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# Federal and Pennsylvania Cannabis Law Health Law Institute

Seth A. Goldberg

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## Federal Cannabis Law

- Controlled Substances Act, 1970
  - Schedule 1 -- most dangerous drugs, e.g., heroin, cocaine, LSD
  - No medical/health benefits
  - Unlawful to manufacture, possess, distribute
  - Criminal penalties for simple possession
  - Supremacy Clause -

## Opportunity For Growth

- Cole Memo, 2013
  - Acknowledges limited federal resources
  - Defers enforcement to states with marijuana programs
  - 8 priorities for U.S. Attorneys
    - Minors, Criminal Enterprises, Diversion to Other States, Pretext for Trafficking, Violence/Firearms, Drugged Driving, Public Lands, Federal Property

## Attempt To Slow The Growth

- Sessions Memo, January 4, 2018
  - Rescinds Cole Memo
  - Civiletti Principles and chapter 9-27.00 of U.S. Attorneys Manual

In the Controlled Substances Act, Congress has generally prohibited the cultivation, distribution, and possession of marijuana. It has established significant penalties for these crimes. 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. These statutes reflect Congress' determination that marijuana is a dangerous drug and that marijuana activity is a serious crime.

## What Has Changed?

- Focus is the Same
  - 8 Cole Priorities: “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.”
  - Sessions’ Civiletti Principles: “the necessary tools to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime across our country.”

## Where Is Congress?

- Rohrbacher-Blumenauer Amendment
  - Federal spending legislation
  - Prohibits DOJ from using federal funds to prevent states “from implementing their own State laws that authorize the use, distribution, possession, or cultivation of **medical** marijuana.”
  - Renewed each fiscal year since passed in 2014
  - Temporarily passed until March 23, 2018
  - Upheld in *U.S. v. McIntosh*, 833 F.3d 1169 (9th Cir. 2016)
  - McClintock-Polis Amendment – expansion to adult-use

## Will Cannabis Ever Be Federally Legal?

- The Ending Federal Marijuana Act
- Regulate Marijuana Like Alcohol Act
- The REFER Act
- The Respect State Marijuana Laws Act
- The Marijuana Justice Act
- Stop Civil Asset Forfeiture Funding for Marijuana Suppression Act of 2018

## The Federal/State Conflict At Work

- Banking Restrictions
  - Bank Secrecy Act of 1970 (“BSA”):
    - detect/prevent money laundering
    - Suspicious Activity Reports (SAR)
  - FinCEN Guidelines – 2014
    - “enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.”
    - Onerous due-diligence and reporting requirements

## The Federal/State Conflict At Work

- Tax Limitations
  - Section 280E: “No deduction... trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act)”
  - Ordinary and necessary business deductions, other than the “cost of goods sold,” are not allowed
  - For cultivators, COGS is cost to produce cannabis (the inventory)
  - For dispensaries, COGS the cost to purchase cannabis (the inventory)

## The Federal/State Conflict At Work

- Trademark/Branding Restrictions
  - The USPTO will refuse to register marks that violate the “Lawful Use Rule,” which is rooted in Trademark Act Sections 1 and 45
  - The Lawful Use Rule is violated when the applicant’s application-relevant activities involve a per se violation of federal law
  - State trademark registration is an option for protection.
  - Common law rights emanating from first use may provide protection.

## The Federal/State Conflict At Work

- Civil Forfeiture Risks
  - It is illegal under the CSA to lease property knowing it would be used for the illegal production or distribution of controlled substances. 21 U.S.C. § 856(a)(1)-(2).
  - Innocent owner defense would likely not apply (as the lease will specifically allow the marijuana-related operation in order to satisfy state licensing/permitting requirements)

## Growth Notwithstanding!

- Revenues
  - \$6.6 billion actual sales in 2016
    - CO hits \$1B actual sales as of 8/31/17
  - \$7.6 billion in California in 2020\*
  - \$24 billion in 2024 (adult-use states as of 1/1/17, not CA)\*
  - \$50 billion in 2026 (assumes 12 adult-use states)
- Capital Markets:
  - \$2 Billion in 2017
  - 300+ publicly traded

## More Verticals Mean More Growth

- Biotech/Biopharma, Medical/Clinical Research
- Financial Products, Banking Solutions
- PE, VC, Family Offices, High-Net Worth Indivs.
- THC/CBD-Infused Products
- Lighting, Hydration, Raw Materials
- Security
- Software/apps
- Industry Consultants

## Pennsylvania Medical Marijuana Act

- April 17, 2016, Senate Bill 3, Medical Marijuana Act
- 24<sup>th</sup> state to legalize for medical purposes
- Contrary to the CSA, provides “[s]cientific evidence suggests that medical marijuana is one potential therapy that may mitigate suffering in some patients and also enhance quality of life.”

## The Act's Regulatory Structure

- PA DOH Oversight
- Office of Medical Marijuana administers and implements
  - Issues permits for growing, processing and dispensing
  - Registration of practitioners and maintenance of registry
  - Issues ID cards to patients, caregivers
  - Develops training courses for physicians, pharmacists, nurses re: MM research, risks, benefits, etc.

## 17 Qualifying Conditions

Cancer; HIV/AIDS; amyotrophic lateral sclerosis; Parkinson's disease; multiple sclerosis; epilepsy; inflammatory bowel disease; damage to the nervous tissue of the spinal cord with objective neurological indicated of intractable spasticity; neuropathies; Huntington's disease; Crohn's disease; post-traumatic stress disorder; intractable seizures; glaucoma; sickle cell anemia; severe chronic or intractable pain of neuropathic origin or severe or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective; and autism

## Limited Forms Of Use

- Pills, oils, topical cream/ointments, vaporization, nebulization, tinctures, or liquids
  - Very high THC
- No dry leaf; no smoking or edibles

## Physician Registration

- Must have valid license to practice in PA
- Must complete course developed by DOH
- May not advertise registration
- May only recommend to patients if:
  - Serious medical condition certified
  - Under continuing care
  - “the practitioner determines the patient is likely to receive therapeutic or palliative benefit from the use of medical marijuana.”
- Restrictions on form and duration of use

## Patient Identification and Use

- Must be certified with serious medical condition
- Patient or caregiver may obtain
- Patients and caregivers must pay a \$50 processing fee
- Renew ID card annually.
- ID card may be suspended or revoked for willful, reckless or intentional violations of the Act.

## Growing/Processing and Dispensing

- **Grower/Processor Permit**
  - Up to 25
  - Fees for application, permit and annual renewal, \$10,000, \$200,000, and \$10,000
  - \$2 million in capital
- **Dispensary Permit**
  - Up to 50
  - 3 locations per permit
  - Fees for application, permit and renewal, \$5,000, \$30,000 and \$5,000.

## Stringent Requirements

- Applicants, including “Financial Backers:” criminal history, moral character, financial wherewithal and financial plan, ability to take possession of land, buildings and other premises, ability to keep facilities secure and to prevent diversion, impact on the local community of operations, and goals for achieving diversity within the ownership and among the employees of the medical marijuana organization.

## Stringent Requirements

- Seed-to-Sale Tacking: inventory, acquisitions, amounts purchased and sold, disbursements, disposals, prices paid, amounts collected, recall of defective medical marijuana, storage, and plant waste
- Grower/processors pay 5% tax on gross receipts
- Dispensaries
  - must have physician, pharmacists or CRNP onsite
  - labeling/packing requirements
    - Dose and % of THC and CBD; dangers; prevention of use by minors

## PA Operations

- Six Regions: Northeast, Southeast, Northcentral, Southcentral, Northwest and Southwest
- June 2017:
  - 2 grower/processor permits in each region
  - 10 dispensary permits in Southeast
  - 5 dispensary permits in Northeast, Southcentral, and Southwest
  - 2 dispensary permits in Northwest and Northcentral

## Duane Morris' Cannabis Practice Group

- Offices in 12 medical and 5 adult use states
- Multi-Disciplinary: Real estate, corporate, banking/finance, including PE/VC, real estate, healthcare, intellectual property, life sciences, litigation, regulatory, taxation
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