Act.Others, including D.C.'s attorney general, argue that the provision does "not prevent the District from using FY15 appropriated local funds to implement Initiative 71" because the marijuana law was enacted before the enactment of the 2015 Consolidated and Further Continuing Appropriations Act.

P.L. 113-79 (H.R. 2642), Agricultural Act of 2014. This public law has two marijuana-related sections. One relates to the Supplemental Nutrition Assistance Program (SNAP) (formerly, food

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(1) maintenance of effective controls against diversion of particular controlled substances and any controlled substance in schedule I or II compounded therefrom into other than legitimate medical, scientific, research, or industrial channels, by limiting the importation and bulk manufacture of such controlled substances to a number of establishments which can produce an adequate and uninterrupted supply of these substances under adequately competitive conditions for legitimate medical, scientific, research, and industrial purposes;

(2) compliance with applicable State and local law;

(3) promotion of technical advances in the art of manufacturing these substances and the development of new substances;

(4) prior conviction record of applicant under Federal and State laws relating to the manufacture, distribution, or dispensing of such substances;

(5) past experience in the manufacture of controlled substances, and the existence in the establishment of effective control against diversion; and

(6) such other factors as may be relevant to and consistent with the public health and safety.

Id. With respect to the CSA's reference to the nation's "obligations under international treaties," the Single Convention on Narcotic Drugs establishes that "any signatory nation that 'permits the cultivation of [marijuana or opium]' must designate one or more agencies to: license cultivators and designate where plants may be grown; purchase and take physical possession of each year's crops; and have the exclusive right of importing, exporting, wholesale trading and maintaining stocks other than those held by manufacturers of opium alkaloids, medicinal opium or opium preparations." Craker v. Drug Enforcement Admin., 714 F.3d 17, 20 (1st Cir. 2013).

[246] Craker v. Drug Enforcement Admin., 714 F.3d 17, 20 (1st Cir. 2013).

[247] *See* NIDA's Role in Providing Marijuana for Research, available at http://www.drugabuse.gov/drugs-abuse/marijuana/nidas-role-in-providing-marijuana-research.

stamps), and the other relates to industrial hemp. Eligibility for the receipt of SNAP benefits is governed in part by a means test. Only individuals below a certain income level are eligible. Section 4005 of P.L. 113-79 (7 U.S.C. §2014(e)(5)(C)) instructs the Secretary of Agriculture to promulgate rules to ensure that the costs of medical marijuana are not treated as a deduction in that calculation. Section 7606 of P.L. 113-79 authorizes institutions of higher education and state departments of agriculture to grow and cultivate industrial hemp for research purposes.

Legislative Proposals in the 114th Congress

P.L. 113-235 §538, 2015 Consolidated and Further Continuing Appropriations Act. This provision prohibits the Department of Justice from using FY2015 appropriated funds "to prevent [32 listed states and the District of Columbia] from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." There appears to be disagreement regarding the breadth of this appropriations language. The Department of Justice reportedly argues that it only prevents the Department from using appropriations to restrict a named state's administrative implementation of state medical marijuana laws. Others maintain that it should be interpreted much more broadly to even bar the Department from enforcing the CSA against individuals who were acting in compliance with a named state's medical marijuana laws.[248]

S. 683/H.R. 1538, Compassionate Access, Research Expansion, and Respect of States Act of 2015. This bill, also referred to as the CARERS Act, would exempt from the CSA "any person acting in compliance with State law relating to the production, possession, distribution, dispensation, administration, laboratory testing, or delivery of medical marihuana."[249] It also would reclassify marijuana as a Schedule II substance, meaning that marijuana would be recognized under federal law as having medical benefits and could be prescribed to patients for legitimate medical reasons in accordance with the CSA.[250] The CARERS Act also would provide legal protections to depository institutions (i.e., banks, thrifts, and credit unions) that provide financial services to marijuana businesses, including by adding a provision stating that "[a] Federal banking regulator may not prohibit, penalize, or otherwise discourage a depository institution from providing financial services to a marijuana-related legitimate business" (i.e., one that is in compliance with a state or local marijuana regulatory regime).[251] The bill also would attempt to further alleviate BSA reporting burdens beyond that which is provided by the February 2014 FinCEN guidance discussed above.[252]

The bill also would attempt to make it easier for individuals to be able to conduct research on marijuana and for entities to obtain approval from the Drug Enforcement Agency to cultivate marijuana for medical research use.[253] Finally, Section 8 of the CARERS Act would authorize Department of Veterans Affairs health care providers to offer recommendations and opinions

[248] *See* Erik Eckholm, *Medical Marijuana Dispensers Trapped by Conflicting Laws*, N.Y. TIMES, April 8, 2015, available at http://www.nytimes.com/2015/04/09/us/medical-marijuana-dispensers-trapped-by-conflicting-laws.html?hp&action=click&pgtype=Homepage&module=second-column-region&region=top-news&WT.nav=top-news.

[249] S. 683/H.R. 1538 §2.

[250] *Id*. §3.

[251] *Id*. §6.

[252] *Id*. §6(d).

[253] *Id*. §7.

regarding veterans' use of marijuana in compliance with state medical and recreational marijuana regimes.[254]

S. 134/H.R. 525, Industrial Hemp Farming Act of 2015. This bill would remove industrial hemp from the definition of "marihuana" under the CSA.

H.R. 262, States' Medical Marijuana Property Rights Protection Act. This bill would amend the civil forfeiture provisions of the CSA[255] to provide that no real property may be subject to civil forfeiture to the United States due to medical marijuana-related activities that are performed in compliance with state law.[256]

H.R. 667, Veterans Equal Access Act. This bill would authorize Department of Veterans Affairs health care providers to offer recommendations and opinions regarding veterans' use of marijuana in compliance with state medical and recreational marijuana regimes.[257]

H.R. 1013, Regulate Marijuana Like Alcohol Act. This bill, among other things, would require the Attorney General to remove marijuana from all schedules of the CSA and would amend other federal laws to regulate marijuana like alcohol.[258]

H.R. 1014, Marijuana Tax Revenue Act of 2015. This bill would amend the Internal Revenue Code to impose an excise tax on the sale of marijuana by the producer or importer of the drug, at a rate of 10% for the first two years after the law goes into effect and increasing by 5% each year until maxing out at 25% from the fifth year on.[259] The bill would provide certain exemptions to the taxation, including "on the distribution or sale of marijuana for medical use in accordance with State law."[260] In addition, the bill would require anyone engaged in a "marijuana enterprise"[261] to pay an occupational tax of $1,000 per year for marijuana producers, manufacturers and importers, and $500 per year for other marijuana enterprisers.[262] The bill would require all marijuana enterprises to obtain a permit from the Secretary of the Treasury.[263] Finally, the bill would impose civil and criminal penalties for violation of the duty to pay the new marijuana-related taxes, engaging in business as a marijuana enterprise without obtaining the requisite permit, and for otherwise violating the provisions of the bill.[264] The bill does not amend the CSA, thus its provisions would remain in effect.

H.R. 1635, Charlotte's Web Medical Access Act of 2015. This bill would remove cannabidiol and cannabidiol-rich plants from coverage under the CSA and the Federal Food, Drug, and Cosmetic Act, subject to a three-year sunset date from the date of enactment.

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[254] *Id.* §8.

[255] 21 U.S.C. §881.

[256] H.R. 262 §3, amending 21 U.S.C. §881(a)(7).

[257] H.R. 667 §2.

[258] H.R. 1013 §101, amending 21 U.S.C. §§801, et seq. and §201, amending 27 U.S.C. §§201, et seq..

[259] H.R. 1014 §2(a), adding new 26 U.S.C. §5901.

[260] *Id.* §2(a), adding new 26 U.S.C. §5902.

[261] The bill defines "marijuana enterprise" as "a producer, importer, manufacturer, distributor, retailer, or any person who transports, stores, displays, or otherwise participates in any business activity that handles marijuana or marijuana products." *Id.* §2(a), adding new 26 U.S.C. §5904(8).

[262] *Id.* §2(a), adding new 26 U.S.C. §5911.

[263] *Id.* §2(a), adding new 26 U.S.C. §5912.

[264] *Id.* §2(a), adding new 26 U.S.C. §§5921, 5922.

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