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Cannabis Industry Should Expect Continued Federal Antitrust Oversight

DOJ Attorney's House Testimony: Industry "Unpopular" With Attorney General Barr

The federal government does not generally enforce the Controlled Substances Act (CSA) in states that have legalized cannabis, unless offenses occur on federal property or involve other federal criminal laws. Even though the Trump Administration's "[Sessions Memorandum](#)" gives each of the 93 U.S. attorneys greater discretion to enforce the CSA in their districts than did the now-rescinded "[Cole Memorandum](#)," it states that local prosecutors should "weigh all relevant considerations" before bringing charges.

We are not aware of any significant changes in CSA enforcement since William Barr became attorney general in February 2019. Nor are we aware of any instances of the 93 U.S. attorneys, who enforce federal law in their respective districts, prosecuting cannabis businesses that are complying with state law and are not otherwise involved in criminal activity.

But the same is not true for the federal antitrust laws. Those laws prohibit certain agreements among competitors, and some of those—like agreements to fix prices or allocate markets—are criminal violations and can result in significant fines and even jail terms. They also prohibit anticompetitive mergers and acquisitions, which can be enjoined as civil violations.

DOJ's antitrust oversight of the cannabis industry has been strict since March 2019. On June 24, a career trial attorney with the DOJ's Antitrust Division testified before the U.S. House Committee on the Judiciary. He testified that DOJ had investigated 10 cannabis mergers since Barr became attorney general, some of which were between companies operating in different geographies and therefore *did not compete at all*, and one which resulted in a trivial combined market share (less than 1%) that would not typically attract attention from DOJ.

The DOJ evaluates mergers under [guidelines](#) stating that markets with a large number of small competitors are "unconcentrated" and mergers between firms with low shares "ordinarily require no further analysis."

The proposed merger of MedMen and PharmaCann received special scrutiny. The DOJ staff concluded that it did not raise any significant competitive issues. AG Barr, however, ordered the Antitrust Division to issue a "second request" for information and launch a more comprehensive review.

The DOJ issues such second requests in only 1%-2% of the mergers it reviews each year. The request for additional information in the MedMen/PharmaCann deal resulted in the production of 1.3 million documents from 40 different employees. Although the investigation closed, the deal was called off in part due to the delays in getting regulatory approval.

Why has the cannabis industry received such close antitrust attention? The DOJ attorney testified that the industry "is unpopular on the fifth floor," a reference to where the AG and his staff sit in the Main Justice Building. During his [confirmation hearings](#), Barr made it clear he disagreed with marijuana use, but also said he would not disrupt the legitimate business expectations of the cannabis industry that has relied on the Cole Memorandum since 2013. This ambiguity leads to an official DOJ policy that avoids open attacks on state-compliant cannabis businesses, but also an unofficial policy that pressures the industry through indirect means, such as burdensome antitrust reviews.

The industry should expect continued oversight in antitrust as well as other areas unrelated to the CSA. As Perkins Coie has previously recommended, companies involved in the cannabis industry or seeking to become

involved in the industry should take a super-compliant approach to state law, and, to the extent possible in light of ambiguous federal guidance, all federal laws as well.

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