

Minimizing the Risks of Doing Business With Companies in the Cannabis Industry

Currently, 30 states have legalized the medical use of cannabis, and eight states and the District of Columbia have legalized the recreational use of cannabis.[1] These state laws reflect an undeniable shift toward a more tolerant legal environment for not only cannabis users but also for an entire industry focused on cannabis use. Prompted by this shift, the cannabis industry is growing rapidly. By one recent estimate, the market for recreational cannabis buyers increased from \$9.2 billion in 2017 to \$47.3 billion by 2027.[2] This growth has encouraged numerous businesses not directly involved in the cannabis industry to seek to partner with companies directly involved in cannabis production and distribution through investments or by providing much-needed support, such as logistical, human resources and insurance services.

Despite the liberalizing path set by the states mentioned above, cannabis remains illegal under the federal Controlled Substances Act (CSA), 21 U.S.C. § 800, *et seq.* Several years ago, in formal guidance issued to federal prosecutors nationwide, the United States Department of Justice (USDOJ) discouraged prosecution of some cannabis-related offenses. Recently, however, USDOJ rescinded the guidance, reminding its prosecutors that cannabis remains a prohibited substance under federal law, notwithstanding state laws that legalize cannabis. If enforced, this change in policy and the threat of criminal penalties obviously threaten to chill the growth of the cannabis industry.

What is the current state of federal enforcement as to cannabis? Are there ways that companies not directly involved in the cannabis industry may still do business with companies in the industry, while minimizing potential exposure to federal criminal penalties under the CSA?

The Cole Memo

In 2013, James M. Cole, then USDOJ's Deputy Attorney General, published a memorandum, known as the Cole Memo, instructing federal prosecutors to use their limited resources to prosecute only marijuana-related offenses that implicate a significant federal interest.[3] According to the Cole Memo, a federal interest arises when a case involves violence in the cultivation and distribution of marijuana, growing marijuana on public lands, and possession and use of marijuana on federal property. In states that have decriminalized marijuana and established a well-regulated legal framework for cultivation, distribution and use of the substance, the Cole Memo emphasized that marijuana-related activities under such frameworks are less likely to threaten federal interests, and therefore do not warrant enforcement under the CSA.

The Sessions Memo

In January 2018, however, the current head of USDOJ, Attorney General Jeff Sessions, released new guidance (the Sessions Memo) to U.S. Attorneys that formally rescinded the Cole Memo.[4] The Sessions Memo emphasizes that the CSA remains the law of the land and that the cultivation, distribution and possession of marijuana continues to be illegal under federal law. The Sessions Memo also reminded prosecutors that marijuana-related activities can serve as a basis for the prosecution of other crimes, such as money laundering and the unlicensed transmission of money under 18 U.S.C. § 1956 and § 1960, respectively. The Sessions Memo does not dictate whether federal prosecutors should target marijuana-related activities, regardless of whether the activities occur in jurisdictions where marijuana is otherwise legal. Rather, the Sessions Memo instructs federal

prosecutors to exercise their prosecutorial discretion with respect to the enforcement of the CSA as to marijuana in accordance with the well-settled principles of federal prosecution.

Principles of Federal Prosecution

The principles of federal prosecution are listed in the U.S. Attorneys' Manual, which describes official policies for federal prosecutors. These principles afford prosecutors "wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law." [5] The principles of federal prosecution require federal prosecutors to weigh "all relevant considerations" when determining whether to initiate or decline criminal charges. [6] The U.S. Attorneys' Manual sets forth a non-exhaustive list of such considerations, including federal law enforcement priorities, the nature and seriousness of the offense, the deterrent effect of prosecution, the target's culpability in connection with an offense, the target's history with respect to criminal activity, the target's willingness to cooperate in an investigation or prosecution of others, the interest of any victims and the probable punishment if the prosecutor obtains a conviction. [7]

As described above, USDOJ currently does not set any bright-line rules for the enforcement of the CSA as to marijuana-related activities. Thus, the principles of federal prosecution and the case-by-case interpretation and application of these principles are critical to predicting the factors that will shape whether federal prosecutors will seek to enforce the CSA with respect to marijuana.

Minimizing Risks

In the wake of the Sessions Memo, we are unaware of any federal prosecutors who have sought charges against companies merely for investing in or providing indirect support for cannabis-related activities where the activities, per se, do not implicate federal interests (such as deterring violent crime).

But in the absence of clear enforcement guidelines, what due diligence can you use to minimize the risk of federal prosecution if your company is interested in investing in or partnering with a company that is directly involved in the manufacture and distribution of cannabis products? The following criteria should help guide your assessment.

- **To what extent will the cannabis-related activities occur in a jurisdiction where cannabis is legal?** So long as key federal concerns, such as violent crime, are not in question, federal prosecutors are unlikely to seek charges against companies that are only indirectly involved in the cannabis industry in states that have legalized the substance. Indeed, cannabis-related activities that are otherwise legal in such jurisdictions do not involve "victims," and are unlikely to be viewed as "serious" by USDOJ. An important corollary to this consideration is that the company directly involved in the cannabis industry should fully comply with the drug laws of the states in which it operates. The due diligence factors listed below become even more significant if the cannabis-related activities will occur outside of a jurisdiction where cannabis is legal.
- **What is the level of support and involvement that your company is contemplating with the company undertaking cannabis-related activities?** Will your company merely invest in or provide passive support to the company that is directly involved in the cannabis industry, or will your company take a predominant role in managing the other company (e.g., through seats on the corporate board)? The more significant your company's role will be in managing the cannabis-related activities, the greater the perceived culpability of your company for those activities in the eyes of a federal prosecutor.
- **How involved will your company be in the finances of the cannabis business?** You should be particularly wary of involvement in processing or handling financial aspects of the company that is directly involved in the cannabis business. Such involvement may be characterized as money laundering by overreaching prosecutors.

- **How will the company in the cannabis industry pay for services provided by your company?** Payments to your company should be transparent, well-documented and absolutely comply with local and federal law in order to avoid concerns that money is being laundered.
- **Does the law of the jurisdiction where your company will be doing business explicitly protect contracts that involve cannabis-related activities regardless of the CSA?** Not only should you protect your company from criminal penalties, but also from challenges to the enforceability of its contracts with companies in the cannabis industry. At least two states (California and Oregon) have passed legislation that expressly protects contracts relating to cannabis from being unenforceable merely because cannabis is illegal under federal law. Check whether the laws of such a jurisdiction will apply to your company's contracts relating to cannabis.

There are significant business opportunities, as well as legal risks, presented by involvement in the cannabis industry. Cannabis-related activities remain technically illegal under federal law. USDOJ does not, however, require the enforcement of the CSA as to cannabis, particularly in states where the substance is legal, or when businesses only indirectly support the cannabis industry by providing legitimate services and investments.

There are no easy answers for completely avoiding the risk of criminal liability for doing business in the cannabis industry, nor is it always possible to forecast the vagaries of prosecutorial discretion. Nonetheless, if your company is considering doing business or partnering with another company that is directly involved in cannabis-related activities, assessing the due diligence questions listed above and seeking the advice of knowledgeable counsel will help minimize the risk of criminal liability.

ENDNOTES

[1] For purposes of this article, the terms cannabis and marijuana are used interchangeably. *See* 21 U.S.C. § 802(16).

[2] Thomas Pellechia, *Legal Cannabis Industry Poised For Big Growth, In North America and Around the World*, Forbes (Mar. 1, 2018), <https://www.forbes.com/sites/thomaspellechia/2018/03/01/double-digit-billions-puts-north-america-in-the-worldwide-cannabis-market-lead/#3af162356510> (last visited April 10, 2018).

[3] James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013).

[4] Jefferson B. Sessions, Att'y Gen., Memorandum for All United States Attorneys: Marijuana Enforcement (Jan. 6, 2018).

[5] U.S. Attorneys' Manual, § 9-27.110.

[6] *Id.* § 9-27.230.

[7] *See id.*

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