More than half the states (in early 2018, 29 of them) and the District of Columbia now have approved the sale to licensed patients of ingestible versions of the genus Cannabis.1 Medical Cannabis activists will continue to pressure holdout states like Georgia2 to pass legislation or at least place an initiative on the ballot for public approval. So long as the federal law enforcement community maintains its present “threats without action” posture, marijuana retailing to “patients” with state authorization will continue. Today, the federal posture on enforcement is in flux notwithstanding the Controlled Substances Act of 1970.3 That Act schedules Cannabis as a drug that cannot be sold, transported, or possessed for sale without felony liability for the actor.

In October 2009, the Justice Department issued a letter4 stating the Obama Administration’s preference that U.S. District Attorneys not prosecute purveyors and users of Cannabis acting in clear compliance with the requirements of state law. In February 2011, however, the U.S. District Attorney for the District of Northern California advised the Oakland City Attorney and the California Attorney General that it would not stand idle while the city licensed commercial-scale (unattached to a dispensary operation and growing in bulk) Cannabis cultivators.5 [No doubt Oakland was peeved by this response, since the licensing fees (including application fee) for the six growers Oakland hoped to license would have raised more than $1 million in fees for the city.6] U.S. Attorney Melinda Haag’s warning to Oakland and the California Attorney General triggered a wave
of aggressive federal prosecution threats, including claims against owners for the forfeiture of real property. Similar threats arise from time to time through the date of this book’s publication, now somewhat shored-up by Attorney General Sessions’ January 2018 memorandum encouraging U.S. Attorneys to enforce marijuana-related federal statutes. This spate of warning shots from federal prosecutors created an environment of confusion and resentment among MBE operators, until Congress’s Rohrabacher-Farr Amendment cut off federal funding for prosecution of dispensary owners. And in August 2017, the State Marijuana and Regulatory Tolerance Enforcement Act (H.R. 3534) was introduced in Congress, seeking to prohibit prosecution by the federal government of state-sanctioned consumers and businesses. The Rohrabacher-Blumenauer Amendment has extended prohibition from using federal funds for prosecuting operators complying with state-regulated medical marijuana programs until at least March 23, 2018.

Despite ambiguity about federal government enforcement policy of anti-drug laws, that are described more in Chapter 12, in difficult economic conditions, state governments will continue to seek new sources of sales tax revenues. Criminal enforcement of drug laws by federal law enforcement is not the only weapon against medical marijuana entrepreneurs. An IRS campaign of aggressive audits of medical marijuana retailers was launched in 2010. The Service uses Section 280E of the Internal Revenue Code to deny marijuana dispensaries deductions for legitimate business expenses such as rent, payroll, and all other necessary business expenses. These denials result in astronomical “back tax” bills for the affected dispensaries. If legislation is not implemented to allow these businesses to deduct legitimate business expenses, these unpaid taxes, with interest and penalties, may destroy the financial viability of any MBE in the United States. For instance, in October 2011, the IRS billed Oakland’s Harborside Health Center $2.5 million in back taxes for calendar years 2007 and 2008, based on a section of the Internal Revenue Code (26 U.S.C. § 280E) that prohibits marijuana dispensaries—unlike other businesses—from deducting payroll, insurance, rent, workers’ compensation premiums, and other operating costs from its revenues. Some question whether landlords of MBEs in single-tenant buildings also are subject to the deduction prohibitions of Section 280E.

Whatever the federal intentions may be in the Trump Administration and beyond, medical marijuana dispensing to patients appears
trending toward universal acceptance. This trend, in addition to the sudden spurt in 2016 of recreational use ballot approvals at the state level, presents both opportunities and risks for commercial landlords in communities adopting ordinances governing growing, dispensing, and recreational use. No readable book comprehensively can analyze each state (and applicable local) government’s rules for establishing and monitoring operations of “marijuana business enterprises”—shortened in this book to “MBEs.” Numerous thorny real property issues face landlords deciding whether—and how—to rent space to MBEs. The following chapters outline these issues in some detail and suggest ways both parties can cope with the difficult choices confronting the landlord in allowing the MBE tenancy. The brief outline below complements the forfeiture and IRS threats.

1. Rent paid to the landlord and passed on to the mortgage lender is subject to the Treasury Department’s Financial Crimes Enforcement Network (or “FinCEN”) Guidance standards of February 2014 that require a regulated lender to report to the IRS cash payments received from MBEs above $10,000. Practically speaking, therefore, landlords cannot accept cash for rent they intend to deposit in their bank or use for a mortgage payment to a bank. So the MBE must cause rent to be paid via checks or wire transfers. If that cannot be accomplished, some form of credit enhancement drawdown must be used for rent payments in those states where no financial institution services are afforded to MBEs. (And in a number of states such as California and Colorado, the “banking community” staunchly refuses to cooperate with MBEs.)

2. Monies paid directly to a landlord by the MBE tenant are subject to forfeiture if either the MBE or the landlord is prosecuted for violating the CSA.

3. If the property is lender-financed, that lender holds a sword above the landlord’s head—the provisions of the loan documents reciting that the landlord promises to comply with all laws (no explicit loan document carve-outs recite that performing this promise is excused while the federal government holds its fire in enforcing the CSA).

4. The landlord with an MBE lease faces addressing these challenges with a future buyer—perhaps one looking for a substantial