Introduction

This handbook provides a general overview of the Foreign Agents Registration Act (FARA), the regulatory and statutory provisions that govern whether an entity must register with the U.S. Department of Justice (DOJ), the registration process, the obligations of registered agents, and the penalties that may be imposed for FARA violations.

Overview

Enacted in 1938 and administered by the FARA Registration Unit of the Counterintelligence and Export Control Section (CES) in the National Security Division (NSD) of DOJ, FARA is a disclosure statute that seeks to ensure that all persons acting politically or quasi-politically on behalf of foreign entities in the United States properly disclose their activities to the United States government. As a result, the statement requires that all persons acting as an “agent of a foreign principal” register with DOJ unless an exception applies. In general, all of the information disclosed in FARA registration materials is made publicly available online.

Is there a registration requirement?

Pursuant to the statute, any person who engages in certain political or quasi-political activities on behalf of a foreign principal (i.e., an agent of a foreign principal) must register under FARA unless an exception applies.

The statute broadly defines a “foreign principal” to include not only foreign governments and foreign political parties, but also persons and organizations outside of the United States, and corporations and other entities that are organized under the laws of a foreign country, or whose principal place of business is a foreign country. Further, the statute defines an “agent of a foreign principal” to include any person (i.e., individual, partnership, association, corporation, etc.) who has an agency relationship with the foreign principal; and directly, or through any other person, is engaged in one of four covered activities in the United States. These activities are: (1) engaging in political activities for or in the interests of such foreign principal; (2) acting as a public relations counsel, publicity agent, information-service employee or political consultant for or in the interests of such foreign principal; (3) soliciting, collecting, disbursing, or dispensing contributions, loans, money, or other things of value for or in the interest of such foreign principal; or (4) representing the interests of such foreign principal before any agency or official of the government of the United States.

“Political activities” are defined as “any activity that the person engaging in believes will, or that the person intends to, in any way influence any agency or official of the government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United
States or with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party.” Notably, the definition of political activities is broad and could include a wide range of activities, such as lobbying U.S. government officials; engaging in public relations activities for the purpose of changing or enhancing the U.S. public’s perception of a foreign government; or arranging meetings, planning itineraries, or supplying a forum for foreign officials to promote their programs.

Does an exception to registration apply?

Even if activity triggers a registration requirement under the statute, an exemption may apply. Specifically, the statute provides exemptions to registration for the following persons/reasons:

- Diplomatic or consular officers
- Officials of foreign governments
- Staff members of diplomatic or consular officers
- Private and nonpolitical activities/solicitation of funds
- Religious, scholastic, or scientific pursuits
- Defense of foreign government vital to United States defense
- Persons qualified to practice law
- Agents registered under the Lobbying Disclosure Act provided that the foreign principal is not a foreign government or foreign political party

Importantly, the party claiming an exemption from the registration requirement bears the burden of demonstrating qualification for the exemption under these provisions. When in doubt as to the applicability of a given exception, potential agents of a foreign principal may pursue a request for a formal advisory opinion.

What are the registration requirements under FARA?

An agent of a foreign principal must file an initial registration statement, short forms, and supplemental statements via FARA’s electronic filing system. Pursuant to the statute, the agent must also properly label and file “informational materials” with DOJ.

**Initial Registration**

The initial registration statement must be submitted to DOJ *within 10 days* of when an agent enters into an agreement with the foreign principal. This initial statement includes a variety of information, such as: the registrant’s contact information; the status of the registrant; the contract between agent and foreign principal or, if no contract exists, a full statement indicating the circumstances by reason of which the registrant is an agent of a foreign principal; the nature and amount of contribution, income, money, or thing of value that the registrant has received; a detailed statement of the activities that
the agent is performing in connection with its representation of the foreign principal; and a detailed statement of the money and other things of value spent by the registrant in connection with his/her representation of the foreign principal. A $305 filing fee per foreign principal is required.

Supplemental Registration Statements

Every six months, registered agents must file a supplemental registration statement with DOJ. The supplemental registration statement includes the following information: any changes in agent management, personnel, or termination of representation; a description of any activities or services performed on behalf of the foreign principal during the six-month reporting period; any monies or things of value expended and received in connection with the representation; and information concerning any “informational materials” disseminated. In addition, a $305 filing fee per foreign principal is required.

Short Forms

Every partner, officer, director, associate, employee, and agent of a registrant is required to file a short form, unless: (1) the partner, officer, director, associate, employee, or agent of the registrant does not engage directly in registerable activity that is in furtherance of the interests of the foreign principal, or (2) the employee or agent of a registrant whose activities further the interests of a foreign principal are provided in a clerical, secretarial, or similar capacity. No filing fee is required to file short forms.

Labeling and Filing Requirements of Informational Materials

Two copies of all “informational materials” that are transmitted or caused to be transmitted to two or more persons on behalf of or for the benefit of the foreign principal must be filed with DOJ within 48 hours of their distribution. “Informational materials” include but are not limited to the following: radio and television broadcasts, advertising, magazine or newspaper articles, motion picture films, pamphlets or other publications, letters or telegrams, and lectures or speeches. In addition, all informational materials must contain a conspicuous statement that the materials are distributed by the agent on behalf of the foreign principal, and that additional information is on file with DOJ.

Recordkeeping Requirements

Registered agents are required to maintain all records related to the activities subject to registration under the statute for up to three (3) years after the termination of an agent’s registration. The recordkeeping requirement covers: financial statements; correspondence between relevant persons; memorandums; written communication; informational materials; bank statements; records containing the names, titles, and contact information of individuals that either provided services to the foreign principal, or were contacted by the agent in relation to the foreign principal’s agenda; and any other documents prepared for, distributed to promote, or containing information regarding the agent’s
representation of the foreign principal. If the registered agent is a corporation or other such entity, then it is also required to retain meeting minutes.

Upon request, these records must be made available for inspection by the NSD and the Federal Bureau of Investigation (FBI).

**Electronic Filing Requirement**

DOJ requires that all registration statements and informational materials be submitted electronically using the agency’s eFile system. In order to file documents electronically using eFile, new registrants must submit their registration package by selecting “New Registration” on the eFile website and then uploading their documents to the system. DOJ will then review the submission, and provide an account number and password via mail. Registrants must use their online user account number and password to upload any subsequent documents. The registration fee associated with the various FARA filings can be paid either online with a credit card or electronic funds transfer, or by mail with a check. Once a document has been successfully submitted, the eFile system will provide a confirmation with a transaction number to track the submission.

**What are the penalties for noncompliance?**

Criminal penalties may be imposed on agents that intentionally and willfully violate any provisions under the statute, including fines up to $10,000, imprisonment for no more than five (5) years, or both. Agents that willfully make false statements or intentionally fail to provide material information in support of their registration or supplemental statements are also subject to these sanctions. In the majority of cases, however, DOJ has found noncompliance with registration requirements to be unintentional, permitting agents to remedy any deficiencies instead of instituting criminal proceedings.

**Recent Developments in FARA Enforcement**

In recent months, DOJ has begun to enforce FARA more aggressively. Indeed, FARA has now been thrust into the national spotlight. Given the broad scope of the statute, the potential consequences of noncompliance, and DOJ’s heightened focus on FARA enforcement, it is important that individuals and companies representing foreign individuals, governments, or companies in the U.S. in a political or quasi-political capacity carefully evaluate whether their activities may trigger registration under FARA and consult counsel when in doubt. Recent developments in FARA enforcement are outlined below.

**The 2016 Inspector General Report**

The DOJ Inspector General (IG) issued a report in September 2016, faulting the National Security Division (NSD) for its failure to enforce FARA. The report found that 63% of new lobbyist registrations weren’t timely made and half of registered agents failed to timely update the division as required
by the statute. The report also revealed a distinct disagreement among FBI counterintelligence agents, Assistant United States Attorneys (AUSAs), and NSD officials regarding what the intent of FARA is, as well as what “constitutes a ‘FARA case.’” The IG reported that investigators had a “clear preference” toward bringing unregistered agents into compliance with FARA, rather than prosecuting them, leaving an “important counterintelligence tool underutilized.”

The report provided 14 recommendations to improve the NSD’s enforcement and administration of FARA, which included making FARA advisory opinions public, establishing a “comprehensive system” to track FARA cases, and expanding the NSD’s information sources to better identify agents who are not in compliance. Since the 2016 report, DOJ has become more aggressive in ensuring that foreign agents register their activities.

The Manafort Investigation

In October 2017, following an investigation by Special Counsel Robert Mueller, Paul Manafort, President Donald Trump’s former campaign manager, was indicted on multiple counts, including charges that he violated FARA by failing to timely register with the NSD regarding his consulting work performed on behalf of a pro-Russia political party in Ukraine between 2012 and 2014. Manafort retroactively filed as a foreign agent after press reports emerged revealing his work for the political party. Richard Gates, Manafort’s business partner and former deputy campaign chairman to President Trump, was also charged with violating FARA. Gates pled guilty to the charges and is currently assisting with the investigation.

Since the investigation into Manafort’s activities began, FARA filings at the NSD have soared. The number of active FARA registrants have increased by roughly 25% since 2016, jumping from 365 registrants in 2016 to 444 registrants as of May 28, 2019. Moreover, as of May 28, 2019, there are approximately 673 active foreign principals registered under the statute.

Media Registrations

There have been several recent press registrations under the statute. Russian network RT was identified in January 2017 as having an impact on the 2016 U.S. Presidential election. After months of pressure from DOJ to register, T&R Productions LLC, the production company responsible for all English language content on RT, registered with FARA on Nov. 10, 2017. In February 2019, Chinese state-run media company CGTN America (CGTN) registered as a U.S.-based agent of the Chinese Government. These recent registrations underscore DOJ’s continued heightened focus on FARA enforcement, specifically, ensuring that all entities that trigger a registration requirement and are not eligible for an exemption – whether lobbyists, public relations companies, or even media outlets – are registered under the statute.

DOJ Public Advisory Opinions

In June 2018, the DOJ released over 50 redacted FARA advisory opinions
addressing common exemptions. The release of the opinions to the public was likely in response to the 2016 IG report’s recommendation. A few important exceptions are outlined below, but for a full list of the advisory opinions, visit the DOJ website.

- **Definition of Agency:** In response to a recent advisory opinion request, DOJ concluded that a commentator hosting a television show that was produced by a U.S. production company registered under FARA (because it was producing programming for a foreign state-owned network) was not required to separately register under FARA given the lack of an independent contractual relationship between the commentator and the foreign state-owned network. As DOJ explained, “[The commentator]’s contractual relationship is with [the U.S. production company], a FARA-registered U.S. entity. Therefore, it cannot be said that the [commentator] is an ‘agent of a foreign principal’ who is acting ‘at the order, request, or under the direction or control of a foreign principal.’”

- **Commerce Exemption:** A U.S. company providing compliance and consulting services to a foreign state bank submitted an advisory opinion request seeking confirmation that FARA’s commerce exemption at 22 U.S.C. § 613(d) applied. The company characterized its services for the bank as private and non-political, claiming that its services do not serve a foreign interest. DOJ disagreed, however. Specifically, DOJ concluded that the U.S. company did not qualify for the commerce exemption because the company’s activities were intended to demonstrate the bank’s fitness to establish relationships with U.S. financial institutions, thereby directly promoting the public interests of the foreign country and disqualifying the agent from the commerce exemption.

- **Legal Exemption:** A U.S. law firm submitted an advisory opinion request claiming that the legal exemption at 22 U.S.C § 613(g) applied to its representation of a foreign person and foreign bank. DOJ agreed, noting that the law firm’s activities were limited to the provision of legal services to the foreign person and foreign bank in the context of a U.S. sanctions-related investigation and enforcement proceeding and were not intended to influence U.S. sanction policies beyond the law firm’s representation of the foreign person and foreign bank, which would have disqualified the firm from the exemption.

- **LDA Exemption:** A U.S. law firm representing a foreign bank submitted an advisory opinion request claiming the LDA Exemption under 22 U.S.C. § 613(h) applied. As part of its representation of the foreign bank, the law firm intended to lobby Congress, special interest groups, and the public. DOJ concluded that the law firm could not avail itself of the LDA exemption because the foreign bank was part of the government, making the foreign government the principal beneficiary of the law firm’s efforts. As DOJ noted, the LDA exemption does not apply where, as here, a foreign government is the principal beneficiary of an agent’s activities. See 18 C.F.R. § 5.307.
While DOJ advisory opinions shed some light on its application and interpretation of the FARA statute, they also reinforce the heavily fact-specific nature of FARA registration obligation determinations. Given that this considerable gray area exists, individuals and companies representing foreign individuals, governments, or companies in the U.S. in a political or quasi-political capacity should seek counsel for specific advice on FARA registration obligations and exemptions.

**Additional Indictments Under FARA**

In addition to the Manafort indictment, the NSD has begun to enforce FARA more aggressively than it has in decades, resulting in a significant increase in criminal indictments. In May 2018, Nisar Ahmed Chaudhry, a U.S. permanent resident and Pakistani national, pled guilty to charges that he failed to register as a foreign agent in connection with lobbying work he did from 2012 through 2018 for the Pakistani government in an effort to shape U.S. foreign policy. On August 31, 2018, Samuel Patten, a former associate of Paul Manafort and prominent Washington, DC lobbyist, pleaded guilty for failing to register as a foreign agent under FARA and other counts, including causing and concealing foreign payments. On September 25, 2018, U.S. army reservist Ji Chaoqun was charged with violating FARA for secretly providing information about American defense contractor employees to a Chinese intelligence officer without registering under FARA. More recently, in February 2019, Greg Craig, former Skadden Partner and former White House Counsel to President Obama, was charged with making false statements to DOJ in connection with his work for Ukraine.
What Academia Must Know About DOJ's China Initiative

By Hdeel Abdelhady (January 28, 2019, 4:01 PM EST)

"China wants the fruits of America’s brainpower to harvest the seeds of its planned economic dominance. Preventing this from happening will take all of us ... across the U.S. government, and within the private sector."
—Assistant Attorney General for National Security John Demers[1]

"No country presents a broader, more severe threat to our ideas, our innovation and our economic security than China."
—FBI Director Christopher Wray[2]

The confrontation between the United States and China is not just a traditional “trade war” centered on tariffs. More consequentially, the two countries are in the early stages of a tech war: a race to develop or dominate emerging technologies deemed critical to future economic, industrial and military positioning and leadership. These emerging technologies include artificial intelligence, robotics, nanotechnology and advanced computing.[3]

On national security grounds, the United States is developing and implementing a whole-of-government approach to maintain the country’s technological edge through legal and policy measures to restrict Chinese access to U.S. technology and intellectual property, including by: (1) limiting or prohibiting certain foreign investment and commercial transactions; (2) adopting export controls on emerging technologies; (3) instituting supply chain exclusions; (4) curbing participation in academic and other research; and (5) combating cyber intrusions and industrial and academic espionage.[4] Additionally, concerns about Chinese government influence have spurred proposals to regulate the activities of entities viewed as Chinese government influence operators.

While the Trump administration has raised the temperature on relevant economic and national security issues, the whole-of-government approach reflects concerns across the executive branch, within Congress and among policy influencers that predate the Trump administration.

DOJ China Initiative: Objectives and Working Group, Jeff Sessions’ Departure

The U.S. Department of Justice recently launched an initiative to “combat Chinese economic espionage.” Announced on Nov. 1, 2018, by then-Attorney General Jeff Sessions, the China Initiative, according to a DOJ fact sheet, acts on the Trump administration’s previous findings “concerning China’s practices” and “reflects the Department’s strategic priority of countering Chinese national security threats and reinforces the President’s overall national security strategy.”[5]
The China Initiative is led by the DOJ’s National Security Division, which “is responsible for countering nation state threats to the country’s critical infrastructure and private sector.”[6] The DOJ Criminal Division will “aggressively investigate Chinese companies and individuals for theft of trade secrets.”[7] In addition to the Federal Bureau of Investigation, five U.S. attorneys are original members of the China Initiative Working Group: from Massachusetts, the Northern District of Alabama, the Northern District of California, the Eastern District of New York and the Northern District of Texas.

The involvement of U.S. attorneys for Massachusetts and the Northern District of California is not surprising, given that Boston and Northern California, for example, are significant technology and IP centers.[8] The membership of the U.S. attorneys for the Eastern District of New York and the Northern District of Texas is more interesting, and likely harnesses those districts’ experience in enforcement against Chinese technology giants ZTE, in the Northern District of Texas, and Huawei, in the Eastern District of New York.[9]

As the China Initiative is part of a whole-of-government approach to deemed national security threats posed by China, the departure of Jeff Sessions is unlikely to slow or diminish the initiative.

**China Initiative Components: Enforcement, Regulation and Private Sector Engagement**

The China Initiative is composed of 10 “components,” some of which are outward-facing and others of which are inward-facing (i.e., capacity building within the DOJ). Broadly, the outward-facing components are of three types: (1) enforcement actions, (2) regulation and monitoring and (3) engagement with the private sector, including academia. Three components of the China Initiative most relevant to academic and research institutions are discussed here.

**Academic and Industrial Espionage Countermeasures: Nontraditional Collectors**

The DOJ will “develop an enforcement strategy concerning nontraditional collectors (e.g., researchers in labs, universities and the defense industrial base) that are being co-opted into transferring technology contrary to U.S. interests.”[10] The “co-opted” language here is noteworthy for its ambiguity and potentially wide scope. For example, a plain reading of the language suggests that a “co-opted” “nontraditional collector” need not knowingly engage in “espionage” or technology transfers in a manner that is illicit or contrary to U.S. interests.

This prong of the China Initiative appears to respond largely to concerns about “academic espionage,” which have been raised for years but appear to have gained steam in 2017 and 2018. For example, the Trump administration’s National Security Strategy, published in December 2017, identifies countering academic espionage as a priority.[11] The same concerns have gained currency among Congress members and those who influence them.[12]

The Trump administration has sought to curb foreign participation in U.S. academic research by indirect means, such as by imposing or proposing limits on foreign student (particularly Chinese) visas.[13] Universities, research institutions and others affected by the DOJ’s focus on nontraditional collectors should seek clarification as to the scope of nontraditional collector targets and underlying premises. For example, would Chinese students whose studies are funded by the Chinese government be considered “co-opted” or so susceptible to being co-opted that they could be, presumptively, targets? Or is a broader premise at work?

Similar questions might apply to non-Chinese nationals who engage in paid or nonpaid work or collaboration with or on behalf of Chinese government or government-affiliated entities, such as those who participate in the Thousand Talents Plan (which has come under scrutiny, with some also suggesting that participants be required to register as foreign agents under the Foreign
Agents Registration Act).

“Threats to Academic Freedom and Open Discourse From Influence Campaigns”

The China Initiative seeks to “educate colleges and universities about potential threats to academic freedom and open discourse from influence efforts on campus.”[14] Targets of this prong of the initiative might include, for example, entities like the Confucius Institute, as well as Chinese companies that are, or are believed to be, state-owned or acting on behalf of the Chinese government.

Chinese government influence on U.S. academia has been highlighted as a national security threat. Corporate sponsorship of university research by Chinese companies (which are believed by some to be acting on behalf of the Chinese government, even if not government-owned) has been flagged as a national security challenge, as have nonprofit and educational institutions affiliated with the Chinese government.[15] As indicated above, an example is the Confucius Institute (understood to be present at over 100 university locations the United States), which lawmakers and others want to have registered as a foreign agent under FARA (including as part of legislation introduced in Congress).

Apply the Foreign Agents Registration Act to “Unregistered Agents Seeking to Advance China’s Political Agenda”

Enacted in 1938 to regulate Nazi propaganda and related activities in the United States, FARA requires, inter alia, natural and legal persons acting or purporting to act on behalf of foreign principals — government and private — in "political" or "quasi-political" capacities to register with the DOJ as foreign agents. FARA’s text is expansive enough to apply to activities that do not or may not appear to be “political” or “quasi-political” (including potentially certain business and advocacy activities).

FARA has gained visibility since the 2016 presidential election, as persons affiliated with the Trump campaign have been accused of or prosecuted for being unregistered foreign agents. FARA’s higher profile has resulted in efforts to apply the law to a wide range of actors, such as to nonprofit organizations engaged in international environmental advocacy and to Chinese government and associated parties.[16]

Academic institutions, research institutes and other parties that host or engage with the Confucius Institute on campus or otherwise, have faculty or personnel who engage or collaborate with the Chinese government or entities perceived to arms of the Chinese state, and those engaged in research and technological development (such as incubators and accelerators) should, as a starting point, educate and train their leadership and relevant personnel on FARA and proposals to potentially apply the law to their environments.

Recommended Action for Academic and Research Institutions

The DOJ’s China Initiative is understood to advance national security objectives of high priority to the U.S. government. Given the United States’ focus on preserving its technological edge, including by curbing Chinese access to U.S. IP and technology (in cases of illicit and lawful access, such as by investment), the reasons for the DOJ China Initiative’s applicability to academic and research environments that birth and nurture technological innovation are clear.

Academic and research institutions should take steps to understand the China Initiative in the context of broader U.S.-China dynamics, seek clarification and develop compliance and other response plans that consider its potential interplay with and implications for, inter alia, academic freedom and privacy in light of applicable law, academic policies and institutional culture. As
appropriate at the institutional level, such efforts should involve administrative, legal, research integrity/export controls and other relevant personnel at leadership and other levels.

More proactive measures — such as the development of advocacy strategies to inform the content and tone of legal and policy measures — might be more appropriate for entities that engage (at the institutional level or through faculty and students) with China and Chinese parties; host or collaborate with the Confucius Institute or other entities deemed influence operators; receive corporate or other support from Chinese companies or other entities; or enroll or host students or researchers who are Chinese nationals.

Given the importance of international cooperation and foreign student enrollment — including Chinese student enrollment — to many U.S. colleges and universities, the reasons for proactive engagement by academia are compelling.[17]

_Hdeel Abdelhady is principal attorney at MassPoint Legal and Strategy Advisory PLLC, and teaches a course on regulation of foreign access to U.S. technology at The George Washington University Law School._

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[2] Id.


[6] Id.

[7] Id.

[8] The Northern District of California is involved in a trade secret theft case against a Taiwanese company, a Chinese state-owned firm and three individuals accused of, among other things, stealing the trade secrets of Micron Technology Inc., a U.S. company.

(detailing that, inter alia, ZTE entered a guilty plea to sanctions violations and other offenses in the Northern District of Texas) Mar. 7, 2017; Emily Rauhala, Huawei executive wanted by U.S. faces fraud charges related to Iran sanctions, could face 30 years in prison, Washington Post, Dec. 7, 2018, at https://www.washingtonpost.com/world/the_americas/huawei-executive-wanted-by-us-scheduled-for-bail-hearing-in-canada/2018/12/07/0a08c602-fa31-11e8-863a-8972120646e0_story.html?utm_term=.101d5c48e8ac. Separately, it should be noted that Huawei has been under investigation for sanctions violations for years, and will likely face enforcement involving multiple U.S. agencies (particularly by the DOJ, the Office of Foreign Assets Control and the Department of Commerce) at the corporate level in the foreseeable future. For more on the ZTE case and discussion of the Trump Administration’s approach to sanctions enforcement, see, e.g., Hdeel Abdelhady, US Law as Trade War Weapon, Law360, May 21, 2018, at https://www-law360-com.gwlaw.idm.oclc.org/articles/1045372/us-law-as-trade-war-weapon.


[11] See, e.g., Abdelhady (“The National Security Strategy states that the ‘United States will review visa procedures to reduce economic theft by nontraditional intelligence collectors ... [and] consider restrictions on foreign STEM students from designated countries to ensure that intellectual property is not transferred to our competitors.’ Relatedly, in a May 2018 statement, the White House reported that the ‘United States will continue efforts to protect domestic technology and intellectual property ... [including by stopping] noneconomic transfers of industrially significant technology and intellectual property to China’”).

[12] For example, in April 2018, two subcommittees of the House Committee on Science, Space, and Technology held a joint hearing entitled "Scholars or Spies: Foreign Plots Targeting America’s Research and Development," the purposes of which were to, inter alia, "explore foreign nationals' exploitation of U.S. academic institutions for the purposes of accessing and engaging in exfiltration of valuable science and technology research and development.” House Committee on Science, Space, and Technology, Hearing Charter, Oversight Subcommittee and Research and Technology Subcommittee joint hearing, April 4, 2018, available at https://science.house.gov/sites/republicans.science.house.gov/files/documents/HHRG-115-SY21-20180411-SD001.pdf.

[13] See, e.g., Commerce Emerging Technologies, Nov. 27, 2018, at https://masspointpllc.com/emerging-technologies-export-controls-rulemaking/ (indicating that the Department of Commerce’s early proposed rulemaking as to potential export controls on “emerging technologies” excludes fundamental research and noting that other methods for restricting fundamental research may be pursued).


[15] See, e.g., Abdelhady, discussing objections by U.S. senators to Chinese corporate sponsorship of U.S. university research, particularly by Huawei. Concerns about Huawei's and other Chinese companies' "espionage" and/or links to the Chinese government (particularly Chinese intelligence) have affected academic institutions outside of the United States. Earlier this month, for example, Oxford University announced that it would “not pursue new funding opportunities” with Huawei, “in the light of public concerns raised in recent months surrounding UK partnerships with Huawei.” BBC News, Oxford University suspends Huawei donations and sponsorships, Jan. 17, 2019, at https://www.bbc.com/news/business-46911265.

[16] For example, in July 2018, the House Committee on Natural Resources sent letters to two U.S.-based nonprofit organizations — the Natural Resources Defense Council and the Center for Biological Diversity — questioning whether their foreign activities and relationships require registration under the Foreign Agents Registration Act.
[17] It was reported recently, for example, that a U.S. university has secured insurance against declines in Chinese student enrollment. See, e.g., MassPoint PLLC, US-China Risks to American Academia Are So Real They Are Insurable, Dec. 27, 2018.

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U.S.-CHINA TECH WAR

Huawei, Questions About Chinese Government Ownership, and the Foreign Agents Registration Act*

Author: Hdeel Abdelhady

The United States has adopted a whole-of-government approach to counter China's “economic aggression” or “economic espionage,” umbrella terms that encompass a range of conduct including IP theft, forced technology transfer, academic espionage, and influence operations in the United States. The whole-of-government approach illustrates that the most strategically significant and complex confrontation between the United States and China is not the “trade war.” Rather, the race to dominate future technologies like artificial intelligence and 5G underpins the most complex legal and policy issues between the two nations.

Reflecting concerns about the means by which China accesses and uses U.S.-origin technology, the whole-of-government approach is a coordinated strategy that harnesses the political, policy, and legal resources of the United States government to curb and control over China's access to U.S. technology, through lawful and illicit means employed by state or private actors. These measures include: restrictions on Chinese investment in U.S. technology; exclusions of Chinese state-owned and private firms from U.S. government and private supply chains (including through outright bans on Chinese companies and export controls); IP theft and economic espionage prosecutions; and, countering Chinese influence in the United States such as by requiring registration under the Foreign Agents Registration Act by parties acting or believed to be acting on behalf of the Chinese government.[2]

Huawei: Allegations of Chinese Government Ownership or Control, Supply Chain Exclusion, and the Foreign Agents Registration Act

The U.S.-China tech war, and the United States' whole-of-government strategy, has put Chinese technology companies under the hot light of U.S. legal and political scrutiny. Companies like Huawei and ZTE, relative unknowns in the United States until recently, have found themselves on the wrong side of U.S. law enforcement. ZTE was hit with criminal and
civil penalties for sanctions and export controls violations. And Huawei faces a range of U.S. legal actions. Among other legal troubles, Huawei's CFO was arrested in Canada at the United States’ request in connection with U.S. sanctions, bank fraud, and other charges (Huawei Device USA and Huawei's Iranian subsidiary are also named defendants); a Huawei entity has been indicted for trade secret theft offenses, wire fraud, and obstruction of justice; and, Huawei was banned from the federal government supply chain in 2019.

Additionally, Huawei, which describes itself as an employee-owned private company, remains the subject of accusations that it is a Chinese government owned, controlled, or influenced company. The allegations about Huawei’s links to the Chinese government have existed for many years, but in the current environment have taken on greater political and legal significance in the United States and, to a lesser extent, in other countries.

Enacted in August 2018, the National Defense Authorization Act for Fiscal Year 2019 (NDAA) contains provisions that exclude Huawei’s telecommunications equipment and services directly from the federal government supply chain and indirectly from private supply chains (by prohibiting federal funding for Huawei equipment and services and their use by federal government contractors). The exclusion is significant, as federal government business opportunities are, directly and indirectly, important for telecommunications equipment and services providers in the United States. Reflecting this, in March Huawei—specifically two Huawei entities, Huawei Technologies USA, Inc. and Huawei Technologies Co., Ltd.—sued the U.S. government in federal court, challenging the NDAA exclusion provisions as, inter alia, unconstitutional bills of attainder and deprivations of due process.

Critical to Huawei's legal positions is its contention that the U.S. Government (specifically Congress, in relation to the lawsuit) has falsely and without due adjudication by the courts or proper determination by the Executive branch adjudged Huawei an entity owned, controlled, or unduly influenced by the Chinese government. In its complaint, Huawei challenges this characterization and describes the Huawei corporate structure as privately owned and controlled, as follows:

Huawei Technologies USA, Inc. (“Huawei USA”), is a corporation organized under Texas . . . Huawei Technologies Co., Ltd. (“Huawei Technologies”) . . . is a limited liability company organized in Shenzhen, Guangdong Province . . . Huawei USA and Huawei Technologies are wholly-owned subsidiaries of Huawei Investment & Holding Co. Ltd. (“Huawei Investment”), and are therefore affiliates. In addition . . . Huawei USA is an indirect subsidiary of . . . Huawei Technologies. Huawei Investment is a private company wholly owned by its employees. Its direct shareholders are an employee-stock-ownership plan named the Union of Huawei Investment & Holding Co., Ltd., and the founder of Huawei, Mr. Ren Zhengfei. The Union of Huawei Investment & Holding Co., Ltd. involved more than 97,000 employees as of February 2019. Mr. Ren's investment accounted at that time for only approximately 1.14% of Huawei Investment's total share capital.[3]
In addition to its lawsuit, the Huawei plaintiffs have engaged (belatedly) U.S. firms to engage in public relations, policy, and other work on their behalf in the United States. Because the Huawei plaintiffs are non-U.S. persons or U.S. persons with certain foreign links, the U.S. firms representing the Huawei entities have registered as foreign agents under the Foreign Agents Registration Act (FARA), a law that generally requires persons acting in certain capacities on behalf of a “foreign principal” to register as “foreign agents” by submitting a “registration statement” with the Attorney General.[4]

FARA registration statements, and exhibits and supplements thereto, are submitted on government forms that contain questions and execution (under penalty of perjury) fields that track the FARA statute’s objectives and requirements. Among the disclosures that filers must make in completing FARA filings are whether the relevant foreign principal is a foreign government or political party or owned, controlled, supervised, financed, or directed by a foreign government, political party, or other foreign principal. Where a foreign principal is not associated with a foreign government or political party within the parameters of FARA, filers must state who “owns and controls” the foreign principal.

In the Huawei FARA filing made by the agent of Huawei Technologies Co., Ltd. ("Huawei Ltd"),[5] the U.S. agent, after indicating that the Huawei Ltd is not foreign government or political party controlled, financed, or directed, states, as to Huawei Ltd’s ownership and control that: “It is our understanding that [Huawei Ltd] is a private, employee-owned company. That understanding and our responses [to the related FARA form question] are 

based on publicly available information. We have requested, but have not obtained, confirmation of this information from Huawei” (emphasis added).

The hedging language—the reliance on publicly available information and indication that Huawei has not confirmed its status with its agent[6]—is understandable (from a legal perspective), but is nevertheless curious given that the FARA filing was made on March 20, 2019, after the Huawei plaintiffs filed their lawsuit asserting (as excerpted above) that Huawei is a privately-owned company.

That Huawei’s agent was not able to “obtain confirmation” from Huawei Ltd as to its ownership and control, where such information was provided in a legally mandated, publicly accessible FARA filing made with the Department of Justice— the same government agency that administers and enforces FARA, obtained the above-noted indictments of Huawei and its CFO, and likely is or will be involved in defending (if not leading the defense of) the U.S. government agencies and officials named as defendants in the Huawei plaintiffs’ lawsuit—seems to feed, rather than stave off, speculation as to Huawei’s Chinese government ties. Moreover, the uncertain (and seemingly, for the agent, prophylactic) FARA filing language—for which, to be clear, there can be a number of explanations—does not comport with the legal and factual positions taken by Huawei in its lawsuit.
Takeaways

Viewed in isolation, the uncertain language used by Huawei Ltd’s agent is eye-catching and open to self-validating interpretations by parties having differing views as to whether Huawei is owned, controlled, or unduly influenced by the Chinese government. When viewed in the context of the U.S.-China tech war, the United States’ whole-of-government strategy to counter China’s technological ambitions and access to U.S. technology, and the specific legal and policy measures directed at Huawei and other Chinese technology companies, the non-committal language of Huawei Ltd’s agent—and more so the agent’s statement that Huawei Ltd did not confirm information about its ownership and control—yields noteworthy takeaways. Among them are the following.

FARA Filings, Strategic Considerations

- **FARA Filing Standards.** FARA requires filers to provide—in registration statements and supplements and exhibits thereto—complete and true statements of material facts. The filing of Huawei Ltd’s agent raises an interesting question of whether an agent, by relying on “publicly available” information, satisfies an agent’s disclosure obligations with respect to the ownership and control of a foreign principal. Under FARA, the filing of a registration statement or supplement neither constitutes “full compliance” nor “indicate[s] that the Attorney General [e., the Department of Justice] has in any way passed upon the merits of such” filings.[7]

- **Deficiencies, Due Diligence Obligations of Agents (Unclear).** FARA filers should not assume that, simply by filing, they will be deemed to be in “full compliance” with FARA’s requirements. And, filers should take note that “full compliance” may not be achieved by stating that a filer has relied on publicly available information while also indicating that they have not confirmed material information with a foreign principal. Such statements—which may raise, rather than answer, questions—may give rise to clarifying or remedial disclosure requirements, and may disrupt the agent’s ability to lawfully act on the foreign principal's behalf where a deficiency is not timely remediated. FARA’s enforcement provisions authorize the Department of Justice to require remediation of filing deficiencies. Moreover, the provisions deem it unlawful for an agent to represent a foreign principal if deficiencies are not cured (by remedial filing) within 10 days after receiving a Notice of Deficiency from the Department of Justice.[8]

- **Strategic Considerations for Agents of Foreign Principals.** Agents representing foreign principals who, like Huawei, are in the public spotlight (for undesirable reasons) and in positions where public statements or disclosures have relevance to separate litigation, law, or policy matters involving a foreign principal should consider taking additional steps to ensure not only that FARA disclosures are complete and accurate (as is expected in the ordinary course), but are also presented in a way that does not run counter to the legal and/or public positions of the foreign agent (such as
Huawei’s assertions in litigation against the U.S. government that it is privately owned and controlled).

Whole-of-Government Strategy to Counter China, FARA, and Other Law

Agents of Chinese principals in particular should take note of the context surrounding Chinese entities in the United States, more particularly Chinese principals that might be known or potential targets of the whole-of-government strategy to counter China’s “economic aggression” or “economic espionage.” As stated above, FARA is one of several U.S. laws that are being deployed (separately and in coordination) to counter Chinese entities’ activities in the United States. While this use of FARA appears to be aimed at foreign influence activities, agents of Chinese foreign principals and foreign principals themselves should be aware that FARA filings concerning Chinese parties of interest to U.S. officials may garner greater scrutiny or generate follow-on consequences, such as when the contents of such statements or disclosures relate directly to other pending matters (like litigation in the case of Huawei).

***

NOTES

[*] Excerpted and adapted from MassPoint PLLC, U.S.-CHINA TECH WAR: The United States’ Whole-of-Government Approach to China is a Force Multiplier, April 2019. To request a copy of this publication, please write to info@masspointpllc.com.

[2] This goes beyond FARA practice as generally understood currently and would encompass entities like the Confucius Institute and, potentially, China’s Thousand Talents program.

[3] Huawei’s corporate disclosure statement, filed in its lawsuit pursuant to Federal Rule of Civil Procedure 7.1, states that:

Huawei Technologies USA, Inc.’s direct parent corporation is Huawei Technologies Cooperatief U.A. (Netherlands). Huawei Technologies Cooperatief U.A.’s parent corporations are Huawei Technologies Co., Ltd. (China) and Hua Ying Management Co., Ltd. (Hong Kong, China). The parent corporation of both Huawei Technologies Co., Ltd. and Hua Ying Management Co., Ltd. is Huawei Investment & Holding Co., Ltd. (China). Huawei Investment & Holding Co., Ltd. has no parent corporation, and no publicly held corporation owns 10% or more of its stock . . . Huawei Technologies Co., Ltd.’s direct parent corporation is Huawei Investment & Holding Co., Ltd. (China). Huawei Investment & Holding Co., Ltd. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

[5] The particular filing of interest here is a completed Exhibit A to the agent's registration statement (the standard form Exhibit A is available here).

[6] An agent of a foreign principal filing under FARA is subject to prosecution for, *inter alia*, the “willful false statement of a material fact . . . or the willful omission of a material fact required to be stated therein or the willful omission of a material fact or copy of a material document necessary to make the statements made in a registration statement and supplements thereto . . . not misleading.” 22 U.S.C. § 612(d).

[7] *Id.*

[8] *Id.* at §618(g) and 28 C.F.R. § 5.801. As stated in a prior MassPoint publication: “the language of FARA is plain, but its meaning is elusive.” It is not entirely clear what standards of due diligence apply to agents of foreign principals in verifying information about foreign principals (including whether reliance on publicly available information is sufficient). The Department of Justice's FARA Registration Unit has fairly recently posted FARA advisory opinions to its website, but questions remain as to the law's mechanics and scope.

Post Author: MassPoint PLLC

MassPoint PLLC is a boutique law and strategy firm that works with diverse clients to meet legal, strategy, and risk management needs in a globalized, complex world.
NONPROFITS AND THE FOREIGN AGENTS REGISTRATION ACT

Congressional Committee’s FARA Inquiries to Nonprofit Organizations Highlight Legal and Political Issues for Nonprofits Under FARA and Nexus to Tax-Exempt Status

The House Committee on Natural Resources (HCNR) this month sent letters to two U.S.-based nonprofit organizations—the Natural Resources Defense Council and the Center for Biological Diversity—questioning whether their foreign activities and relationships require registration under the Foreign Agents Registration Act (FARA or the “Act”). Also this month, the HCNR sent a letter to Defense Secretary Mattis, raising the same issues and seeking information “from the Defense Department on [the] impact of environmental litigation military readiness.”

The HCNR letters merit attention as they put into focus legal and political issues under FARA for nonprofits that are based or operating in the United States and have foreign activities and relationships (including funding sources). This Legal Alert briefly discusses FARA, the relationship of FARA to nonprofits’ tax-exempt status, and considerations for nonprofits in responding to Congressional inquiries regarding their FARA status.

The Foreign Agents Registration Act

FARA’s Recent Rise From Obscurity
FARA was enacted in 1938, but only recently entered the public consciousness through the Special Counsel’s investigation of Trump campaign and administration officials. Following the indictment of Paul Manafort for FARA and other violations, and Michael Flynn’s remedial registration under FARA after his previously undisclosed work on behalf of foreign governments came to light, lobbyists, public relations professionals and law firms, among others, reportedly were moved to register as foreign agents or assess their FARA registration obligations.

Foreign Agents Registration Requirement; Administration by DOJ
The Department of Justice states that FARA’s purpose “is to insure that the U.S. Government and the people of the United States are informed of the source of information (propaganda) and the identity of persons attempting to influence U.S. public opinion, policy, and laws.”

Toward that end, FARA requires natural and legal persons who are “agents of foreign principals” to register as such with the Attorney General of the United States. The Act is administered and enforced by the Department of Justice (DOJ) FARA Registration Unit, which is part of the Counterintelligence and Export Control Section, National Security Division.

Foreign Agent and Foreign Principal Definitions; DOJ Advisory Opinions
Under FARA, a person is a foreign agent and required to register as such if, inter alia, that person, within the United States, engages in political, public relations, lobbying or certain business activities in the interests and at the direct or indirect instruction or control of a foreign government, political party, or private natural or legal person.
The language of FARA is plain, but its meaning is elusive. The Act’s language is broad on its face and arguably captures a wide range of activities United States conducted on behalf of foreign parties, or that can be construed as such. Following a recommendation contained in a DOJ Inspector General’s audit of FARA enforcement and administration, the DOJ FARA Unit this month published, for the first time, its advisory opinions issued since January 1, 2010.8

Importantly, and contrary to what appears to be a common assumption, a “foreign principal” under FARA is not just a foreign government or political party: a foreign principal includes, in addition to a foreign government or political party, any natural person outside of the United States who is not a citizen of and domiciled within the United States, or is a legal person who is organized under the laws of the United States and has its principal place of business within the United States.9 Thus, for example, a U.S. citizen or lawful permanent resident who is domiciled outside of the United States would appear to qualify as a “foreign principal.” A company, nonprofit organization or other legal entity organized under U.S. law but having its principal place of business outside of the United States would be, on the face of the Act, a “foreign principal.”

The recently released advisory opinions, which are redacted and respond to specific facts and circumstances, provide some insight as to how the FARA Unit has interpreted the Act’s applicability in specific cases, but they have not provided clarity as to how the Act might apply more generally or in the future. Moreover, the advisory opinions are not binding in similar or seemingly similar circumstances, nor do they create substantive or procedural rights.10 Parties other than those to whom those advisory opinions were addressed may not and should not rely on them, except for informational purposes.

Link Between FARA and Nonprofit Tax-Exempt Status: Political Activities and Lobbying

Conduct that might require a party to register under FARA might also constitute “lobbying.” As noted above, FARA provides that lobbyists registered under the LDA are not required to register under FARA if the lobbying activity for which they are registered is not on behalf of a foreign government of foreign political party.11

Lobbying is also important in the context of tax-exempt entities, as 501(c)(3) organizations may not—as a condition of their tax-exempt status—engage in more than “some lobbying,” which the IRS explains is the attempt to “influence legislation.”12 According to the IRS, “legislation” includes actions by Congress and state and local legislative or equivalent bodies, as well as public referenda, ballot measures, constitutional amendments, and similar procedures. Lobbying does not, however, include “actions by executive, judicial, or administrative bodies.”13

IRS guidance is helpful, but there is ambiguity in terms of the nature and degree of activity that could constitute “lobbying” sufficient to jeopardize a 501(c)(3)’s tax-exempt status, as “some” lobbying is not quantified or otherwise delineated and the line between advocacy and lobbying is not entirely clear. Where a “foreign principal” is in the mix, including indirectly where a foreign government or other party has an interest in issues that are the subject of a nonprofit organization’s advocacy, links may be drawn (even if attenuated) between “lobbying” and foreign agent activities, potentially raising not only issues under FARA, but also about the tax-exempt status of a targeted nonprofit entity (i.e., if a nonprofit is found to be required to register as a foreign agent under FARA, it’s activities, if “lobbying,” would raise questions about its tax-exempt status).
Nonprofits Should Add FARA to Their Lexicons and Compliance Radars

Increased awareness of FARA and its potentially wide applicability have rendered the once obscure law a tool not only for traditional “foreign agent” disclosure and monitoring, but also for championing or stifling policy perspectives and gathering information about nonprofit or other entity activities related to foreign parties or international issues.

Nonprofit organizations should take note of the FARA inquiries issued to environmental advocacy groups, as it is likely that additional inquiries will be directed to other nonprofit (or other) entities, including outside of the environmental law and policy areas. Tax-exempt organizations that are based or active in the United States and have international activities—e.g., foreign funding sources or relationships—should as a starting point familiarize themselves with FARA. Information about FARA within such organizations should not only be obtained by legal or compliance personnel, but should also be disseminated, as appropriate, to management and to staff or entity representatives with direct or indirect contacts with parties who might constitute “foreign principals” under FARA.

Responding to Congressional Inquiries as to FARA Status: Considerations and Approaches for Nonprofits

Nonprofit entities that receive Congressional or similar requests for information about their foreign activities or relationships should, in crafting responses, consider the following matters, among others:

1. Whether FARA is likely applicable to their activities (including, where necessary, by seeking an advisory opinion from the DOJ’s FARA Unit).
2. Whether the inquiring Congressional committee or other body’s request is within its jurisdiction (e.g., as spelled out by the Committee’s rules and/or House or Senate rules).
3. Whether the Congressional or other request is of an oversight, investigative, or other nature.
4. The scope of the Congressional or other request, both in terms of information clearly or immediately requested and any potential follow-up requests that might result.
5. The potential for subpoenas or other measures compelling responses (or fuller responses); and,
6. The potential wider implications of any response to Congressional or other requests, such as:
   a. The nonprofit’s interests in confidentiality of information;
   b. Attorney-client privilege and confidentiality, where applicable;
   c. Tax exempt status;
   d. Any potential reputational risk; and,
   e. How the request might implicate or affect donor and other perceptions and relationships.

* * * * *

For more information about this update and the issues it covers, contact Hdeel Abdelhady at habdelhady@masspointllc.com.
NOTES

4 Notwithstanding news reports of raised concern among and registration by lobbyists and others, a comparison of statistical information contained in the first semi-annual reports of the Attorney General to Congress from 2013-2017 do not indicate a significant increase in the raw numbers of total FARA registrants or new registrations. Department of Justice, FARA Reports to Congress, available at https://www.justice.gov/nsd-fara/fara-reports-congress (Section 621 of the FARA requires the Attorney General to report every six months to Congress on his or her administration of FARA, including as to registrations filed).
5 22 U.S.C. § 612(a). Registration must be made within ten days after a person becomes a foreign agent and the registration must include, inter alia, information as to the foreign agent’s business and nature of the relationship with the foreign principal.
7 Id. at §§ 611-612. Some activities that might appear to require registration are expressly exempt from FARAs registration requirements, such as those of certain U.S. news organizations that are excluded from the definition of “agent of foreign principal” (§ 611(d)); certain private and non-commercial activities (§ 613(d)); and, lawyers and law firms that provide legal representation to disclosed foreign principals, so long as such legal representation does not include lobbying and certain other activities designed to “influence or persuade” certain judicial and administrative proceedings or investigations or inquiries (§ 613(g)). A person who is engaged in “lobbying” and registered under the Lobbying Disclosure Act (LDA) is exempt from FARA registration only if the LDA-registered lobbying activity is not on behalf of a foreign government or foreign political party.
8 Department of Justice, Foreign Agents Registration Act, Advisory Opinions, at https://www.justice.gov/nsd-fara/advisory-opinions (stating that the opinions released are “advisory opinions that the FARA Registration Unit has issued pursuant to requests under 28 C.F.R. § 5.2 since January 1, 2010, as well as three opinions issued prior to that point (which were previously summarized on this website.
9 Id. at § 611(b).
10 Id.
11 See note 7 above.
13 Id.
ABA Business Law Section Annual Meeting  
Washington, DC  
Thursday, September 12, 2019, 10:30 a.m. - 12:00 p.m.

State and Provincial Regulation of Cannabis

Moderated by:

Amy Kellogg

Panelists:

Harry Berezin, Bloom Farms  
Erin Carlstrom, Kelly, Carlstrom & Noble

Sponsored by the Government Affairs Practice Committee

Co-sponsored by:

International Business Law Committee  
International Coordinating Committee  
Consumer Financial Services Committee
Program Materials Index

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8. TSA Guidance re: Medical Marijuana

9. San Francisco Bar Association Letter 2015-1 (re: Representation of Medical Marijuana Enterprise)

10. Los Angeles County Bar Association Opinion Letter 527 (re: Representation of Clients Involved in Cultivation, Distribution or Consumption of Marijuana)

11. California Rule of Professional Conduct 1.2.1

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13. Government of Canada - Cannabis Legalization and Regulation


15. SGSB INC. v. City of Santa Barbara - First Amended Verified Petition for Writ of Mandate and Complaint for Damages

1
Program Abstract

In the year 2019, it’s hard not to notice the momentum that the cannabis legalization movement has gained in the United States and Canada. As of July 2019, 11 states and the District of Columbia have legalized adult-use cannabis in the United States. An additional 22 states have legalized cannabis for medical use. And in 2018, Canada became the second nation (behind Uruguay) to legalize both recreational and medicinal cannabis nationwide.

The program State and Provincial Regulation of Cannabis will look at these legislative changes as well as other actions that are impacting cannabis and explore what they mean for the business lawyer. Specifically, these recent events have created a myriad of new opportunities for the business lawyer. Whether you are cannabis user, a skeptic, or somewhere in between, you may have considered the opportunities that cannabis legalization could generate for your practice. But given the conflict that exists between federal law and the laws of many states, you have likely been confronted with more questions than answers.

This program will help the business lawyer gain a better understanding of the distinction between cannabis and hemp and why this distinction matters. By way of background, cannabis (or marijuana) is a genus of flowering plants in the family known as Cannabaceae. The most common species is called cannabis sativa. The plant contains compounds called cannabinoids, such as tetrahydrocannabinol (THC), cannabidiol (CBD), and over 100 others. THC is the compound associated with getting “high,” but scientists have begun to study the effects of other cannabinoids, such as CBD, which has been known to provide palliative and restful effects without causing the high that people commonly associate with marijuana.

Hemp is a specific strain of cannabis that contains less than 0.3% THC, an amount which is unlikely to produce a high. But hemp can contain higher levels of other cannabinoids, such as CBD. While the legalization of cannabis has proceeded on a state-by-state basis, the United States Congress, through the 2014 and 2018 Farm Bills, has eliminated hemp from Schedule I of the Controlled Substances Act and permitted states to create industrial hemp programs. But the Food and Drug Administration (FDA), which retains regulatory authority over drugs including CBD, has been frustratingly slow in providing guidance to the industry on which types of CBD products can be legally marketed.

We will also delve into the inherent conflict in this space. We will directly explore the inherent conflict between the federal law and the state laws and talk about the importance of government interaction in regard to cannabis law. We will look at cases like US v. McIntosh, where the courts were asked to decide whether criminal defendants may avoid prosecution for various federal marijuana offenses on the basis of a congressional appropriations rider that prohibits the United States Department of Justice from spending funds to prevent states’ implementation of their own medical marijuana laws. We’ll also review the role of local government decision making by reviewing SBGS v. Santa Barbara and talk about other federal opportunities.

This program will also explore key issues related to the business side of cannabis. We will explore specific challenges to the industry such as banking. This has been an ongoing issue for any business in this space, and to date, there has been no way for the industry to access
traditional banking models. We will explore H.R. 1595, which is currently before Congress. This bill is expected to pass sometime in the fall and will allow Cannabis businesses to access banking and lending services without being penalized.

We will also explore the contract drafting issue. Given the evolving landscape of cannabis and hemp laws, the best approach for a business lawyer is to proceed cautiously. Because the law in this area is constantly changing, and because cannabis businesses themselves remain in an immature stage, the best approach for contract drafting is one of flexibility. Lawyers should try to remind themselves about what they don’t know and that they cannot possibly predict the future. Although both lawyers and their clients usually seek certainty when creating written agreements, lawyers should avoid drafting contracts that are overly rigid. It may be impossible to provide contracts that will survive in the long-term. And lawyers should recognize that many business relationships in the cannabis space will not work out.

The best practice is to draft contracts that will allow both your client, and the other party to the contract, to exit gracefully. Changing conditions in the industry may require the parties to frequently revisit the terms of their agreements. The best lawyers in the industry draft contracts that allow clients to be nimble in the fact of such changes. Second, remember the likely mindset of your client. If your client has been in the cannabis business for a few years, they are probably used to doing deals by handshake. Many are still scarred by the fear of illegality and may be reluctant to put details in writing. And lastly, if you are an experienced contract drafter, remember that certain things you would take for granted, such as compliance with federal law, are not currently possible in cannabis contracts. Oftentimes cannabis business lawyers will have to unlearn habits that have served them well in other areas of business.

It is also natural for a prudent business attorney to wonder whether they should be doing this work at all. After all, cannabis is still illegal on the federal level, at least in the United States. Arguably, a lawyer advising a cannabis company is advising the violation of law and breaking the professional oath they took upon being sworn into the Bar. Most states that have legalized cannabis have provided at least some degree of protection for attorneys who advise clients on how to operate legally within state regulatory frameworks. As an example, we will explore the new California rules of professional conduct that were effective as of November 1, 2018, which were intended to regulate professional conduct of lawyers. Specifically, the update included a change permitting a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law.

At a minimum, lawyers in the United States should advise their clients that while their actions may be legal under state laws, clients are still risking prosecution or civil or criminal forfeiture under federal laws. In-house attorneys who hold equity stakes in cannabis businesses face an additional layer of ethical questions beyond those of lawyers who provide outside counsel to cannabis companies for a fee.

Overall, there are many nuances to this ever-evolving issue. The landscape in this area is constantly changing, and by the time this program is presented, some of the information contained herein will have already changed. It is imperative that a business lawyer working in this area stay abreast of each development so that they are properly advising their clients. The goal of this program is to provide the business lawyer with background and tips for how to keep current in this evolving world.
Biographies of Panelists
Harry Berezin is the Chief Compliance Officer and Deputy General Counsel at Bloom Farms, a licensed California cannabis company and nationwide hemp brand. Harry manages all of the company’s compliance efforts and represents the company in all legal matters, including contracting, licensing and government affairs.

Born and raised in San Francisco, Harry attended the University of Pennsylvania where he graduated Summa Cum Laude and served as Sports Editor of the school’s daily newspaper, The Daily Pennsylvanian. After serving for three years on the staff of U.S. Senator Dianne Feinstein, Harry got his J.D. at Stanford Law School.

He has been a member of the California Bar since 2011. Prior to joining Bloom Farms, Harry was an associate attorney at Remcho Johansen & Purcell LLP in Oakland, where he advised candidates, PACs, and ballot measure committees on compliance with the full panoply of local, state and federal political laws.

Harry lives in San Francisco with his wife Rose and a black and white shorthair cat named Oakley.
Erin is a partner at Kelly, Carlstrom & Noble in Santa Rosa, California. Her practice includes state and local cannabis compliance, corporate formation and compliance, land use, and government relations. Erin has specific expertise in land use entitlements and navigating the various regulatory agencies and has been responsible for major project developments across California.

Erin’s experience offers clients comprehensive support from seed to sale, including transitioning from collective operations to for-profit corporations, applying for and prosecuting permit applications and developing strategic collaborations.

Erin represents cannabis producers, farmers, manufacturers, labs, distributors and dispensaries, as well as investment groups interacting with all sectors, in matters ranging from corporate formation and transition, operations management, land use and state and local compliance.

Erin served on the Santa Rosa City Council, including a term as Vice Mayor, and twice chaired the cannabis subcommittee. Erin’s work helped position Santa Rosa as one of the state’s most progressive cannabis communities, forming predictable and business friendly paths to operation. Her experience in cannabis extends throughout California, and has yielded several national speaking engagements.
Amy Kellogg's law practice focuses on representing a variety of New York State professional associations, businesses and not for profits before New York State Government, including the State Legislature, Governor’s Office and State Agencies. Amy is a former Legislative Aide to New York Assemblywoman Helene E. Weinstein, Chair of the Assembly Ways & Means Committee. Her practice includes:

- Providing lobbying and government-related services.
- Monitoring, analysing, and reporting on the status of pending legislation.
- Communicating clients' positions to members of the State Legislature, state agencies, and the Governor's Office.
- Drafting legislation on behalf of clients.
- Researching and ensuring compliance with state and federal lobby and election laws.
- Assisting clients with strategy regarding the availability of and access to a variety of government funding-mechanisms and other programs.
- Advising clients regarding a myriad of government relations compliance issues, from procurement regulations to campaign finance laws.

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- Member, American Bar Association
- Immediate Past Chair, American Bar Association Business Law Section Government Affairs Practice Committee
- Past President, National Alumni Association of Albany Law
- Past President, State University of New York at Potsdam Alumni Board of Trustees
- Past State President, New York State Women, Inc.

ADMISSIONS

New York

EDUCATION

Albany Law School, *cum laude*, J.D.
SUNY Potsdam, *summa cum laude*, B.A.
Affairs Practice Committee
Presented by the Government

Flag of Canada and the United States

Regulation of Cannabis
State and Provincial
Consumer Financial Services
Law, International Coordinating and
Co-sponsored by International Business
Practice Committee
Presented by the Government Affairs
Thursday, September 12, 2019
Washington, DC
Annual Meeting
State and Provincial Regulation of Cannabis
Partner, Kelly, Carlstrom & Noble
Erin Carlstrom

Bloom Farms
Harry Berzin

Panelists

Partner, Hartter Secretary & Emery
Amy Kelloff

Moderator

State and Provincial Regulation of Cannabis
Overview of Topic

Introduction of Speakers

State and Provincial Regulation of Cannabis
State and Provincal Regulation of Cannabis

- Hemp vs. Cannabis
The Confusion

Hemp (Prepared by Erin)

The Difference Between Cannabids and
Georgia

or low THC products ex. Alabama and approved medical marijuana only for CBD oil

- Of the 34 states, 12 are states that have

  - Legislation approved some form of medical marijuana
  - Puerto Rico and the US Virgin Islands have all

  - 34 states, the District of Columbia, Guam,

  Overview of State Laws on Cannabids

State and Provinicial Regulation of Cannabids
Idaho, Kansas, Nebraska, and South Dakota – Only 4 states do not allow any marijuana use.

- As of June 25, 2019, 14 states and territories –

• Overview of State Laws on Cannabids
professional prescription from a medical marijuana through a dispensary system that approved system for distribution of medical cannabis. Most states have a state regulated and managed distribution of medical and recreational marijuana and each state has their own model for the sale of cannabis.

Overview of State Laws on Cannabis
Marijuana
at home cultivation of a small amount of recreational use of marijuana, some allow for
- For those states that have legalized
  need for the referral
  are also dispensary systems in place but no
- For those with recreational marijuana, there

Overview of State Laws on Cannabis

State and Provinicial Regulation of Cannabis
EX. – New York, Ohio, North Dakota

small levels of marijuana

passed to decriminalize the possession of

recreational marijuana, there have been laws

– In several states that have not approved

Overview of State Laws on Cannabis

State and Provincial Regulation of Cannabis
a federal offense

Distribution of a Schedule 1 substance is

medical use

high potential for dependency and no

This means it is considered to have a

Schedule 1 substance

Under federal law, marijuana is a

Federal Issue

State and Provincial Regulation of Cannabis
Law

Marijuana use that would be legal under state
encouraging them not to prosecute people for
Department to federal prosecutors

This was a memo sent from the Justice
medical marijuana

President Obama issued a memo regarding
In 2009, the Department of Justice, under

Federal Issue

State and Provincial Regulation of Cannabis
Substances Act
remained an illegal drug under the Controlled
The Cole memo made clear that marijuana
Cole memo
an updated memo that became known as the
In response, the Department of Justice issued
the use of recreational marijuana
In 2013, Colorado and Washington legalized
Federal Issue

State and Provincial Regulation of Cannabis
in these areas
laws and give their law enforcement priorities
prosecutors would defer to the state and local
outside those priority areas, the federal
However, the memo also made clear that
primarily that federal prosecutors would continue to
The memo identified eight enforcement areas
Federal Issue

State and Provincial Regulation of Cannabis
• Federal issue
  - And then along came Attorney General Jeff Sessions
  - In January 2018, he rescinded the Cole Memo and directed federal prosecutors to decide how to prioritize enforcement of federal marijuana laws
the first

Legализация резервных марихуаны — Уругвай

Canada became the second country to

all provinces in Canada in 2018

Recreational marijuana use was approved in

Provincial marijuana laws

State and Provincial Regulation of Cannabis
Regulation in 2016

Program happening in 2013 and again by

forms since 2001 with changes to the original

- Medicinal marijuana had been legal in different

- The law took effect on October 17, 2018

- Provincial marijuana laws

State and Provincial Regulation of Cannabis
who is allowed to sell marijuana be located, how stores must be operated and for how marijuana is sold, where stores may

Each province and territory sets its own policy sale, distribution and use of marijuana to enact their own restrictions regarding the

while the law change was country wide,

Provincial marijuana laws
Set added requirements on personal cultivation

Restrict where cannabis may be used in public

Increasing the minimum age of purchase

Lower possession limits

Make decisions to:

The provinces and territories can also

Provincial marijuana laws

State and Provincial Regulation of Cannabis
License
only grow at home if you have a medical license.
Growing in Quebec and in Manitoba, you can
grow up to four cannabis plants.

However, Quebec decided not to participate in
this part of the program, so there is no home
law for each household to grow.

Provincial and State Laws
and how they will be operating
understanding of where their client is located
Canada will need to have a strong
— Attorneys advising marijuana clients in
you are in will make a real difference
— This means that which province or territory

Provincial marijuana laws

State and Provincial Regulation of Cannabis
names on sports or cultural facilities
sponsor people or events and cannot put their products on TV or in magazines and cannot advertise their
Marijuana companies cannot advertise their and must contain a health warning packages of a single color without any graphics.
Marijuana can only be sold in promotion, packaging and advertising of marijuana.
Adult-use marijuana will vary among the provinces.

Provincial Marijuana Laws
Provincial marijuana laws

State and Provincial Regulation of Cannabis

With the passage of the 2018 law, Canada no longer has the inherent conflict between country and provincial laws that will likely plague the United States for years to come.
and Resolving Ethical Issues
Roadmap for the Business Lawyer

Regulation of Cannabis and Hemp:
Roadmap for the Business Lawyer
One of the questions of California law is local control jurisprudence: in which you intend to operate. Know the law of the state (and in many cases, the local prohibiting cannabis). The required cannabis licenses? Drafting around federal laws. What state are we operating in? Confirmed that the entities have cannabis contracts? Is this a cannabis contract or a hemp contract?
Hemp Program, FDA, USDA, TSA, state law, etc.

Understand the current framework of US hemp law: Industrial hemp coming from? How will the product be marketed? Are there any other licenses required? Where is the hemp coming from? What type of products are being bought/sold? Where is the Hemp contract? Is this a cannabis contract or a Hemp contract?
Contract Drafting: You Have Sunglasses!

- Know what you don’t know and expect the unexpected
- Don’t draft rigidly, best approach is one of flexibility
- Laws are constantly evolving
- Business of cannabis is still immature
Federal laws

Can't take certain things for granted, can't comply with certain

Reticence towards putting things in writing

Remember client's mindset: Custom is for handshakes, agreements,

Draft contracts that allow for graceful exit

not survive or terms of engagement need to be frequently changed

Draft contracts with understanding that business relationships may

Best Practices
Resolving Ethical Issues
clear conflict

This is terra incognita in the world of legal ethics, never been such a

law

Potentially violating oath you took not to advise clients to break the

clear disconnect between federal law and laws of many states

The Basic Problem
Lawyers MUST:

- Avoid advising violations of federal law with impunity.
- Advise clients that actions pose risk of civil/criminal liability under federal law.
- Carrying out affairs in compliance with the law.
- Legal profession exists to connect public with the law for advice and
  Legal services only compounds the problem.
- Denying regulatory scheme should be able to obtain legal advice.
- People attempting to operate illegally within a state.

Most states provide some protections
Help clients operate in the most compliant way possible. You are doing a good thing.

Working to revamp the laws. We have momentum on our side. Lawyers have always been an agent of social change. We are compliant with state law.

Compared to simply advising a client on how to operate in combination with sharing in the profits of a cannabis company is a different beast as

In-House Counsel
(415) 722-6539
harry@bloomfarm
Hary Berezin

Questions?

Thank You!
The SAFE Banking Act is still the best and most supported legislative vehicle to address cannabis-related banking issues.

- SAFE (Secure and Fair Enforcement) Banking Act
- S.1200 The Secure and Fair Enforcement
- Cannabis Industry
- Current Banking Challenges Faced by the Legal

July 2019
Senate Committee Hearing on SAFE Banking
States v. Loven—arising out of the Eastern District of California.

7118, 15-7117, 15-7119, 15-7122, which we shall address as United

for mandamus—Nos. 15-10122, 15-10127, 15-10132, 15-10137, 15-

District of Washington and your appeals with your corresponding petitions

United States v. Kynaston, No. 15-30098, arising out of the Eastern

10117, arising out of the Northern District of California; one appealed in

Appellee's filed one appeal in United States v. McIntosh, No. 15-

MVC-3

3:14-cv-00116-

D.C. No.

Defendant-Appellant

Steve McIntosh,

v.

Plaintiff-Appellee

United States of America,

US v. McIntosh
Defendants:
California Limited Liability Company, and
COASTAL DISPENSARY, LLC.
And
THE CITY OF SANTA BARBARA
v.

Plaintiff, SCSB, INC., a California Corporation

Case No. 18CV04923
ANACAPA DIVISION
FOR THE COUNTY OF SANTA BARBARA
SUPERIOR COURT OF THE STATE OF CALIFORNIA
June 24, 2019

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PATENT AND TRADEMARK OFFICE, PETITIONER; ERIK BRUNNETTI

ANDREI LANCU, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR

NO. 18-302

SUPREME COURT OF THE UNITED STATES

Lancu v. Brunetti
Contact Information

Kelly, Carstrom & Noble
50 Santa Rosa Ave suite 320,
Santa Rosa CA, 95404

Erin Carstrom Esq.

Phone: (707)521-0780
Email: Erin@kcn.law
Final Questions, Comments and Discussion
MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

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

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

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

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

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

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

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

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

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

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation’s compliance with such a system, may allay the threat that an operation’s size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department’s enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation’s large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.
As with the Department’s previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department’s authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

cc: Mythili Raman
    Acting Assistant Attorney General, Criminal Division

    Loretta E. Lynch
    United States Attorney
    Eastern District of New York
    Chair, Attorney General’s Advisory Committee

    Michele M. Leonhart
    Administrator
    Drug Enforcement Administration

    H. Marshall Jarrett
    Director
    Executive Office for United States Attorneys

    Ronald T. Hosko
    Assistant Director
    Criminal Investigative Division
    Federal Bureau of Investigation
MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: Jefferson B. Sessions, Attorney General

SUBJECT: Marijuana Enforcement

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

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

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

May 28, 2019

MEMORANDUM

SUBJECT: EXECUTIVE SUMMARY OF NEW HEMP AUTHORITIES

On December 20, 2018, President Trump signed into law the Agriculture Improvement Act of 2018, Pub. L. 115-334 (2018 Farm Bill). The 2018 Farm Bill legalized hemp production for all purposes within the parameters laid out in the statute.

The Office of the General Counsel (OGC) has issued the attached legal opinion to address questions regarding several of the hemp-related provisions of the 2018 Farm Bill, including: a phase-out of the industrial hemp pilot authority in the Agricultural Act of 2014 (2014 Farm Bill) (Section 7605); an amendment to the Agricultural Marketing Act of 1946 to allow States and Indian tribes to regulate hemp production or follow a Department of Agriculture (USDA) plan regulating hemp production (Section 10113); a provision ensuring the free flow of hemp in interstate commerce (Section 10114); and the removal of hemp from the Controlled Substances Act (Section 12619).

The key conclusions of the OGC legal opinion are the following:

1. As of the enactment of the 2018 Farm Bill on December 20, 2018, hemp has been removed from schedule I of the Controlled Substances Act and is no longer a controlled substance.

2. After USDA publishes regulations implementing the new hemp production provisions of the 2018 Farm Bill contained in the Agricultural Marketing Act of 1946, States and Indian tribes may not prohibit the interstate transportation or shipment of hemp lawfully produced under a State or Tribal plan or under a license issued under the USDA plan.

3. States and Indian tribes also may not prohibit the interstate transportation or shipment of hemp lawfully produced under the 2014 Farm Bill.

4. A person with a State or Federal felony conviction relating to a controlled substance is subject to a 10-year ineligibility restriction on producing hemp under the Agricultural Marketing Act of 1946. An exception applies to a person who was lawfully growing hemp under the 2014 Farm Bill before December 20, 2018, and whose conviction also occurred before that date.
MEMORANDUM
May 28, 2019
Page 2

With the enactment of the 2018 Farm Bill, hemp may be grown only (1) with a valid USDA-issued license, (2) under a USDA-approved State or Tribal plan, or (3) under the 2014 Farm Bill industrial hemp pilot authority. That pilot authority will expire one year after USDA establishes a plan for issuing USDA licenses under the provisions of the 2018 Farm Bill.

It is important for the public to recognize that the 2018 Farm Bill preserves the authority of States and Indian tribes to enact and enforce laws regulating the production of hemp that are more stringent than Federal law. Thus, while a State or an Indian tribe cannot block the shipment of hemp through that State or Tribal territory, it may continue to enforce State or Tribal laws prohibiting the growing of hemp in that State or Tribal territory.

It is also important to emphasize that the 2018 Farm Bill does not affect or modify the authority of the Secretary of Health and Human Services or Commissioner of Food and Drugs to regulate hemp under applicable U.S. Food and Drug Administration (FDA) laws.

USDA expects to issue regulations implementing the new hemp production authorities in 2019.

Attachment
May 28, 2019

MEMORANDUM FOR SONNY PERDUE
SECRETARY OF AGRICULTURE

SUBJECT: LEGAL OPINION ON CERTAIN PROVISIONS OF THE AGRICULTURE IMPROVEMENT ACT OF 2018 RELATING TO HEMP

This memorandum provides my legal opinion on certain provisions of the Agriculture Improvement Act of 2018 ("2018 Farm Bill"), Pub. L. No. 115-334, relating to hemp.

As explained below, this memorandum concludes the following:

1. As of the enactment of the 2018 Farm Bill on December 20, 2018, hemp has been removed from schedule I of the Controlled Substances Act ("CSA") and is no longer a controlled substance. Hemp is defined under the 2018 Farm Bill to include any cannabis plant, or derivative thereof, that contains not more than 0.3 percent delta-9 tetrahydrocannabinol ("THC") on a dry-weight basis.

2. After the Department of Agriculture ("USDA" or "Department") publishes regulations implementing the hemp production provisions of the 2018 Farm Bill contained in subtitle G of the Agricultural Marketing Act of 1946 ("AMA"), States and Indian tribes may not prohibit the interstate transportation or shipment of hemp lawfully produced under a State or Tribal plan or under a license issued under the Departmental plan.

3. States and Indian tribes may not prohibit the interstate transportation or shipment of hemp lawfully produced under the Agricultural Act of 2014 ("2014 Farm Bill").

4. A person with a State or Federal felony conviction relating to a controlled substance is subject to a 10-year ineligibility restriction on producing hemp under subtitle G of the AMA. An exception applies to a person who was lawfully growing hemp under the 2014 Farm Bill before December 20, 2018, and whose conviction also occurred before that date.
MEMORANDUM FOR THE SECRETARY OF AGRICULTURE
May 28, 2019
Page 2

This memorandum also emphasizes two important aspects of the 2018 Farm Bill provisions relating to hemp. First, the 2018 Farm Bill preserves the authority of States and Indian tribes to enact and enforce laws regulating the production (but not the interstate transportation or shipment) of hemp that are more stringent than Federal law. For example, a State law prohibiting the growth or cultivation of hemp may continue to be enforced by that State. Second, the 2018 Farm Bill does not affect or modify the authority of the Secretary of Health and Human Services or Commissioner of Food and Drugs under applicable U.S. Food and Drug Administration laws.

I. BACKGROUND

The 2018 Farm Bill, Pub. L. No. 115-334, enacted on December 20, 2018, includes several provisions relating to hemp.1 This legal opinion focuses on sections 7605, 10113, 10114, and 12619, summarized below.

- **Section 7605** amends section 7606 of the 2014 Farm Bill (7 U.S.C. § 5940), which authorizes institutions of higher education or State departments of agriculture to grow or cultivate industrial hemp under certain conditions — namely, if the hemp is grown or cultivated for research purposes in a State that allows hemp production. Among other things, section 7605 amends 2014 Farm Bill § 7606 to require the Secretary of Agriculture (“Secretary”) to conduct a study of these hemp research programs and submit a report to Congress. Section 7605 also repeals 2014 Farm Bill § 7606, effective one year after the date on which the Secretary establishes a plan under section 297C of the AMA.2

- **Section 10113** amends the AMA by adding a new subtitle G (sections 297A through 297E) (7 U.S.C. §§ 1639o – 1639s) relating to hemp production. Under this new authority, a State or Indian tribe that wishes to have primary regulatory authority over the production of hemp in that State or territory of that Indian tribe may submit, for the approval of the Secretary, a plan concerning the monitoring and regulation of such hemp production. See AMA § 297B. For States or Indian tribes that do not have approved plans, the Secretary is directed to establish a Departmental plan concerning the monitoring and regulation of hemp production in those areas. See AMA § 297C. The

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1 The 2014 Farm Bill defines “industrial hemp” as “the plant Cannabis sativa L. and any part of such plant, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.” 7 U.S.C. § 5940(a)(2). The 2018 Farm Bill added a new, slightly different definition of “hemp” in section 297A of the AMA, defined as “the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.” 7 U.S.C. § 1639o(1). Both definitions require a THC concentration of not more than 0.3 percent for a Cannabis sativa L. plant to be considered hemp versus marijuana. For purposes of this legal opinion, I use the terms “hemp” and “industrial hemp” interchangeably.

2 The Conference Report accompanying the 2018 Farm Bill explains the effect of the repeal as follows: “The provision also repeals the hemp research pilot programs one year after the Secretary publishes a final regulation allowing for full-scale commercial production of hemp as provided in section 297C of the [AMA].” H.R. REP. No. 115-1072, at 699 (2018).
MEMORANDUM FOR THE SECRETARY OF AGRICULTURE  
May 28, 2019  
Page 3

Secretary is also required to promulgate regulations and guidelines implementing subtitle G. See AMA § 297D. The new authority also provides definitions (see AMA § 297A) and an authorization of appropriations (see AMA § 297E).

- **Section 10114** (7 U.S.C. § 1639o note) is a freestanding provision stating that nothing in title X of the 2018 Farm Bill prohibits the interstate commerce of hemp or hemp products. Section 10114 also provides that States and Indian tribes shall not prohibit the interstate transportation or shipment of hemp or hemp products produced in accordance with subtitle G through the State or territory of the Indian tribe.

- **Section 12619** amends the CSA to exclude hemp from the CSA definition of marijuana. Section 12619 also amends the CSA to exclude THC in hemp from Schedule I.3

In passing the 2018 Farm Bill, Congress legalized hemp production for all purposes within the parameters of the statute but reserved to the States and Indian tribes authority to enact and enforce more stringent laws regulating production of hemp.

II. ANALYSIS

A. **As of the Enactment of the 2018 Farm Bill on December 20, 2018, Hemp Has Been Removed from Schedule I of the Controlled Substances Act and Is No Longer a Controlled Substance.**

CSA § 102(6) defines “controlled substance” to mean “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this title. . . .” 21 U.S.C. § 802(6). Marijuana4 is a controlled substance listed in schedule I of the CSA. See CSA § 202(c)(10), schedule I (21 U.S.C. § 812(c), Schedule I (c)(10)); 21 C.F.R. § 1308.11(d)(23).

The 2018 Farm Bill amended the CSA in two ways.

- First, 2018 Farm Bill § 12619(a) amended the CSA definition of marijuana to exclude hemp. Before enactment of the 2018 Farm Bill, CSA § 102(16) (21 U.S.C. § 802(16)) defined marijuana as follows:

  (16) The term ‘marihuana’ means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake,


4 This opinion uses the common spelling of “marijuana” except when quoting the CSA, which uses the “marihuana” spelling.
MEMORANDUM FOR THE SECRETARY OF AGRICULTURE
May 28, 2019
Page 4

or the sterilized seed of such plant which is incapable of germination.

As amended by the 2018 Farm Bill, the CSA definition of marijuana now reads:

(A) Subject to subparagraph (B), the term ‘marihuana’ means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.

(B) The term ‘marihuana’ does not include—

(i) hemp, as defined in section 297A of the Agricultural Marketing Act of 1946; or

(ii) the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

- Second, 2018 Farm Bill § 12619(b) amended the CSA to exclude THC in hemp from the term “tetrahydrocannabinols” in schedule I. As amended by the 2018 Farm Bill, CSA § 202(c)(17), schedule I (21 U.S.C. § 812(c)(17), schedule I) now reads:

Tetrahydrocannabinols, except for tetrahydrocannabinols in hemp (as defined under section 297A of the Agricultural Marketing Act of 1946).

By amending the definition of marijuana to exclude hemp as defined in AMA § 297A, Congress has removed hemp from schedule I and removed it entirely from the CSA. In other words, hemp is no longer a controlled substance. Also, by amending schedule I to exclude THC in hemp, Congress has likewise removed THC in hemp from the CSA.

It is important to note that this decontrolling of hemp (and THC in hemp) is self-executing. Although the CSA implementing regulations must be updated to reflect the 2018 Farm Bill amendments to the CSA, neither the publication of those updated regulations nor any other action is necessary to execute this removal.

I address here two principal objections to the view that the decontrolling of hemp is self-executing. The first objection is that, because regulations have not been published under CSA § 201, the legislative changes to schedule I regarding hemp are not effective. This objection is not valid.

The typical process for amending the CSA schedules is through rulemaking. Under CSA § 201(a), the Attorney General “may by rule” add to, remove from, or transfer between the schedules, any drugs or other substances upon the making of certain findings. 21 U.S.C. § 811(a). However, the schedules also can be amended directly by Congress through changes to the statute; and Congress has done so several times.²

² See, e.g., Pub. L. 112-144, § 1152 (amending schedule I to add cannabimimetic agents); Pub. L. 101-647, § 1902(a) (amending schedule III to add anabolic steroids).
MEMORANDUM FOR THE SECRETARY OF AGRICULTURE
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Page 5

The second objection is that, because the legislative changes to schedule I regarding hemp are not yet reflected in 21 C.F.R. § 1308.11, the removal is not yet effective. This objection also is not valid.

It is axiomatic that statutes trump regulations. See Nat’l Family Planning & Reprod. Health Ass’n, Inc. v. Gonzales, 468 F.3d 826, 829 (D.C. Cir. 2006) (“[A] valid statute always prevails over a conflicting regulation.”). Congress established the five CSA schedules in statute, providing that “[s]uch schedules shall initially consist of the substances listed in this section.” 21 U.S.C. § 812(a). Congress further provided that “[t]he schedules established by this section shall be updated and republished on a semiannual basis during the two-year period beginning one year after October 27, 1970, and shall be updated and republished on an annual basis thereafter.” 21 U.S.C. § 812(a). The requirement to update and republish the schedules, however, is not a prerequisite to the effectiveness of the schedules “established by [the statute].” Id. In other words, where Congress itself amends the schedules to add or remove a controlled substance, the addition or removal of that controlled substance is effective immediately on enactment (absent some other effective date in the legislation); its addition to or removal from a schedule is not dependent on rulemaking.

To illustrate, Congress amended the CSA in 2012 to add “cannabimimetic agents” to schedule I. That amendment was enacted as part of the Synthetic Drug Abuse Prevention Act of 2012 (Pub. L. 112-144, title XI, subtitle D), which was signed into law on July 9, 2012. Almost six months later, the Drug Enforcement Administration (“DEA”) published a final rule establishing the drug codes for the cannabimimetic agents added to schedule I by Congress and making other conforming changes to schedule I as codified in 21 C.F.R. § 1308.11. See 78 Fed. Reg. 664 (Jan. 4, 2013). In explaining why notice-and-comment rulemaking was unnecessary, DEA noted that “the placement of these 26 substances in Schedule I has already been in effect since July 9, 2012.” Id. at 665 (emphasis added). In other words, the legislative changes to schedule I were effective immediately upon enactment. The reflection of those changes in 21 C.F.R. § 1308.11, although required by 21 U.S.C. § 812(a), was not necessary for the execution of those changes to schedule I.

Accordingly, enactment of the 2018 Farm Bill accomplished the removal of hemp (and THC in hemp) from the CSA. Conforming amendments to 21 C.F.R. § 1308.11, while required as part

6 “Marihuana” and “Tetrahydrocannabinols” were both included in the initial schedule I established by Congress in 1970.

7 Cf. United States v. Huerta, 547 F.2d 545, 547 (10th Cir. 1977) (“[F]ailure to publish the ‘updated’ schedules as required by Section 812(a) had no effect upon the validity of those substances initially listed in the five schedules.”); United States v. Monroe, 408 F. Supp. 270, 274 (N.D. Cal. 1976) (“Thus, while section 812(a) clearly orders the controlled substance schedules to be republished, it is clear that Congress did not intend republication to serve as a reissuance of the schedules, which if done improperly would cause those schedules to lapse and expire. . . . [T]he requirement that the schedules, once ‘updated,’ be ‘republished’ was solely for the purpose of establishing one list which would reflect all substances which were currently subject to the Act’s provisions . . . ”).

8 Schedule I, as published in 21 C.F.R. § 1308.11, includes a definition of “tetrahydrocannabinols” in paragraph (d)(31) that does not appear in the CSA. Notwithstanding the presence of that definition in the current regulations, I
of DEA’s continuing obligation to publish updated schedules, are not necessary to execute the 2018 Farm Bill changes to schedule I.\(^9\)

B. **After the Department of Agriculture Publishes Regulations Implementing the Hemp Production Provisions of the 2018 Farm Bill Contained in Subtitle G of the Agricultural Marketing Act of 1946, States and Indian Tribes May Not Prohibit the Interstate Transportation or Shipment of Hemp Lawfully Produced Under a State or Tribal Plan or Under a License Issued Under the Departmental Plan.**

AMA § 297D(a)(1)(A) directs the Secretary to issue regulations and guidelines “as expeditiously as possible” to implement subtitle G of the AMA. 7 U.S.C. § 1639r(a)(1)(A). These regulations will address the approval of State and Tribal plans under AMA § 297B and the issuance of licenses under the Departmental plan under AMA § 297C. As explained below, once these regulations are published, States and Indian tribes may not prohibit the transportation or shipment of hemp (including hemp products) produced in accordance with an approved State or Tribal plan or produced under a license issued under the Departmental plan.

Transportation of hemp is addressed in 2018 Farm Bill § 10114.\(^10\) Subsection (a) provides:

\[(a) \text{ RULE OF CONSTRUCTION.}—Nothing in this title or an amendment made by this title prohibits the interstate commerce of hemp (as defined in section 297A of the Agricultural Marketing Act of 1946 (as added by section 10113)) or hemp products.\]

7 U.S.C. § 1639o note. This provision states that nothing in title X of the 2018 Farm Bill

\[^9\] Schedule I, as reflected in 21 C.F.R. § 1308.11, includes a separate listing of “marihuana extract” in paragraph (d)(58). Marijuana extract is not reflected in schedule I in the statute because it was added after 1970 by regulation under CSA § 201. The term “marihuana extract” is defined in regulation as “an extract containing one or more cannabinoids that has been derived from any plant of the genus Cannabis, other than the separated resin (whether crude or purified) obtained from the plant.” The 2018 Farm Bill amended the definition of “marihuana” to exclude hemp, but because the regulatory definition of “marihuana extract” in schedule I does not use the words “marihuana” or “tetrahydrocannabinol” to define the term, a question arises whether hemp extract is still considered to be listed as a schedule I controlled substance. While the issue is not further addressed in this opinion, I think that the revised statutory definition of “marihuana” has effectively removed hemp extract from schedule I, and that reflecting such in 21 C.F.R. § 1308.11(d)(58) would be merely a conforming amendment.

\[^10\] Hemp transportation is also addressed in annual appropriations acts, which restrict Federal appropriated funds from being used to prohibit the transportation of hemp. However, those provisions are limited in scope because they address only hemp produced under the 2014 Farm Bill authority, and they address only Federal government actions. That is, while the provisions prohibit Federal actors from blocking the transportation of so-called “2014 Farm Bill hemp,” they do not restrict State action in that regard. See Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2019, Pub. L. 116-6, div. B, § 728 (prohibiting funds made available by that Act or any other Act from being used in contravention of 2014 Farm Bill § 7606 or “to prohibit the transportation, processing, sale, or use of industrial hemp, or seeds of such plant, that is grown or cultivated in accordance with [2014 Farm Bill § 7606], within or outside the State in which the industrial hemp is grown or cultivated”). See also Commerce, Justice, Science, and Related Agencies Appropriations Act, 2019, Pub. L. 116-6, div. C, § 536 (“None of the funds made available by this Act may be used in contravention of [2014 Farm Bill § 7606] by the Department of Justice or the Drug Enforcement Administration.”).
prohibits the interstate commerce of hemp. However, this provision, standing alone, does not have the effect of sanctioning the transportation of hemp in States or Tribal areas where such transportation is prohibited under State or Tribal law.

Subsection (b), however, specifically prohibits States and Indian tribes from prohibiting the transportation of hemp through that State or Tribal territory. Subsection (b) provides:

(b) TRANSPORTATION OF HEMP AND HEMP PRODUCTS.—No State or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products produced in accordance with subtitle G of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable.

7 U.S.C. § 1639o note. In effect, this provision preempts State law to the extent such State law prohibits the interstate transportation or shipment of hemp that has been produced in accordance with subtitle G of the AMA.

As a matter of constitutional law, "[t]he Supremacy Clause provides a clear rule that federal law ‘shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any [S]tate to the Contrary notwithstanding, . . .’ Under this principle, Congress has the power to preempt [S]tate law.” Arizona v. United States, 567 U.S. 387, 398-99 (2012) (citing U.S. Const. art. VI, cl. 2). “Under the doctrine of federal preemption, a federal law supersedes or supplants an inconsistent [S]tate law or regulation.” United States v. Zadeh, 820 F.3d 746, 751 (5th Cir. 2016).

Federal courts generally recognize three categories of preemption: (1) express preemption (where Congress “withdraw[s]” powers from the State through an “express preemption provision”);\(^\text{11}\) (2) field preemption (where 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”);\(^\text{12}\) and conflict preemption (where State laws are preempted when they conflict with Federal law, which includes situations “where ‘compliance with both federal and [S]tate regulations is a physical impossibility’” or situations “where the challenged [S]tate law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’”).\(^\text{13}\) Arizona, 567 U.S. at 399-400 (citations omitted); see also Zadeh, 820 F.3d at 751.

\(^\text{11}\) See, e.g., 7 U.S.C. § 1639(b) (“(b) Federal preemption.—No State or a political subdivision of a State may directly or indirectly establish under any authority or continue in effect as to any food or seed in interstate commerce any requirement relating to the labeling of whether a food (including food served in a restaurant or similar establishment) or seed is genetically engineered (which shall include such other similar terms as determined by the Secretary of Agriculture) or was developed or produced using genetic engineering, including any requirement for claims that a food or seed is or contains an ingredient that was developed or produced using genetic engineering.”).


\(^\text{13}\) See, e.g., 21 U.S.C. § 903 (“No provision of this subchapter shall be construed as indicating an intent on the part of 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
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Section 10114(b) of the 2018 Farm Bill satisfies the definition of conflict preemption because a State law prohibiting the interstate transportation or shipment of hemp or hemp products that have been produced in accordance with subtitle G of the AMA would be in direct conflict with section 10114(b), which provides that no State may prohibit such activity. Therefore, any such State law has been preempted by Congress. The same result applies to Indian tribes.

In sum, once the implementing regulations are published, States and Indian tribes may not prohibit the shipment of hemp lawfully produced under an approved State or Tribal plan or under a license issued under the Departmental plan.

C. States and Indian Tribes May Not Prohibit the Interstate Transportation or Shipment of Hemp Lawfully Produced Under the Agricultural Act of 2014.

Because the 2018 Farm Bill does not immediately repeal the hemp pilot authority in 2014 Farm Bill § 7606 — and because the publication of regulations implementing the hemp production provisions of the 2018 Farm Bill will likely not occur until later in 2019 — the question arises whether States and Indian tribes are prohibited from blocking the interstate transportation or shipment of hemp (including hemp products) lawfully produced under the 2014 Farm Bill. The answer depends on the meaning of the phrase “in accordance with subtitle G of the Agricultural Marketing Act of 1946” in 2018 Farm Bill § 10114(b) (7 U.S.C. § 1639o note). Only hemp produced in accordance with subtitle G is covered by the preemption provision discussed above. As explained below, it is my opinion that the answer to this question is yes, by operation of AMA § 297B(f).

AMA § 297B(f) states the legal effect of the provisions authorizing States and Indian tribes to develop plans for exercising primary regulatory authority over the production of hemp within that State or territory of the Indian tribe. Specifically, section 297B(f) provides:

(f) EFFECT.—Nothing in this section prohibits the production of hemp in a State or the territory of an Indian tribe—

(1) for which a State or Tribal plan is not approved under this section, if the production of hemp is in accordance with section 297C or other Federal laws (including regulations); and

(2) if the production of hemp is not otherwise prohibited by the State or Indian tribe.

a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together."

Alternatively, section 10114(b) might be considered an express preemption provision because the statute expressly withdraws the power of a State to prohibit the transportation or shipment of hemp or hemp products through the State.

AMA § 297B(a)(3) contains an anti-preemption provision stating that nothing in § 297B(a) "preempts or limits any law of a State or Indian tribe" that "regulates the production of hemp" and "is more stringent than [subtitle G]." 7 U.S.C. § 1639p(a)(3). However, that anti-preemption provision is limited to the production of hemp — not the transportation or shipment of hemp — and thus does not conflict with 2018 Farm Bill § 10114(b).
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7 U.S.C. § 1639p(f) (emphasis added).

This provision addresses the production of hemp in a State or Tribal territory for which the State or tribe does not have an approved plan under AMA § 297B. This provision acknowledges that, in such a scenario, the production of hemp in that State or Tribal territory is still permissible if it is produced either in accordance with the Departmental plan under AMA § 297C or in accordance with other Federal laws, and the State or tribe does not otherwise prohibit its production.

The plain language of subtitle G of the AMA, as added by the 2018 Farm Bill, thus clearly contemplates a scenario in which hemp is neither produced under an approved 297B plan nor under a license issued under the Department’s 297C plan, but is still legally produced under “other Federal laws.” It is my opinion that “other Federal laws” encompasses 2014 Farm Bill § 7606.16

To my knowledge, before enactment of 2014 Farm Bill § 7606, the CSA was the only Federal law that authorized the production of hemp. Indeed, the production of hemp — as the “manufacture” of a schedule I controlled substance — was generally prohibited under the CSA except to the extent authorized under a registration or waiver under the CSA. See 21 U.S.C. §§ 802(15), 802(22), 822, and 823; 21 C.F.R. part 1301. Given (1) the removal of hemp as a controlled substance under the CSA, (2) the delayed repeal of the 2014 Farm Bill § 7606 authority, and (3) the enactment of the new hemp production authorities in subtitle G of the AMA, it is my opinion that “other Federal laws” refers to the provisions of 2014 Farm Bill § 7606, which are still in effect. Such an interpretation gives immediate effect to the phrase “other Federal laws.” It is a “cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute.” See, e.g., Loughrin v. United States, 573 U.S. 351, 358 (2014) (internal quotations and citations omitted).

Therefore, reading AMA § 297B(f) in harmony with 2014 Farm Bill § 10114(b), if the hemp is legally produced in accordance with 2014 Farm Bill § 7606 (“other Federal law”), then, by virtue of AMA § 297B(f), its production is not prohibited. Such hemp would have been produced “in accordance with subtitle G,” which specifically addresses just such a scenario, as AMA § 297B(f) is part of subtitle G. Accordingly, under 2018 Farm Bill § 10114(b), a State or Indian

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16 That Congress envisioned such a scenario is apparent given the language in 2018 Farm Bill § 7605(b) delaying the repeal of 2014 Farm Bill § 7606 until 12 months after the Secretary establishes the 297C plan. Accordingly, this interpretation is not precluded byAMA § 297C(c)(1), which provides: “in the case of a State or Indian tribe for which a State or Tribal plan is not approved under section 297B, it shall be unlawful to produce hemp in that State or the territory of that Indian tribe without a license issued by the Secretary under subsection (b).” Given the reference to “or other Federal laws” in AMA § 297B(f)(1) — and the fact that 2014 Farm Bill § 7606 is still in effect — it would be an absurd reading ofAMA § 297C(c)(1) to conclude that hemp produced in accordance with Federal law (2014 Farm Bill § 7606) is, at the same time, unlawful without a separate license issued by the Secretary under the 297C plan. As courts have long recognized, statutory interpretations that “produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.” Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 575 (1982).
tribe may not prohibit the transportation or shipment of so-called “2014 Farm Bill hemp” through that State or Tribal territory.\textsuperscript{17}

Recent Developments

I acknowledge that this conclusion is in tension with a recent decision in a case in the District of Idaho, but it also is consistent with a recent decision in a case in the Southern District of West Virginia. Neither court addressed the “other Federal laws” language in AMA § 297B(f)(1), which I find conclusive.

In \textit{Big Sky Scientific LLC v. Idaho State Police}, Case No. 19-CV-00040 (D. Idaho), a magistrate judge found that a shipment of Oregon hemp bound for Colorado and interdicted by Idaho State Police could not have been produced “in accordance with subtitle G” because the State of origin does not yet have an approved plan under AMA § 297B and the Secretary has not yet established a plan under AMA § 297C.\textsuperscript{18} The magistrate acknowledged Oregon law authorizing the cultivation of hemp, noting the plaintiff’s assertion that the hemp was produced by a grower licensed by the Oregon Department of Agriculture (and, thus, presumably in compliance with 2014 Farm Bill § 7606 requirements).\textsuperscript{19} However, in denying the plaintiff’s motion for a preliminary injunction, the magistrate concluded that, in enacting the 2018 Farm Bill, Congress intended to “create a regulatory framework around the production and interstate transportation of hemp for purposes of federal law, and that framework is to be contained in the federal (or compliant [S]tate or [T]ribal) plan for production of hemp found in the 2018 Farm Bill.”\textsuperscript{20} Although the 2018 Farm Bill allows hemp to be transported across State lines, the magistrate found those interstate commerce protections apply only to hemp produced under regulations promulgated under the authority of the 2018 Farm Bill.\textsuperscript{21} Therefore, because those regulations do not yet exist, the interdicted hemp is subject to Idaho law prohibiting its transportation.

USDA is not a party in the \textit{Big Sky} case, and this office does not concur with the reasoning of the magistrate regarding the shipment of hemp lawfully produced under the 2014 Farm Bill. In

\textsuperscript{17} This conclusion seems to be supported in the legislative history as well. In explaining the effect of the preemption provision, the Conference Report states: “While [S]tates and Indian tribes may limit the production and sale of hemp and hemp products within their borders, the Managers, in Sec. 10112 [sic], agreed to not allow [S]tates and Indian tribes to limit the transportation or shipment of hemp or hemp products through the [S]tate or Indian territory.” H.R. Rep. No. 115-1072, at 738 (2018). Notably, the Managers referred to hemp generally, not merely hemp produced under a plan developed under subtitle G of the AMA.

\textsuperscript{18} See \textit{Big Sky}, ECF Doc. #32, Memorandum Decision and Order Re: Plaintiff’s Motion for Preliminary Injunction; see also ECF Doc. #6, Memorandum Decision and Order Re: Plaintiff’s Emergency Motion for Temporary Restraining Order and Preliminary Injunction and Plaintiff’s Motion to File Overlength Brief (available at 2019 WL 438336 (Feb. 2, 2019)).

\textsuperscript{19} \textit{Big Sky}, ECF Doc. #32, at 5, 7-8.

\textsuperscript{20} \textit{Id.} at 3.

\textsuperscript{21} \textit{Id.} at 19-26.
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interpreting the statutory language, the magistrate correctly noted the well-recognized principle of statutory construction that statutes should not be interpreted “in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous.”22 However, seemingly ignoring that guiding principle of interpretation, the magistrate did not address the effect of the “other Federal laws” language in AMA § 297B(f) or attempt to give that language any meaning. The Idaho court failed to read the statute as a whole and did not consider the “other Federal laws” clause that I find conclusive. Given the preliminary nature of the magistrate’s ruling, I find his opinion denying a preliminary injunction unpersuasive.23

Conversely, the interpretation of 2018 Farm Bill § 10114 advanced by this legal opinion is consistent with a decision issued in the Southern District of West Virginia. In United States v. Mallory, Case No. 18-CV-1289 (S.D. W. Va.), the Department of Justice filed a civil action to seize hemp allegedly grown in violation of the CSA and also outside the scope of the 2014 Farm Bill. At issue in that case was hemp purportedly grown by a producer licensed by the State of West Virginia under a 2014 Farm Bill § 7606 pilot program, where the hemp seeds were shipped from a Kentucky supplier licensed by the Commonwealth of Kentucky under a 2014 Farm Bill § 7606 pilot program. The court relied on a combination of laws — the 2014 Farm Bill, the appropriations acts provisions,24 and the 2018 Farm Bill — to dissolve a preliminary injunction against the defendant25 and to dismiss entirely the government’s case.26 In dissolving the preliminary injunction, the court permitted the defendants to transport the hemp product across State lines to Pennsylvania for processing and sale.27

Although the Mallory court did not have occasion to address any State attempts to block the transportation of hemp, the court did reference 2018 Farm Bill § 10114, noting that it “expressly allows hemp, its seeds, and hemp-derived products to be transported across State lines.”28 The district judge’s opinion addressed hemp produced under 2014 Farm Bill § 7606 and not hemp produced under State, Tribal, or Departmental plans. The conclusion reached by the Mallory court is consistent with my interpretation that States cannot block the shipment of hemp, whether

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22 Id. at 21-22 (citing Padush v. I.N.S., 258 F.3d 1161, 1170-71 (9th Cir. 2004)). The magistrate continued:

It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant . . . . It is our duty to give effect, if possible, to every clause and word of a statute.

Id. at 23 (internal quotations and citations omitted).

23 Indeed, the magistrate’s ruling is under appeal. See Big Sky Sci. LLC v. Bennatts, Case No. 19-35138 (9th Cir.).

24 See supra footnote 10.


27 Mallory, ECF Doc. #60, 2019 WL 252530, at *3.

that hemp is produced under the 2014 Farm Bill or under a State, Tribal, or Departmental plan under the 2018 Farm Bill. It is also a final judgment of the Southern District of West Virginia court, and not a preliminary ruling as with the District of Idaho magistrate’s opinion.\textsuperscript{29}

In matters of statutory interpretation, the text of the statute governs. One must read that text in its entirety and give every word meaning. The reference to “other Federal laws” must be given meaning, and that language clearly refers to the Federal law that currently authorizes the production of hemp — 2014 Farm Bill § 7606. Therefore, hemp produced under that pilot authority is hemp produced in accordance with subtitle G of the AMA. States and Indian tribes may not prohibit the transportation or shipment of such hemp through that State or Tribal territory.

D. The 2018 Farm Bill Places Restrictions on the Production of Hemp by Certain Felons.

The 2018 Farm Bill added a new provision addressing the ability of convicted felons to produce hemp. The 2014 Farm Bill is silent on the issue. AMA § 297B(c)(3)(B) (hereafter, “Felony provision”), as added by the 2018 Farm Bill, provides:

(B) FELONY.—

(i) IN GENERAL.—Except as provided in clause (ii), any person convicted of a felony relating to a controlled substance under State or Federal law before, on, or after the date of enactment of this subtitle shall be ineligible, during the 10-year period following the date of the conviction—

(I) to participate in the program established under this section or section 297C; and

(II) to produce hemp under any regulations or guidelines issued under section 297D(a).

(ii) EXCEPTION.—Clause (i) shall not apply to any person growing hemp lawfully with a license, registration, or authorization under a pilot program authorized by section 7606 of the Agricultural Act of 2014 (7 U.S.C. 5940) before the date of enactment of this subtitle.

7 U.S.C. § 1639p(e)(3)(B) (emphasis added). The references to “the date of enactment of this subtitle” are to subtitle G of the AMA, as added by section 10113 of 2018 Farm Bill. Therefore, the “date of enactment of this subtitle” is the date of enactment of the 2018 Farm Bill — December 20, 2018.

In explaining the Felony provision, the Conference Report notes:

Any person convicted of a felony relating to a controlled substance shall be ineligible to participate under the [S]tate or [T]ribal plan for a 10-year period following the date of the conviction. However, this prohibition shall not apply to producers who have been lawfully participating in a [S]tate hemp pilot program as authorized by the Agricultural Act of 2014, prior to enactment of this subtitle. Subsequent felony convictions after the date of enactment of this subtitle will trigger a 10-year

\textsuperscript{29} Mallory, ECF Doc. #72, 2019 WL 1061677, at *9 (denying the United States’ motion to amend and granting the defendants’ motion to dismiss). Big Sky, ECF Doc. #32, at 28 (denying the plaintiff’s motion for preliminary injunction and noting that the court will separately issue an order setting a scheduling conference to govern the case going forward).
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nonparticipation period regardless of whether the producer participated in the pilot program authorized in 2014.


In sum, a person convicted of a State or Federal felony relating to a controlled substance — regardless of when that conviction occurred — is ineligible to produce hemp under subtitle G of the AMA for a period of 10 years following the date of the conviction. An exception exists in clause (ii) of the Felony provision that applies to a person who was lawfully producing hemp under the 2014 Farm Bill before December 20, 2018, and who had been convicted of a felony relating to a controlled substance before that date. States and Indian tribes now have a responsibility to determine whether a person wishing to produce hemp in that State or Tribal territory has any Federal or State felony convictions relating to controlled substances that would make that person ineligible to produce hemp.

III. OTHER ISSUES

There are two additional important aspects of this issue that should be emphasized.

First, the 2018 Farm Bill preserves the authority of States and Indian tribes to enact and enforce laws regulating the production of hemp that are more stringent than Federal law. See AMA § 297B(a)(3) (7 U.S.C. § 1639p(a)(3)) (“Nothing in this subsection preempts or limits any law of a State or Indian tribe that . . . (i) regulates the production of hemp; and (ii) is more stringent than this subtitle.”). For example, a State may continue to prohibit the growth or cultivation of hemp in that State.30 As discussed above, however, while a State or Indian tribe may prohibit the production of hemp, it may not prohibit the interstate shipment of hemp that has been produced in accordance with Federal law.

Second, the 2018 Farm Bill does not affect or modify the authority of the Secretary of Health and Human Services (“HHS Secretary”) or Commissioner of Food and Drugs (“FDA Commissioner”) under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 301 et seq.) and section 351 of the Public Health Service Act (42 U.S.C. § 262). See AMA § 297D(c) (7 U.S.C. § 1639r(c)). While AMA § 297D(b) provides that the Secretary of Agriculture shall have “sole authority” to issue Federal regulations and guidelines that relate to the production of hemp, this authority is subject to the authority of the HHS Secretary and FDA Commissioner to promulgate Federal regulations and guidelines under those FDA laws. 7 U.S.C. § 1639r(b).

IV. CONCLUSION

I have analyzed the hemp provisions enacted as part of the 2018 Farm Bill and reach the following conclusions:

1. As of the enactment of the 2018 Farm Bill on December 20, 2018, hemp has been removed from schedule I of the CSA and is no longer a controlled substance.

2. After USDA publishes regulations implementing the hemp production provisions of the 2018 Farm Bill contained in subtitle G of the AMA, States and Indian tribes may not prohibit the interstate transportation or shipment of hemp lawfully produced under a State or Tribal plan or under a license issued under the Departmental plan.

3. States and Indian tribes may not prohibit the interstate transportation or shipment of hemp lawfully produced under the 2014 Farm Bill.

4. A person with a State or Federal felony conviction relating to a controlled substance is subject to a 10-year ineligibility restriction on producing hemp under subtitle G of the AMA. An exception applies to a person who was lawfully growing hemp under the 2014 Farm Bill before December 20, 2018, and whose conviction also occurred before that date.

The 2018 Farm Bill preserves the authority of States and Indian tribes to enact and enforce laws regulating the production of hemp that are more stringent than Federal law. Additionally, the 2018 Farm Bill does not affect or modify the authority of the HHS Secretary or FDA Commissioner to regulate hemp under applicable FDA laws.
FDA STATEMENT

Statement from FDA Commissioner Scott Gottlieb, M.D., on new steps to advance agency's continued evaluation of potential regulatory pathways for cannabis-containing and cannabis-derived products

For Immediate Release:
April 02, 2019
Statement From:

In recent years, we’ve seen a growing interest in the development of therapies and other FDA-regulated consumer products derived from cannabis (Cannabis sativa L.) and its components, including cannabidiol (CBD). This interest spans the range of product categories that the agency regulates. For example, we’ve seen, or heard of interest in, products containing cannabis or cannabis derivatives that are marketed as human drugs, dietary supplements, conventional foods, animal foods and drugs, and cosmetics, among other things. We also recognize that stakeholders are looking to the FDA for clarity on how our authorities apply to such products, what pathways are available to market such products lawfully under these authorities, and how the FDA is carrying out its responsibility to protect public health and safety with respect to such products.

Interest in these products increased last December when Congress passed the Agriculture Improvement Act of 2018 (the 2018 Farm Bill). Among other things, this law established a new category of cannabis classified as “hemp” – defined as cannabis and cannabis derivatives with extremely low (no more than 0.3 percent on a dry weight basis) concentrations of the psychoactive compound delta-9-tetrahydrocannabinol (THC). The 2018 Farm Bill removed hemp from the Controlled Substances Act, which means that it is no longer a controlled substance under federal law.

At the same time, Congress explicitly preserved the FDA’s current authority to regulate products containing cannabis or cannabis-derived compounds under the Federal Food, Drug, and Cosmetic Act (FD&C Act) and section 351 of the Public Health Service Act. In doing so, Congress recognized the agency’s important public health role with respect to all the products it regulates. This allows the FDA to continue enforcing the law to protect patients and the public while also providing potential regulatory pathways, to the extent permitted by law, for products containing cannabis and cannabis-derived compounds.
When the 2018 Farm Bill became law, I issued a statement (https://news-events/press-announcements/statement-fda-commissioner-scott-gottlieb-md-signing-agriculture-improvement-act-and-agencys) explaining the FDA’s current approach to these products and our intended next steps. Consistent with the approach and commitments described in that statement, today the FDA is announcing a number of important new steps and actions to advance our consideration of a framework for the lawful marketing of appropriate cannabis and cannabis-derived products under our existing authorities. These new steps include:

- A public hearing (https://www.federalregister.gov/documents/2019/04/03/2019-06436/scientific-data-and-information-about-products-containing-cannabis-or-cannabis-derived-compounds) on May 31, as well as a broader opportunity for written public comment, for stakeholders to share their experiences and challenges with these products, including information and views related to product safety.

- The formation of a high-level internal agency working group to explore potential pathways for dietary supplements and/or conventional foods containing CBD to be lawfully marketed; including a consideration of what statutory or regulatory changes might be needed and what the impact of such marketing would be on the public health.

- Updates to our webpage (FDA Regulation of Cannabis and Cannabis-Derived Products: Questions and Answers) with answers to frequently asked questions on this topic to help members of the public understand how the FDA’s requirements apply to these products.

- The issuance of multiple warning letters to companies marketing CBD products with egregious and unfounded claims that are aimed at vulnerable populations.

Public Hearing

The public hearing will give stakeholders an opportunity to provide the FDA with additional input relevant to the agency’s regulatory strategy related to existing products, as well as the lawful pathways by which appropriate products containing cannabis or cannabis-derived compounds can be marketed, and how we can make these legal pathways more predictable and efficient. We hope to gain additional information and data for the FDA to consider with respect to products containing cannabis and cannabis-derived compounds, including CBD.

As we’ve stated before, we treat products containing cannabis or cannabis-derived compounds as we do any other FDA-regulated products. Among other things, the FDA requires a cannabis product (hemp-derived or otherwise) that’s marketed with a claim of therapeutic benefit to be approved by the FDA for its intended use before it may be introduced into interstate commerce. Additionally, it is unlawful to introduce food containing added CBD, or the psychoactive compound THC, into interstate commerce, or to market CBD or THC products as dietary supplements. This is because CBD and THC are active ingredients in FDA-approved drug products and were the subject of substantial clinical investigations before they were marketed as food. In such situations, with certain exceptions that are not applicable here, the only path that
the FD&C Act allows for such substances to be added to foods or marketed as dietary supplements is if the FDA first issues a regulation, through notice-and-comment rulemaking, allowing such use.

While the availability of CBD products in particular has increased dramatically in recent years, open questions remain regarding the safety considerations raised by their widespread use. For example, during its review of the marketing application for Epidiolex (/news-events/press-announcements/fda-approves-first-drug-comprised-active-ingredient-derived-marijuana-treat-rare-severe-forms) – a purified form of CBD that the FDA approved in 2018 for use in the treatment of certain seizure disorders – the FDA identified certain safety risks, including the potential for liver injury. These are serious risks that can be managed when the product is taken under medical supervision in accordance with the FDA-approved labeling for the product, but it is less clear how this risk might be managed in a setting where this drug substance is used far more widely, without medical supervision and not in accordance with FDA-approved labeling. There are also unresolved questions regarding the cumulative exposure to CBD if people access it across a broad range of consumer products, as well as questions regarding the intended functionality of CBD in such products. Additionally, there are open questions about whether some threshold level of CBD could be allowed in foods without undermining the drug approval process or diminishing commercial incentives for further clinical study of the relevant drug substance.

It’s critical that we address these unanswered questions about CBD and other cannabis and cannabis-derived products to help inform the FDA’s regulatory oversight of these products – especially as the agency considers whether it could be appropriate to exercise its authority to allow the use of CBD in dietary supplements and other foods. As I stated in December, the FDA would only consider this path if the agency were able to determine that all other requirements in the FD&C Act are met, including those required for food additives or new dietary ingredients.

As part of the public hearing and related public comment period, the agency is interested in whether there are particular safety concerns that we should be aware of as we consider the FDA’s regulatory oversight and monitoring of these products. For example, we’re seeking comments, data and information on a variety of topics including: what levels of cannabis and cannabis-derived compounds cause safety concerns; how the mode of delivery (e.g., ingestion, absorption, inhalation) affects the safety of, and exposure to, these compounds; how cannabis and cannabis-derived compounds interact with other substances such as drug ingredients; and other questions outlined in the hearing announcement.

Additionally, we’re interested in how the incentives for, and the feasibility of, drug development with CBD and other cannabis-derived compounds would be affected if the commercial availability of products with these compounds, such as foods and dietary supplements, were to become significantly more widespread. We don’t want companies to forgo research that might support approval through the FDA’s drug review process, which could potentially lead to
important safe and effective therapies. We also don't want patients to forgo appropriate medical treatment by substituting unapproved products for approved medicines used to prevent, treat, mitigate or cure a particular disease or condition. For example, in the case of Epidiolex, the adequate and well-controlled clinical studies that supported its approval, and the assurance of manufacturing quality standards, can provide prescribers confidence in the drug’s uniform strength and consistent delivery that support appropriate dosing needed for treating patients with these complex and serious epilepsy syndromes. It's important that we continue to assess whether there could be medical ramifications if patients choose to take CBD to treat certain diseases at levels higher or lower than studied in well-controlled clinical studies.

**FDA Working Group**

We hope that information we receive through the public hearing this May, as well as through the written public comment process, will help inform our consideration of these and other important scientific, technical and policy questions. Given the importance of these questions, and the significant public interest with respect to CBD in particular, we’re forming a high-level internal agency working group to explore potential pathways for dietary supplements and/or conventional foods containing CBD to be lawfully marketed. Given the importance of this issue, I’ve asked Principal Deputy Commissioner Amy Abernethy, M.D., Ph.D. and Principal Associate Commissioner for Policy Lowell Schiller, to co-chair the group and charged them with considering what options might be appropriate under our current authorities, in view of all the evidence before us and our agency’s fundamental public health mission. I’m also asking the group to consider whether there are legislative options that might lead to more efficient and appropriate pathways than might be available under current law – again, with the same science-based, public health focus that the FDA endeavors to bring to all matters before it. This is a complicated topic and we expect that it could take some time to resolve fully. Nevertheless, we're deeply focused on this issue and committed to continuing to engage relevant stakeholders as we consider potential paths forward. The working group plans to begin sharing information and/or findings with the public as early as Summer 2019.

**New Compliance Actions**

We’ll continue to use our authorities to take action against companies illegally selling these types of products when they are putting consumers at risk. I am deeply concerned about any circumstance where product developers make unproven claims to treat serious or life-threatening diseases, and where patients may be misled to forgo otherwise effective, available therapy and opt instead for a product that has no proven value or may cause them serious harm.

Today, the FDA is announcing that it has issued warning letters, in collaboration with the Federal Trade Commission, to three companies – Advanced Spine and Pain LLC (d/b/a Relievus) (Advanced Spine and Pain, LLC (d/b/a Relievus)), Nutra Pure LLC (/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/nutra-pure-llc-567714-
03282019 and PotNetwork Holdings Inc. (/inspections-compliance-enforcement-and-criminal-investigations/warning-letters/potnetwork-holdings-inc-564030-03282019) – in response to their making unsubstantiated claims related to more than a dozen different products and spanning multiple product webpages, online stores and social media websites. The companies used these online platforms to make unfounded, egregious claims about their products' ability to limit, treat or cure cancer, neurodegenerative conditions, autoimmune diseases, opioid use disorder, and other serious diseases, without sufficient evidence and the legally required FDA approval. Examples of claims made by these companies include:

- “CBD successfully stopped cancer cells in multiple different cervical cancer varieties.”
- “CBD also decreased human glioma cell growth and invasion, thus suggesting a possible role of CBD as an antitumor agent.”
- “For Alzheimer’s patients, CBD is one treatment option that is slowing the progression of that disease.”
- “Fibromyalgia is conceived as a central sensitization state with secondary hyperalgesia. CBD has demonstrated the ability to block spinal, peripheral and gastrointestinal mechanisms responsible for the pain associated with migraines, fibromyalgia, IBS and other related disorders.”
- “Cannabidiol May Be Effective for Treating Substance Use Disorders.”
- “CBD reduced the rewarding effects of morphine and reduced drug seeking of heroin.”
- “CBD may be used to avoid or reduce withdrawal symptoms.”

I believe these are egregious, over-the-line claims and we won't tolerate this kind of deceptive marketing to vulnerable patients. The FDA continues to be concerned about the proliferation of egregious medical claims being made about products asserting to contain CBD that haven't been approved by the FDA, such as the products and companies receiving warning letters today. CBD is marketed in a variety of product types, such as oil drops, capsules, syrups, teas and topical lotions and creams. Often such products are sold online and are therefore available throughout the country.

Selling unapproved products with unsubstantiated therapeutic claims can put patients and consumers at risk. These products have not been shown to be safe or effective, and deceptive marketing of unproven treatments may keep some patients from accessing appropriate, recognized therapies to treat serious and even fatal diseases. Additionally, because they are not evaluated by the FDA, there may be other ingredients that are not disclosed, which may be harmful.

As our actions today make clear, the FDA stands ready to protect consumers from companies illegally selling CBD products that claim to prevent, diagnose, treat, or cure serious diseases, such as cancer, Alzheimer’s disease, psychiatric disorders and diabetes. The agency has and will
continue to monitor the marketplace and take enforcement action as needed to protect the public health against companies illegally selling cannabis and cannabis-derived products that can put consumers at risk and are being marketed and distributed in violation of the FDA's authorities.

Ultimately, we remain committed to exploring an appropriate, efficient and predictable regulatory framework to allow product developers that meet the requirements under our authorities to lawfully market these types of products. The actions we’re announcing today will allow us to continue to clarify our regulatory authority over these products and seek input from a broad range of stakeholders and examine a variety of approaches and considerations in the marketing and regulation of cannabis or cannabis-derived products, while continuing to protect the public’s health and safety.

The FDA, an agency within the U.S. Department of Health and Human Services, protects the public health by assuring the safety, effectiveness, and security of human and veterinary drugs, vaccines and other biological products for human use, and medical devices. The agency also is responsible for the safety and security of our nation's food supply, cosmetics, dietary supplements, products that give off electronic radiation, and for regulating tobacco products.

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**Inquiries**

**Media:**

✉️ Michael Felberbaum (mailto:michael.felberbaum@fda.hhs.gov)

📞 240-402-9548

**Consumer:**

📞 888-INFO-FDA

🔗 More Press Announcements (/news-events/newsroom/press-announcements)
Medical Marijuana

**Carry On Bags: Yes (Special Instructions)**

**Checked Bags: Yes (Special Instructions)**

Marijuana and certain cannabis infused products, including some Cannabidiol (CBD) oil, remain illegal under federal law except for products that contain no more than 0.3 percent THC on a dry weight basis or that are approved by FDA. (See the Agriculture Improvement Act of 2018, Pub. L. 115-334.) TSA officers are required to report any suspected violations of law to local, state or federal authorities.

TSA’s screening procedures are focused on security and are designed to detect potential threats to aviation and passengers. Accordingly, TSA security officers do not search for marijuana or other illegal drugs, but if any illegal substance is discovered during security screening, TSA will refer the matter to a law enforcement officer.

For more prohibited items, please go to the 'What Can I Bring?' page.

*The final decision rests with the TSA officer on whether an item is allowed through the checkpoint.*
OPINION 2015-1
[Issue date: June 2015]

ISSUE:
May a California lawyer ethically represent a client in respect to a medical marijuana enterprise in California?

DIGEST:
A California attorney may ethically represent a California client in respect to lawfully forming and operating a medical marijuana dispensary and related matters permissible under state law, even though the attorney may thereby aid and abet violations of federal law. However, the attorney should advise the client of potential liability under federal law and relevant adverse consequences and should be aware of the attorney’s own risks.

STATEMENT OF FACTS:
Lawyer receives a telephone call from a client who says she wants to open a medical marijuana dispensary and wants assistance negotiating a lease and obtaining financing, a use permit, and a business license. Client says she will only sell to customers who have bona fide recommendations from medical doctors and will grow her own inventory in California.

DISCUSSION:
This fact scenario presents a clear example of the difference between ethical conduct, on the one hand, and illegal conduct or conduct that may subject one to discipline, on the other. The lawyer may operate within the bounds of California law and advise the client about her rights under California law, but the lawyer may be accused of aiding conduct that is illegal under federal law. We conclude that the lawyer may ethically represent the client, even if doing so might violate federal laws or the Rules of Professional Conduct.

To borrow a phrase from City of Garden Grove v. Superior Court (2007) 157 Cal.App.4th 355, 362, “This request is terra incognita,” as are “the many confusing aspects of the current tension between California marijuana laws and those of the federal government.” We know of no other area in which a lawyer may be asked to represent a client in a matter that is legal under California law, but illegal under federal law.

A. Federal Law
Federal law makes it a crime to grow, sell, or possess marijuana. See, e.g., 21 U.S.C. § 841(a)(1); 21 U.S.C. § 812, Schedule I (c), (d). Possession of marijuana for personal use is a federal misdemeanor. 21 U.S.C. § 844(a). However, manufacture, distribution, possession with intent to distribute, or attempts and conspiracies to do so involve penalties that vary with the type and quantity of drug and other factors. 21 U.S.C. §§ 841(b), 846 & 960(b). For example, a statutory range of five to forty years applies to offenses involving at least 100 kilograms of marijuana or 100 plants, while 1,000 kilograms of marijuana or 1,000 plants can range from ten years to life. 21 U.S.C. §§ 841(b)(1)(A), (B) & 960(b)(2). A doctor may not prescribe marijuana because it is a Schedule I drug. However, a doctor may recommend use of marijuana and discuss treatment options with patients, even though that might lead to illegal conduct. Gonzales v. Raich (2005) 545 U.S. 1, 14-15; Conant v. Walters (9th Cir. 2002) 309 F.3d 629, 636-38, cert. denied sub. nom. Walters v. Conant (2003) 540 U.S. 946. In addition to, or in lieu of, imprisonment or fines, the Department of Justice may seek civil forfeiture of property from the owner, landlord, mortgage holder or other person or entity who has an interest in property connected with an illegal activity. See, e.g., 21 U.S.C. § 881.

In addition, “aiding and abetting” a violation of federal marijuana laws is a crime. Conant v. Walters, supra,309 F.3d at 635 (citing U.S. v. Gaskins (9th Cir. 1988) 649 F.2d 454, 459) (setting forth elements of “aiding and abetting”). Thus, if the lawyer represents or counsels the California client in complying with state law in the situation posed, he or she nevertheless could be prosecuted under federal law for aiding and abetting the client’s violation. Representing a client in connection with medical marijuana may expose the lawyer to risks under other federal statutes. See, e.g., 18 U.S.C. § 2(a) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”); 18 U.S.C. § 2(b) (“Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.”); and 21 U.S.C. § 846 (“Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”).

The Department of Justice has given guidance about its priorities for the enforcement of the Controlled Substances Act, and characterized as low priorities individuals who are in “clear and unambiguous compliance” with state medical-marijuana laws. See, e.g., James M. Cole, U.S. Dept of Justice, Office of Deputy Attorney General, Guidance Regarding Marijuana Enforcement (2013), ; James M. Cole, U.S. Dept of Justice, Office of Deputy Attorney General, Guidance Regarding Marijuana Related Financial Crimes (2014). Nevertheless, violation of the act is still a crime under federal law and is still subject to discretionary enforcement.

B. Conflicting California Law
California law obviously conflicts with federal law because possession, sale, and cultivation of marijuana for medical purposes will not be prosecuted by the state. Proposition 215 added the Compassionate Use Act of 1996 as section 11362.5 to the Health & Safety Code, providing in relevant part:

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient’s primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the
written or oral recommendation or approval of a physician.

Effective in 2004, Senate Bill 420, the Medical Marijuana Program Act (Health & Safety Code sections 11362.7 to 11362.83) supplemented the Compassionate Use Act by, for example, creating a state-approved medical marijuana identification card program, setting the quantity of marijuana that a qualified patient or primary caregiver can possess, and creating certain immunities from state marijuana laws. Thus, California state law permits sale and use of marijuana under certain circumstances, even though doing so remains a crime under federal law.

C. No Preemption of California Law

"The Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land." U.S. Constitution, Art. VI, § 2. However, federal preemption of marijuana laws is limited:

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.

21 U.S.C. § 903. Thus, California may regulate marijuana as long as state law does not positively conflict with the Controlled Substances Act.

Neither Proposition 215 nor the Medical Marijuana Program Act positively conflicts with the Controlled Substances Act because they do not "legalize" medical marijuana. They exercise the state's power not to punish certain marijuana offenses under state law if a physician has recommended its use to treat a serious medical condition. They are not preempted by the Controlled Substances Act. Pack v. Superior Court (2011) 195 Cal.App.4th 1070, 1076 review granted and opinion superseded sub nom. (Pack v. S.C. (Cal. 2012) 136 Cal.Rptr.3d 665); Qualified Patients Alliance v. City of Anaheim (2010) 157 Cal.App.4th 734, 756-63; City of Garden Grove v. Superior Court, supra, 157 Cal.App.4th at 371-373, 381-382; but see Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries (2010) 348 Or. 159, 172 (employers not obliged to accommodate employees' use of medical marijuana; federal law preempts state legislation); and Ross v. RagingWire Telecommunications, Inc. (2008) 42 Cal.4th 920, 926-30 (Compassionate Use Act shields medical marijuana users from criminal liability under state law but does not require employers to accommodate use of medical marijuana, which is illegal under federal law).

Conversely, the legality of possession and use under California law does not bar enforcement of the federal Controlled Substances Act. Gonzales v. Reich, supra, 545 U.S. at 63 ("In enforcement of the CSA can continue as it did prior to the Compassionate Use Act."); Thomas, J., dissenting). Federal law on this subject can be enforced regardless of the California statutes. See U.S. v. Cannabis Cultivators Club (N.D. Cal. 1998) 5 F.Supp.2d 1086, 1100 ("Proposition 215 does not conflict with federal law because on its face it does not purport to make legal any conduct prohibited by federal law; it merely exempts certain conduct by certain persons from the California drug laws."); County of San Diego v. San Diego NORML (2008) 165 Cal.App.4th 796, 826.

D. Clients Need Representation Regarding Activities Permissible Under State Law.

Like any other business venture, a client that embarks on a medical marijuana venture may need a lawyer's advice and assistance, but the issues involved in the legal representation are complicated by the dissonance between state and federal laws. For example:

California law does not permit the unfettered cultivation, possession, sale, or use of medical marijuana. A client who wants to engage in permissible activities may need a lawyer's advice on applicable statutes and regulations, such as: What persons or entities may cultivate, dispense, recommend use of, or possess marijuana and in what quantities? May they be compensated and, if so, in what amounts? A financial institution may refuse to grant a loan or line of credit to fund a client's business that is related to marijuana. [1] A client may need assistance negotiating a lease, particularly if a prospective landlord wants to prohibit use of real property for illegal activities and fears seizure by federal authorities. [2]

The dispensary will need a seller's permit. See June, 2007, Cal. Bd. Of Equalization Special Notice at www.boe.ca.gov. Who will draft contracts for the purchase of the marijuana inventory?

If the client will conduct a cash-only business, then she may need representation in negotiating arrangements to lower the risks associated with handling large amounts of cash. [3] The marijuana enterprise may need legal advice and representation to obtain a use permit or zoning variance. The client will also need tax advice. Unlike other business ventures, marijuana sellers may not deduct expenses such as employee salaries, rent, mortgage payments, legal fees, state taxes, or equipment depreciation. 26 U.S.C. § 208E; see Dep't of Treasury, Internal Revenue Serv. (Dec. 16, 2010) at http://www.irs.gov/pub/irs-wd/11-0005.pdf.

Health care providers and their patients may also need legal advice. Even if California residents comply with state laws regarding medical marijuana, they risk prosecution or civil or criminal forfeiture under federal laws. None of these issues is easily resolved. If they can skirt federal enforcement activities, they need representation by lawyers to ensure compliance with state laws, ordinances, and regulations and to minimize the risks of criminal prosecution and exposure under federal laws and policies.

E. Lawyers Should Not Be Subject to Professional Discipline for Representing Clients on Matters Relating to Medical Marijuana that Comply with State Law.

We do not believe that the State Bar Act or California Rules of Professional Conduct should be used to discipline lawyers whose clients seek advice on how to comply with state or local laws when the client's proposed conduct may violate the Controlled Substance Act. Provided that the client limits his or her activities to those that comply with state law, and provided that the lawyer counsels against otherwise violating the Controlled Substances Act, a lawyer should be permitted to advise and represent a client regarding matters related to medical marijuana under state law.

A lawyer who advises or assists a California resident regarding cultivation, sale, manufacture, distribution, or use of marijuana may be assisting the client in violating federal laws. One of the duties of a lawyer is to support the laws of the United States and of California. Bus. & Prof. Code § 6068(a). What is a lawyer to do when those laws conflict? We believe that the lawyer may advise, assist, and represent the client in complying with state and local laws and ordinances while, at the same time, counseling against conduct that may invite prosecution for violation of federal laws.

To paraphrase Justice Lewis Powell, a duty of a lawyer "is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State." Application of Griffiths (1973) 413 U.S. 717, 724, n. 14. In this case, assisting the client to comply with California law may conflict with the interests of the United States. A lawyer, however, may advise the client on her legal rights and obligations and may
explain the practical implications and liabilities created by the laws. Without legal representation, those who want to engage in transactions related to medical marijuana may not fully understand their rights, duties, and liabilities. If, as a matter of ethics or policy, the bar were to refuse to represent people regarding medical marijuana, then non-lawyers would be deprived of essential legal representation.

We do not believe that California Rule of Professional Conduct 3-210 should be interpreted to prohibit a lawyer from representing the client concerning conduct permissible under Proposition 215 or the Medical Marijuana Program Act, but prohibited by federal law. Rule 3-210 states:

A member shall not advise the violation of any law . . . unless the member believes in good faith that such law . . . is invalid.

However, this situation is unique. Rule 3-210 did not anticipate it. We know of no other subject in which California law permits what is forbidden by federal penal law. This state's public policy conflicts with federal law. Even if the lawyer does not believe that the federal laws regarding marijuana are invalid, we conclude that he or she may advise and assist the client in complying with state laws.

Assisting the client who wants to comply with state and local laws is not the same as advising the client to violate federal laws. A lawyer should tell the client that the proposed activities will violate federal laws and may warn the client of the associated risks. But that lawyer may concurrently advise the client how to comply with state and local laws and ordinances that permit such activities. For example, the lawyer may assist the client in accomplishing other tasks but advise against, and refuse to assist the client in, purchasing marijuana in another state or selling to minors because such conduct is more likely to result in criminal prosecution by the federal government and may violate state law too. See, e.g., James M. Cole, U.S. Dept. of Justice, Office of Deputy Attorney General, Guidance Regarding Marijuana Related Financial Crimes, (February 14, 2014), (discussing prosecution priorities) and Health & Saf. Code § 11361 (use of minor in marijuana activities or sale to minor unlawful).

We also believe that a lawyer's assistance to a client who wants to comply with the Compassionate Use Act should not be considered an act of moral turpitude because it does not suggest that the lawyer is dishonest, untrustworthy, or unfit to practice. Cf., Bus. & Prof. Code § 6106 (allowing disbarment or suspension for commission of acts involving moral turpitude, dishonesty or corruption). To the contrary, the public's adoption of the Compassionate Use Act suggests that a lawyer who assists a client in complying with it is fulfilling a public service.

Nevertheless, a lawyer should be aware that he or she is assuming the risk that the State Bar's Office of Chief Trial Counsel may disagree with our interpretation of Rule 3-210 or of Business & Professions Code section 6106 and seek to discipline the lawyer who represents this client, just as the lawyer will risk federal prosecution for aiding and abetting.

We conclude that, by telling the client about the risks, but concurrently assisting the client to carry on a business that is expressly permitted by California laws, the lawyer would be fulfilling his or her ethical duties to the client. "[T]here is a responsibility on the bar to make legal services available to those who need them. The maxim, 'privileged brings responsibilities,' can be expanded to read, exclusive privilege to render public service brings responsibility to assure that the service is available to those in need of it." Cheatham, Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar, 12 U.C.L.A. L. Rev. 438, 443 (1965). Canon 2 of the American Bar Association Code of Professional Responsibility was "A Lawyer Should Assist the Legal Profession in Fulfilling its Duty to Make Legal Counsel Available." EC 2-1 stated:

The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available. [citations omitted].

If Rule 3-210 were interpreted to prohibit lawyers from representing clients involved with medicinal marijuana activities that are permissible under California law and public policy, then we would be adding "the Bar Association won't let us represent you" to such barriers to legal representation as lack of money or failure to recognize that a layperson may need a lawyer. Such concerted refusal to represent clients who need representation would bring the bar into disrepute.

A client should not have to wait until he or she is a defendant in a prosecution or forfeiture action before obtaining legal advice. "The obligation to provide legal services for those actually caught up in litigation carries with it the obligation to make preventive legal advice accessible to all. It is among those unaccustomed to business affairs and who are fearful of the ways of the law that such advice is often most needed. If it is not received in time, the most valiant and skillful representation in court may come too late." Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1216 (1958).

F. Comparison Under Model Rule 1.2(d)

The lawyer's duties under California Rule of Professional Conduct 3-210 differ from a lawyer's duties in a state that has adopted American Bar Association Model Rule 1.2(d). Model Rule 1.2(d) contains a broader proscription and does not just prohibit a lawyer from advising a client to violate the law. It states, "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." Our Rule 3-210 [d] does not expressly proscribe assisting a client in conduct that the lawyer knows is permissible under state law, but criminal under federal law. We do not opine that a lawyer may assist a client to violate a law where both federal and state laws prohibit the act, but the situation presented here does not violate both sets of laws. Even if Model Rule 1.2(d) applied in California, we do not believe that it should deprive California residents of candid advice and advocacy. An ethical lawyer should not be limited to the bare words of a disciplinary rule in deciding upon commitments to the client or duties to the public. Bar associations interpreting this issue under their own state versions of Model Rule 1.2(d) have issued inconsistent, and sometimes, inconclusive, ethics opinions.

Among those that opine that legal assistance is prohibited are:

- Maine Professional Ethics Commission Opinion 169 advised that, absent an amendment to the rules of professional conduct or federal law, a lawyer "may counsel or assist a client in making good faith efforts to determine the validity, scope, meaning or application of the law." However, it said that "the Rule forbids attorneys from counseling a client to engage in the (marijuana) business or to assist the client in doing so." Me. Prof1 Ethics Comm., Op. #159 (2010) (advising clients concerning Maine’s Medical Marijuana Act).

- Connecticut Bar Association Informal Opinion 2013-02 gave similar advice and left to individual lawyers the burden of deciding whether it would be permissible to advise clients about complying with the state law. On March 24, 2014, Connecticut amended its version of Rule 1.2(d) effective in 2015 to permit a lawyer to advise or assist a client with conduct permitted by that state's law "provided the lawyer counsels the client about the legal consequences . . . under other applicable law . . ." Con. Prof1 Ethics Comm., Informal Op. 2013-02 (2013) (providing legal services to clients seeking licenses under the Connecticut medical marijuana law).

Among those that opine that legal assistance is permitted are:

- State Bar of Arizona concluded that an Arizona lawyer may ethically assist a client in engaging in medical marijuana in compliance with Arizona law, provided that (1) at the time the advice or assistance is provided, no court decisions have held that the provisions of the Act relating to the

https://www.sfbbar.org/ethics/opinion_2015-1.aspx?print=1
client's proposed course of conduct are preempted, void or otherwise invalid; (2) the lawyer reasonably concludes that the client's activities or proposed activities comply fully with state law requirements; and (3) the lawyer advises the client regarding possible federal law implications of the proposed conduct if the lawyer is qualified to do so, or recommends that the client seek other legal counsel regarding those issues and appropriately limits the scope of the representation. Ariz. Ethics Comm. Op. 11-01 (2011) (a lawyer may ethically counsel a client in legal matters expressly permissible under the Arizona Medical Marijuana Act).

Colorado Bar Association said that, under Rule 1.2(d), an attorney may represent and advise a client about the consequences of marijuana related activities; may advise a client about establishing, interpreting, enforcing, or amending zoning, local ordinances, or legislation; and may advise about the tax consequences of growing or selling marijuana. It asked the Colorado Supreme Court to amend its rules of professional conduct. Colo. Ethics Comm. Formal Op. 123 (2013) (extent to which lawyers may represent clients regarding marijuana-related activities). On March 24, 2014, the Court adopted Comment [14]: "A lawyer may counsel a client regarding the validity, scope, and meaning of [Colorado’s Constitutional marijuana provision] and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy."

New York State Bar Association Committee on Professional Ethics concluded that a lawyer may assist a client in conduct designed to comply with state medical marijuana law. However, that opinion was carefully limited and seems to depend upon the United States Department of Justice guidance restricting enforcement of the federal marijuana prohibition when individuals and entities act in accordance with state regulation of medical marijuana. [5] N.Y. Comm. on Prof'l Ethics Op. 1024 (2014) (counseling clients in illegal conduct; medical marijuana law).

Washington has two opinions. In one, King County Bar Association essentially stated that an attorney is not subject to discipline as long as the client's conduct is permitted under state law and as long as the client is informed about federal law and the Cole Memorandum. It also opined that an attorney is not subject to discipline because he owns an interest in a marijuana dispensary. Although that might be a federal crime, it does not reflect "adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer." King County Bar Association Ethics Advisory Op. (Oct. 2013) (opinion on I-502 and rules of professional conduct). In the second, Washington State Bar Association said a lawyer could advise a client about the nuances of state law as long as he did not do so in furtherance of an effort to violate or mask a violation of state marijuana law. Wash. State Bar Assn., Comm. on Prof'l Ethics Proposed Advisory Op. 2232 (2014) (providing legal advice and assistance to clients under Washington state marijuana law I-502). Both opinions proposed amending the Rules of Professional Conduct. Effective December 9, 2014, the Washington Supreme Court added Comment [18] to Rule 1.2: "At least until there is a change in federal enforcement policy," a lawyer who counsels or assists a client regarding conduct permitted under Washington Initiative 502 does not violate RPC 1.2(d).

Some additional states have legislated or enacted policies to protect lawyers:

At the request of the Nevada bar, on May 7, 2014, the Nevada Supreme Court adopted a comment to Rule 1.2 to the effect that a lawyer may counsel and assist a client in complying with that state's medical marijuana law and must also advise about federal law and policy. We understand that the matter is under further study. Nev. Supreme Ct. Order ADKT 0495 (order regarding an amendment to Rule of Professional Conduct 1.2 regarding medical marijuana).

The Florida Bar has adopted a policy protecting lawyers from discipline if they advise clients under Florida law, as long as they advise clients about federal law. See http://www.floridabar.org/DIVCOMUN/jnnews01.html?8c9f13012b96736985265aa800624289579b2ba3c9f153d85257cf20048398009OpenDocument

Minnesota's medical marijuana statute includes immunity for attorneys. See Minn. Stat. Ann. § 152.32(l) ("An attorney may not be subject to disciplinary action by the Minnesota Supreme Court or professional responsibility board for providing legal assistance to prospective or registered manufacturers or others related to activity that is no longer subject to criminal penalties under state law").

The Massachusetts Board of Bar Overseers and the Massachusetts Office of the Bar Counsel have adopted a policy under which they will not prosecute a member of the Massachusetts bar solely for advising a client regarding the validity, scope, and meaning of Massachusetts statutes regarding medical marijuana or for assisting a client in conduct that the lawyer reasonably believes is permitted by Massachusetts statutes, regulations, orders, and other state or local provisions implementing them, as long as the lawyer also advises the client regarding related federal law and policy. See http://www.mass.gov/obobbo/marijuana.pdf.

G. Additional Considerations

If the lawyer decides to represent the client, he or she should counsel the client not to violate state laws; should only assist the client in conduct that conforms with state law; should warn the client about the risks of prosecution under federal laws; and should advise the client how to minimize the risk of prosecution under federal laws consistent with the discussion above.

The lawyer should warn the client that, if the client endeavors to violate California law or to act in ways that invite federal prosecution, then the lawyer may withdraw from the representation. See Rule of Professional Conduct 3-700(J)(1)(b) (withdrawal permitted if continued employment is likely to result in a violation of the Rules of Professional Conduct). If the client seeks to pursue conduct that is illegal under state law, or if the lawyer discovers after the fact that the client inadvertently violated state laws, then the lawyer may withdraw, but is not required to do so. Ibid.

In addition, the lawyer should counsel the client about limitations on confidentiality. One of the duties of a California lawyer is to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Bus. & Prof. Code § 6068(e)(1). The lawyer should warn the client that their communications may not be privileged in the event of litigation. The "crime fraud" exception to the attorney-client privilege applies if the lawyer's services are obtained to help the client to plan or to commit a crime. Evid. Code § 956. The client's mere disclosure of his or her intent to commit a crime is privileged. People v. Clark (1990) 50 Cal.3d 583, 621-23. But where the client seeks legal assistance to plan or to perpetrate a crime, the privilege is overruled. Ibid. Thus, the lawyer should warn the client that, if the client becomes involved in civil or criminal litigation, there is a risk that the communications between them will not be held to be privileged and thus be subject to disclosure in testimony.

The exception in section 6088(e)(2) is not limited to a client who intends to commit a violent criminal act or to an intention to commit an act that may imminently cause bodily injury. Accordingly, a lawyer may (but is not required to) disclose a client's confidential information to prevent either a client's or a third party's criminal act that the lawyer reasonably believes is likely to result in the death of or substantial bodily harm to an individual. Section 6088(e)(2); Rule Prof. Conduct 3-100(B). If it is reasonable under the circumstances, the lawyer should warn the client that, if the lawyer concludes that the client's intended conduct is likely to cause death or bodily injury to a purchaser, then the lawyer may have discretion to disclose the client's confidential information. If a lawyer finds himself or herself in such a situation, the lawyer should comply with Rule 3-100(C) and first attempt to dissuade the client and inform the client of the lawyer's decision to reveal the information. Further, any disclosure must be more than is necessary to prevent the criminal act. Rule 3-100(D).
CONCLUSION

We conclude that a lawyer may ethically represent the client on the facts presented consistent with California Rule of Professional Conduct 3-210, provided that the legal advice and assistance is limited to activities permissible under state law and the lawyer advises the client regarding possible liability under federal law and other potential adverse consequences under state and federal laws.

Nevertheless, because of the risks to both lawyer and client, we recommend that the Bar Association of San Francisco urge the Rules Revision Commission, the Board of Trustees of the State Bar and the Supreme Court to adopt rules and propose legislation that would protect the lawyer from discipline under these circumstances and propose an amendment to the Evidence Code to preserve the attorney-client privilege under these circumstances.

1. A bank may also seek a lawyer’s advice about whether to lend or to provide other services to a marijuana-related entity. May a bank allow its credit card services to be used to purchase marijuana? A financial institution could face prosecution under federal law for aiding and abetting a business that is lawful under state law, but unlawful under federal law. Even if the bank does not provide such services, it will need guidance about its duties. For example, banks have a duty to file Suspicious Activity Reports (“SARs”) about any transaction involving $5,000 or more if the bank has reason to suspect the money is derived from illegal activity. Banks must also maintain anti-money laundering activities. There are different levels of SARs related to marijuana. If a bank’s due diligence leads it reasonably to believe that the marijuana business does not implicate any DOJ priority or state law, it may file a “Marijuana Limited” SAR. That form only requires the financial institution to provide the client’s identifying information and explain to law enforcement that diligence uncovered no suspicious activity. However, if the bank concludes that the customer is engaged in activities identified as a priority in the Cole Memorandum or that violate state law, then the bank must file a more detailed “Marijuana Priority” SAR. See Department of the Treasury, Financial Crimes Network, FIN 2014 – G001, available at http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf.

2. The landlord will also need a lawyer’s advice.

3. May an armored car service perform services for a marijuana dispensary? Will it face the risk of forfeiture or other liability? It, too, may need a lawyer’s advice.

4. Rule 3-210 is derived from former Rule 7-101 and former Rule 11. When the current rule was amended in 1989 and 1992, the Commission for the Revision of the Rules of Professional Conduct did not recommend adopting Model Rule 1.2(d) because the consensus was that the California rule adequately stated the public policy of California respecting a lawyer advising the violation of law.

5. The usefulness of the opinion appears narrow by its premise that the administration will not prosecute such cases. The federal government does seek to enforce the prohibition against medical marijuana dispensaries, even after the Cole memoranda. See, e.g., forfeiture action against real property in United States v. Real Property and Improvements Located at 1840 Embarcadero, Oakland, California, Northern District of California Case No. C 12-3567 MEJ, complaint to enjoin sale and defendants’ successful motion to dismiss in City of Oakland v. Eric Holder, et al., Northern District of California Case No. C 12-05125 MEJ; and pending appeal in City of Oakland v. Holder, 9th Circuit Court of Appeals Case No. 13-15391, which we understand is now under submission. The conduct of a medical marijuana dispensary is a violation of federal criminal law whether the Department of Justice decides to pursue a given matter or not and regardless of the defenses available. Californians need legal advice regardless of whether the Department of Justice decides to prosecute a case.

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LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 527
August 12, 2015

LEGAL ADVICE AND ASSISTANCE TO CLIENTS
WHO PROPOSE TO ENGAGE OR ARE ENGAGED IN THE
CULTIVATION, DISTRIBUTION OR CONSUMPTION OF MARIJUANA

SUMMARY

A member may advise and assist a client regarding compliance with California’s marijuana laws provided that the member does not advise the client to violate federal law or assist the client in violating federal law in a manner that would enable the client to evade arrest or prosecution for violation of the federal law. In advising and assisting a client to comply with California’s marijuana laws, a member must limit the scope of the member’s representation of the client to exclude any advice or assistance to violate federal law with impunity. In so doing, the member must advise the client regarding the violation of federal law and the potential penalties associated with a violation of federal law.

AUTHORITIES CITED

Rules of Professional Conduct:

Calif. Rules of Professional Conduct, Rule 1-100
Calif. Rules of Professional Conduct, Rule 3-210
ABA Model Rule 2.1

Statutes:

Bus. & Prof. C. §§ 6067, 6068(a); 6106
Health & Safety Code § 11362.5
Health & Safety Code § 11362.7 et seq.
18 USC §§ 2, 4, 371
21 USC §§ 812, 841(a)(1), 844(a),
21 USC § 846

Cases:

City and County of San Francisco v. Cobra Solutions (2006) 38 Cal.4th 839
Gonzales v. Raich (2005) 545 U.S. 1
In re Eric J. (1979) 25 Cal.3d 522
In re Lesansky (2001) 25 Cal.4th 11, 14
INTRODUCTION

This opinion addresses whether the State Bar Act and the California Rules of Professional Conduct prohibit a member of the California State Bar from counseling and assisting a client regarding compliance with California law, which creates immunities from California criminal statutes related to the cultivation, distribution and consumption of marijuana in specified circumstances. Specifically, this Opinion considers the following three questions:

1. Do the State Bar Act and the California Rules of Professional Conduct prohibit a member from advising a client on how to individually or collectively cultivate, distribute and consume marijuana in a manner that would not constitute a crime under California law even though such conduct by the client would violate federal law?

2. Do the State Bar Act and the California Rules of Professional Conduct prohibit a member from drafting incorporation documents and incorporating a cooperative which would be engaged in collective cultivation of marijuana in a manner that would not constitute a crime under California law even though such conduct by the client would violate federal law?

3. Do the State Bar Act and the California Rules of Professional Conduct prohibit a member from advising and assisting a client already cultivating and distributing marijuana regarding taking actions that would result in the activity not constituting a crime under California law even though such conduct by the client would violate federal law?

It is the Committee’s opinion that the answer to all of these questions is “no,” provided that the member does not advise the client to violate federal law or assist the client in violating federal law in a manner that would enable the client to evade arrest or prosecution for violation of the federal law. In advising and assisting a client to comply with California law concerning the cultivation, distribution and consumption of marijuana, a member must limit the scope of the member’s representation of the client to exclude any advice or assistance to violate federal law with impunity. In so doing, the member must advise the client regarding the violation of federal law and the potential penalties associated with a violation of federal law.
BACKGROUND

Both federal and California law criminalize the use, possession, cultivation, transportation, and furnishing of marijuana. However, California statutes create certain immunities from criminal prosecution under California law for the cultivation, distribution and consumption of marijuana for medical purposes.

In 1996, California voters passed the Compassionate Use Act of 1996 ("CUA;" Health & Safety Code § 11362.5). This statute provides that state law proscriptions against possession and cultivation of marijuana do not apply to a patient or a patient’s designated caregiver who possesses or cultivates marijuana for the patient’s personal medical purposes upon the written or oral recommendation or approval of a physician. (Health & Safety Code § 11362.5(d).)

In 2004, the California legislature adopted the Medical Marijuana Program Act ("MMPA;" Health & Safety Code §§ 11362.7 et seq.). The express intent of the MMPA was to: (1) clarify the scope of the application of the CUA and facilitate the prompt identification of qualified patients and their designated primary caregivers in order to avoid unnecessary arrest and prosecution of these individuals and provide needed guidance to law enforcement officers; (2) promote uniform and consistent application of the act among the counties within the state and (3) enhance the access of patients and caregivers to medical marijuana through collective, cooperative cultivation projects. (Qualified Patients Assn. et al. v. City of Anaheim (2010) 187 Cal.App.4th 734, 744.)

The MMPA provides, among other things, that “[q]ualified patients ... and the designated primary caregivers of qualified patients ..., who associate within the State of California in order collectively or cooperatively to cultivate marijuana for medical purposes, shall not solely on the basis of that fact be subject to state criminal sanctions” for possession, cultivation, harvesting, processing, possession for sale, transportation, furnishing or administration, maintaining a place for the sale, use or furnishing, making a place available for the purpose of unlawful manufacture, storage or distribution, or for maintaining a place for the unlawful sale, serving, storage, manufacture or furnishing of marijuana for medical purposes. (Health & Safety Code § 11362.775, emphasis added.) The MMPA also expressly immunizes from state criminal liability, in relation to lawful medical marijuana use, “Any individual who provides assistance to a qualified patient or a person with an identification card, or his or her designated primary caregiver, in administering medical marijuana to the qualified patient or person or acquiring the skills necessary to cultivate or administer marijuana for medical purposes to the qualified patient or person.” (Health & Safety Code § 11362.765 (b)(3).)

The legislature also directed the California Attorney General to “develop and adopt appropriate guidelines to ensure the security and nondiversion of marijuana grown for medical use by patients qualified under the [CUA].” (Health & Safety Code § 11362.81(d).) On August 25, 2008, the California Attorney General issued “Guidelines for the Security and Non-Diversion of Marijuana Grown for Medical Use” (“A.G. Guidelines.”) While the AG Guidelines are not binding on California courts, they are accorded great weight. (Qualified Patients Assn. et al. v. City of Anaheim, supra, 187 Cal.App.4th at 748.)
The A.G. Guidelines’ stated purpose is to “(1) ensure that marijuana grown for medical purposes remains secure and does not find its way to non-patients or illicit markets, (2) help law enforcement agencies perform their duties effectively and in accordance with California law, and (3) help patients and primary caregivers understand how they may cultivate, transport, possess, and use medical marijuana under California law.” (A.G. Guidelines, p. 1.) Among other things, the AG Guidelines articulate requirements for the lawful operation of nonprofit cooperatives and collectives for the collective cultivation of medical marijuana by qualified patients, including that “[n]o business may call itself a ‘cooperative’ (or ‘co-op’) unless it is properly organized and registered as such a corporation under the Corporations or Food and Agricultural Code.” (A.G. Guidelines, p. 8.)

Thus, the CUA and MMPA, along with the AG Guidelines, specify a narrow set of circumstances under which someone may cultivate, distribute and consume marijuana without committing a crime under California law. Someone who meets the requirements is not committing a California crime in connection with the activities covered by the statutes. At the same time, someone who fails to satisfy the requirements is likely committing a crime under California law and may be prosecuted. (See e.g. People ex rel. City of Dana Point v. Holistic Health (2013) 213 Cal.App.4th 1016; People v. Solis (2013) 217 Cal.App.4th 51; People v. Jackson (2012) 210 Cal.App.4th 525.)

The CUA and the MMPA have no effect on the applicability of the federal Controlled Substances Act (“CSA”) in California. Under the CSA it is illegal to manufacture, distribute or dispense a controlled substance, including marijuana (21 USC § 841(a)(1)), or to conspire to do so. (21 USC § 846.) It is also illegal under the CSA to possess marijuana, even for medical uses. (See 21 U.S.C. §§ 812, 844(a); Gonzales v. Raich (2005) 545 U.S. 1, 26–29, 125 S.Ct. 2195, 162 L.Ed.2d 1 (Gonzales); United States v. Oakland Cannabis Buyers’ Cooperative (2001) 532 U.S. 483, 491–495, 121 S.Ct. 1711, 149 L.Ed.2d 722 (Oakland Cannabis).) In Gonzales, the United States Supreme Court held that intrastate cultivation and use of marijuana under the CUA did not place the defendants in that case beyond the CSA’s reach, since Congress’s plenary commerce power extends to those activities. (Gonzales, supra, 545 U.S. at pp. 17, 26–29, 125 S.Ct. 2195.) In Oakland Cannabis, the Court held the CSA did not authorize an implied defense to its penal provisions based on medical necessity, even where a state strictly controlled access to medical marijuana. (Oakland Cannabis, supra, 532 U.S. at p. 491, 121 S.Ct. 1711.) To the contrary, the terms of the CSA reflect Congress’s conclusion that marijuana serves no medical purpose. (Id.)

However, California courts have held that state and local agencies are not preempted by federal law and may carry out state law by allowing medical marijuana dispensaries that qualify for the immunities under state law. (Qualified Patients Assn. et al. v. City of Anaheim, supra, at 741-743; City of Garden Grove v. Superior Court (2007) 157 Cal.App.4th 355, 385; County of San Diego v. San Diego NORML (2008) 165 Cal.App.4th 798, 811, 818, 825–828)

At this point in time, the federal CSA and California’s CUA and MMPA exist side by side and inherently conflict. The cultivation, distribution and consumption of marijuana in accordance
with California’s marijuana laws necessarily violate federal law to the contrary. As a result, someone may cultivate, distribute and consume marijuana in a manner that avoids committing a crime under California law, but the same acts likely constitute a federal crime. Furthermore, a member’s representation of a client who is cultivating, distributing or using marijuana in a manner that falls within the California law immunities may nevertheless violate a number of federal statutes, under which a member may also be prosecuted.

Whether and to what extent a member’s representation of a client in connection with legal advice concerning the cultivation, distribution or use of marijuana would be a federal crime is beyond the Committee’s purview. The Committee notes that in October 2009 the United States Department of Justice (“USDOJ”) advised that it does not intend to use federal resources to prosecute under federal law patients and their caregivers who are in “clear and unambiguous compliance” with state medical-marijuana laws, except in cases involving broader issues of federal policy such as unlawful possession or use of a firearm, sales to minors, evidence of money-laundering activity, ties to other criminal enterprises, violence, or amounts of marijuana inconsistent with purported compliance with state or local law. Furthermore, the Commerce, Justice, Science and Related Agencies Appropriations Act for 2015 prohibits the use of federal funds in 2015 to prevent California, 16 other states and the District of Columbia from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana. (H.Amdt.748 to HR 4660.)

1 This is unlike more common scenarios where compliance with California laws can be accomplished in a manner that does not violate federal law. For example, a client can legally form a corporation in a wide range of circumstances that would not implicate federal law. However, a client cannot form a corporation for the purpose of taking actions that violate federal law. In such cases, a member’s assistance to the client, which would be permissible in other circumstances, may violate the State Bar Act and the Rules of Professional Conduct depending on factors and considerations that are beyond the scope of this opinion.

2 For example, a member who assists a client in setting up a marijuana operation in compliance with California law or in assisting a client in maintaining compliance with California’s marijuana laws may be engaging in federal criminal conspiracy in violation of 18 USC §371 (which would result in the member’s culpability for the wrongdoing of all others within the scope of the entire conspiracy), aiding & abetting the client in violation of 18 USC §2, and misprision of felony in violation of 18 USC § 4 (concerning the knowing concealment of a felony and failure to inform law enforcement).

3 However, the Committee believes that members should assume that cultivation, distribution and consumption of marijuana in a manner that avoids committing a crime under California law is a federal crime until the member determines otherwise.

While members may take some solace from the latest federal appropriations legislation for 2015 and USDOJ’s current position regarding prosecution, there is no guarantee that either will continue in the future. Because federal statutes of limitations may be five to ten years, depending on the violation, if federal authorities were to change their position with respect to enforcement, it is possible that members who assist clients in compliance with California marijuana laws today could be criminally prosecuted in the future.

OVERVIEW OF APPLICABLE CALIFORNIA RULES

This Opinion focuses on whether the California Rules of Professional Conduct and the State Bar Act prohibit a member from advising a client regarding how to engage in the cultivation and distribution of marijuana in a manner that avoids engaging in a crime under California law, even though engaging in those acts violates federal law. It also addresses whether a member violates the California Rules of Professional Conduct and the State Bar Act by assisting a client in carrying out such advice, even though the client would be committing a federal crime.

There are two California provisions that address these questions. First, Rule of Professional Conduct 3-210 states

“A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.”

Second, Business & Professions Code § 6068(a) states that it is an attorney’s duty to “support the Constitution and laws of the United States and of this state.”

California does not have a rule of professional conduct that specifically prohibits a lawyer from assisting a client in engaging in an action that the lawyer knows is a crime. Under Business and Professions Code § 6106, “[t]he commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.” But as the California Supreme Court has observed, “discipline may be imposed only for criminal conduct having a logical relationship to an attorney’s fitness to practice, and [t]he term ‘moral turpitude’ must be defined accordingly.” (In re Lesansky (2001) 25 Cal.4th 11, 14.) Providing legal advice regarding compliance with California law in a manner that is consistent with a lawyer’s professional responsibility would not reflect negatively on a

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5 Some ethics opinions in other states have relied on the USDOJ’s position in concluding that advice and assistance regarding compliance with state law allowing cultivation, distribution or use of marijuana is permissible under those states’ rules of professional conduct. (See State Bar of Arizona Ethics Opinion 11-01; Washington State Bar Association Advisory Opinion 2232.) This Opinion does not rely on the USDOJ’s advisory. The Committee does not believe that determining a lawyer’s professional responsibility in these circumstances should depend on current prosecutorial or federal appropriation intentions.
lawyer's fitness to practice law, and, therefore, without more, would not constitute moral turpitude.⁶

By contrast, ABA Model Rule 1.2(d) 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."

While the Model Rule is comparable to Rule 3-210 in prohibiting a lawyer from advising a client to violate the law, there is no corresponding prohibition in Rule 3-210, or Section 6068(a), or elsewhere in the State Bar Act or the California Rules of Professional Conduct, on assisting a client in conduct that the lawyer knows is criminal. The issues under the applicable California rules are (i) whether advising a client regarding compliance with California law regarding cultivation, distribution and use of marijuana is also advising a client to violate federal law, and (ii) whether advising or assisting a client in complying with California law regarding the cultivation, distribution and use of marijuana, while supportive of California law, is nevertheless a violation of Section 6068(a) because it is not supportive of the laws of the United States.

Neither of these rules is clear on these questions. If Rule 3-210 is read literally, advising a client regarding how to avoid committing a crime under California law is not advising the client to violate federal law. However, the Rule does not directly address whether advice regarding compliance with state law is a violation of the rule if the advice would result in a violation of federal law when carried out by a client.

Ordinarily, under Section 6068(a), when compliance with California law can be accomplished in a manner that does not violate federal law, an attorney is required to advise and assist clients in a manner that supports both bodies of law. However, the inherent conflict between California and federal marijuana laws makes a literal application of Section 6068(a) problematic. An attorney who advises or assists a client to cultivate, distribute and consume marijuana in a manner that would not constitute a crime under California law is supporting state law, but is not supporting the laws of the United States. On the other hand, if an attorney maintains that the laws of the United States prevail over advising and assisting clients regarding compliance with California's marijuana laws, the attorney is supporting the laws of the United States, but is not supporting the laws of this state. A literal reading of the statute does not resolve this dilemma.

The answer to these questions becomes apparent when the Model Rules and the Restatement (Third) of the Law Governing Lawyers are consulted with respect to those aspects of the Model Rules and Restatement that are consistent with the California rules. Both sources recognize that

⁶ A member's oath on admission to practice is also not applicable. The oath is codified in Business and Professions Code section 6067, which provides in relevant part that: "Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability." (Emphasis added.) A member breaches the oath by failing to support either the United States or California constitution or by failing to discharge his or her duties as an attorney, which are not described in the oath. In this situation, those duties are stated in Rule 3-210 and Business and Professions Code Section 6068(a).
advice regarding compliance with the law does not violate the rules that prohibit advising violations of law, even if the client intends to use the advice to engage in a criminal act. Furthermore, the principles expressed in the Restatement indicate that a lawyer may assist a client in carrying out advice to avoid committing a crime under California's marijuana laws, even though the client's acts would violate federal criminal laws regarding marijuana.

The ABA Model Rules and the Restatement are not binding in California and have no legal force of their own. (City and County of San Francisco v. Cobra Solutions (2006) 38 Cal.4th 839, 852 (“Cobra Solutions”).) However, they may be considered as a collateral source, particularly in areas where there is no direct authority in California and there is no conflict with the public policy of California. (Cobra Solutions, supra, 38 Cal.4th at 852; State Bar Formal Opinion No. 1983-71; Cal. Rules of Prof. Cond. Rule 1-100(A).) Because the import of the comparable aspects of the Model Rules and the Restatement (Third) of the Law Governing Lawyers is the same as the applicable California requirements, they inform the Committee's understanding regarding how the California requirements should be applied to answer the questions presented. In addition, the comparable aspects of the Model Rules and Restatement reveal a policy that applies equally to the application of the California requirements to the questions presented.

**ANSWER TO QUESTION 1: ADVICE REGARDING COMPLIANCE WITH STATE LAW DOES NOT VIOLATE CALIFORNIA RULES**

Comment [9] to Model Rule 1.2 provides guidance as it relates to the limitations on advising a client expressed in California Rule 3-210. The Comment states that the prohibition on counseling and assisting a client to commit a crime “does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client’s conduct.” The Comment then states:

Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

Under the principles in Comment [9], advising a client about how to comply with California law so as not to commit a California crime is not prohibited as long as the lawyer is not also advising the client about how to commit a federal crime with impunity. The first sentence of the Comment allows a lawyer to render that advice even if the client uses the advice to commit a federal crime. The second sentence makes the point that advising a client about the legal aspects of a questionable course of action is not a violation of the rule, while advising a client about how to commit a crime with impunity would be.

The Restatement also provides guidance. Section 94(2) of the Restatement (Third) of the Law Governing Lawyers states that “[f]or purposes of professional discipline, a lawyer may not counsel or assist a client in conduct that the lawyer knows to be criminal or fraudulent or in violation of a court order with the intent of facilitating or encouraging the conduct...”
The intent element in this Section is an important qualification with respect to what is meant by counseling or assisting a client in conduct the lawyer knows to be criminal. Comment (a) defines these terms as follows:

“Counseling” by a lawyer, within the meaning of the Section, means providing advice to the client about the legality of contemplated activities with the intent of facilitating or encouraging the client’s action. “Assisting” a client refers to providing, with a similar intent, other professional services, such as preparing documents, drafting correspondence, negotiating with a nonclient, or contacting a governmental agency. (Comment (a), para. 3.)

In the context of advising a client regarding how to avoid committing a California crime, the lawyer’s intent is to facilitate and encourage the client to act in a manner that complies with California law. A lawyer is not advising a client to violate federal law when the lawyer advises the client on how not to violate state law. A lawyer who intends to advise a client for that purpose acts properly under the Restatement.

The fact that the client may use the advice to commit a federal crime does not change the result. In explaining the rationale, the Comment states: “That a client intends to commit a crime or fraud or violate a court order does not by itself preclude a lawyer from providing legal advice to the client concerning that conduct.” (Comment (c), para 4.) The same Comment states that Section 94(2) “prohibits counseling or assisting a client only with the intent to facilitate or encourage the action.”

Neither the Model Rule nor the Restatement directly addresses the scenario presented by the conflict between state and federal marijuana laws. But both recognize that a lawyer may advise a client regarding compliance with a law even if a client uses or intends to use the advice to commit a crime. These principles support the proposition that a lawyer may advise a client who wants to know how to cultivate, distribute and consume marijuana in California in a manner that would not constitute a California crime. That is true even if the client’s use of the advice results in a violation of federal marijuana laws.

While the wording of Rule 3-210 differs from both Model Rule 1.2(d) and Section 94(2) of the Restatement, the import of all of these rules with respect to advising a client is the same. For this reason, the Committee believes that the foregoing principles in the Model Rule and the Restatement apply equally to the application of Rule 3-210.

As a result, it is the Committee’s opinion that a member does not violate Rule 3-210 by advising a client regarding how to cultivate, distribute and consume marijuana in a manner that would not constitute a crime under California law.

**ANSWER TO QUESTIONS 2 & 3: ASSISTANCE REGARDING COMPLIANCE WITH CALIFORNIA LAW DOES NOT VIOLATE CALIFORNIA RULES**

The next question is whether the State Bar Act and the California Rules of Professional Conduct allow a member to assist a client in implementing advice regarding the cultivation, distribution and consumption of marijuana in a manner that does not constitute a criminal act under
California law, even if the client's conduct under California law would violate federal marijuana laws. Questions 2 and 3 posited in this opinion differ in terms of whether the member is assisting a client who intends to engage in such activities or whether a lawyer is assisting a client who is already engaged in such activities. However, in the Committee's opinion, the answers to these questions are the same.

In this regard, the Comment to Restatement Section 94 is instructive. In explaining the rationale for the rule, the Comment notes:

Lawyers play an important public role by advising clients about law and the operation of the legal system and providing other assistance to clients. In counseling clients a lawyer may appropriately advise them about the legality of contemplated or past activities... Lawyers are occupationally engaged in advising clients about activities on which law has an often uncertain bearing. A lawyer who proceeds reasonably to advise a client with the intent of providing the client with legal advice on how to comply with the law does not act wrongfully, even if the client employs that advice for wrongful purposes or even if a tribunal later determines that the lawyer's advice was incorrect. (Emphasis added.)

With respect to assisting a client, the Comment states:

A lawyer's counseling or assisting a client in conduct that does not constitute a crime or fraud or violation of a court order is not subject to professional discipline under Subsection (2), even if the client or lawyer would be subject to other remedies, such as damages in a civil action by an injured third person. For example, it is not a disciplinary violation nor does it create liability to a third person (see § 57, Comment g) to prepare a document for a client that, when executed by the client, breaches contractual obligations of the client. (Emphasis added.)

While the Comment does not specifically address the circumstances involved in this opinion, it does reflect a basic understanding about the role of lawyering, which the Committee believes should inform an understanding of a member's professional responsibility under Section 6068(a). The legal profession exists to connect the public with the law both in terms of advice and in carrying out their affairs in compliance with the law. The legal profession exists as a profession to maintain standards of training, skill, knowledge and experience in order to provide consistency and reliability in the law's application, which benefits the public. Lawyer duties and
professional responsibilities exist in part to protect and promote that function. For this reason, the Committee believes that a member does not violate his or her professional responsibilities under Section 6068(a) in assisting a client to take actions to avoid committing a crime under California’s marijuana laws, despite the fact that the client’s acts would likely violate federal marijuana laws. So long as the member is not assisting a client in evading the prescriptions of federal law, that member is not acting in a manner that constitutes a failure to support federal law in violation of Section 6068(a).

The Committee believes that this approach is consistent with the policy that underlies the applicable California rules. If a lawyer is permitted to advise a client on how to act in a manner that would not result in a California crime, the lawyer should be able to assist a client in carrying out that advice so the California crime does not occur—and a client should be able to receive such assistance from a lawyer.

An analysis that would conclude that a California client cannot obtain legal advice about how to comply with California law from a lawyer or that a client cannot obtain legal assistance in carrying out that advice disconnects the profession from its function—to assist clients in complying with the law, in this case California law. It would be a strange result indeed, if a client who wants to avoid committing a crime under California law cannot receive assistance from a lawyer.

In reaching this conclusion, the Committee is mindful of the rules of statutory construction that state that a statute or regulation should not be interpreted to produce an absurd or unworkable result. (See e.g. In re Eric J. (1979) 25 Cal.3d 522, 537 ["Where the language of a statutory

7 For example, Preamble [14] to the ABA Model Rules of Professional Conduct states, "The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself."

8 The same concepts have been applied in ethics opinions in other states concerning marijuana to the same effect. (State Bar of Arizona in Arizona Ethics Opinion 11-01 (February 2011) ["Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law. In any potential conflict between state and federal authority, such as may be presented by the interplay between the Act and federal law, lawyers have a critical role to perform in the activities that will lead to the proper resolution of the controversy."]; Illinois State Bar Professional Conduct Advisory Opinion No. 14-07 (October 2014) ["The Committee believes that it is reasonable to permit Illinois lawyers, whose expertise in draftsmanship and negotiations is of great value to the public, to provide the same services to medical marijuana clients that they provide to other businesses. One of the purposes of legal representation is to enable clients to engage in legally regulated businesses efficiently, and that purpose is advanced by their retention of counsel to handle matters that require legal expertise. A lawyer who concludes that a client's conduct complies with state law in a manner consistent with the application of federal criminal law may provide ancillary services to assure that the client continues to do so."
provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted.""); accord Wasatch Property Management v. Degrade (2005) 35 Cal.4th 1111, 1122.) The State Bar Act and the Rules of Professional Conduct are products of state law. The Committee believes they should be reasonably interpreted in a way that provides consistency with the rest of California law of which they are a part.

Voters and the legislature enacted the CUA and the MMPA respectively. The legislature directed the Attorney General to issue guidelines to implement those statutes. There is nothing in the statutes that suggests that either intended that the public should be deprived of the same degree of legal assistance in this one area of state law that is available to the public with respect to every other California statutory enactment. Nor is there anything in the statutes that suggests that either the voters or the legislature intended that the public would be denied any legal assistance in meeting all of the technical legal requirements that determine whether a marijuana operation is in compliance with California law or committing a crime under California law.

A construction of the State Bar Act or the California Rules of Professional Conduct that would result in either of the foregoing outcomes produces an absurd and unworkable result. Where there is a reasonable interpretation of the State Bar Act and the Rules that would avoid such results, the Committee is obliged to adopt that construction.

The Committee believes that both Rule 3-210 and Section 6068(a) should be applied in a manner that preserves the basic functionality of the legal profession, as just described. For that reason, it is the Committee’s opinion that neither Rule 3-210 nor Section 6068(a) prevents a member from assisting a client in carrying out advice regarding cultivation, distribution and use of marijuana to avoid committing a crime under California law, even if the client would be or is committing a federal crime in undertaking those actions.10

ADVICE AND ASSISTANCE DIRECTED TO VIOLATING FEDERAL LAW IS NOT PERMITTED

While a member’s professional responsibilities under the Rules of Professional Conduct and the State Bar Act do not prevent a member from advising and assisting a client about cultivating, distributing and consuming marijuana in a manner that does not constitute a crime under California law, they do not allow a member to advise a client to violate federal law or assist a client in violating federal law in a manner that evades detection or prosecution. Such advice and assistance would violate a member’s professional responsibility under both Rule 3-210 and Section 6068(a).

9 The fact that the legislature directed the Attorney General to adopt guidelines is an indication of a contrary intent.

10 While this Opinion does not address whether the same result would obtain under Model Rule 1.2(d), the Committee notes that assistance that is intended to allow a client to act in a manner that does not violate state law may not violate the Model Rule.
In this regard, a member advising a client regarding compliance with California law with respect to cultivation, distribution and consumption of marijuana must limit the scope of the lawyer’s representation of the client to exclude any advice or assistance to violate federal law with impunity. In so doing, the member is required to advise the client regarding the violation of federal law and the potential penalties associated with the violations of federal law.

CONCLUSION

This opinion is limited to the unique circumstances that currently exist due to the inherent dichotomy between state and federal law with respect to the cultivation, distribution and consumption of marijuana as described in this opinion. The Committee recognizes that lawyers who advise and assist clients with respect to compliance with the CUA, MMPA and Attorney General Guidelines are at risk of federal prosecution. That risk will continue until either the federal government or California changes their marijuana laws in a way that ends the dichotomy.

The Committee believes the State Bar Act and California Rules of Professional Conduct should not compound the risk to the profession. Nor should they be applied in a manner that would preclude access to legal services needed to attain compliance with California’s marijuana laws, when there is a reasonable construction of the State Bar Act and the Rules of Professional Conduct that would avoid that result.

For the reasons set forth in this Opinion, the Committee concludes that a member does not violate the California Rules of Professional Conduct or the State Bar Act by (i) advising a client regarding how to cultivate, distribute and consume marijuana in a manner that does not result in a crime under California law and (ii) assisting a client in implementing such advice, provided that the member does not advise the client to violate federal law or assist the client in violating federal law in a manner that would evade detection or prosecution or otherwise allow the client to evade detection or prosecution under federal law.\textsuperscript{11}

This opinion is advisory only. The Committee acts on specific questions submitted \textit{ex parte} or generated by the Committee and its opinion is based on such facts as are set forth in the inquiry.

\textsuperscript{11} This opinion is limited to the professional responsibility of a member of the California State Bar representing a client in California with respect to the cultivation, distribution and consumption of marijuana in California under California law. The California Rules of Professional Conduct do not authorize a member to perform functions in other states except as otherwise permitted by law. (Cal. Rules of Prof. Cond. 1-100(D).) The laws and applicable professional standards outside of California are different and a member advising and assisting clients located outside of California or with respect to activities that will occur outside of California are subject to the specific requirements of those jurisdictions. (Id.)
Rule 1.2.1 Advising or Assisting the Violation of Law  
(Rule Approved by the Supreme Court, Effective November 1, 2018)

(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows* is criminal, fraudulent,* or a violation of any law, rule, or ruling of a tribunal.*

(b) Notwithstanding paragraph (a), a lawyer may:

(1) discuss the legal consequences of any proposed course of conduct with a client; and

(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.*

Comment

[1] There is a critical distinction under this rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud* might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent* does not of itself make a lawyer a party to the course of action.

[2] Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rules 1.13 and 1.16.

[3] Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

[4] Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal* that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes* to be unjust or invalid.
[5] If a lawyer comes to know* or reasonably should know* that a client expects assistance not permitted by these rules or other law or if the lawyer intends to act contrary to the client’s instructions, the lawyer must advise the client regarding the limitations on the lawyer’s conduct. (See rule 1.4(a)(4).)

[6] Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with, California laws, including statutes, regulations, orders, and other state or local provisions, even if the client’s actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).
NEW RULE OF PROFESSIONAL CONDUCT 1.2.1
(Former Rule 3-210)
Advising or Assisting the Violation of Law

EXECUTIVE SUMMARY

In connection with consideration of current rule 3-210 (Advising the Violation of Law) the Commission for the Revision of the Rules of Professional Conduct ("Commission") has reviewed and evaluated the national standard of ABA Model Rule 1.2 (Advising or Assisting the Violation of Law). The Commission also reviewed relevant California statutes, rules, case law, and ethics opinions relating to the issues addressed by the proposed rules. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. The result of this evaluation is proposed Rule 1.2.1 (Advising or Assisting the Violation of Law).

Rule As Issued For 90-day Public Comment

Proposed Rule 1.2.1 carries forward the substance of current rule 3-210 but with additional clarifying language derived from ABA Model Rule 1.2(d) which provides that a lawyer may explain the legal consequences of a client’s proposed course of conduct without running afoul of the rules. This additional language serves as an important public protection as it will assist a lawyer in attempting to dissuade a client from pursuing such a course of conduct. The proposed rule has been further modified by dividing the Model Rule’s single sentence substantive provision into three paragraphs for clarity.

Comment [1] addresses paragraph (c), a new clause being added to current rule 3-210 that assists lawyers by giving them an additional tool to dissuade a client from undertaking a proposed course of action. Given that the clause would be new to the rule, comment [1] explains that lawyers are not given carte blanche to advise clients on how to conduct their affairs in a manner that avoids criminal prosecution.

Comment [2] clarifies that the rule also applies when a client’s conduct has already begun and is continuing. Moreover, the comment explains that a lawyer must comply with his or her duty of confidentiality and that a lawyer’s only recourse if the client persists in illegal conduct may be resignation or withdrawal.

Comment [3] clarifies the application of paragraph (a) by providing interpretive guidance concerning a client’s desire to test the validity of a law, rule, or ruling of a tribunal.

Comment [4] addresses a lawyer’s provision of legal advice and services to a client who contemplates engaging in civil disobedience. The last sentence of the comment provides guidance on the application of the proposed rule.

Comment [5] addresses a lawyer’s obligation to communicate his or her ethical limitations with a client who expects assistance not permitted by the rules.
Post-Public Comment Revisions

After consideration of comments received in response to the initial 90-day public comment period, the Commission revised the text of the rule to use the language of the Model Rule counterpart, Model Rule 1.2(d), but unlike the Model Rule the proposed rule is organized in two main paragraphs ((a) and (b)) and two subparagraphs ((b)(1) and (b)(2)). Paragraph (a) states the general prohibition against counseling a violation of law and paragraph (b) describes conduct that is permitted notwithstanding the general prohibition. The implementation of two subparagraphs in (b) is for clarity because discussion of consequences of a proposed course of conduct is distinct from counseling/assisting a client in a good faith effort to determine the scope or validity of a law. Subparagraph (b)(2) includes language from current California Rule 3-210 that refers to a rule or ruling of tribunal as "law" that can be tested as to its meaning or application.

The Commission also revised the rule comments in response to public comments. First, in Comment [2], the Commission added a reference to a lawyer’s statutory duty to uphold the law (Business and Professions Code § 6068(a)). Comment [2] also includes a non-substantive stylistic revision made to the citation to a lawyer’s duty of confidentiality. Second, a new Comment [6] was added to describe situations where conflicts of law may render it challenging for a lawyer to avoid counseling a federal law violation when the client’s conduct expressly is permitted under state law. A public comment argued in favor of adding an explicit medical marijuana example in the rule but the Commission did not make that change because California laws regulating marijuana cultivation and consumption are subject to change in the near future.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Commission Action on the Proposed Rule Following 45-Day Public Comment Period

After consideration of comments received in response to the additional 45-day public comment period, the Commission combined Comments [3] and [4] to be a single comment numbered as Comment [3], with subsequent comments renumbered accordingly. In the second sentence of the new Comment [3], the word "thus" was added to read: "Paragraph (b) thus authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal. . . ."

With these changes, the rule Commission voted to recommend that the Board adopt the proposed rule.

Board’s Consideration of the Commission’s Proposed Rule on March 9, 2017

At its meeting on March 9, 2017, the Board revised the Commission’s final version of the proposed rule. Comment [3] was revised to become two separate comments as follows with other subsequent comments renumbered accordingly:

[3] Determining Paragraph (b) authorizes a lawyer may to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal in good faith may require a course of action involving disobedience of the law, rule, or ruling of a tribunal, or of the meaning placed
upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

Paragraph (b) thus also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes to be unjust or invalid.

The above revisions were made by the Board as non-substantive clarifying changes that were reasonably implicit in the 45-day public comment version of the proposed rule. It was observed that these revisions would help eliminate concerns that a lawyer might be required to take affirmative action to determine the validity of a law, for example, by filing a declaratory action, before the lawyer could provide a client with the lawyer's opinion about the validity, scope, meaning or application of a law, rule, or ruling of a tribunal.

The Board adopted proposed rule 1.2.1 at its March 9, 2017 meeting and it was submitted to the Supreme Court for approval on March 30, 2017 as part of a package of comprehensive amendments to rules.

**Supreme Court Action (April 11, 2018)**

The Supreme Court did not approve proposed rule 1.2.1 as submitted by the State Bar. The Court issued an order directing the State Bar to consider alternative revisions of the proposed rule provided in an attachment to the Court's order. The Court's order was referred to the Commission for study and a report. Following consideration of the Commission's report, the Board authorized a 45-day public period on two versions of the proposed rule.

**Supreme Court Action (May 10, 2018)**

The Supreme Court issued an order approving other proposed rules that were submitted by the State Bar on March 30, 2017. Consistent with Court's order on April 11, 2018, the Court did not approve proposed rule 1.2.1 as submitted by the State Bar on March 30, 2017. The Court amended then current rule 1-120 and adopted it as rule 1.2.1 (Assisting, Soliciting, or Inducing Violations) pending the State Bar's anticipated submission of a modified version of proposed rule 1.2.1 in response to the Court's April 11, 2018 order.

**Supreme Court Action (September 26, 2018)**

In response to the Supreme Court's April 11, 2018 order and following consideration of public comments received, the State Bar adopted a further revised version of proposed rule 1.2.1 and submitted it to the Court on August 24, 2018. On September 26, 2018, the Court approved, operative November 1, 2018, this proposed rule without any changes. Set forth below is a redline/strikeout version of rule 1.2.1 showing the language revisions to the version of the rule originally submitted to the Supreme Court on March 30, 2017. (Revised language only appears in Comment [6].)
Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law, and, despite the event of such a conflict, the lawyer may assist a client in conduct that the lawyer reasonably believes is permitted by drafting or administering, or interpreting or complying with, California laws, including statutes, regulations, orders, and other state or local provisions implementing those laws, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer should also advise the client regarding related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).
Rule 3-2101.2.1 Advising or Assisting the Violation of Law
(Redline Comparison to the California Rule Operative Until October 31, 2018)

A member shall not advise the violation of any law, rule, or ruling of a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid. A member may take appropriate steps in good faith to test the validity of any law, rule, or ruling of a tribunal.

(a) A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows\footnote{$^*$} is criminal, fraudulent,\footnote{$^*$} or a violation of any law, rule, or ruling of a tribunal.*

(b) Notwithstanding paragraph (a), a lawyer may:

(1) discuss the legal consequences of any proposed course of conduct with a client; and

(2) counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.*

DiscussionComment

Rule 3-210 is intended to apply not only to the prospective conduct of a client but also to the interaction between the member and client and to the specific legal service sought by the client from the member. An example of the former is the handling of physical evidence of a crime in the possession of the client and offered to the member. (See People v. Meredith (1981) 29 Cal.3d 682 [175 Cal.Rptr. 612].) An example of the latter is a request that the member negotiate the return of stolen property in exchange for the owner's agreement not to report the theft to the police or prosecutorial authorities. (See People v. Piccioni (1982) 31 Cal.3d 731 [183 Cal.Rptr. 685].)

\footnote{[1]} There is a critical distinction under this rule between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud\footnote{$^*$} might be committed with impunity. The fact that a client uses a lawyer's advice in a course of action that is criminal or fraudulent\footnote{$^*$} does not of itself make a lawyer a party to the course of action.

\footnote{[2]} Paragraphs (a) and (b) apply whether or not the client's conduct has already begun and is continuing. In complying with this rule, a lawyer shall not violate the lawyer's duty under Business and Professions Code section 6068, subdivision (a) to uphold the Constitution and laws of the United States and California or the duty of confidentiality as provided in Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6. In some cases, the lawyer's response is limited to the lawyer's right and, where appropriate, duty to resign or withdraw in accordance with rules 1.13 and 1.16.
Paragraph (b) authorizes a lawyer to advise a client in good faith regarding the validity, scope, meaning or application of a law, rule, or ruling of a tribunal* or of the meaning placed upon it by governmental authorities, and of potential consequences to disobedience of the law, rule, or ruling of a tribunal* that the lawyer concludes in good faith to be invalid, as well as legal procedures that may be invoked to obtain a determination of invalidity.

Paragraph (b) also authorizes a lawyer to advise a client on the consequences of violating a law, rule, or ruling of a tribunal* that the client does not contend is unenforceable or unjust in itself, as a means of protesting a law or policy the client finds objectionable. For example, a lawyer may properly advise a client about the consequences of blocking the entrance to a public building as a means of protesting a law or policy the client believes* to be unjust or invalid.

If a lawyer comes to know* or reasonably should know* that a client expects assistance not permitted by these rules or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must advise the client regarding the limitations on the lawyer's conduct. (See rule 1.4(a)(4).)

Paragraph (b) permits a lawyer to advise a client regarding the validity, scope, and meaning of California laws that might conflict with federal or tribal law. In the event of such a conflict, the lawyer may assist a client in drafting or administering, or interpreting or complying with, California laws, including statutes, regulations, orders, and other state or local provisions, even if the client's actions might violate the conflicting federal or tribal law. If California law conflicts with federal or tribal law, the lawyer must inform the client about related federal or tribal law and policy and under certain circumstances may also be required to provide legal advice to the client regarding the conflict (see rules 1.1 and 1.4).
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ETHICS OPINION 1024

New York State Bar Association
Committee on Professional Ethics

Opinion 1024 (9/29/14)

Topic: Counseling clients in illegal conduct; medical marijuana law.

Digest: In light of current federal enforcement policy, the New York Rules permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana.

Rules: 1.2(d), 1.2(f), 1.2 cmt 9, 1.16(c)(2), 6.1 cmt 1, 8.4(b).

FACTS

1. In July 2014, New York, following the lead of 22 other states, adopted the Compassionate Care Act ("CCA"), a law permitting the use of medical marijuana in tightly controlled circumstances. The CCA regulates the cultivation, distribution, prescription and use of marijuana for medical purposes. It permits specially approved organizations such as hospitals and community health centers to dispense medical marijuana to patients who have been certified by a health care provider and who have registered with the state Department of Health, and it further provides for the regulation and registration of organizations to manufacture and deliver marijuana for authorized medical uses.

2. At the same time, federal criminal law forbids the possession, distribution, sale or use of marijuana, and the federal law provides no exception for medical uses. The U.S. Department of Justice takes the position that the federal law is valid and enforceable even against individuals and entities engaged in the cultivation, transportation, delivery, prescription or use of medical marijuana in accordance with state regulatory law; however, the U.S. Department of Justice has adopted and published formal guidance restricting federal enforcement of the federal marijuana prohibition when individuals and entities act in accordance with state regulation of medical marijuana.
QUESTION

3. Under these unusual circumstances, do the New York Rules of Professional Conduct ("Rules") permit a lawyer to provide legal advice and assistance to doctors, patients, public officials, hospital administrators and others engaged in the cultivation, distribution, prescribing, dispensing, regulation, possession or use of marijuana for medical purposes to help them act in compliance with state regulation regarding medical marijuana and consistently with federal enforcement policy?

OPINION

4. Lawyers may advise clients about the lawfulness of their proposed conduct and assist them in complying with the law, but lawyers may not knowingly assist clients in illegal conduct. Rule 1.2(d) provides: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client." Disciplinary Rule 7-102(A)(7), contained in the pre-2009 Code of Professional Responsibility, was to the same effect. As this Committee has observed, if a client proposes to engage in conduct that is illegal, "then it would be unethical for an attorney to recommend the action or assist the client in carrying it out." N.Y. State 769 (2003); accord N.Y. State 666 (1994).

5. This ethical restriction reflects lawyers' fundamental role in the administration of justice, which is to promote compliance with the law by providing legal advice and assistance in structuring clients' conduct in accordance with the law. See also Rule 8.4(b) (forbidding "illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer"). Ideally, lawyers will not only attempt to prevent clients from engaging in knowing illegalities but also discourage clients from conduct of doubtful legality:
The most effective realization of the law’s aims often takes place in the attorney’s office, . . . where the lawyer’s quiet counsel takes the place of public force. Contrary to popular belief, the compliance with the law thus brought about is not generally lip-serving and narrow, for by reminding him of its long-run costs the lawyer often deters his client from a course of conduct technically permissible under existing law, though inconsistent with its underlying spirit and purpose. . . .

The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is immoral, unfair, or of doubtful legality.

Am. Bar Ass’n & Ass’n of Am. Law Sch., Professional Responsibility Report of the Joint Conference, 44 A.B.A. J. 1159, 1161 (1958). The public importance of lawyers’ role in promoting clients’ legal compliance is reflected in the attorney-client privilege, which protects the confidentiality that is traditionally considered essential in order for lawyers to serve this role effectively. See, e.g., Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (privilege “is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”).

6. It is counter-intuitive to suppose that the lawyer’s fundamental role might ever be served by assisting clients in violating a law that the lawyer knows to be valid and enforceable. But the question presented by the state’s medical marijuana law is highly unusual if not unique: Although participating in the production, delivery or use of medical marijuana violates federal criminal law as written, the federal government has publicly announced that it is limiting its enforcement of this law, and has acted accordingly, insofar as individuals act consistently with state laws that legalize and extensively regulate medical marijuana. Both the state law and the publicly announced federal enforcement policy presuppose that individuals and entities will comply with new and intricate state regulatory law and, thus, presuppose that lawyers will provide legal advice and assistance to an array of public and private actors and institutions to promote their compliance with state law and current federal policy. Under these unusual circumstances, for the reasons discussed below, the Committee concludes that Rule 1.2(d) does not forbid lawyers from providing the necessary advice and assistance.
Legal background

7. Much has been written elsewhere about the interrelationship between federal criminal narcotics laws and recent state medical marijuana laws. For purposes of this opinion, only the following basic understanding is needed.

8. Under federal criminal law, marijuana is a Schedule I narcotic, whose manufacture, possession and distribution is prohibited, and for which there is no approved medical use. Further, individuals and entities are forbidden by federal law not only from violating these laws as principals, but also, under principles of accessorial liability, from intentionally aiding and abetting others in violating the narcotics law, counseling others to violate the narcotics law, or conspiring with others to violate the narcotics law.²

9. For many years, states likewise criminalized the manufacture, possession and distribution of marijuana, allowing for concurrent federal and state enforcement of the criminal law. Most prosecutions of narcotics laws, especially with regard to marijuana, occurred at the state and local level. However, in recent years, more than 20 states have legalized marijuana for medicinal purposes to make it available by prescription. Colorado and Washington have gone farther, developing regulation permitting the sale and use of marijuana for recreational purposes.

10. The U.S. Department of Justice (“DOJ”) takes the position that the manufacture, possession and distribution of marijuana remains a federal crime, and can be enforced by federal law enforcement officials, even when the conduct in question is undertaken in accordance with state medical marijuana laws. However, current federal policy restricts federal enforcement activity, including civil as well as criminal enforcement, concerning medical marijuana. The Deputy Attorney General’s August 29, 2013 memorandum, titled “Guidance Regarding Marijuana Enforcement,” acknowledges that “the federal government has traditionally relied on state and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws,” and the federal government has concentrated its effort in accordance with federal enforcement priorities, such as preventing the distribution of marijuana to minors, preventing revenue from marijuana sales from going to criminal enterprises, and preventing marijuana activity from being used as a cover for trafficking other drugs. The memorandum directs Department attorneys and federal law enforcement authorities to focus their enforcement resources and efforts on these priorities, which are less likely to be threatened “[i]n jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana.” Although the memorandum makes plain that it is not intended to create any enforceable substantive or procedural rights, the memorandum might fairly be read as an expression by the current Administration that it will not enforce the federal criminal law with regard to otherwise-lawful
medical marijuana activities that are carried out in accordance with a robust state regulatory law and that do not implicate the identified federal enforcement priorities. Over the period of more than a year since the memorandum was published, federal law enforcement authorities have acted consistently with this understanding.

11. The CCA allows specified licensed New York physicians to prescribe, and patients to use, medical marijuana only in pill form or in a form that may be inhaled as a vapor, but not in a form that may be smoked. Medical marijuana may only be prescribed for identified, documented medical conditions categorized as “severely debilitating or life-threatening.” The regulation of medical marijuana under the law will be overseen by the Health Department, which, among other things, will authorize and register a limited number of organizations (“Registered Organizations”) to manufacture and dispense marijuana for medical use, will issue registration cards to patients or their caregivers certified to receive medical marijuana, and will set prices. The law restricts who may be hired by Registered Organizations, regulates their production and dispensation of medical marijuana, establishes a tax on their receipts, and criminalizes various abuses. See generally Francis J. Serbaroli, “A Primer on New York’s Medical Marijuana Law,” NYLJ, July 22, 2014, p. 3.

The potential role of lawyers in providing legal assistance regarding compliance with the medical marijuana law

12. Lawyers might provide a range of assistance to clients seeking to comply with the CCA and to act consistently with federal law enforcement policy. Among the potential clients are public officials and agencies including the Health Department that have responsibility for implementing the law, health care providers and other entities that may apply to be selected or eventually be selected as Registered Organizations authorized to manufacture and dispense medical marijuana, physicians seeking to prescribe medical marijuana, and patients with severely debilitating or life-threatening conditions seeking to obtain medical marijuana. Any or all of these potential clients may seek legal assistance not only so that they may be advised how to comply with the state law and avoid running afoul of federal enforcement policy but also for affirmative legal assistance. The Health Department may seek lawyers’ help in establishing internal procedures to conduct the registrations and other activities contemplated by the law. Entities may seek assistance in applying to become Registered Organizations as well as in understanding and complying with employment, tax and other requirements of the law. Physicians may seek help in understanding the severe restrictions on the issuance of prescriptions for medical marijuana and in navigating the procedural requirements for effectively issuing such prescriptions.

13. Leaving aside the federal law, the above-described legal assistance would be entirely consistent with lawyers’ conventional role in helping clients comply with the law. Indeed, it seems fair to say that state law would not only permit but affirmatively expect lawyers to
provide such assistance. In general, it is assumed that lawyers, by virtue of their expertise and ethical expectations, have a necessary role in ensuring the public’s compliance with the law. “As our society becomes one in which rights and responsibilities are increasingly defined in legal terms, access to legal services has become of critical importance.” Rule 6.1, Cmt. [1]. This is especially true with regard to complex, technical regulatory schemes such as the one established by the CCA, and where, as in the case of the CCA, noncompliance can result in criminal prosecution.

14. However, the federal law cannot easily be left aside. The question of whether lawyers may serve their traditional role is complicated by the federal law. Assuming, as we do for purposes of this opinion, that the federal marijuana prohibition remains valid and enforceable notwithstanding state medical marijuana law, then individuals and entities seeking to dispense, prescribe or use medical marijuana, or to assist others in doing so, pursuant to the CCA would potentially be violating federal narcotics law as principals or accessories; in that event, the legal assistance sought from lawyers might involve assistance in conduct that the lawyer knows to be illegal.

Prior ethics opinions

15. Several other bar association ethics committees have confronted this problem but reached different conclusions under their counterparts to Rule 1.2(d). Most of these opinions pre-dated DOJ’s August 2013 guidance, but took account of a 2009 DOJ memorandum suggesting that federal law enforcement would not be directed at patients and their caregivers who are in “clear and unambiguous compliance” with state medical marijuana laws.

16. In 2010, Maine’s ethics committee took the view that although lawyers may assist clients in determining “the validity scope, meaning or application of the law,” the rule “forbids attorneys from assisting a client in engaging in the medical marijuana business” because the rule “does not make a distinction between crimes which are enforced and those which are not. . . [A]n attorney needs to . . . determine whether the particular legal service being requested rises to the level of assistance in violating federal law.” Maine Op. 199 (July 7, 2010).

17. Connecticut’s ethics committee similarly concluded that a lawyer may not assist a client insofar as its conduct, although authorized by the state’s medical marijuana law, which created a broad licensing and registration structure to be implemented by the Department of Consumer Protection, violates federal law. Connecticut Op. 2013-02 (Jan. 16, 2013). The opinion noted that much of the legal assistance sought by clients seeking to comply with the law (e.g., patients, caregivers, physicians, pharmacists, distributors and growers), such as legal advice and assistance regarding the law’s requirements and the rule-making and regulatory processes,
would be consistent with lawyers’ “traditional role as counselors” and “in the classic mode envisioned by professional standards.” But some of that legal work might nevertheless constitute impermissible assistance in violating federal law.

18. More recently, in the context of Colorado’s state law decriminalizing and regulating the sale of marijuana for recreational purposes, the state’s ethics committee opined: “[U]nless and until there is a change in applicable federal law or in the Colorado Rules of Professional Conduct, a lawyer cannot advise a client regarding the full panoply of conduct permitted by the marijuana amendments to the Colorado Constitution and implementing statutes and regulations. To the extent that advice were to cross from advising or representing a client regarding the consequences of a client’s past or contemplated conduct under federal and state law to counseling the client to engage, or assisting the client, in conduct the lawyer knows is criminal under federal law, the lawyer would violate Rule 1.2(d).” Colorado Op. 125 (Oct. 21, 2013). However, the committee recommended amending the state ethics rules to authorize lawyers to advise and assist clients regarding marijuana-related conduct, notwithstanding contrary federal law.3

19. In 2011, Arizona’s ethics committee reached a very different conclusion, however, based in significant part on the premise that “no court opinion has held that the state law is invalid or unenforceable on federal preemption grounds.”
In these circumstances, we decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client’s proposed conduct is in “clear and unambiguous compliance” with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits. The maintenance of an independent legal profession, and of its right to advocate for the interests of clients, is a bulwark of our system of government. History is replete with examples of lawyers who, through vigorous advocacy and at great personal and professional cost to themselves, obtained the vindication of constitutional or other rights long denied or withheld and which otherwise could not have been secured.

A state law now expressly permits certain conduct. Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law. In any potential conflict between state and federal authority, such as may be presented by the interplay between the Act and federal law, lawyers have a critical role to perform in the activities that will lead to the proper resolution of the controversy. Although the Act may be found to be preempted by federal law or otherwise invalid, as of this time there has been no such judicial determination.

Arizona Op. 11-01 (Feb. 2011). The opinion concluded:
• If a client or potential client requests an Arizona lawyer’s assistance to undertake the specific actions that the 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.

Id.

20. A recent opinion of the King County (Washington) Bar Association endorsed the Arizona committee’s conclusion and much of its reasoning,4 in the context of Washington’s adoption of a state-regulated system for producing and selling marijuana for recreational purposes:
While the KCBA does not agree with all components of the Arizona opinion, its emphasis on the client’s need for legal assistance to comply with state law accurately reflects the reality that Washington clients face in navigating the new Washington law. The initial proposed implementing regulations for I-502, for example, have added 49 new sections in the Washington Administrative Code encompassing 42 pages of text. These regulations are consistent with I-502’s express goal of removing the marijuana economy from the province of criminal organizations and bringing it into a "tightly regulated, state-licensed system." In building this complex system, the voters of Washington could not have envisioned it working without attorneys. As the State Bar of Arizona recognized, disciplining attorneys for working within such a system would deprive the state’s citizens of legal services 'necessary and desirable to implement and bring to fruition that conduct expressly permitted under state law.

KCBA Ethics Advisory Opinion on I-502 [Initiative 502 - marijuana legalization] & Rules of Professional Conduct (Oct. 2013). Following suit, the Washington State bar ethics committee recently proposed adding a Comment to the state’s ethics code and issuing an advisory opinion authorizing lawyers to assist clients in complying with the state marijuana law at least until federal enforcement policy changes.

Analysis

21. As Rule 1.2(d) makes clear, although a lawyer may not encourage a client to violate the law or assist a client in doing so, a lawyer may advise a client about the reach of the law. See N.Y. State 455 (1976) ("[W]here the lawyer does no more than advise his client concerning the legal character and consequences of the act, there can be no professional impropriety. That is his proper function and fully comports with the requirements of Canon 7... . But, where the lawyer becomes a motivating force by encouraging his client to commit illegal acts or undertakes to bring about a violation of law, he oversteps the bounds of propriety."). Thus, a lawyer may give advice about whether undertaking to manufacture, transport, sell, prescribe or use marijuana in accordance with the CCA’s regulatory scheme would violate federal narcotics law. If the lawyer were to conclude competently and in good faith that the
federal law was inapplicable or invalid, the lawyer could so advise the client and would not be subject to discipline even if the lawyer’s advice later proved incorrect. See, e.g., ABA Op. 85-352 (1985) ("[W]here a lawyer has a good faith belief . . . that a particular transaction does not result in taxable income or that certain expenditures are properly deductible as expenses, the lawyer has no duty to require [disclosure] as a condition of his or her continued representation . . . In the role of advisor, the lawyer should counsel the client as to whether the position is likely to be sustained by a court if challenged by the IRS, as well as of the potential penalty consequences to the client if the position is taken on the tax return without disclosure."). As the Second Department recognized in dismissing a prosecution against a lawyer who allegedly gave erroneous advice about the lawfulness of the client’s proposed conduct:

We cannot conclude that an attorney who advises a client to take an action that he or she, in good faith, believes to be legal loses the protection of the First Amendment if his or her advice is later determined to be incorrect. Indeed, it would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice. The potential impact of allowing an attorney to be prosecuted in circumstances such as those presented here is profoundly disturbing. A looming threat of criminal sanctions would deter attorneys from acquainting individuals with matters as vital as the breadth of their legal rights and the limits of those rights. Correspondingly, where counsel is restrained, so is the fundamental right of the citizenry, bound as it is by laws complex and unfamiliar, to receive the advice necessary for measured conduct.

Matter of Vinluan v Doyle, 60 AD3d 237, 243, 873 NYS2d 72 (2d Dep’t 2009).

22. Further, Rule 1.2(d) forbids a lawyer from assisting a client in conduct only if the lawyer knows the conduct is illegal or fraudulent. If the lawyer believes that conduct is unlawful but there is some support for an argument that the conduct is legal, the lawyer may provide legal assistance under the Rules (but is not obligated to do so). See Rule 1.2(f) ("A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though
there is some support for an argument that the conduct is legal.”); see also Rule 1.16(c)(2) (“a lawyer may withdraw from representing a client when . . . the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent”).

23. The difficult question arises if the lawyer knows that the client’s proposed conduct, although consistent with state law, would violate valid and enforceable federal law. Ordinary, in that event, while the lawyer could advise the client about the reach of the federal law and how to conform to the federal law, the lawyer could not properly encourage or assist the client in conduct that violates the federal law. That would ordinarily be true even if the federal law, although applicable to the client’s proposed conduct, was not rigorously enforced and the lawyer anticipated that the law would not be enforced in the client’s situation. See Charles W. Wolfram, Modern Legal Ethics 703 (1986) (“on the whole, lawyers serve the interests of society better if they urge upon clients the desirability of complying with all valid laws, no matter how widely violated by others they may be”); cf. Restatement (Third) of the Law Governing Lawyers § 94, Cmt. f (2000) (“A lawyer’s advice to a client about the degree of risk that a law violation will be detected or prosecuted [is impermissible when] the lawyer thereby intended to counsel or assist the client’s crime, fraud, or violation of a court order.”). But the situation is different where the state executive branch determines to implement the state legislation by authorizing and regulating medical marijuana, consistent with current, published federal executive-branch enforcement policy, and the federal government does not take effective measures to prevent the implementation of the state law. In that event, the question under Rule 1.2(d) is whether a lawyer may assist in conduct under the state medical marijuana law that the lawyer knows would violate federal narcotics law that is on the books but deliberately unenforced as a matter of federal executive discretion.

24. This situation raises political and philosophical questions that this Committee cannot and need not resolve regarding how best to make and implement law in a federal system. Some may think it anomalous, where Congress has recognized no relevant exception to its narcotics prohibitions, for states to adopt medical marijuana laws that appear to contravene federal law and for the federal executive branch, through the exercise of prosecutorial discretion, effectively to carve out an exception for the implementation of these state laws. Others may think that DOJ’s forbearance is consistent with its tradition, known to Congress, of exercising prosecutorial discretion to mitigate the criminal law’s excesses, including where the criminal law reaches farther than its underlying purposes. We do not believe that by adopting Rule 1.2(d), our state judiciary meant to declare a position on this debate or meant to preclude lawyers from counseling or assisting conduct that is legal under state law. Rule 1.2(d) was based on an ABA model and there is no indication that anyone – not the ABA, not the state bar, and not the state court itself -- specifically considered whether lawyers may serve in their traditional role in this sort of unusual legal situation. We assume for purposes of this Opinion that state courts will themselves serve in their traditional role: As issues of interpretation arise in litigation under
the CCA, state courts will be available to issue interpretive rulings and take other judicial action that has the practical effect of assisting in the implementation of the CCA. Serving this role will not undermine state judicial integrity. Similarly, we do not believe that it derogates from public respect for the law and lawyers, or otherwise undermines the objectives of the professional conduct rules, for lawyers as "officers of the court" to serve in their traditional role as well, if they so choose. Obviously, lawyers may decline to give legal assistance regarding the CCA.

25. We conclude that the New York Rules of Professional Conduct permit lawyers to give legal assistance regarding the CCA that goes beyond a mere discussion of the legality of the client's proposed conduct. In general, state professional conduct rules should be interpreted to promote state law, not to impede its effective implementation. As the Arizona and King County opinions recognized, a state medical-marijuana law establishing a complex regulatory scheme depends on lawyers for its success. Implicitly, the state law authorizes lawyers to provide traditional legal services to clients seeking to act in accordance with the state law. Further, and crucially, in this situation the federal enforcement policy also depends on the availability of lawyers to establish and promote compliance with the "strong and effective regulatory and enforcement systems" that are said to justify federal forbearance from enforcement of narcotics laws that are technically applicable. The contemplated legal work is not designed to escape law enforcement by avoiding detection. Cf. Rule 1.2 cmt. [9] ("There is a critical distinction between presenting an analysis of the legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."); N.Y. State 529 (1981) ("[T]he Code distinguishes between giving legal advice and giving advice which would aid the client in escaping punishment for past crimes. EC 7-5 warns that 'a lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment'). Lawyers would assist clients who participate openly and subject to a state regulatory structure that the federal government allows to function as a matter of discretion. Nothing in the history and tradition of the profession, in court opinions, or elsewhere, suggests that Rule 1.2(d) was intended to prevent lawyers in a situation like this from providing assistance that is necessary to implement state law and to effectuate current federal policy. If federal enforcement were to change materially, this Opinion might need to be reconsidered.

CONCLUSION

26. In light of current federal enforcement policy, the New York Rules of Professional Conduct permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana.
1 Laws of 2014, Chap. 90 (signed by the Governor and effective on July 5, 2014).

2 See, e.g., 18 U.S.C. §2(a)("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."); 18 U.S.C. § 2(b)("Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."); 21 U.S.C. § 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

3 Colorado added a new comments [14] to Rule 1.2 of the Colorado Rules of Professional Conduct, permitting a lawyer to counsel a client regarding the validity, scope and meaning of the Colorado marijuana law and to assist a client in conduct that the lawyer reasonably believes is permitted by that law, but the lawyer must also advise the client regarding related federal law and policy. Nevada adopted a new Comment [1] to Rule 1.2 that is substantively identical to Colorado Comment [14]. In Washington State, the King County Bar Association has urged the Washington Supreme Court to amend the Washington Rules of Professional Conduct to add a comment to Rule 8.4 and a new Rule 8.6, to make clear that conduct permitted by the state marijuana law does not reflect adversely on the lawyer’s honesty, trustworthiness or fitness in other respects, and that a lawyer is not subject to discipline for counseling or assisting a client in conduct permitted by the state marijuana law, even though the conduct may violate federal law. Those proposals were still pending when we issued this opinion.

4 The King County opinion rejected the implication of the Arizona opinion that the propriety of the lawyer’s assistance turned on the fact that the state medical marijuana law had not yet been invalidated or preempted.

5 Inasmuch as this Committee limits itself to interpreting the ethics rules, we take no view on whether a colorable argument can be made that the federal narcotics law is invalid or unenforceable in situations where individuals or entities transport, distribute, possess or use marijuana pursuant to state medical marijuana law. We note, however, that as a constitutional matter, duly enacted federal laws ordinarily preempt inconsistent state laws under the federal Supremacy Clause. We also note, in particular, that in Gonzales v. Raich, 545 U.S. 1 (2005), the
Court rejected a claim that Congress exceeded its authority under the Commerce Clause insofar as the marijuana prohibition applied to personal use of marijuana for medical purposes.

6Rule 1.2(d) allows lawyers to assist clients in good faith challenges to a law’s validity, but that is not the situation posed here.

7If the state courts were to nullify the CCA based on inconsistent federal narcotics law, the question addressed in this opinion would, of course, become moot.

8For essentially the same reason, we regard Rule 8.4(b) as inapplicable. Assuming that a lawyer’s legal assistance in implementing the state medical-marijuana law technically violates the unenforced federal criminal law, we do not believe that the lawyer’s assistance under the circumstances described here would amount to “illegal conduct that adversely reflects on the lawyer’s honesty, trustworthiness or fitness as a lawyer.”
13
Cannabis Legalization and Regulation

Cannabis is now legal.

The *Cannabis Act* creates a strict legal framework for controlling the production, distribution, sale and possession of cannabis across Canada. The Act aims to accomplish 3 goals:

- keep cannabis out of the hands of youth
- keep profits out of the pockets of criminals
- protect public health and safety by allowing adults access to legal cannabis

What is legal as of October 17, 2018

Subject to provincial or territorial restrictions, adults who are 18 years of age or older are legally able to:

- possess up to 30 grams of legal cannabis, *dried or equivalent* in non-dried form in public
- share up to 30 grams of legal cannabis with other adults
- buy dried or fresh cannabis and cannabis oil from a provincially-licensed retailer
  - in provinces and territories without a regulated retail framework, individuals are able to purchase cannabis online from federally-licensed producers
- grow, from licensed seed or seedlings, up to 4 cannabis plants per residence for personal use
- make cannabis products, such as food and drinks, at home as long as organic solvents are not used to create concentrated products

Cannabis edible products and concentrates will be legal for sale approximately one year after the *Cannabis Act* came into force on October 17th, 2018.

Possession limits for cannabis products

The possession limits in the *Cannabis Act* are based on dried cannabis. Equivalents were
developed for other cannabis products to identify what their possession limit would be.

One (1) gram of dried cannabis is equal to:

- 5 grams of fresh cannabis
- 15 grams of edible product
- 70 grams of liquid product
- 0.25 grams of concentrates (solid or liquid)
- 1 cannabis plant seed

This means, for example, that an adult 18 years of age or older, can legally possess 150 grams of fresh cannabis.

Cannabis for medical purposes

The current regime for medical cannabis will continue to allow access to cannabis for people who have the authorization of their healthcare provider.

Protecting youth

The Cannabis Act has several measures that help prevent youth from accessing cannabis. These include both age restrictions and restricting promotion of cannabis.

Age restrictions

No person may sell or provide cannabis to any person under the age of 18. There are 2 criminal offences related to providing cannabis to youth, with maximum penalties of 14 years in jail:

- giving or selling cannabis to youth
- using a youth to commit a cannabis-related offence

Restricting promotion and enticement

The Cannabis Act helps discourage youth cannabis use by prohibiting:

- products that are appealing to youth
- packaging or labelling cannabis in a way that makes it appealing to youth
- selling cannabis through self-service displays or vending machines
- promoting cannabis, except in narrow circumstances where young people could not see the promotion
Penalties for violating these prohibitions include a fine of up to $5 million or 3 years in jail.

Protecting public health

The Act protects public health through creating strict safety and quality regulations. In addition, public education efforts are currently underway to raise awareness about safety measures and any potential health risks.

Strict regulation

Federal, provincial and territorial governments share responsibility for overseeing the cannabis regulation system.

The Federal government's responsibilities are to set:

- strict requirements for producers who grow and manufacture cannabis
- industry-wide rules and standards, including:
  - types of cannabis products available for sale
  - packaging and labelling requirements for products
  - standardized serving sizes and potency
  - prohibitions on the use of certain ingredients
  - good production practices
  - tracking requirements of cannabis from seed to sale to keep it out of the illegal market
  - restrictions on promotional activities

Provinces and territories are responsible for developing, implementing, maintaining and enforcing systems to oversee the distribution and sale of cannabis. They are also able to add their own safety measures, such as:

- increasing the minimum age in their province or territory (but not lowering it)
- lowering the personal possession limit in their jurisdiction
- creating additional rules for growing cannabis at home, such as lowering the number of plants per residence
- restricting where adults can consume cannabis, such as in public or in vehicles

Be sure to check local laws in your province.

Public education

The Government of Canada has committed close to $46 million over the next five years for cannabis public education and awareness activities. These are to inform Canadians, especially youth, of the health and safety risks of cannabis consumption.

**Reducing criminal activity**

Statistics Canada reports that in 2017, almost 48,000 cannabis-related drug offences were reported to police. The majority of these (80%) were possession offences. A criminal record resulting from a cannabis offence, even a minor possession charge, can have serious and lifelong implications for the person charged. In allowing the production and possession of legal cannabis for adults, the Act helps keep Canadians who consume cannabis out of the criminal justice system, reducing the burden on the courts.

**Criminal penalties**

Cannabis offences target those acting outside of the legal framework, such as organized crime. Penalties are set in proportion to the seriousness of the offence. Sanctions range from warnings and tickets for minor offences to criminal prosecution and imprisonment for more serious offences. Some offences specifically target people who make cannabis available to youth.

<table>
<thead>
<tr>
<th>Offence</th>
<th>Penalties</th>
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<tbody>
<tr>
<td><strong>Possession over the limit</strong></td>
<td>• tickets for small amounts</td>
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<tr>
<td></td>
<td>• up to 5 years in jail</td>
</tr>
<tr>
<td><strong>Illegal distribution or sale</strong></td>
<td>• tickets for small amounts</td>
</tr>
<tr>
<td></td>
<td>• up to 14 years in jail</td>
</tr>
<tr>
<td><strong>Producing cannabis beyond personal cultivation limits or with combustible solvents</strong></td>
<td>• tickets for small amounts</td>
</tr>
<tr>
<td></td>
<td>• up to 14 years in jail</td>
</tr>
<tr>
<td>Taking cannabis across Canada's borders</td>
<td>• up to 14 years in jail</td>
</tr>
<tr>
<td>-------------------------------------------------------------</td>
<td>------------------------</td>
</tr>
<tr>
<td>Giving or selling cannabis to a person under 18</td>
<td>• up to 14 years in jail</td>
</tr>
<tr>
<td>Using a youth to commit a cannabis-related offence</td>
<td>• up to 14 years in jail</td>
</tr>
</tbody>
</table>

Further penalties related to cannabis-impaired driving are also included in Canada's impaired driving legislation, along with impairment rules for other drugs such as:

- LSD
- heroin
- cocaine
- psilocybin (magic mushrooms)

**More information**

Please visit Cannabis in Canada for more information on cannabis:

- safety risks
- health effects
- transportation
- licensed production

**Date modified:**

2018-10-17
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

STEVE McINTOSH,

Defendant-Appellant.

No. 15-10117

D.C. No.
3:14-cr-00016-
MMC-3

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, Senior District Judge, Presiding

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

IANE LOVAN,

Defendant-Appellant.

No. 15-10122

D.C. No.
1:13-cr-00294-
LJO-SKO-1
UNITED STATES OF AMERICA,
    Plaintiff-Appellee,

v.

SOMPHANE MALATHONG,
    Defendant-Appellant.

No. 15-10127
D.C. No.
1:13-cr-00294-
LJO-SKO-3

UNITED STATES OF AMERICA,
    Plaintiff-Appellee,

v.

VONG SOUTHY,
    Defendant-Appellant.

No. 15-10132
D.C. No.
1:13-cr-00294-
LJO-SKO-2

UNITED STATES OF AMERICA,
    Plaintiff-Appellee,

v.

KHAMPHOU KHOUTHONG,
    Defendant-Appellant.

No. 15-10137
D.C. No.
1:13-cr-00294-
LJO-SKO-4

Appeals from the United States District Court
for the Eastern District of California
Lawrence J. O’Neill, District Judge, Presiding
UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JERAD JOHN KYNASTON, AKA Jared J. Kynaston, AKA Jerad J. Kynaston; SAMUEL MICHAEL DOYLE, AKA Samuel M. Doyle; BRICE CHRISTIAN DAVIS, AKA Brice C. Davis; JAYDE DILLON EVANS, AKA Jayde D. Evans; TYLER SCOTT MCKINLEY, AKA Tyler S. McKinley,

Defendants-Appellants.

No. 15-30098

D.C. No.
2:12-cr-00016-
WFN-1

Appeal from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, Senior District Judge, Presiding
IN RE IANE LOVAN,

IANE LOVAN,
       Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
CALIFORNIA, FRESNO,
       Respondent,

UNITED STATES OF AMERICA,
       Real Party in Interest.


IN RE SOMPHANE MALATHONG,

SOMPHANE MALATHONG,
       Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
CALIFORNIA, FRESNO,
       Respondent,

UNITED STATES OF AMERICA,
       Real Party in Interest.
IN RE VONG SOUTHY,

VONG SOUTHY,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
CALIFORNIA, FRESNO,

Respondent,

UNITED STATES OF AMERICA,

Real Party in Interest.

No. 15-71179

D.C. No.
1:13-cr-00294-
LJO-SKO-2

IN RE KHAMPHOU KHOUTHONG,

KHAMPHOU KHOUTHONG,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
CALIFORNIA, FRESNO,

Respondent,

UNITED STATES OF AMERICA,

Real Party in Interest.

No. 15-71225

D.C. No.
1:13-cr-00294-
LJO-SKO-4

OPINION
Petitions for Writ of Mandamus

Argued and Submitted December 7, 2015
San Francisco, California

Filed August 16, 2016


Opinion by Judge O'Scannlain

SUMMARY*

Criminal Law

In ten consolidated interlocutory appeals and petitions for writs of mandamus arising from three district courts in two states, the panel vacated the district court’s orders denying relief to the appellants, who have been indicted for violating the Controlled Substances Act, and who sought dismissal of their indictments or to enjoin their prosecutions on the basis of a congressional appropriations rider, Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015), that prohibits the Department of Justice from spending funds to prevent states’ implementation of their medical marijuana laws.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.
The panel held that it has jurisdiction under 28 U.S.C. § 1292(a)(1) to consider the interlocutory appeals from these direct denials of requests for injunctions, and that the appellants have standing to invoke separation-of-powers provisions of the Constitution to challenge their criminal prosecutions.

The panel held that § 542 prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by state medical marijuana laws and who fully complied with such laws. The panel wrote that individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and that prosecuting such individuals does not violate § 542.

Remanding to the district courts, the panel instructed that if DOJ wishes to continue these prosecutions, the appellants are entitled to evidentiary hearings to determine whether their conduct was completely authorized by state law. The panel wrote that in determining the appropriate remedy for any violation of § 542, the district courts should consider the temporal nature of the lack of funds along with the appellants' rights to a speedy trial.
COUNSEL

Marc J. Zilversmit (argued), San Francisco, California, for Defendant-Appellant Steve McIntosh.


Richard D. Wall, Spokane, Washington, for Defendant-Appellant Tyler Scott McKinley.


David Matthew Miller, Spokane, Washington, for Defendant-Appellant Brice Christian Davis.

Nicholas V. Vieth, Spokane, Washington, for Defendant-Appellant Jayde Dillion Evans.

Andras Farkas (argued), Assistant Federal Defender; Heather E. Williams, Federal Defender; Federal Defenders of the Eastern District of California, Fresno, California; for Defendant-Appellant/Petitioner Iane Lovan.

Daniel L. Harralson, Daniel L. Harralson Law Corp., Fresno, California, for Defendant-Appellant/Petitioner Somphane Malathong.

Harry M. Drandell, Law Offices of Harry M. Drandell, Fresno, California, for Defendant-Appellant/Petitioner Vong Southy.
OPINION

O’SCANNLAIN, Circuit Judge:

We are asked to decide whether criminal defendants may avoid prosecution for various federal marijuana offenses on the basis of a congressional appropriations rider that prohibits the United States Department of Justice from spending funds to prevent states’ implementation of their own medical marijuana laws.

I

A

These ten cases are consolidated interlocutory appeals and petitions for writs of mandamus arising out of orders entered
by three district courts in two states within our circuit.\(^1\) All Appellants have been indicted for various infractions of the Controlled Substances Act (CSA). They have moved to dismiss their indictments or to enjoin their prosecutions on the grounds that the Department of Justice (DOJ) is prohibited from spending funds to prosecute them.

In *McIntosh*, five codefendants allegedly ran four marijuana stores in the Los Angeles area known as Hollywood Compassionate Care (HCC) and Happy Days, and nine indoor marijuana grow sites in the San Francisco and Los Angeles areas. These codefendants were indicted for conspiracy to manufacture, to possess with intent to distribute, and to distribute more than 1000 marijuana plants in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A). The government sought forfeiture derived from such violations under 21 U.S.C. § 853.

In *Lovan*, the U.S. Drug Enforcement Agency and Fresno County Sheriff’s Office executed a federal search warrant on 60 acres of land located on North Zedicker Road in Sanger, California. Officials allegedly located more than 30,000 marijuana plants on this property. Four codefendants were indicted for manufacturing 1000 or more marijuana plants and for conspiracy to manufacture 1000 or more marijuana plants in violation of 21 U.S.C. §§ 841(a)(1), 846.

\(^1\) Appellants filed one appeal in *United States v. McIntosh*, No. 15-10117, arising out of the Northern District of California; one appeal in *United States v. Kynaston*, No. 15-30098, arising out of the Eastern District of Washington; and four appeals with four corresponding petitions for mandamus—Nos. 15-10122, 15-10127, 15-10132, 15-10137, 15-71158, 15-71174, 15-71179, 15-71225, which we shall address as *United States v. Lovan*—arising out of the Eastern District of California.
In *Kynaston*, five codefendants face charges that arose out of the execution of a Washington State search warrant related to an investigation into violations of Washington’s Controlled Substances Act. Allegedly, a total of 562 “growing marijuana plants,” along with another 677 pots, some of which appeared to have the root structures of suspected harvested marijuana plants, were found. The codefendants were indicted for conspiring to manufacture 1000 or more marijuana plants, manufacturing 1000 or more marijuana plants, possessing with intent to distribute 100 or more marijuana plants, possessing a firearm in furtherance of a Title 21 offense, maintaining a drug-involved premise, and being felons in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(c)(1)(A)(i) and 21 U.S.C. §§ 841, 856(a)(1).

B

In December 2014, Congress enacted the following rider in an omnibus appropriations bill funding the government through September 30, 2015:

None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to prevent such
States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.


Appellants in McIntosh, Lovan, and Kynaston filed motions to dismiss or to enjoin on the basis of the rider. The motions were denied from the bench in hearings in McIntosh and Lovan, while the court in Kynaston filed a short written order denying the motion after a hearing. In McIntosh and Kynaston, the court concluded that defendants had failed to carry their burden to demonstrate their compliance with state medical marijuana laws. In Lovan, the court concluded that the determination of compliance with state law would depend on facts found by the jury in a federal prosecution, and thus it would revisit the defendants’ motion after the trial.

Appellants in all three cases filed interlocutory appeals, and Appellants in McIntosh and Lovan ask us to consider issuing writs of mandamus if we do not assume jurisdiction over the appeals.
II

Federal courts are courts of limited subject-matter jurisdiction, possessing only that power authorized both by the Constitution and by Congress. *See Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013). Before proceeding to the merits of this dispute, we must assure ourselves that we have jurisdiction. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 95 (1998).

A

The parties dispute whether Congress has authorized us to exercise jurisdiction over these interlocutory appeals. “Our jurisdiction is typically limited to final decisions of the district court.” *United States v. Romero-Ochoa*, 554 F.3d 833, 835 (9th Cir. 2009). “In criminal cases, this prohibits appellate review until after conviction and imposition of sentence.” *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989). In the cases before us, no Appellants have been convicted or sentenced. Therefore, unless some exception to the general rule applies, we should not reach the merits of this dispute. Appellants invoke three possible avenues for reaching the merits: jurisdiction over an order refusing an injunction, jurisdiction under the collateral order doctrine, and the writ of mandamus. We address the first of these three avenues.

I

Under 28 U.S.C. § 1292(a), “the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, . . .
except where a direct review may be had in the Supreme Court.” (emphasis added). By its terms, § 1292(a)(1) requires only an interlocutory order refusing an injunction. Nonetheless, relying on Carson v. American Brands, Inc., 450 U.S. 79, 84 (1981), the government argues that § 1292(a)(1) requires Appellants to show that the interlocutory order (1) has the effect of refusing an injunction; (2) has a serious, perhaps irreparable, consequence; and (3) can be effectually challenged only by immediate appeal.

The government’s reliance on Carson is misplaced in light of our precedent interpreting that case. In Shee Atika v. Sealaska Corp., we explained:

In Carson, the Supreme Court considered whether section 1292(a)(1) permitted appeal from an order denying the parties’ joint motion for approval of a consent decree that contained an injunction as one of its provisions. Because the order did not, on its face, deny an injunction, an appeal from the order did not fall precisely within the language of section 1292(a)(1). The Court nevertheless permitted the appeal. The Court stated that, while section 1292(a)(1) must be narrowly construed in order to avoid piecemeal litigation, it does permit appeals from orders that have the “practical effect” of denying an injunction, provided that the would-be appellant shows that the order “might have a serious, perhaps irreparable, consequence.”
We find nothing in *Carson* to suggest that the requirement of irreparable injury applies to appeals from orders specifically denying injunctions. *Carson* merely expanded the scope of appeals that do not fall within the meaning of the statute. Sealaska appeals from the direct denial of a request for an injunction. *Carson*, therefore, is simply irrelevant.

39 F.3d 247, 249 (9th Cir. 1994) (citations omitted); *accord Paige v. California*, 102 F.3d 1035, 1038 (9th Cir. 1996); see also *Shee Atika*, 39 F.3d at 249 n.2 (noting that its conclusion was consistent with “the overwhelming majority of courts of appeals that have considered the issue” and collecting cases). Thus, *Carson*’s requirements do not apply to appeals from the “direct denial of a request for an injunction.” *Shee Atika*, 39 F.3d at 249.

2

In the cases before us, the district courts issued direct denials of requests for injunctions. Lovan, for instance, requested injunctive relief in the conclusion of his opening brief: “Therefore, the Court should dismiss all counts against Mr. Lovan based upon alleged violations of 21 U.S.C. § 841 and/or enjoin the Department of Justice from taking any further action against the defendants in this case unless and until the Department can show such action does not involve the expenditure of any funds in violation of the Appropriations Act.” At the hearing, Lovan’s counsel made exceptionally clear that his motion sought injunctive relief in the alternative:
THE COURT: But remember, your remedy is not because you are upset that the Department of Justice is spending taxpayer money. Your remedy is a dismissal, which is what you are seeking now, is it not?

MR. FARKAS: And your Honor, as an alternative in our motion, we ask for a stay of these proceedings, asked this Court to enjoin the Department of Justice from spending any funds to prosecute Mr. Lovan if this Court finds he is in conformity with the California Compassionate Use Act. So it is a motion to dismiss or, alternatively, a motion to enjoin until Congress designates funds for that purpose.

Shortly thereafter, Lovan’s counsel reiterated: “[W]e would ask either for a dismissal or to enjoin the government from spending any funds that were not appropriated under the Appropriations Act.” At the close of the hearing, Lovan’s counsel even explicitly argued that the district court’s denial of injunctive relief would be appealable immediately: “I believe this might be the type of collateral order that is appealable to the Ninth Circuit immediately. As I said, we are asking for an injunction.” The district court denied Lovan’s motion, which clearly requested injunctive relief.

Similarly, in Kynaston, the opening brief in support of the motion began and ended with explicit requests for injunctive relief. Subsequent filings by other defendants in that case referenced the injunctive relief sought, and one discussed at length how courts of equity should exercise their jurisdiction.
The district court denied the motion, which clearly sought injunctive relief.

In *McIntosh*, the defendant requested injunctive relief in his moving papers, and he mentioned his request for injunctive relief three times in his reply brief. At the hearing, the question of injunctive relief did not arise, and the district court said simply that it was denying the motion. Although McIntosh could have emphasized the equitable component of his request more, we conclude that he raised the issue sufficiently for the denial of his motion to constitute a direct denial of a request for an injunction.

Therefore, we have jurisdiction under 28 U.S.C. § 1292(a)(1) to consider the interlocutory appeals from these direct denials of requests for injunctions.

We note the unusual circumstances presented by these cases. In almost all federal criminal prosecutions, injunctive relief and interlocutory appeals will not be appropriate. Federal courts traditionally have refused, except in rare instances, to enjoin federal criminal prosecutions. See *Ackerman v. Int'l Longshoremen's Union*, 187 F.2d 860, 868 (9th Cir. 1951); *Argonaut Mining Co. v. McPike*, 78 F.2d 584, 586 (9th Cir. 1935); *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 185 (3d Cir. 2006); *Deaver v. Seymour*, 822 F.2d 66, 69 (D.C. Cir. 1987). “An order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1).” *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988). Thus, in almost all circumstances, federal
criminal defendants cannot obtain injunctions of their ongoing prosecutions, and orders by district courts relating solely to requests to stay ongoing federal prosecutions will not constitute appealable orders under § 1292(a)(1).

Here, however, Congress has enacted an appropriations rider that specifically restricts DOJ from spending money to pursue certain activities. It is "emphatically . . . the exclusive province of the Congress not only to formulate legislative policies and mandate programs and projects, but also to establish their relative priority for the Nation. Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for . . . the courts to enforce them when enforcement is sought." Tenn. Valley Auth. v. Hill, 437 U.S. 153, 194 (1978); accord United States v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 497 (2001). A "court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" Oakland Cannabis, 532 U.S. at 497 (quoting Virginian Ry. Co. v. Sys. Fed'n No. 40, 300 U.S. 515, 551 (1937)). Even if Appellants cannot obtain injunctions of their prosecutions themselves, they can seek—and have sought—to enjoin DOJ from spending funds from the relevant appropriations acts on such prosecutions.\(^2\) When Congress has enacted a legislative

\(^2\) We need not decide in the first instance exactly how the district courts should resolve claims that DOJ is spending money to prosecute a defendant in violation of an appropriations rider. We therefore take no view on the precise relief required and leave that issue to the district courts in the first instance. We note that district courts in criminal cases have ancillary jurisdiction, which "is the power of a court to adjudicate and determine matters incidental to the exercise of its primary jurisdiction over a cause under review." United States v. Sumner, 226 F.3d 1005, 1013–15 (9th Cir. 2000); see Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S.
restriction like § 542 that expressly prohibits DOJ from spending funds on certain actions, federal criminal defendants may seek to enjoin the expenditure of those funds, and we may exercise jurisdiction over a district court’s direct denial of a request for such injunctive relief.

B

1

As part of our jurisdictional inquiry, we must consider whether Appellants have standing to complain that DOJ is spending money that has not been appropriated by Congress. “The doctrine of standing asks whether a litigant is entitled to have a federal court resolve his grievance.” Kowalski v. Tesmer, 543 U.S. 125, 128 (2004). Although the government concedes that Appellants have standing, we have an “independent obligation to examine [our] own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines.” United States v. Hays, 515 U.S. 737, 742 (1995) (internal quotation marks and alterations omitted).

Constitutional limits on our jurisdiction are established by Article III, which limits the jurisdiction of federal courts to “Cases” and “Controversies.” U.S. Const. art. III, § 2. It “demands that an ‘actual controversy’ persist throughout all stages of litigation. That means that standing ‘must be met by persons seeking appellate review . . . .’” Hollingsworth v. Perry, 133 S. Ct. 2652, 2661 (2013) (citations omitted). To have Article III standing, a litigant “must have suffered or be

imminently threatened with a concrete and particularized ‘injury in fact’ that is fairly traceable to the challenged action . . . and likely to be redressed by a favorable judicial decision.” *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014).

In *Bond v. United States*, the Supreme Court addressed a situation similar to the cases before us. 564 U.S. 211 (2011). There, the Third Circuit had concluded that the criminal defendant lacked “standing to challenge a federal statute on grounds that the measure interferes with the powers reserved to States,” and the Supreme Court reversed. *Id.* at 216, 226.

The Court explained that “[o]ne who seeks to initiate or continue proceedings in federal court must demonstrate, among other requirements, both standing to obtain the relief requested, and, in addition, an ‘ongoing interest in the dispute’ on the part of the opposing party that is sufficient to establish ‘concrete adverseness.’” *Id.* at 217 (citations omitted). “When those conditions are met, Article III does not restrict the opposing party’s ability to object to relief being sought at its expense.” *Id.* “The requirement of Article III standing thus had no bearing upon [the defendant’s] capacity to assert defenses in the District Court.” *Id.*

Applying those principles to the defendant’s standing to appeal, the Court concluded that it was “clear Article III’s prerequisites are met. Bond’s challenge to her conviction and sentence ‘satisfies the case-or-controversy requirement, because the incarceration . . . constitutes a concrete injury, caused by the conviction and redressable by invalidation of the conviction.’” *Id.* Here, Appellants have not yet been deprived of liberty via a conviction, but their indictments imminently threaten such a deprivation. *Cf. Susan B.*
Anthony List v. Driehaus, 134 S. Ct. 2334, 2342–47 (2014) (threatened prosecution may give rise to standing). They clearly had Article III standing to pursue their challenges below because they were merely objecting to relief sought at their expense. And they have standing on appeal because their potential convictions constitute concrete, particularized, and imminent injuries, which are caused by their prosecutions and redressable by injunction or dismissal of such prosecutions. See Bond, 564 U.S. at 217.

After addressing Article III standing, the Bond Court concluded that, "[i]f the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." Id. at 223. The Court explained that both federalism and separation-of-powers constraints in the Constitution serve to protect individual liberty, and a litigant in a proper case can invoke such constraints "[w]hen government acts in excess of its lawful powers." Id. at 220–24. The Court gave numerous examples of cases in which private parties, rather than government departments, were able to rely on separation-of-powers principles in otherwise justiciable cases or controversies. See id. at 223 (citing Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010); Clinton v. City of New York, 524 U.S. 417, 433–36 (1998); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); Bowsher v. Synar, 478 U.S. 714 (1986); INS v. Chadha, 462 U.S. 919 (1983); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); A.L.A. Schechtman Poultry Corp. v. United States, 295 U.S. 495 (1935)).

The Court reiterated this principle in NLRB v. Noel Canning, 134 S. Ct. 2550 (2014). There, the Court granted
relief to a private party challenging an order against it on the basis that certain members of the National Labor Relations Board had been appointed in excess of presidential authority under the Recess Appointments Clause, another separation-of-powers constraint. *Id.* at 2557. The Court "recognize[d], of course, that the separation of powers can serve to safeguard individual liberty and that it is the 'duty of the judicial department'—in a separation-of-powers case as in any other—'to say what the law is.'" *Id.* at 2559–60 (citing *Clinton*, 524 U.S. at 449–50 (Kennedy, J., concurring), and quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); see also id. at 2592–94 (Scalia, J., concurring in the judgment) (discussing at great length how the separation of powers protects individual liberty).

Thus, Appellants have standing to invoke separation-of-powers provisions of the Constitution to challenge their criminal prosecutions.

2

Here, Appellants complain that DOJ is spending funds that have not been appropriated by Congress in violation of the Appropriations Clause of the Constitution. *See* U.S. Const. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."). This "straightforward and explicit command . . . means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424 (1990) (citation omitted). "Money may be paid out only through an appropriation made by law; in other words, the payment of money from the Treasury must be authorized by a statute." *Id.*
The Appropriations Clause plays a critical role in the Constitution's separation of powers among the three branches of government and the checks and balances between them. "Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury." *Id.* at 425. The Clause has a "fundamental and comprehensive purpose...to assure that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Id.* at 427–28. Without it, Justice Story explained, "the executive would possess an unbounded power over the public purse of the nation; and might apply all its moneyed resources at his pleasure." *Id.* at 427 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1348 (3d ed. 1858)).

Thus, if DOJ were spending money in violation of § 542, it would be drawing funds from the Treasury without authorization by statute and thus violating the Appropriations Clause. That Clause constitutes a separation-of-powers limitation that Appellants can invoke to challenge their prosecutions.

III

The parties dispute whether the government's spending money on their prosecutions violates § 542.

A

We focus, as we must, on the statutory text. Section 542 provides that "[n]one of the funds made available in this Act
to the Department of Justice may be used, with respect to [Medical Marijuana States\(^3\)] to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.’’ Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332–33 (2015). Unfortunately, the rider is not a model of clarity.

1

‘‘It is a ‘fundamental canon of statutory construction’ that, ‘unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.’’ Sandifer v. U.S. Steel Corp., 134 S. Ct. 870, 876 (2014) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)). Thus, in order to decide whether the prosecutions of Appellants violate § 542, we must determine the plain meaning of “prevent any of [the Medical Marijuana States] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.’’ The pronoun “them” refers back to the Medical Marijuana States, and “their own

\(^3\) To avoid repeating the names of all 43 jurisdictions listed, we refer to Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming, the District of Columbia, Guam, and Puerto Rico as the “Medical Marijuana States” and their laws authorizing “the use, distribution, possession, or cultivation of medical marijuana” as the “State Medical Marijuana Laws.” While recognizing that the list includes three non-states, we will refer to the listed jurisdictions as states and their laws as state laws without further qualification.
laws” refers to the state laws of the Medical Marijuana States. And “implement” means:

To “carry out, accomplish; esp.: to give practical effect to and ensure of actual fulfillment by concrete measure.” Implement, Merriam-Webster’s Collegiate Dictionary (11th ed. 2003);

“To put into practical effect; carry out.” Implement, American Heritage Dictionary of the English Language (5th ed. 2011); and

“To complete, perform, carry into effect (a contract, agreement, etc.); to fulfil (an engagement or promise).” Implement, Oxford English Dictionary, www.oed.com.

See Sanford v. MemberWorks, Inc., 625 F.3d 550, 559 (9th Cir. 2010) (We “may follow the common practice of consulting dictionaries to determine” ordinary meaning.); Sandifer, 134 S. Ct. at 876. In sum, § 542 prohibits DOJ from spending money on actions that prevent the Medical Marijuana States’ giving practical effect to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

DOJ argues that it does not prevent the Medical Marijuana States from giving practical effect to their medical marijuana laws by prosecuting private individuals, rather than taking legal action against the state. We are not persuaded.
Importantly, the "[s]tatutory language cannot be construed in a vacuum. It is [another] fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." Sturgeon v. Frost, 136 S. Ct. 1061, 1070 (2016) (internal quotation marks omitted). Here, we must read § 542 with a view to its place in the overall statutory scheme for marijuana regulation, namely the CSA and the State Medical Marijuana Laws. The CSA prohibits the use, distribution, possession, or cultivation of any marijuana. See 21 U.S.C. §§ 841(a), 844(a). The State Medical Marijuana Laws are those state laws that authorize the use, distribution, possession, or cultivation of medical marijuana. Thus, the CSA prohibits what the State Medical Marijuana Laws permit.

In light of the ordinary meaning of the terms of § 542 and the relationship between the relevant federal and state laws, we consider whether a superior authority, which prohibits certain conduct, can prevent a subordinate authority from implementing a rule that officially permits such conduct by punishing individuals who are engaged in the conduct officially permitted by the lower authority. We conclude that it can.

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4 This requires a slight caveat. Under the CSA, "the manufacture, distribution, or possession of marijuana [is] a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study." Gonzales v. Raich, 545 U.S. 1, 14 (2005); see 21 U.S.C. §§ 812(c), 823(f), 841(a)(1), 844(a). Thus, except as part of "a strictly controlled research project," federal law "designates marijuana as contraband for any purpose." Raich, 545 U.S. at 24, 27.
DOJ, without taking any legal action against the Medical Marijuana States, prevents them from implementing their laws that authorize the use, distribution, possession, or cultivation of medical marijuana by prosecuting individuals for use, distribution, possession, or cultivation of medical marijuana that is authorized by such laws. By officially permitting certain conduct, state law provides for non-prosecution of individuals who engage in such conduct. If the federal government prosecutes such individuals, it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct.

We therefore conclude that, at a minimum, § 542 prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.

Appellants in McIntosh and Kynaston argue for a more expansive interpretation of § 542. They contend that the rider prohibits DOJ from bringing federal marijuana charges against anyone licensed or authorized under a state medical marijuana law for activity occurring within that state, including licensees who had failed to comply fully with state law.

For instance, Appellants in Kynaston argue that “implementation of laws necessarily involves all aspects of putting the law into practical effect, including interpretation of the law, means of application and enforcement, and procedures and processes for determining the outcome of
individual cases.” Under this view, if the federal government prosecutes individuals who are not strictly compliant with state law, it will prevent the states from implementing the entirety of their laws that authorize medical marijuana by preventing them from giving practical effect to the penalties and enforcement mechanisms for engaging in unauthorized conduct. Thus, argue the *Kynaston* Appellants, the Department of Justice must refrain from prosecuting “unless a person’s activities are so clearly outside the scope of a state’s medical marijuana laws that reasonable debate is not possible.”

To determine whether such construction is correct, we must decide whether the phrase “laws that authorize” includes not only the rules authorizing certain conduct but also the rules delineating penalties and enforcement mechanisms for engaging in unauthorized conduct. In answering that question, we consider the ordinary meaning of “laws that authorize the use, distribution, possession, or cultivation of medical marijuana.” “Law” has many different meanings, including the following definitions that appear most relevant to § 542:

“The aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them.”

“The set of rules or principles dealing with a specific area of a legal system <copyright law>.”
Law, Black’s Law Dictionary (10th ed. 2014); and:

“1. a. The body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects. (In this sense usually the law.).”

“One of the individual rules which constitute the ‘law’ (sense 1) of a state or polity. . . . The plural has often a collective sense . . . approaching sense 1.”

Law, Oxford English Dictionary, www.oed.com. The relative pronoun “that” restricts “laws” to those laws authorizing the use, distribution, possession, or cultivation of medical marijuana. See Bryan A. Garner, Garner’s Dictionary of Legal Usage 887–89 (3d ed. 2011). In sum, the ordinary meaning of § 542 prohibits the Department of Justice from preventing the implementation of the Medical Marijuana States’ laws or sets of rules and only those rules that authorize medical marijuana use.

We also consider the context of § 542. The rider prohibits DOJ from preventing forty states, the District of Columbia, and two territories from implementing their medical marijuana laws. Not only are such laws varied in composition but they also are changing as new statutes are enacted, new regulations are promulgated, and new administrative and judicial decisions interpret such statutes and regulations. Thus, § 542 applies to a wide variety of laws that are in flux.
Given this context and the restriction of the relevant laws to those that authorize conduct, we conclude that § 542 prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana. DOJ does not prevent the implementation of rules authorizing conduct when it prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws. Individuals who do not strictly comply with all state-law conditions regarding the use, distribution, possession, and cultivation of medical marijuana have engaged in conduct that is unauthorized, and prosecuting such individuals does not violate § 542. Congress could easily have drafted § 542 to prohibit interference with laws that address medical marijuana or those that regulate medical marijuana, but it did not. Instead, it chose to proscribe preventing states from implementing laws that authorize the use, distribution, possession, and cultivation of medical marijuana.

The parties cite various pieces of legislative history to support their arguments regarding the meaning of § 542.

We cannot consider such sources. It is a fundamental principle of appropriations law that we may only consider the text of an appropriations rider, not expressions of intent in legislative history. “An agency’s discretion to spend appropriated funds is cabined only by the ‘text of the appropriation,’ not by Congress’ expectations of how the funds will be spent, as might be reflected by legislative history.” Salazar v. Ramah Navajo Chapter, 132 S. Ct. 2181, 2194–95 (2012) (quoting Int’l Union, UAW v. Donovan,
746 F.2d 855, 860–61 (D.C. Cir. 1984) (Scalia, J.). In *International Union*, then-Judge Scalia explained:

As the Supreme Court has said (in a case involving precisely the issue of Executive compliance with appropriation laws, although the principle is one of general applicability): “legislative intention, without more, is not legislation.” The issue here is not how Congress expected or intended the Secretary to behave, but how it required him to behave, through the only means by which it can (as far as the courts are concerned, at least) require anything—the enactment of legislation. Our focus, in other words, must be upon the text of the appropriation.

746 F.2d at 860–61 (quoting *Train v. City of New York*, 420 U.S. 35, 45 (1975)); see also *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 646 (2005) (“The relevant case law makes clear that restrictive language contained in Committee Reports is not legally binding.”); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (“[I]ndicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on’ the agency.”) (citation omitted)).

We recognize that some members of Congress may have desired a more expansive construction of the rider, while others may have preferred a more limited interpretation. However, we must consider only the text of the rider. If Congress intends to prohibit a wider or narrower range of DOJ actions, it certainly may express such intention, hopefully with greater clarity, in the text of any future rider.
IV

We therefore must remand to the district courts. If DOJ wishes to continue these prosecutions, Appellants are entitled to evidentiary hearings to determine whether their conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana. We leave to the district courts to determine, in the first instance and in each case, the precise remedy that would be appropriate.

We note the temporal nature of the problem with these prosecutions. The government had authority to initiate criminal proceedings, and it merely lost funds to continue them. DOJ is currently prohibited from spending funds from specific appropriations acts for prosecutions of those who complied with state law. But Congress could appropriate funds for such prosecutions tomorrow. Conversely, this temporary lack of funds could become a more permanent lack of funds if Congress continues to include the same rider in future appropriations bills. In determining the appropriate remedy for any violation of § 542, the district courts should consider the temporal nature of the lack of funds along with Appellants’ rights to a speedy trial under the Sixth Amendment and the Speedy Trial Act, 18 U.S.C. § 3161.5

5 The prior observation should also serve as a warning. To be clear, § 542 does not provide immunity from prosecution for federal marijuana offenses. The CSA prohibits the manufacture, distribution, and possession of marijuana. Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime. The federal government can prosecute such offenses for up to five years after they occur. See 18 U.S.C. § 3282. Congress currently restricts the government
V

For the foregoing reasons, we vacate the orders of the district courts and remand with instructions to conduct an evidentiary hearing to determine whether Appellants have complied with state law.\textsuperscript{6}

\textbf{VACATED AND REMANDED WITH INSTRUCTIONS.}

from spending certain funds to prosecute certain individuals. But Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding. Moreover, a new president will be elected soon, and a new administration could shift enforcement priorities to place greater emphasis on prosecuting marijuana offenses.

Nor does any state law "legalize" possession, distribution, or manufacture of marijuana. Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. Const. art VI, cl. 2. Thus, while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law.

\textsuperscript{6} We have jurisdiction under the All Writs Act to "issue all writs necessary or appropriate in aid of [our] jurisdiction[] and agreeable to the usages and principles of law." 28 U.S.C. § 1651. The writ of mandamus "is a drastic and extraordinary remedy reserved for really extraordinary causes." \textit{United States v. Guerrero}, 693 F.3d 990, 999 (9th Cir. 2012) (quoting \textit{Cheney v. U.S. Dist. Court}, 542 U.S. 367, 380 (2004)). We DENY the petitions for the writ of mandamus because the petitioners have other means to obtain their desired relief and because the district courts' orders were not clearly erroneous as a matter of law. \textit{See id.} (citing \textit{Bauman v. U.S. Dist. Ct.}, 557 F.2d 650, 654–55 (9th Cir. 2010)). In addition, we GRANT the motion for leave to file an oversize reply brief, ECF No. 47-2; DENY the motion to strike, ECF No. 52; and DENY the motion for judicial notice, ECF No. 53.
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA BARBARA
ANACAPA DIVISION

SGSB, INC., a California corporation,
   Petitioner and Plaintiff,

v.

THE CITY OF SANTA BARBARA; and
DOES 1-10, Inclusive,

Respondents and Defendants.

COASTAL DISPENSARY, LLC, a California
limited liability company; GSG SBCA, INC., a
California corporation; and FARMACY SB,
INC., a California corporation,

Real Parties in Interest.

AND RELATED CROSS-ACTION.
INTRODUCTION

Petitioner and Plaintiff SGSB, Inc. ("SGSB") for its Complaint and Petition against Defendant/Respondent the City of Santa Barbara (the "City") and Real Parties in Interest Coastal Dispensary, LLC ("Coastal"), GSG SBCA, Inc. ("GSG"), and Farmacy SB, Inc. ("Farmacy") states as follows:

1. When the City launched a competitive application process to award Permits\(^1\) for storefronts for the sale of commercial cannabis, it had to abide by the highest standards of fairness and integrity. Unfortunately, it did not. The City’s failure to act in this manner prevented SGSB from receiving a Permit, a permit which it earned in the rigorous application review process. In fact, SGSB finished in first place (5 points ahead of Coastal) in the first scoring phase, and in second place in the second and final scoring phase (and a mere 3 points on a 1,000-point scale behind Coastal). The City was obligated to award Permits to the three highest scoring applicants. Yet, the City denied SGSB the Permit that the City’s own scoring determined SGSB had earned, choosing instead to award Permits to applicants in third and fourth place, 21 and 34 points behind SGSB. The fourth place finisher only exceeded the minimum point total to be eligible for a Permit (900) by 1 point (901). In the end, the City did not conduct a fair permitting process. Rather, it was an arbitrary and capricious process.

2. SGSB is a highly qualified and experienced applicant with deep ties to the Santa Barbara community. SGSB is ready, willing, and able to provide safe, reliable cannabis to those in Santa Barbara who need it. The City, in an arbitrary and capricious fashion, however, prevented SGSB from serving the residents of Santa Barbara. The City has provided no legitimate or legally supportable reason for this deprivation. Indeed, the only stated basis for the City deeming SGSB ineligible to receive a Permit is that its proposed location is allegedly within 1,000 feet of Coastal’s proposed location (the "Setback Requirement").

3. Section 9.44.090 of the Santa Barbara Municipal Code ("S.B.M.C"), which describes the "Permittee Selection Process," and the City’s "Application Procedure to Operate a

\(^1\) "Permit" as used in this Petition and Complaint is defined in Paragraph 32 below.
Commercial Cannabis Business in Santa Barbara” (“Application Procedures”) describe a four phase process where applicants for a commercial cannabis business permit from the City earn points for specifically detailed “Evaluation Criteria.” None of the criteria, which are explained in enormous detail in the City’s Application Procedures, include the Setback Requirement.

4. Nor does it make sense to apply the Setback Requirement in this manner, given that applicants had no way of knowing at application submission the proposed locations of its then unknown competitors.

5. Under the plain language of the S.B.M.C, the Setback Requirement is an “Operating Requirement for Storefront Retail Facilities” that applies to already permitted businesses. (Compare S.B.M.C. § 9.44.090 [using “applicant” and “application” to describe permit process] with S.B.M.C. § 9.44.280 [no use of “applicant” or “application,” but describing operational requirements for “retailers”].) The Setback Requirement is only a prerequisite to commencing operations after a business has already received a Permit. It is not a requirement to be met in order to obtain a Permit.

6. Even assuming arguendo that the Setback Requirement applies during the Permit application process, the City arbitrarily and capriciously failed to eliminate Coastal from consideration after the first phase of scoring. At that time, Coastal was second to SGSB and Coastal had a proposed location within 1,000 feet of SGSB’s. Under the City’s reading of the applicability of the Setback Requirement, Coastal should not have advanced. Yet, the City advanced Coastal to the final scoring phase with full knowledge that its location was within 1,000 feet of SGSB, the highest scoring first phase applicant.

7. Moreover, as it turns out, the City should have eliminated Coastal from contention during the first phase of the application process for another reason: because Coastal submitted false, misleading, or fraudulent statements to the City in its application.

8. For example, as a prerequisite to consideration for a Permit, Coastal, like SGSB and all other applicants, was required to submit a “Proof of Property Ownership or Consent of Landlord” form. Upon information and belief, Coastal knew that the owner of Coastal’s proposed location at 1019 Chapala St., Santa Barbara, California 93101 (the “Chapala Property”)
was unwilling to sign the form or lease the property to Coastal for use as a cannabis sale
storefront. Thus, Coastal could not secure a lease to operate a dispensary on the Chapala
Property.

9. On information and belief, rather than tell the City the truth, Coastal submitted a
fraudulent form. To that end, Coastal submitted a Proof of Property Ownership or Consent of
Landlord form, signed on March 28, 2018 under penalty of perjury by Julian Michalowski (“Mr.
Michalowski”), asserting that he personally owned the Chapala Property. Public records show
that Mr. Michalowski did not own the property at that time. Nor does he currently own the
property. After Coastal submitted its application, on April 18, 2018, the Chapala Property was
transferred from Chapala Partners LLC and Janet M. Nancarrow, Trustee of the Janet M.
Nancarrow 2012 Revocable trust dated January 31, 2012 to West Bluff Capital Inc. (“West Bluff
Capital”)

10. On information and belief, West Bluff Capital is a California Corporation. State
filings indicate that Mr. Michalowski is one of three directors of West Bluff Capital, but he is not
an officer of West Bluff Capital. On information and belief, in violation of S.B.M.C. § 9.44.080,
Coastal did not submit to the City a notarized Proof of Property Ownership or Consent of
Landlord form signed by West Bluff Capital. Likewise, Coastal never provided a “signed and
notarized statement from [West Bluff Capital], acknowledging that [West Bluff Capital] has read
[Chapter 9.44 of the Santa Barbara Municipal Code] and consents to the operation of the
commercial cannabis business on the owner’s property.”

11. Mr. Michalowski fraudulently misrepresented the ownership of the Chapala
Property in Coastal’s application. In addition, every responsible party that signed Coastal’s
application acknowledged, under penalty of perjury, that they had personal knowledge of the
information in the application. As noted above, the application stated -- falsely-- that Julian
Michalowski owned the Chapala Property. Therefore, all of Coastal’s Responsible Parties
(Malante Hayworth, Chief Executive Officer; Mr. Michalowski, Chief Financial Officer; Josh
Ginsberg, Chief Operating Officer; and Kimberly Moffatt Jones, Advisory Board Chairman)
made false, misleading, and fraudulent statements to the City in Coastal’s application when they
allowed the false affidavit to be included.

12. On information and belief, Coastal also submitted other fraudulent and incorrect
information to the City, including a lease dated March 30, 2018 purportedly demonstrating that
Jamaba Properties was leasing the property at 1019 Chapala Street to Coastal. Jamaba did not
own the Chapala Property at that time and Jamaba Properties has never owned the Chapala
Property. On information and belief, Coastal also placed its experience and operational capability
in a false light in its application. As will be discussed in detail below and through attached
exhibits below, upon information and belief, Coastal passed off as its own the experience and
confidential and proprietary operational procedures of another company.

13. For these transgressions, Coastal should not have been awarded a permit. (See
e.g., S.B.M.C. § 9.44.080.) The City also should have significantly lowered Coastal’s score or
disqualified Coastal altogether under S.B.M.C. § 9.44.090(H).

14. Adding insult to injury, after the announcement that Coastal, Farmacy, and GSG
would be awarded permits and SGSB’s application was denied due to the Setback Requirement,
the City Attorney then refused to provide SGSB with an administrative appeal of its arbitrary and
capricious permitting decision. SGSB is entitled to an administrative appeal under the S.B.M.C.
SGSB timely filed its Notice of Appeal. The City Attorney had no discretion to deny SGSB its
legal right to an administrative appeal. Yet, the City inexplicably did so here.

15. Based on the announced evaluation and scoring procedures and criteria and the
scores determined for SGSB’s application, the City has no discretion but to award a Permit to
SGSB. The law and the equities command the issuance of a Permit to SGSB.

16. Additionally, on information and belief, after the City’s decision to award a permit
to Coastal, and despite warnings in the City’s Application Procedures and Section 9.44 which
requires permittees to obtain “[a]ll required City approvals, plan approvals, and permits” before
making any alterations to the existing building, (see S.B.M.C. § 9.44.190.C.), Coastal has
violated City building permit requirements.
17. On information and belief, Coastal also has failed to meet the proposed schedule of operations in its application. This schedule estimated its business would start on October 2018. If Coastal did not inform the City of this change, that it is in violation of Section 9.44.190.D.

18. On information and belief, Coastal’s temporary cannabis retailer license expires on July 10, 2019 and the business owner is listed as Christian Nitu, a name that is not mentioned anywhere in Coastal Dispensary’s application. This switch after public hearings were held without disclosure to the public raises additional questions about the City’s process for handling retail dispensary licenses.

19. To right these wrongs, SGSB seeks a writ of mandamus compelling the City to set aside its denial of a Permit to SGSB based on the Setback Requirement, thereby clearing the path to award SGSB the Permit it has earned by virtue of the second place finish in the application evaluation and scoring process. Alternatively, SGSB seeks a writ of mandamus compelling the City to accept SGSB’s Notice of Appeal and schedule SGSB’s appeal for hearing. SGSB also seeks money damages against the City flowing from the City’s Constitutional violations that resulted in the City denying SGSB’s permit application.

20. Furthermore, Coastal’s misrepresentations and violations demonstrate a willingness to break the law and make misrepresentations, which is indefensible in the highly regulated cannabis industry. This creates a real risk for the residents of Santa Barbara. The City and State established strict permitting rules, which include security and background check protocols, to avoid the risks that a poorly or illegally operated cannabis establishment will certainly present to the City of Santa Barbara’s citizens. In light of the false, misleading, and fraudulent statements that Coastal has made to the City and other violations of Section 9.44 by Coastal, if the City fails to do so, SGSB seeks a writ of mandamus compelling the City to declare Coastal’s business a nuisance, to prohibit Coastal from operating, and to revoke Coastal’s permit. (See S.B.M.C. §§ 9.44.040, 9.44.050, 9.44.060, 9.44.090, 9.44.110A, 9.44.370, and 9.44.390.)

PARTIES

21. As detailed in SGSB’s application, SGSB’s individual owners and leadership team have deep ties to Santa Barbara and are national leaders in the cannabis industry. Specifically,
the application made clear to the City that SGSB was owned by the owners and operators of many
renowned Santa Barbara establishments (such as Holdren’s Steak and Seafood, Santa Barbara
Shellfish Company, FisHouse, Boathouse, Casablanca, and Santa Barbara Brewing Company).
The majority of SGSB’s responsible party positions are held by County residents, and SGSB is
committed to filling additional positions from the local community.

22. SGSB is also part of the largest vertically integrated cannabis operations in the
United States, with affiliated operations currently in California and Arizona, and with licenses
and permits in other states. SGSB is well capitalized and part of a national leader in the cannabis
industry. SGSB has offices in the State of California, County of Los Angeles, with its
headquarters in Scottsdale, Arizona.

23. The City is subject to Section 1085 of the California Code of Civil Procedure,
California’s “ordinary” mandamus statute. County of Los Angeles v. City of Los Angeles, (2013)

24. The City is a “local agency” as defined in Section 54951 of the California
Government Code, as referenced in Sections 1094.5 and 1094.6 of the California Code of Civil
Procedure, California’s “administrative” mandamus statute.

25. Coastal was one of the competing applicants for a Permit selected in the second
round of scoring to be eligible to receive a Permit. Coastal is a California Limited Liability
Company headquartered in the State of California, Santa Barbara County.

26. GSG was one of the competing applicants for a Permit selected in the second
round of scoring to be eligible to receive a Permit. GSG is a California corporation doing
business in the County of Santa Barbara.

27. Farmacy was one of the competing applicants for a Permit who was selected in the
second round of scoring to be eligible to receive a Permit. Farmacy is a California corporation
doing business in the County of Santa Barbara.

28. The names and capacities, whether individual, corporate or otherwise, of
defendants named herein as Does 1 through 10, inclusive, are unknown to SGSB at this time, who
therefore sues said defendants by such fictitious names. SGSB will amend this petition and
1916223.2

1ST AMENDED VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DAMAGES
complaint to show their true names and capacities if and when they have been ascertained. SGSB
is informed and believe, and on such information and belief allege, that each of the defendants
named as a Doe claims an interest in, or a right to use or to regulate the use of, the property which
is the subject of this litigation or is responsible in some manner for events and occurrences about
which this complaint and petition are filed and therefore is liable for the relief sought herein.

JURISDICTION AND VENUE

29. Jurisdiction is proper in this Court pursuant to Article VI, Section 10 of the
California Constitution, California Code of Civil Procedure § 410.10, and Chapter 2 of the
California Code of Civil Procedure.

30. Venue is proper in this Court, pursuant to California Code of Civil Procedure §§
393(b), 394(a), 395(a) and 395.5. GSG, Coastal, and Farmacy do business in the County of Santa
Barbara and have applied to operate retail marijuana dispensaries in the City of Santa Barbara.

FACTUAL BACKGROUND

31. On December 5, 2017, the City passed the Commercial Cannabis Regulation and
Safety Ordinance (the “Ordinance”). The Ordinance added Chapter 9.44 to the S.B.M.C. The
Ordinance governs the commercial activity of both medicinal and adult-use cannabis. (See
S.B.M.C. § 9.44.010.) In order to engage in any sort of commercial cannabis activity – e.g.,
cultivation, manufacturing, testing, distribution, or sale of cannabis – a person must have a valid
commercial cannabis business permit from the City. (See S.B.M.C. § 9.44.060.)

32. One such permit is the “Retailer-Storefront” permit at issue here, a type of
commercial cannabis business permit that allows for the “retail sale” of cannabis “to customers at
a fixed location” (referred throughout the Complaint as the “Permit”). (See S.B.M.C. § 9.44.050.)
On January 23, 2018, the City Council established that three such Permits could be issued through
the application process. (Exhibit A at 2; See also S.B.M.C. § 9.44.070.)

33. Under the City’s application process, the three applicants who received the three
highest scores were to receive the three Permits. (See Exhibit B at 5; S.B.M.C. §§ 9.44.080 and
9.44.090.)
34. The Ordinance mandated that the Santa Barbara City Council "adopt by resolution the procedures to govern the application process, and the manner in which the decision will ultimately be made regarding the issuance of any commercial cannabis business permits(s), including objective review criteria." (See S.B.M.C. § 9.44.080(A) [emphasis added].) The adopted resolution tasked the Santa Barbara City Administrator "to prepare the necessary forms, adopt any necessary rules to the application, regulation and processes, solicit applications, conduct initial evaluations of the applicants, and to ultimately issue commercial cannabis business permits." (See S.B.M.C. § 9.44.080(A).) As required, the City Council adopted the objective review criteria for the Permit application, and the City Administrator implemented the review, evaluation, and scoring of the applications based on that review criteria.

35. To guide the applicants in their preparation of Permit applications, the City published "Application Procedures" attached hereto as Exhibit B. The document "outlines the application process, required materials, and other information necessary to operate a [Commercial Cannabis Business] in the City of Santa Barbara." (Exhibit B at 1.)

36. On February 1, 2018, the City "commenced the competitive process to solicit [Commercial Cannabis Business] proposals." (Exhibit A at 2.) The submission deadline for Permit applications was initially March 30, 2018, but was subsequently extended through April 20, 2018. (Id.) The City received 14 timely Permit applications. (Id.)

37. The application submission, evaluation, and selection had the following four phases: Phase I: Application Submittal; Phase II: Initial Ranking; Phase III: Public Meeting for Interviews; and Phase IV: Final Ranking. (Exhibit B at 4-5.)

38. Within the Application Procedures, the City delineated the "objective review criteria" for the evaluation and ranking of each Permit applicant during the two rounds of scoring, i.e., the Initial Ranking (Phase II) and Final Ranking (Phase IV). (See id.) Each criterion carried a specific weight that contributed to a total and final score used to rank the Permit applicants. (See id.) The "objective review criteria" was divided into five "Plans," with the following point allocations for each:
a. "Business Plan" (400 points), which was further sub-divided into five sub-criteria: "Operations, Best Practices & Financial Pro Forma" (200 points); "Qualifications of Principals" (100 points); "Community Benefits" (50 points); "Environmental Benefits" (25 points); and "Local Enterprise" (25 points);

b. "Neighborhood Integration Plan" (200 points);
c. "Safety and Security Plan" (300 points);
d. "Labor & Employment" (25 points); and
e. "Air Quality" (75 points).

The same criteria and same weight per criterion applied during the two rounds of scoring. (Id.)

The Setback Requirement was not one of these criteria.

39. The Setback Requirement only appears in Section 9.44 as an Operational Restriction in Section 9.44.280. The Setback Requirement is not listed in Sections 9.44.080 or 9.44.090 or in the Application Procedures as a basis to reduce the score of a Permit applicant, let alone to serve as a basis for a Permit denial.

40. A Cannabis Application Review Team (or "CART") composed of 5 City employees, chosen by the City Administrator for their expertise in particular subject areas, conducted the scoring and review of applications for the Initial Ranking. (Id. at 4; Exhibit A at 2.) Applicants who scored a minimum of 80% or 800 Points during the Initial Ranking advanced to Phase III. (Exhibit B at 5.) During Phase III, the applicants participated in a public interview and presentation in front of the City Administrator’s designated Permit Application Evaluator. (Id.) SGSB’s presentation is attached as Exhibit C. The City then conducted a site inspection for each applicant. (Exhibit B at 5.)

41. The City certainly knew -- at the latest -- at the time it scheduled the public interviews and presentations, that Coastal and SGSB had proposed locations within 1,000 feet of one another. Indeed, it was during the public interviews, presentations, and site visits that the applicants learned for the first time from the City of the proposed locations of their competitors.

42. If the Setback Requirement was intended to exclude either Coastal or SGSB from receiving a permit for any location based on who had the higher score, you would expect the City
to have asked the public or the applicants at the public meeting on June 1, 2018 to comment about
the relative merits of their two proposals. The City never asked the public or the applicants to do
so. Nor was the Setback Requirement discussed at the public meeting.

43. The City also did not tell SGSB at the meeting that, even if it scored among the top
three, it could be denied a permit due to the Setback Requirement.

44. The City did not give SGSB an opportunity to propose an alternate location to
avoid potential denial due to the Setback Requirement.

45. Only the single Permit Application Evaluator performed the Phase IV scoring for
the Final Ranking. This scoring purportedly involved taking into consideration the applicants’
applications, public interviews and presentations, and site visits, and “supplemental
documentation” provided by certain applicants. (Id.) The City provided no parameters or
instructions regarding what types of documentation and/or information could be provided, and did
not delineate how that information and/or documentation would be fairly and consistently
considered and evaluated by the City in scoring and ranking the applicants.

46. A Permit was to be awarded to each applicant who: (1) scored a minimum of 90%
or 900 points in the Final Ranking, and (2) received a top three score. “In case of tie, the
Storefront-Retailer applicant scoring highest on the Neighborhood Integration Plan will receive
the higher ranking.” (Exhibit B at 5.)

47. The single Permit Application Evaluator jumbled the original results from the
CART, including moving one applicant (GSG) up 77 points from its first phase scoring to 901
total points, just one more than the bare minimum score (900) necessary to be eligible for a
Permit. Having this fourth eligible applicant by the narrowest of margins allowed the City to
declare SGSB ineligible and still be able to issue three Permits.

48. To this end, the actual final scores of the four qualified applicants were as follows:
(1) Coastal (938 points); (2) SGSB (935 points); (3) Farmacy (914 points); and (4) GSG (901
points). As such, under the announced application procedures and criteria, the Permits should
have gone to Coastal, SGSB, and Farmacy, the top-three finishers.
49. Yet, on July 9, 2018 when the City Administrator announced the results, he stated that SGSB was ineligible and that the Permits would go to Coastal, Farmacy, and GSG. (Exhibit A at 1.) The City Administrator’s sole reason for declaring SGSB ineligible despite being the second highest scoring applicant: SGSB’s proposed site was located within 1,000 feet of Coastal’s. (Id. at 4; see also Exhibit D [the City Administrator’s letter to SGSB regarding its ineligibility].)

50. The Permits do not entitle Coastal, Farmacy, or GSG to commence operations. Rather, before operating, they must complete additional certifications and inspections, and meet other permitting and documentation requirements established by the City; and they must follow all City regulations while making any improvements on their retail sites. (See Exhibit A at 4-5; Exhibit B at 6; Exhibit E [Commercial Cannabis Permit Holder “Next Steps”]; Exhibit F [City Presentation on Award of Commercial Cannabis Permits] at 23-26.)

51. SGSB incorporates fully by reference all paragraphs of this Complaint in support of all of its following Causes of Action.

FIRST CAUSE OF ACTION AGAINST DEFENDANT CITY OF SANTA BARBARA
(Real Parties in Interest: COASTAL, FARMACY, AND GSG)
(Mandamus Pursuant to Cal. Code of Civ. Proc., § 1094.5)

52. SGSB incorporates paragraphs 1-51 above and further alleges:

53. This is a claim pursuant to California Code of Civil Procedure § 1094.5 for a writ of mandamus on grounds that the City should have issued a Permit to SGSB. SGSB therefore seeks alternative writs of mandamus in this case because: (1) the City Administrator erred in applying a Setback Requirement at the last minute to deny SGSB’s Permit application; (2) SGSB’s Permit application should have received the highest, rather than the second-highest, score in the application process; and (3) Coastal should have been disqualified and/or rendered ineligible (or at least given a lower score than SGSB) because it submitted false, misleading, and fraudulent statements to the City in its application.
The Setback Requirement Used To Disqualify SGSB Was Not A Precondition For A Permit

54. The City Administrator based SGSB’s ineligibility on a last minute application of the Setback Requirement. The City Administrator’s reliance on the Setback Requirement was entirely misplaced. As a clear matter of law, the Setback Requirement is an operating requirement, not a permitting requirement.

55. S.B.M.C. § 9.44.280 is titled “Operating Requirements for Storefront Retail Facilities.” (Emphasis added). S.B.M.C. § 9.44.280 sets forth the requirements to begin operating after already having been awarded a Permit. (See, e.g., § 9.44.280.B [requiring that the Permit holder shall obtain a verification that a person requesting medicinal cannabis is a "qualified patient"]; § 9.44.280.C [requiring that the Permit holder “comply with the requirement pertaining to deliveries in section 9.44.290 of this Chapter”]; § 9.44.280.F [requiring that “[a]ll restroom facilities shall remain locked and under the control of management.”]). Nothing in Section 9.44.280 refers to an “applicant” or an “application” for a Permit. The Setback Requirement is an operating requirement, not a Permit application requirement.

56. By contrast, the two code sections that govern the application process repeatedly reference “applicant” and “application.” (See § 9.44.080 [“Initial Application Procedure”] and § 9.44.090 [“Permitee Selection Process”].) The Setback Requirement is neither mentioned nor referenced in the sections.

57. Even the organization of Section 9.44 makes it clear that the Setback Requirement is not a permitting requirement because Section 9.44.280, the section that includes the Setback Requirement is near the end of the Ordinance, far away from the permitting sections. (See list of sections in Section 9.44.) The Ordinance, as is standard practice, starts with legal authority and definitions sections (see §§ 9.44.010-060). Then the Ordinance addresses the permitting process, regulating initial applications, renewal, and appeals (see §§ 9.44.070-140). Then the ordinance covers issues related to changing the permit, including assignability and changes in location or ownership (see §§ 9.44.150-190). Only then does the ordinance cover requirements to commence and maintain operations (see §§ 9.44.200-360). The Setback Requirement section applying to
Storefront Retail facilities is near the end of the Ordinance, embedded among many other sections regulating the operations of all different Commercial Cannabis Businesses. Then, the final sections of the Ordinance deal with enforcement — violations and inspections. (See §§ 9.44.370-380) This too makes clear that the Setback Requirement is not a precondition for an award of a permit.

58. Further bolstering the conclusion that the Setback Requirement is not a basis to deny a permit application is S.B.M.C. § 9.44.160, which establishes a straightforward process for a "commercial cannabis retailer" already awarded a Permit to relocate their storefront to ensure a distance of more than 1,000 feet from another storefront. In fact, a document provided by the City in response to public records requests indicates that Canndescent (an unsuccessful applicant for a permit to operate a retail cannabis dispensary) was allowed to switch its proposed location during the application process. (See Exhibit G.) SGSB was never provided the opportunity to switch locations based on Coastal’s higher score in the final round. The City knew SGSB had an alternative location to the State Street location which would have put it outside of the Setback Requirement, but was not permitted to avail itself of that location.

59. Any decision by the City to apply the Setback Requirement at Phase IV (instead of Phase II or not at all) is arbitrary and capricious and not supported by the Ordinance or the law.

**The City Under Scored SGSB’s Application When In Fact SGSB Should Have Received The Highest Score Out Of All The Applicants**

60. The City also incorrectly scored Coastal ahead of SGSB in the Phase IV Final Rankings. Coastal scored 921 points in Phase II, and scored 938 points in Phase IV. (See Exhibit A at 3; compare Exhibit H at 2 with Exhibit I at 2.) SGSB scored 926 points in Phase II and 935 points in Phase IV. (See Exhibit A at 3; compare Exhibit H at 1 with Exhibit I at 1.) The City Administrator contends that Coastal “edged out SGSB” in final scoring only because of unspecified “site-specific qualities.” (See Exhibit A at 4 & Exhibit B at 5.)

61. No evidence supports the City’s contention that Coastal “edged” out SGSB based upon “site-specific qualities.” In fact, a comparison between the Phase II and Phase IV scorecards
reveals that, if anything, Coastal "edged out" SGSB in Phase IV by gaining points in criteria completely unrelated to "site-specific qualities." (See Exhibits H at 1-2 & Exhibit I at 1-2.)

62. Between the two scoring rounds, Coastal netted an additional 7 points in the Business Plan's sub-criterion of "Operations, Best Practices, and Financial Pro forma," and an additional 5 points in its "Neighborhood Integration Plan." There are no notes, comments, or feedback in Coastal's final scorecard indicating why it received an additional 12-point improvement in those criteria. (Compare Exhibit H at with Exhibit I at 2.) The only criterion remotely related to "site-specific qualities" where Coastal received a point improvement is for its "Safety and Security Plan," which only netted Coastal an additional 5 points. (Compare Exhibit G at 2 with Exhibit H at 2.) Moreover, there was in fact significant neighborhood opposition to Coastal opening its proposed location, all of which was expressed directly to the City (but apparently ignored by the City). (See Exhibits J, K, and L.)

63. The vast majority of Coastal's 17-point increase, which placed it only 3 points ahead of SGSB, was due to criteria unrelated to "site-specific qualities." Had Coastal not received a 12-point improvement in this unrelated criteria, SGSB would have received the highest score in the Final Ranking. Coastal was not entitled to that 17-point increase.

64. Not only was Coastal incorrectly scored ahead of SGSB in the Final Ranking, but SGSB was under scored. SGSB submitted a 397-page Permit application and thereafter supplemented its application with 21 additional pages. (See generally Exhibit M.) A comparison of SGSB's application against other applications will demonstrate that it should have been awarded additional points for at least the following criteria: (1) Business Plan – Operations, Best Practices, Financial Pro forma; (2) Business Plan – Qualifications of Principals; (3) Business Plan – Community Benefits; (4) Business Plan – Environmental Benefits; (5) Business Plan – Local Enterprise; (6) Labor and Employment; (7) Safety & Security Plan; and (8) Air Quality. (See Exhibit I at 1; see generally Exhibit M.)

65. By way of just one example, SGSB received 13 of 25 possible points for the "Local Enterprise" sub-criterion. SGSB is owned by Santa Barbara business owners, the majority of its responsible party positions are held by County residents, and SGSB is committed to filling...
additional positions from the local community. (See Exhibit M at 63 & 66.) SGSB’s proposed site at 913 State Street further justifies additional points for “Local Enterprise” given the City’s months’ long, well-publicized public process of re-assessing appropriate locations for storefront retail dispensaries in the City, culminating in the adoption of Title 30 of the S.B.M.C. Title 30 heavily favors locations on State Street and within the City’s central business district and is intended to promote foot traffic to the selected retail dispensaries and neighboring businesses and minimize car trips thereto in support of the City’s strong environmental ethos and programming aimed at reducing the City’s overall carbon footprint. (See Exhibit N at II-84.) Mayor Murillo has also voiced her support for cannabis retail storefronts on State Street. (See Exhibit O at 1.)

Therefore, SGSB should have received a significantly higher score in “Local Enterprise” than 13 out of 25 points. (See also, e.g., Exhibit P at 5-7 & 12-13 [providing additional examples of SGSB’s underscoring.]) This is just one of many examples of the severe underscoring of SGSB’s application that the record evidence will establish.

66. There also are serious questions regarding the convenient jump of GSG in scoring between the score it received from the CART (834 points) to the score it received from the Permit Application Evaluator (901 points), conveniently just 1 point above the minimum final score of 900 needed to be eligible for a Permit. The difference between GSG’s first phase CART score and its final phase Permit Application Evaluator score was 77 points. At the same time, the difference between the other three qualified applicants’ initial and final scores was precipitously smaller. Coastal gained just 17 points, SGSB just 9 points, and Farmacy just 12 points. Upon information and belief, GSG’s point increase was related to “supplemental documentation” GSG submitted to the City, which was arbitrarily, capriciously, and unfairly reviewed, evaluated, and scored by the City. In addition, the public records produced by the City to date in response to SGSB’s public records requests show that Farmacy may have submitted untimely and/or inappropriate supplemental information to the City in support of its application. SGSB is still awaiting unredacted copies of the other bidder’s applications.
**The City Should Have Disqualified Coastal**

67. Coastal acquired its proposed site for a cannabis sale storefront using false, misleading, and fraudulent information and documentation. The City knew or should have known about the false, misleading, and fraudulent statements and should have disqualified Coastal, or at least significantly reduced Coastal’s score.

68. As described above, Coastal submitted a fraudulent “Proof of Property Ownership or Consent of Landlord” form. (See Exh. Q [Proof of Landlord Consent Form].) All four Responsible Parties that signed the application also lied under penalty of perjury about the ownership of the Chapala Property where Coastal proposed to locate.

69. Upon information and belief, Coastal also provided false information in its application about its cannabis experience and operational capabilities, passing off the experience and confidential and proprietary operational procedures of another company as its own and without the knowledge or consent of that company.

70. Coastal’s submission of this inaccurate, misrepresentative, and unauthentic information and documentation was raised to the City by individuals other than SGSB prior to the award of the Permit, but apparently was ignored by the City in its final scoring. (See Exhibits R and S June 1, 2018 email [regarding Coastal’s property owner information for its proposed location] and June 12, 2018 email [referencing additional operational information from Coastal that, upon information and belief, may belong to another company and was utilized by Coastal without that company’s knowledge or permission].)

71. The City had the express authority to reject or deny Coastal’s application because Coastal submitted false, misleading, and fraudulent information in the application process. (See S.B.M.C. § 9.44.090.H.4.) The City also had the authority to reduce Coastal’s score.

72. The City’s application of the Setback Requirement constituted a prejudicial abuse of discretion because the Setback Requirement has no applicability to the Permit application process. The City further abused its discretion when it scored SGSB only as the second-highest scoring Permit applicant, scored Coastal as the highest scoring applicant, overscored Farmacy and

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GSG (the latter by just 1 point over the 900-point minimum), and failed to reject and/or disqualify Coastal’s application. SGSB is entitled to this Court’s mandamus review of the record of these City’s Permit application decisions.

SECOND CAUSE OF ACTION AGAINST DEFENDANT CITY OF SANTA BARBARA
(Real Parties in Interest: COASTAL, FARMACY, AND GSG)
(Equitable Estoppel)

73. SGSB incorporates by reference paragraphs 1-72 and further alleges:

74. SGSB requests this Court hold the City estopped from asserting the Setback Requirement against SGSB. The City cannot use the Setback Requirement because: (1) as a matter of law, it is not a requirement to obtaining a Permit; (2) SGSB relied on the fact that the Ordinance and Application Procedures do not include any Setback Requirement as a condition to receiving a permit; (3) once the City realized that two of the top ranked applicants were within 1,000 feet and the City considered using the Setback Requirement to block an applicant from getting a Permit, the City should have told the applicants to allow them the opportunity to explore the possibility of moving to another location; and (4) any decision by the City to apply the Setback Requirement at Phase IV (instead of Phase II or not at all) is arbitrary and capricious and not supported by the Ordinance. There is no practical way to apply the Setback Requirement to disqualify bidders as part of the original application process for permits as bidders did not know of the locations that other bidders would propose to use until after they submitted their application.

75. For the reasons discussed in detail supra, the Setback Requirement legally cannot be used by the City as a Permit requirement. Application of the Setback Requirement would otherwise be entirely unfair and contrary to law.

76. Neither the Setback Requirement nor any of the other requirements of S.B.M.C. § 9.44.280 (which contains the Setback Requirement) are referenced anywhere in the Application Procedure published by the City, or in the S.B.M.C. sections which govern the Permit application process. (See generally Exhibit B; S.B.M.C.; § 9.44.080 ["Initial Application Procedure"] and § 9.44.090 ["Permittee Selection Process"])
77. In the City Administrator’s memorandum to the Mayor and City Council, he stated that because “Coastal Dispensary edged out SGSB, Inc. in the final scoring” and “[SGSB] is located within 1,000 feet of Coastal Dispensary, LLC,” SGSB “is therefore ineligible to receive a permit pursuant to SBMC Chapter 9.44.280.” Exhibit A at 4.

78. Using the same reasoning, had the City awarded SGSB a higher score than Coastal, then the Setback Requirement would have disqualified Coastal. However, the City failed to apply the Setback Requirement against Coastal at the end of Phase II, in which SGSB in fact outscored Coastal. (See Exhibit A at 3 [providing that SGSB had the initial, and highest score of 926, while Coastal had an initial score of 921].) Per the City’s Application Procedure, the same objective criteria applied during Phase II and Phase IV scoring. (See Exhibit B at 4-5.) But, the City arbitrarily and capriciously applied the Setback Requirement, a criterion that does not appear in the Ordinance’s application provisions or the Application Procedures, for the first time at Phase IV while failing to apply it in Phase II. This led to the arbitrary and capricious result of SGSB, not Coastal, being disqualified.

79. SGSB relied on the affirmative acts and representations of the City (the City’s Ordinance and Application Procedures) when it invested time and money in the application process, e.g., by acquiring land for a proposed storefront, preparing and submitting its application, preparing a presentation for the Permit Application Evaluator, and by participating in the public interview process and site visits. SGSB had a right to rely on (and did so rely on) the City’s affirmative acts and representations that the Setback Requirement did not apply at the Permit application stage.

80. SGSB’s reliance was reasonable and its reliance on the City’s affirmative acts and/or representations has resulted in significant damage to SGSB. SGSB has, at a minimum, lost future income and economic advantage and the value of the investments, expenses, and time it spent on the Permit application process. SGSB spent over $110,000.00 in preparing and submitting its application and participating in the application process. SGSB anticipates its annual lost profits are substantial and those lost profits are reflected in the pro forma SGSB.
submitted with its application. This pro forma shows SGSB's profits over the first 5-year period of its operations to be in excess of $1 million.

81. The resulting injury to SGSB if the City is not estopped from asserting the Setback Requirement as the lone basis to deny SGSB a Permit far outweighs any injury to the public interest if the City is so estopped. First, estopping the City from asserting the Setback Requirement simply enforces the law. The Ordinance is clear, the Setback Requirement applies to "commercial cannabis retailers" who have already been awarded a Permit as a prerequisite to commencing actual operations. Second, the Setback Requirement is not a "strong rule of public policy" because the plain language of the Ordinance makes clear that it does not apply in the Permit application phase. Third, even if the Setback Requirement could be applied to the Permit application process, the City's arbitrary application of the rule to deny SGSB's application has produced an unfair result where a highly qualified applicant was denied and a much less highly qualified applicant (the fourth place finisher) was granted a Permit. Such a result cannot be in the public interest. A Permit award to SGSB overwhelmingly aligns with the public interest, given SGSB's (at worst) second place finish, its preeminent qualifications, and its strong ties to the Santa Barbara community.

82. SGSB requests a declaration that the City is estopped from asserting the Setback Requirement against SGSB and a declaration that SGSB is rightfully entitled to a Permit.

**THIRD CAUSE OF ACTION AGAINST DEFENDANT CITY OF SANTA BARBARA**

(Real Parties in Interest: COASTAL, FARMACY, AND GSG)  

83. SGSB incorporates by reference paragraphs 1-82 and further alleges:

84. This is a claim pursuant to California Code of Civil Procedure §§ 1085 and 1086. SGSB seeks the same writs of mandamus under this Cause of Action as sought in its First Cause of Action.

85. Alternatively, SGSB seeks a writ of mandamus ordering the City to accept SGSB's Notice of Appeal and set an appeal hearing regarding SGSB's Permit denial.

86. Alternatively, in light of the false, misleading, and fraudulent statements that Coastal has made to the City and other violations of Section 9.44 by Coastal, SGSB seeks a writ

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of mandamus ordering the City to declare Coastal’s business a nuisance, prohibit Coastal from
operating, and revoke Coastal’s permit. (See S.B.M.C. §§ 9.44.040, 9.44.050, 9.44.060, 9.44.090,
9.44.110A, 9.44.370, and 9.44.390.)

87. Following the July 9, 2018 Permit awards announcement, SGSB timely filed a
Notice of Appeal with Santa Barbara Mayor Cathy Murillo and the City Council, in full
compliance with the appeal procedures set forth in the S.B.M.C. On July 30, 2018, twelve days
after SGSB submitted its Notice of Appeal, the City sent SGSB a letter claiming that the “City
Administrator’s decision to award the three available Retailer-Storefront Permits is final and not
administratively appealable.” (See Exhibit T [emphasis added].) The City cited S.B.M.C.
§ 9.44.090.F as its legal authority for not affording SGSB its requested appeal.

88. S.B.M.C. § 9.44.090.F does not provide that the City Administrator’s decision is
not “administratively appealable.” (S.B.M.C. § 9.44.090.F.) This Section states that the “City
Administrator may either deny or approve the Phase II candidates, and may select the candidates
in each category of the Commercial Cannabis Businesses to be awarded Commercial Cannabis
Business permits. The City Administrator’s decision as to the selection of the prevailing
candidates shall be final.” (S.B.M.C. § 9.44.090.F [emphasis added].)

89. In its Notice of Appeal, SGSB’s claims were not limited to the “selection” of the
Permit awardees. SGSB requested the City exercise its right to award a fourth Permit to SGSB,
which would not affect the Permit awarded to the three selected applicants. (See Exhibit P at 10-
13.) SGSB is also specifically challenging the denial of its Permit at Phase IV of the application
process. S.B.M.C. § 9.44.090.F only applies to decisions made by the City Administrator during
Phase II of the application process. The City’s reliance on S.B.M.C. § 9.44.090.F to foreclose
SGSB’s right of appeal is misplaced.

90. S.B.M.C. § 9.44.140, which governs all Permit appeals, supports SGSB’s right to
an appeal. S.B.M.C. § 9.44.140.B.5.b places upon the City the “burden of proof to establish the
grounds for denial, nonrenewal, suspension, or revocation by a preponderance of the evidence”
during a Permit appeal. (Emphasis added). Moreover, if on appeal “the City Council determines
that no grounds for denial, nonrenewal, suspension, revocation or other action exist, the City
Administrator’s notice of decision shall be deemed canceled.” (See S.B.M.C. § 9.44.140.C.1. [Emphasis added].) By its express language, the S.B.M.C. not only specifically allows for appeals of Permit “denials,” but requires the City Council to accept such appeals, and then hold a hearing and render a decision on each such appeal. That is precisely the nature of SGSB’s appeal here.

91. Under S.B.M.C. § 9.44.140, SGSB is entitled to appeal its Permit denial. The City violated S.B.M.C. § 9.44.140 when it denied SGSB’s Notice of Appeal and refused to schedule an appeal hearing. Under California law, the City cannot violate its own regulations and/or deny SGSB the due process rights afforded by those regulations. SGSB lacks a plain, speedy, and adequate remedy in the ordinary course of law outside of mandamus. SGSB is therefore entitled to a writ of mandamus requiring the City to immediately set a hearing in accordance with S.B.M.C. § 9.44.140.

92. As described above, on information and belief, Coastal has taken various acts or done various omissions during and after the application process which under the Ordinance mandate the City to declare Coastal’s business a nuisance, prohibit Coastal from operating, and revoke Coastal’s permit. (See S.B.M.C. §§ 9.44.040, 9.44.050, 9.44.060, 9.44.090, 9.44.110A, 9.44.370, and 9.44.390.)

FOURTH CAUSE OF ACTION AGAINST DEFENDANT CITY OF SANTA BARBARA
(Real Parties in Interest: COASTAL, FARMACY, AND GSG)
(Declaratory Relief)

93. SGSB incorporates by reference Paragraphs 1-92 above and further alleges:

94. There is an existing dispute between SGSB and the City with respect to S.B.M.C. § 9.44.280, which provides the Setback Requirement. SGSB contends that S.B.M.C. § 9.44.280 is clear in that the Setback Requirement applies only as a prerequisite to operating after having already received a Permit. The City is taking the contrary position that S.B.M.C. § 9.44.280 is a permitting requirement.

95. SGSB seeks and is entitled to a declaration that S.B.M.C. § 9.44.280 is an operating requirement only, not a permitting requirement, and therefore cannot be applied by the City to SGSB to prevent SGSB from receiving a Permit.
96. Alternatively, SGSB seeks and is entitled to a declaration that S.B.M.C. § 9.44.280 is unenforceable because it is confusing, unintelligible, contradictory, and/or may be applied in an arbitrary manner. Indeed, it was improperly applied in such a manner by the City here to prevent SGSB from receiving the Permit to which it is entitled, including, but not limited to, by applying the Setback Requirement as a condition to granting a permit with no basis to do so in the Ordinance or the Application Procedures, and by the City applying it in Phase IV scoring but not in Phase II scoring.

97. The City’s application and interpretation of S.B.M.C. § 9.44.280 renders the regulation imprecise and uncertain. City employees went beyond the scope of the Ordinance by arbitrarily applying the Setback Requirement in the permit application phase and denying SGSB’s permit. The City also impermissibly delegated to City employees the interpretation and implementation of S.B.M.C. § 9.44.280 in the permitting process, which led to an ad hoc and subjective application of S.B.M.C. § 9.44.280 and produced clearly arbitrary and discriminatory results.

98. The requested declarations are necessary and appropriate at this time so that SGSB and others who may seek a Permit will not be deprived of a Permit based on the City’s improper and arbitrary application of S.B.M.C. § 9.44.280. SGSB has no other adequate remedy at law for the clarification of S.B.M.C. § 9.44.280 requested here.

FIFTH CAUSE OF ACTION AGAINST DEFENDANT CITY OF SANTA BARBARA

99. SGSB incorporates by reference Paragraphs 1-98 above and further alleges:

100. This is a claim under the due process clause of the United States Constitution made applicable to the states through the Fourteenth Amendment and 42 U.S.C. § 1983 for violation of SGSB’s due process rights.

101. The City violated the due process clause of the United States Constitution by abusing its discretion in applying the Setback Requirement to the original permitting process, in refusing to allow SGSB an opportunity to identify an alternative location outside of the Setback Requirement; in refusing to disqualify Coastal; in its scoring and permitting process; in refusing...
to declare Coastal’s business a nuisance, to prohibit Coastal from operating, and to revoke
Coastal’s permit; and in refusing to provide an appeal process for challenging the City
Administrator’s arbitrary and capricious acts of Santa Barbara.

102. As a direct and proximate result of the acts of the City, SGSB has been deprived of
the rights afforded to it and has been damaged by those acts.

SIXTH CAUSE OF ACTION AGAINST DEFENDANT CITY OF SANTA BARBARA

103. SGSB incorporates by reference Paragraphs 1-102 above and further alleges:

104. SGSB was “intentionally treated differently from others similarly situated,” and
there “is no basis for the difference in treatment.” (See Squaw Valley Dev. Co. v. Goldberg (9th
Cir. 2004) 375 F.3d 936, 944). There was no rational basis for using the Setback Requirement in
the original permitting process to disqualify SGSB from receiving a license and allowing two
other significantly lower scoring businesses to receive licenses.

105. The also City improperly calculated SGSB’s scores such that SGSB was moved
from the first rank after Phase II to second after Phase IV. The City failed to disqualify or
significantly reduce Coastal’s score for the false, misleading, and fraudulent statements it made to
the City in its application. Instead, the City arbitrarily decided to disqualify SGSB based on an
unequal and unfair application of the Setback Requirement, which would have disqualified
Coastal if it had been applied in Phase II.

106. SGSB thus was deprived of equal protection guaranteed under the Fourteenth
Amendment of the U.S. Constitution and Section 7 of Article I of the California Constitution.

107. The City’s actions constitute a violation of SGSB’s equal protection rights and
warrant an award of damages in favor of City in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, SGSB prays for the following from this Court:

A. Writs of mandamus, collectively and/or individually in the alternative, compelling
the City to: (1) set aside its Permit denial and award a Permit to SGSB; (2) set
aside its Permit award to Coastal and award a Permit to SGSB; (3) declare

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Coastal’s business a nuisance; (4) prohibit Coastal from operating; (5) revoke Coastal’s permit; (6) accept SGSB’s appeal and promptly schedule an appeal hearing;

B. An award to SGSB of all damages and costs available under California Code of Civil Procedure § 1085 and 1095;

C. An award of statutory penalties and compensatory, expectation, and exemplary damages, including interest, in an amount to be proven at trial;

D. For declaratory relief that S.B.M.C. § 9.44.280 must be interpreted by the City as an operating requirement and not a permitting requirement or, alternatively, for declaratory relief to have S.B.M.C. § 9.44.280 deemed unenforceable as being confusing, unintelligible, contradictory, and/or subject to being applied in an arbitrary manner;

E. An award of SGSB’s costs, expenses, and attorneys’ fees incurred in this action as allowed by law, including attorneys’ fees under Code of Civil Procedure 1021.5;

F. An award of pre-judgment and post-judgment interest, as provided by law;

G. Leave to amend this Complaint to conform to the evidence produced at trial; and

H. Awarding such other and further legal and equitable relief as this Court deems appropriate.
DEMAND FOR JURY TRIAL

Pursuant to California Code of Civil Procedure section 631, Plaintiff SGSB hereby requests a trial by jury on all issues so triable.

Respectfully submitted,

Dated: May 23, 2019

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: BETH A. COLLINS

And

CARPENTER LIPPS & LELAND LLP

By: /s/ Jeffrey A. Lipps

JEFFREY A. LIPPS (admitted pro hac vice)

Attorneys for Petitioner/Plaintiff
SGSB, INC.
VERIFICATION

I, Alison Park, declare:

I am the Vice President of Licensing for SGSB, Inc., the Petitioner and Plaintiff of the within action and am authorized to make this verification on its behalf. I have read the foregoing FIRST AMENDED VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DAMAGES; DEMAND FOR JURY TRIAL and know the contents thereof. The same is true of my own knowledge, except as to those matters which are therein stated on information and belief and, as to those matters, I believe it to be true.

Executed on May 22, 2019, at 220 Kalamazoo, MI 49007.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

ALISON PARK
PROOF OF SERVICE

I am a citizen of the United States and employed in Santa Barbara County, California. I
am over the age of eighteen years and not a party to the within-entitled action. My business
address is Brownstein Hyatt Farber Schreck, LLP, 1021 Anacapa Street, 2nd Floor, Santa Barbara,
CA, 93101. On May 23, 2019, I served a copy of the within document(s):

FIRST AMENDED VERIFIED PETITION FOR WRIT OF MANDATE AND
COMPLAINT FOR DAMAGES; DEMAND FOR JURY TRIAL;

☐ by placing the document(s) listed above in a sealed envelope with postage thereon
fully prepaid, the United States mail at Santa Barbara, California addressed as set
forth below.

☐ based on a court order or an agreement by the parties to accept service by
electronic transmission, I caused the documents to be sent to the persons at the
electronic notification listed below.

Please see attached service list.

I am readily familiar with the firm's practice of collection and processing correspondence
for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
motion of the party served, service is presumed invalid if postal cancellation date or postage
meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above
is true and correct.

Executed on May 23, 2019, at Santa Barbara, California.

[Signature]
Caitlin Malone

1ST AMENDED VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DAMAGES
Service List

Ariel P. Calonne, Esq.
acallonnc@santabarbaraca.gov
Tava M. Ostrenger, Esq.
tostrenger@santabarbaraca.gov
Office of the City Attorney
720 State Street, Suite 201
Santa Barbara, CA 93101

Attorneys for
Respondent/Defendant/Cross-Complainant City of Santa Barbara

Jeffrey V. Dunn, Esq.
jeffrey.dunn@bbklaw.com
Daniel L. Richards, Esq.
daniel.richards@bbklaw.com
Best Best & Krieger LLP
18101 Von Karman Ave., Suite 1000
Irvine, CA 92612

Attorneys for
Respondent/Defendant/Cross-Complainant City of Santa Barbara
Union Calendar No. 78

116th CONGRESS
1st Session

H. R. 1595

[Report No. 116–104, Part I]

To create protections for depository institutions that provide financial services to cannabis-related legitimate businesses and service providers for such businesses, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

March 7, 2019

Mr. PERLMUTTER (for himself, Mr. BECK, Mr. STIVERS, Mr. DAVIDSON of Ohio, Mr. AGUILAR, Ms. BARRAGÁN, Mr. BUEYRE, Mr. BLUMENAUER, Ms. BONAMICI, Mr. BRENDAN F. BOYLE of Pennsylvania, Mr. BROWN of Maryland, Ms. BROWNLEY of California, Mr. CARRAJAL, Mr. CÁRDENAS, Mr. CARTWRIGHT, Ms. CASTOR of Florida, Mr. CICILLINE, Mr. CISNEROS, Ms. CLARK of Massachusetts, Ms. CLARKE of New York, Mr. COHEN, Mr. COOPER, Mr. CORREA, Mr. COURTNEY, Mr. COX of California, Mr. CRIST, Mr. CROW, Mrs. DAVIS of California, Mr. DEFazio, Ms. DEGETTE, Ms. DELAURO, Ms. DELBENE, Mr. DESaulnier, Ms. ESHEE, Mr. ESPAILLAT, Mr. FOSTER, Ms. FUDGE, Ms. GABBARD, Mr. GALLEGOS, Mr. GARCÍA of Illinois, Mr. GOMEZ, Mr. GONZALEZ of Texas, Mr. HASTINGS, Ms. HILL of California, Mr. HORSFORD, Mr. HUFFMAN, Ms. JACKSON LEE, Ms. JAYAPAL, Mr. JOHNSON of Georgia, Mr. KHANNA, Mr. KILMER, Mrs. KIRKPATRICK, Mr. KRISHNAMOORTHI, Mr. LAWSON of Florida, Ms. LEE of California, Mrs. LEE of Nevada, Mr. LEVIN of Michigan, Mr. LEVIN of California, Mr. TED LIEU of California, Mr. LUJÁN, Ms. MATSUI, Ms. McCOLLUM, Mr. McGovern, Mr. MEeks, Mr. NEGUSSIE, Ms. NORTON, Mr. PANETTA, Mr. PAPPAS, Ms. Pingree, Ms. PORTER, Mr. QUIGLEY, Mr. RASKIN, Mr. RUSH, Mr. RYAN, Mr. ROUDA, Ms. SCHAKOWSKY, Mr. SCHMIDT, Mr. SCHLESSER, Mr. SMITH of Washington, Mr. SOTO, Ms. SPEIER, Mr. SWALWELL of California, Ms. TITUS, Mrs. TORRES of California, Mr. VARGAS, Ms. VELÁZQUEZ, Mrs. WATSON COLEMAN, Mr. WELCH, Ms. WILD, Mr. YARMUTCH, Mr. RODNEY DAVIS of Illinois, Mr. HUNTER, Mr. JOYCE of Ohio, Mr. NEWHOUSE, Mr. YOUNG, Mr. Himes, Mr. LOEBSACK, Ms. LOGERHEN, Mr. LOWENTHAL, Mrs. CAROLYN B. MALONEY of New York, Mr. SEAN PATRICK MALONEY of New York, Mr.
Takano, Mr. Thompson of California, Mr. Gartz, Mr. Riggleman, Mr. David Scott of Georgia, Ms. Waters, and Ms. Schrier) introduced the following bill; which was referred to the Committee on Financial Services, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

June 5, 2019

Additional sponsors: Mr. Amodei, Mr. Balderson, Mr. Pocan, Mr. Connolly, Mr. McClintock, Mr. Brara, Mr. Pascrell, Mr. Larson of Connecticut, Mr. Peters, Mr. Stanton, Mr. Larsen of Washington, Ms. Sánchez, Mr. Grijalva, Mr. Harder of California, Mr. San Nicolas, Mr. Higgins of New York, Mr. Golden, Mr. Case, Ms. Meng, Mr. Castro of Texas, Mr. Moulton, Ms. Dean, Ms. Haaland, Mr. Evans, Ms. Kuster of New Hampshire, Mr. Kildee, Mr. Nadler, Mr. Ruiz, Mr. Neal, Ms. Pressley, Mr. Lamb, Ms. Slotkin, Mr. Deutch, Mr. Michael F. Doyle of Pennsylvania, Mr. Clay, Ms. Stevens, Ms. Wexton, Ms. Scanlon, Ms. Bass, Mrs. Murphy, Mrs. Lawrence, Ms. Sherrill, Mrs. Bustos, Mr. McNerney, Mrs. Luria, Mr. Brindisi, Mr. Steube, Mr. Trone, Mr. Massie, Mr. Reschenthaler, Mr. Norcross, Mr. Upton, Mr. Sarbanes, Mr. Banks, Ms. Pinkenauer, Mrs. Dingell, Ms. Tlaib, Ms. Davids of Kansas, Mr. Meuser, Mr. Malinowski, Mr. Armstrong, Mr. Vela, Mr. Bishop of Georgia, Mr. Gibbs, Ms. Moore, Mrs. Axne, Mr. Delgado, Ms. Torres Small of New Mexico, Ms. Kendra S. Horn of Oklahoma, Mr. Van Drew, Ms. Blunt Rochester, Ms. Spanberger, Ms. Houlahan, Mr. Kennedy, Ms. Underwood, Mr. Jeffries, Mr. Comer, Mr. Garamendi, Miss González-Colón of Puerto Rico, Mr. Tonko, Mr. Bacon, Mr. Payne, Mr. Thompson of Mississippi, Ms. Mucarsel-Powell, Mr. Schiff, Ms. Shalala, Ms. Judy Chu of California, Ms. Roybal-Allard, Ms. Escobar, Ms. Adams, Ms. Frankel, Mr. Casten of Illinois, Mr. Graves of Georgia, Mr. Collins of New York, Mr. Gonzalez of Ohio, Mr. Morelle, Mr. Cleaver, and Mr. Costa

• HR 1555 RH
June 5, 2019

Reported from the Committee on Financial Services with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

June 5, 2019

Committee on the Judiciary discharged; committed to the Committee of the Whole House on the State of the Union and ordered to be printed

[For text of introduced bill, see copy of bill as introduced on March 7, 2019]
A BILL

To create protections for depository institutions that provide financial services to cannabis-related legitimate businesses and service providers for such businesses, and for other purposes.
Be it enacted by the Senate and House of Representa-
tives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; PURPOSE.

(a) SHORT TITLE.—This Act may be cited as the “Se-
cure And Fair Enforcement Banking Act of 2019” or the
“SAFE Banking Act of 2019”.

(b) PURPOSE.—The purpose of this Act is to increase
public safety by ensuring access to financial services to can-
nabis-related legitimate businesses and service providers
and reducing the amount of cash at such businesses.

SEC. 2. SAFE HARBOR FOR DEPOSITORY INSTITUTIONS.

(a) IN GENERAL.—A Federal banking regulator may
not—

(1) terminate or limit the deposit insurance
or share insurance of a depository institution
under the Federal Deposit Insurance Act (12
U.S.C. 1811 et seq.), the Federal Credit Union
Act (12 U.S.C. 1751 et seq.), or take any other
adverse action against a depository institution
under section 8 of the Federal Deposit Insurance
Act (12 U.S.C. 1818) solely because the deposi-
tory institution provides or has provided finan-
cial services to a cannabis-related legitimate
business or service provider;
(2) prohibit, penalize, or otherwise discourage a depository institution from providing financial services to a cannabis-related legitimate business or service provider or to a State, political subdivision of a State, or Indian Tribe that exercises jurisdiction over cannabis-related legitimate businesses;

(3) recommend, incentivize, or encourage a depository institution not to offer financial services to an account holder, or to downgrade or cancel the financial services offered to an account holder solely because—

(A) the account holder is a cannabis-related legitimate business or service provider, or is an employee, owner, or operator of a cannabis-related legitimate business or service provider;

(B) the account holder later becomes an employee, owner, or operator of a cannabis-related legitimate business or service provider; or

(C) the depository institution was not aware that the account holder is an employee, owner, or operator of a cannabis-related legitimate business or service provider;
(4) take any adverse or corrective supervisory action on a loan made to—

(A) a cannabis-related legitimate business or service provider, solely because the business is a cannabis-related legitimate business or service provider;

(B) an employee, owner, or operator of a cannabis-related legitimate business or service provider, solely because the employee, owner, or operator is employed by, owns, or operates a cannabis-related legitimate business or service provider, as applicable; or

(C) an owner or operator of real estate or equipment that is leased to a cannabis-related legitimate business or service provider, solely because the owner or operator of the real estate or equipment leased the equipment or real estate to a cannabis-related legitimate business or service provider, as applicable; or

(5) prohibit or penalize a depository institution (or entity performing a financial service for or in association with a depository institution) for, or otherwise discourage a depository
institution (or entity performing a financial
service for or in association with a depository
institution) from, engaging in a financial service
for a cannabis-related legitimate business or
service provider.

(b) Safe Harbor Applicable to De Novo Institutions.—Subsection (a) shall apply to an institution applying for a depository institution charter to the same extent as such subsection applies to a depository institution.

SEC. 3. PROTECTIONS FOR ANCILLARY BUSINESSES.

For purposes of sections 1956 and 1957 of title 18,
United States Code, and all other provisions of Federal law,
the proceeds from a transaction conducted by a cannabis-related legitimate business or service provider shall not be considered as proceeds from an unlawful activity solely because the transaction was conducted by a cannabis-related legitimate business or service provider, as applicable.

SEC. 4. PROTECTIONS UNDER FEDERAL LAW.

(a) In General.—With respect to providing a financial service to a cannabis-related legitimate business or service provider within a State, political subdivision of a State, or Indian country that allows the cultivation, production, manufacture, sale, transportation, display, dispensing, distribution, or purchase of cannabis pursuant to a law or regulation of such State, political subdivision, or
Indian Tribe that has jurisdiction over the Indian country, as applicable, a depository institution, entity performing a financial service for or in association with a depository institution, or insurer that provides a financial service to a cannabis-related legitimate business or service provider, and the officers, directors, and employees of that depository institution, entity, or insurer may not be held liable pursuant to any Federal law or regulation—

(1) solely for providing such a financial service;

or

(2) for further investing any income derived from such a financial service.

(b) Protections for Federal Reserve Banks.—With respect to providing a service to a depository institution that provides a financial service to a cannabis-related legitimate business or service provider (where such financial service is provided within a State, political subdivision of a State, or Indian country that allows the cultivation, production, manufacture, sale, transportation, display, dispensing, distribution, or purchase of cannabis pursuant to a law or regulation of such State, political subdivision, or Indian Tribe that has jurisdiction over the Indian country, as applicable), a Federal reserve bank, and the officers, directors, and employees of the Federal reserve bank, may not be held liable pursuant to any Federal law or regulation—
(1) solely for providing such a service; or
(2) for further investing any income derived from such a service.

(c) FORFEITURE.—

(1) DEPOSITORY INSTITUTIONS.—A depository institution that has a legal interest in the collateral for a loan or another financial service provided to an owner, employee, or operator of a cannabis-related legitimate business or service provider, or to an owner or operator of real estate or equipment that is leased or sold to a cannabis-related legitimate business or service provider, shall not be subject to criminal, civil, or administrative forfeiture of that legal interest pursuant to any Federal law for providing such loan or other financial service.

(2) FEDERAL RESERVE BANKS.—A Federal reserve bank that has a legal interest in the collateral for a loan or another financial service provided to an owner, employee, or operator of a depository institution that provides a financial services to a cannabis-related legitimate business or service provider, or to an owner or operator of real estate or equipment that is leased or sold to such a depository institution, shall not be subject to criminal, civil, or administrative forfeiture of that legal interest pursuant to any Fed-
eral law for providing such loan or other financial service.

SEC. 5. RULE OF CONSTRUCTION.

Nothing in this Act shall require a depository institution, entity performing a financial service for or in association with a depository institution, or insurer to provide financial services to a cannabis-related legitimate business or service provider.

SEC. 6. REQUIREMENTS FOR FILING SUSPICIOUS ACTIVITY REPORTS.

Section 5318(g) of title 31, United States Code, is amended by adding at the end the following:

“(5) REQUIREMENTS FOR CANNABIS-RELATED LEGITIMATE BUSINESSES.—

“(A) IN GENERAL.—With respect to a financial institution or any director, officer, employee, or agent of a financial institution that reports a suspicious transaction pursuant to this subsection, if the reason for the report relates to a cannabis-related legitimate business or service provider, the report shall comply with appropriate guidance issued by the Financial Crimes Enforcement Network. The Secretary shall ensure that the guidance is consistent with the purpose and intent of the SAFE Banking Act of 2019.
and does not significantly inhibit the provision of financial services to a cannabis-related legitimate business or service provider in a State, political subdivision of a State, or Indian country that has allowed the cultivation, production, manufacture, transportation, display, dispensing, distribution, sale, or purchase of cannabis pursuant to law or regulation of such State, political subdivision, or Indian Tribe that has jurisdiction over the Indian country.

"(B) DEFINITIONS.—For purposes of this paragraph:

"(i) CANNABIS.—The term 'cannabis' has the meaning given the term 'marihuana' in section 102 of the Controlled Substances Act (21 U.S.C. 802).

"(ii) CANNABIS-RELATED LEGITIMATE BUSINESS.—The term 'cannabis-related legitimate business' has the meaning given that term in section 11 of the SAFE Banking Act of 2019.

"(iii) INDIAN COUNTRY.—The term 'Indian country' has the meaning given that term in section 1151 of title 18.
“(iv) INDIAN TRIBE.—The term ‘Indian Tribe’ has the meaning given that term in section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a).

“(v) FINANCIAL SERVICE.—The term ‘financial service’ has the meaning given that term in section 11 of the SAFE Banking Act of 2019.

“(vi) SERVICE PROVIDER.—The term ‘service provider’ has the meaning given that term in section 11 of the SAFE Banking Act of 2019.

“(vii) STATE.—The term ‘State’ means each of the several States, the District of Columbia, Puerto Rico, and any territory or possession of the United States.”

SEC. 7. GUIDANCE AND EXAMINATION PROCEDURES.

Not later than 180 days after the date of enactment of this Act, the Financial Institutions Examination Council shall develop uniform guidance and examination procedures for depository institutions that provide financial services to cannabis-related legitimate businesses and service providers.
SEC. 8. ANNUAL DIVERSITY AND INCLUSION REPORT.

The Federal banking regulators shall issue an annual report to Congress containing—

(1) information and data on the availability of access to financial services for minority-owned and women-owned cannabis-related legitimate businesses; and

(2) any regulatory or legislative recommendations for expanding access to financial services for minority-owned and women-owned cannabis-related legitimate businesses.

SEC. 9. GAO STUDY ON DIVERSITY AND INCLUSION.

(a) STUDY.—The Comptroller General of the United States shall carry out a study on the barriers to marketplace entry, including in the licensing process, and the access to financial services for potential and existing minority-owned and women-owned cannabis-related legitimate businesses.

(b) REPORT.—The Comptroller General shall issue a report to the Congress—

(1) containing all findings and determinations made in carrying out the study required under subsection (a); and

(2) containing any regulatory or legislative recommendations for removing barriers to marketplace entry, including in the licensing process, and expand-
ing access to financial services for potential and exist-
ing minority-owned and women-owned cannabis-re-
lated legitimate businesses.

SEC. 10. GAO STUDY ON EFFECTIVENESS OF CERTAIN RE-
PORTS ON FINDING CERTAIN PERSONS.

Not later than 2 years after the date of the enactment
of this Act, the Comptroller General of the United States
shall carry out a study on the effectiveness of reports on
suspicious transactions filed pursuant to section 5318(g) of
title 31, United States Code, at finding individuals or orga-
nizations suspected or known to be engaged with
transnational criminal organizations and whether any such
engagement exists in a State, political subdivision, or In-
dian Tribe that has jurisdiction over Indian country that
allows the cultivation, production, manufacture, sale, trans-
portation, display, dispensing, distribution, or purchase of
cannabis. The study shall examine reports on suspicious
transactions as follows:

(1) During the period of 2014 until the date of
the enactment of this Act, reports relating to mari-
juana-related businesses.

(2) During the 1-year period after date of the en-
actment of this Act, reports relating to cannabis-re-
lated legitimate businesses.
SEC. 11. DEFINITIONS.

In this Act:

(1) BUSINESS OF INSURANCE.—The term “business of insurance” has the meaning given such term in section 1002 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5481).

(2) CANNABIS.—The term “cannabis” has the meaning given the term “marihuana” in section 102 of the Controlled Substances Act (21 U.S.C. 802).

(3) CANNABIS PRODUCT.—The term “cannabis product” means any article which contains cannabis, including an article which is a concentrate, an edible, a tincture, a cannabis-infused product, or a topical.

(4) CANNABIS-RELATED LEGITIMATE BUSINESS.—The term “cannabis-related legitimate business” means a manufacturer, producer, or any person or company that—

(A) engages in any activity described in subparagraph (B) pursuant to a law established by a State or a political subdivision of a State, as determined by such State or political subdivision; and

(B) participates in any business or organized activity that involves handling cannabis or cannabis products, including cultivating, producing, manufacturing, selling, transporting,
displaying, dispensing, distributing, or purchasing cannabis or cannabis products.

(5) DEPOSITORY INSTITUTION.—The term "depository institution" means—

(A) a depository institution as defined in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c));

(B) a Federal credit union as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752); or

(C) a State credit union as defined in section 101 of the Federal Credit Union Act (12 U.S.C. 1752).

(6) FEDERAL BANKING REGULATOR.—The term "Federal banking regulator" means each of the Board of Governors of the Federal Reserve System, the Bureau of Consumer Financial Protection, the Federal Deposit Insurance Corporation, the Financial Crimes Enforcement Network, the Office of Foreign Asset Control, the Office of the Comptroller of the Currency, the National Credit Union Administration, the Department of the Treasury, or any Federal agency or department that regulates banking or financial services, as determined by the Secretary of the Treasury.
(7) FINANCIAL SERVICE.—The term “financial service”—

(A) means a financial product or service, as defined in section 1002 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5481);

(B) includes the business of insurance;

(C) includes, whether performed directly or indirectly, the authorizing, processing, clearing, settling, billing, transferring for deposit, transmitting, delivering, instructing to be delivered, reconciling, collecting, or otherwise effectuating or facilitating of payments or funds, where such payments or funds are made or transferred by any means, including by the use of credit cards, debit cards, other payment cards, or other access devices, accounts, original or substitute checks, or electronic funds transfers;

(D) includes acting as a money transmitting business which directly or indirectly makes use of a depository institution in connection with effectuating or facilitating a payment for a cannabis-related legitimate business or service provider in compliance with section 5330 of title
31, United States Code, and any applicable State law; and

(E) includes acting as an armored car service for processing and depositing with a depository institution or the Board of Governors of the Federal Reserve System with respect to any monetary instruments (as defined under section 1956(c)(5) of title 18, United States Code.

(8) INDIAN COUNTRY.—The term “Indian country” has the meaning given that term in section 1151 of title 18.

(9) INDIAN TRIBE.—The term “Indian Tribe” has the meaning given that term in section 102 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 479a).

(10) INSURER.—The term “insurer” has the meaning given that term under section 313(r) of title 31, United States Code.

(11) MANUFACTURER.—The term “manufacturer” means a person who manufactures, compounds, converts, processes, prepares, or packages cannabis or cannabis products.

(12) PRODUCER.—The term “producer” means a person who plants, cultivates, harvests, or in any way facilitates the natural growth of cannabis.
(13) SERVICE PROVIDER.—The term "service provider"—

(A) means a business, organization, or other person that—

(i) sells goods or services to a cannabis-related legitimate business; or

(ii) provides any business services, including the sale or lease of real or any other property, legal or other licensed services, or any other ancillary service, relating to cannabis; and

(B) does not include a business, organization, or other person that participates in any business or organized activity that involves handling cannabis or cannabis products, including cultivating, producing, manufacturing, selling, transporting, displaying, dispensing, distributing, or purchasing cannabis or cannabis products.

(14) STATE.—The term "State" means each of the several States, the District of Columbia, Puerto Rico, and any territory or possession of the United States.
A BILL

[Report No. 116-104, Part I]

H.R. 1595

116th CONGRESS

Union Calendar No. 78