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# Maryland's Medical Marijuana Law: Transactional and Ethical Perspectives for Real Estate Practitioners

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# ARTICLE

## MARYLAND'S MEDICAL MARIJUANA LAW: TRANSACTIONAL AND ETHICAL PERSPECTIVES FOR REAL ESTATE PRACTITIONERS

Nicole M. Lacoste Folks, Lawrence F. Haislip  
and Matthew L. Kimball<sup>1</sup>

The congruence between Federal and state laws relating to marijuana,<sup>2</sup> which has existed for generations, is unraveling. In recent years a number of states have reduced or eliminated criminal penalties for the possession or use of small amounts of marijuana;<sup>3</sup> twenty-three states have established a state law exception for medical marijuana;<sup>4</sup> and Colorado, Washington, Alaska and Oregon now authorize the retail and personal growth, sale and possession of marijuana as a matter of state law.<sup>5</sup> Maryland has lately joined the list of states purporting to create exceptions or safe harbors for those wishing to engage in the manufacture, distribution and use of so-called “medical marijuana.”<sup>6</sup> Yet Congress’s operative expression of the federal legislative intent on this topic remains as it was first embodied in the Controlled Substances Act (“CSA”),<sup>7</sup> which was originally enacted as Title

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  2. In this article the terms “marijuana” and “cannabis” are used interchangeably. Cannabis is commonly used in three forms: marijuana, hashish and hash oil. Cannabis comes from the cannabis plant and marijuana is made from the dried flowers and leaves of the cannabis plant. *Learn About Marijuana*, UNIV. OF WASH., <http://learnaboutmarijuanawa.org/factsheets/whatis cannabis.htm#sthash.iNhjHEol.dpuf>. (last visited Sep. 9, 2016).
  3. *E.g.*, California, Connecticut, Maine, Massachusetts, Mississippi, Nebraska, Ohio, Vermont. The Marijuana Policy Project provides a map illustrating the status of state marijuana laws. *State Policy*, MARIJUANA POLY PROJECT <https://www.mpp.org/states/> (last visited Sep. 9, 2016)/.
  4. *E.g.*, Alaska, Arizona, Connecticut, Delaware, Illinois, Maine, Massachusetts, Michigan, Montana, New Mexico, Vermont, Washington. *Id.*
  5. Colo. Rev. Stat. Ann., Prof. & Occ. §§ 12-43.3-101-12-43.3-1102 (2016); Wash. Rev. Code Ann., Food, Drugs, Cosm., & Pois. §§ 69-50.325 - 69-50.369 (2016); Alaska Stat., Rev. & Tax. §§17.8.010–17.38.900; 43.61.010–43.61.030; Measure 91, (Or. 2016).
  6. Md. Code Ann., Health-Gen. §§ 13-3301-13-3316 (2016).
  7. 21 U.S.C. §§ 801, *et seq.*

II of the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>8</sup> This divergence in approach has created fissures in the legal landscape which pose serious traps for unwary Maryland real property owners, landlords and tenants who would engage in medical marijuana-related activities, as well as for the attorneys who are called upon to advise them. This article will examine some of those transactional and ethical issues.

### Federal and State Laws – Divergent Paths

#### *The Federal Approach*

The Congress of the United States has regulated drugs, chemicals, plants and other products which are now classified as “controlled substances” for over one hundred years.<sup>9</sup> The CSA—the current embodiment of the Federal criminal and regulatory approach—was passed in order to federally regulate and facilitate the manufacture, distribution, and use of controlled substances for legitimate medical, scientific, research, and industrial purposes, and to prevent these substances from being diverted for illegal purposes.

The CSA places various plants, drugs, and chemicals (such as narcotics, stimulants, depressants, hallucinogens, and anabolic steroids) into one of five schedules based on the substance’s medical use, potential for abuse, and safety or dependence liability. Marijuana (including substances containing its active ingredient, tetrahydrocannabinol) is classified as a “Schedule I” controlled substance. Substances classified in Schedule I are deemed to have “a high potential for abuse” with “no currently accepted medical use in treatment in the United States” and lack “accepted safety for use of the drug under medical supervisions.”<sup>10</sup> So under the CSA such substances may not be dispensed under a prescription, and such substances may be used only for *bona fide*, federal government-approved research studies.<sup>11</sup>

Persons who manufacture, distribute, import, or possess controlled substances in violation of the CSA commit a federal crime, and are subject to significant civil and criminal penalties. Since marijuana is classified as a Schedule I controlled substance, CSA violations with respect to marijuana are subject to the most severe penalties imposable under that act. The mere possession of marijuana generally constitutes a misdemeanor subject to up to one year imprisonment and a minimum fine of \$1,000.<sup>12</sup> A violation of the federal “simple possession” statute that occurs after a single prior conviction under any fed-

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8. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub L. No. 91-513, 84 Stat. 1236 (1970).

9. *E.g.*, The Harrison Narcotics Act of 1914, 38 Stat. 785 (1914).

10. 21 U.S.C. § 812(b)(1).

11. 21 U.S.C. § 823(f).

12. 21 U.S.C. § 844(a).

eral or state drug law triggers a mandatory minimum fine of \$2,500 and a minimum imprisonment term of 15 days (up to a maximum of two years); and if the defendant has had multiple prior drug offense convictions at the time of his or her federal simple possession offense, then the sentencing court must impose a mandatory minimum fine of \$5,000 and a mandatory minimum imprisonment term of 90 days (up to a maximum term of three years).<sup>13</sup> Furthermore, a person who cultivates or distributes marijuana, or who possesses it with the intent to distribute it, is subject to even more severe penalties – including the risk of imprisonment for a term of from five years to life.<sup>14</sup> Moreover, any property associated with the offense may be confiscated – regardless of any prior or accompanying criminal conviction.<sup>15</sup>

As a matter of fact, the CSA contains both civil<sup>16</sup> as well as criminal forfeiture provisions for violations of the act, and in a given case the U.S. Department of Justice (“DOJ”) may choose to seek civil forfeiture remedies either in addition to, or in lieu of, criminal prosecution. Conceivably civil forfeiture proceedings could be used more extensively by DOJ in order to disrupt marijuana growers, processors and dispensers operating under various state regulatory schemes which attempt to de-criminalize marijuana production and distribution under state laws, discussed below.

Civil forfeiture under the CSA is conducted through *in rem* proceedings: the property itself is treated as the “offender,” and the government need not proffer any criminal charges against the owner, landlord, tenant, mortgagee or other lienholder with respect to the property, since *mens rea* is not at issue: the only relevant inquiry is whether the property was used in, or otherwise connected to, any activity in violation of the CSA. Moreover, “property” subject to forfeiture for CSA violations includes not only the actual physical property (real or personal) used in connection with the violation, but also the direct and indirect proceeds of the violative acts themselves.<sup>17</sup> Obviously, the property most likely to be subject to seizure and forfeiture in the first instance is the controlled substance itself, which has been manufactured, distributed, dispensed, acquired, or possessed in violation of the CSA. But the government’s net will spread wide enough to capture any and all real or personal property, or interests therein, or furniture, fixtures, machinery and equipment, or money or cash equivalents, accounts or other financial assets which have been used or intended to be used in connection with a CSA violation. Moreover, in such a civil forfeiture proceeding the government need only prove

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13. *Id.*

14. 21 U.S.C. §§ 841(b), 848(a).

15. 21 U.S.C. § 853.

16. 21 U.S.C. § 881.

17. *Id.*

the elements of its case by a preponderance of the evidence.<sup>18</sup> In any such case the government will destroy any controlled substances which it seizes, and sell all other seized property at public auction, in which case the proceeds of sale, net of expenses, will be forwarded to an Asset Forfeiture Fund established by DOJ.<sup>19</sup>

Although courts have recognized an “innocent owner” exception to the forfeiture rules, an owner is not an innocent owner where it is reasonable to believe that the owner of the property to be forfeited is aware that the property is the proceeds of narcotics transactions, or that it was somehow used in connection with, or otherwise involved in narcotics exchange business.<sup>20</sup>

The common, garden-variety anti-conspiracy and aiding and abetting laws also exist within the Federal criminal arsenal, for use against would-be violators of the CSA. To prove a conspiracy to commit offenses against the United States<sup>21</sup> the government need only establish three simple elements beyond a reasonable doubt: first, that the defendant entered into an agreement to commit an unlawful act; second, that the defendant had knowledge of the agreement and voluntarily participated in it; and third, that at least one of the co-conspirators committed an overt act in furtherance of the conspiracy. The government must prove that the defendant had both the intent to agree and the intent to commit the substantive offense.<sup>22</sup> Provided that these elements are proven beyond a reasonable doubt, a defendant may be held indirectly responsible as an aider and abettor if he associated himself with the venture, participated in it as something that he wanted to bring about, or sought by his actions to make the venture succeed. It is settled that a culpable aider and abettor need not perform the substantive offense, be present when it is performed, or be aware of the details of its execution.<sup>23</sup> Furthermore, a corporation may be held liable for the criminal acts of its agents so long as those agents are acting within the scope of employment. Typically, the test is whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated—at least in part—by intent to benefit the corporation.<sup>24</sup>

So, for example, by application of these statutes and principles a landlord who knowingly leases commercial space to a participant in a state-sponsored or licensed marijuana-related enterprise is nevertheless liable to independent prosecution under federal law, as an aider and abettor, if not as a co-conspirator, to the operating enterprise,

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18. 18 U.S.C. § 981(b).

19. 21 U.S.C. § 881(e).

20. *U.S. v. Four Million Two Hundred and Fifty-Five Thousand, Six Hundred and Twenty-Five Dollars and Thirty-Nine Cents*, 551 F.Supp. 314 (D.C.Fla., 1982).

21. *See* 18 U.S.C. § 371.

22. *United States v. Agosto-Vega*, 617 F.3d 541 (1st Cir. 2010).

23. *Id.* at 552.

24. *Id.* at 552-53.

which operates in violation of the CSA. Typically, the same penalties apply to persons who conspire to do so, or who aid and abet others in so doing.<sup>25</sup>

### *Maryland's Medical Marijuana Laws*

Most states have enacted anti-drug statutes modeled on the CSA. Maryland's anti-drug statute is not dissimilar to the laws enacted in other states, and is generally congruent with the CSA: under Maryland law, the possession or administration to another of a controlled dangerous substance is prohibited unless obtained from an authorized provider acting in the course of professional practice.<sup>26</sup>

However, under Maryland laws enacted in the 2013,<sup>27</sup> 2014 and 2015 sessions of the Maryland General Assembly<sup>28</sup> (such statutes, together with accompanying regulations published in COMAR,<sup>29</sup> being collectively referred to as the "Maryland Medical Marijuana Laws" or the "MMM Laws") an exemption has been provided from arrest, prosecution, or any civil or administrative penalty, or the denial of any right or privilege,<sup>30</sup> for licensees regarding the medical use of "Medical Cannabis," including "Medical Cannabis Concentrate," "Medical Cannabis Finished Product" or "Medical Cannabis Infused Products."<sup>31</sup>

On September 28, 2015, the Maryland Department of Health and Mental Hygiene Natalie M. LaPrade Maryland Medical Cannabis Commission (the "Commission")<sup>32</sup> published its forms for applications for Medical Cannabis grower, processor and dispensary licenses, with the stated intent to seek applications from qualified applicants interested in receiving such licenses. Under the MMM Laws, the Commission can award a maximum of fifteen grower licenses, an unlimited num-

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25. *Id.*; 18 U.S.C. § 2; 18 U.S.C. §§ 981, 982.

26. Md. Code Ann., Crim. Law §§ 5-101-5-1101; § 5-601 (2016).

27. The current law is not Maryland's first venture into the legalization of medical cannabis. In 2013, the State legislature approved a prior version of this law that limited distribution of medical cannabis to academic medical centers and only to patients with a debilitating illness. No application for consideration was submitted by any academic institution eligible under the prior version of this law so that lack of participation amongst the academic world set the stage for the current version of the law that opens licenses for the growing, processing, and dispensing of medical cannabis to private applicants not related in any way to an academic institution.

28. Md. Code Ann., Health-Gen. §§13-3301-13-3316 (2016).

29. MD CODE REGS. §§10.62.01-10.62-35.

30. Md. Code Ann., Health-Gen. § 13-3313.

31. MD CODE REGS. §§10.62.01-10.62-35.

32. The Commission is named after Natalie M. LaPrade, the late mother of State Delegate Cheryl D. Glenn, who died of kidney cancer in 2011. Delegate Glenn was a lead sponsor of the State's medical cannabis legislation. See Timothy B. Wheeler, *Medical Marijuana Fees Stir Debate in Maryland*, THE BALTIMORE SUN, (Oct. 11, 2014), <http://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-medical-marijuana-fees-20141011-story.html>.

ber of processor licenses and up to two dispensary licenses in each of the state's senatorial districts (that is to say, ninety-four dispensary licenses in total).

The deadline for submission of applications was November 6, 2015, and so-called "Stage-One" awards were to have been made by mid-January 2016. But on December 21, 2015, the Commission announced that it had received 146 grower license applications, 124 processor license applications and 811 dispensary license applications and that, in response to the overwhelming number of applications received, the Commission revised its schedule and stated that it anticipated issuing Stage-One awards for grower and processor applicants by summer 2016. The revised schedule for the issuance of Stage-One approval of dispensary applicants was stated to be announced "in the near future."<sup>33</sup>

The Commission's grower, processor and dispensary license application process serves to highlight the incongruity which now exists, between federal law, on the one hand, and under Maryland and other similar state laws, on the other, in respect of the growth, manufacture, sale, possession and use of "Medical Cannabis." It also points to the inherent – and as of this date irreducible – risks which must be borne by any persons who choose to engage in commercial Medical Cannabis activities, in reliance upon the protections and approvals obtained under the MMM Laws. Although the Commission proposes to act in accordance with *state statute*—the MMM Law—it is unclear how any applicant can accept a license, as a "Licensed Grower," and construct and operate a facility to produce and distribute "Medical Cannabis," including "Medical Cannabis Concentrate," "Medical Cannabis Finished Product" or "Medical Cannabis Infused Products" under the MMM Law<sup>34</sup> without violating *federal statutes*, e.g., the CSA.

One will look in vain for any exception or safe harbor for such activities under the CSA, and at any rate the Commission itself does not appear to think that one exists. For example, in certification 9, which appears at page 33 of the Commission's Application for a Grower License, the applicant is asked to acknowledge that the applicant "fully understands" that "Cannabis is a Schedule I controlled substance under the Controlled Substances Act of 1970 (21 U.S.C. 801 *et seq.*); Manufacture, distribution, cultivation, processing, possession, or possession with intent to distribute a Schedule I controlled substance, or conspiring or attempting to do so, are offenses subject to harsh penalties under federal law and could result in arrest, prosecution, conviction, incarceration, fine, seizure of property, and loss of licenses or other privileges: . . ."<sup>35</sup>

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33. MD CODE REGS. §§10.62.01-10.62.35.

34. *Id.*

35. *Id.*

One can only presume that this is the Commission's way of making sure that each applicant for a Grower License proceeds with his eyes open. That is to say, each applicant is obliged to certify to the Commission that the applicant understands that while the growth, processing, distribution and dispensation of cannabis may be done in accordance with *Maryland* law, each of these activities remains an independent violation of long-standing *federal* law; that these activities are all *federal* crimes; and that they will remain *federal* crimes even if the state has decriminalized these activities.

#### Federal and State Responses to the Problems Posed by the Conflict in Laws

##### *Preemption – Or Not*

Generally speaking, Congress has the power under the Commerce Clause of the U.S. Constitution “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”<sup>36</sup> Defendants subject to prosecution under the CSA have used the Commerce Clause offensively, to argue that the CSA, when applied to purely intrastate commercial activity, is an impermissible extension of federal power into an area reserved to the states, but such arguments have been unavailing. For example, in *Gonzales v. Raich*,<sup>37</sup> the U.S. Supreme Court specifically found that, with respect to the prosecution of activity that was legal under California's medical marijuana laws, the regulation of marijuana under the CSA was squarely within Congress's power under the Commerce Clause, because production of marijuana meant for home consumption had a substantial effect on supply and demand in the national market. Citing the enforcement difficulties in distinguishing between marijuana cultivated locally and marijuana grown elsewhere, and concerns about diversion into illicit channels, the Court concluded that Congress had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA.

Furthermore, the Supremacy Clause of the U.S. Constitution<sup>38</sup> dictates that, to the extent that federal laws conflict with state laws, federal laws are understood to control, or to “preempt” state laws. The extent to which a federal law shall operate preemptively is a matter generally vested within the discretion of the Congress, when it acts within the scope of its enumerated powers under the U.S. Constitution. In some cases, Congress exercises its powers so pervasively that it

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36. U.S. CONST. art I, § 8, cl. 3.

37. 545 U.S. 1, 2 (2005).

38. See U.S. CONST. art. VI, cl. 2. (“[T]he laws of the United States [. . .] shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”).



precludes any state activity on the same matter. The immigration laws provide a topical example of such an instance.<sup>39</sup> In other cases, Congress has elected to share the legislative field with the states, and in such cases state laws may be given effect unless, and to the extent that, they conflict with federal law in one of two ways: first, if it is “physically impossible” to comply with both the state and federal law (“impossibility preemption”); or second, if the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (“obstacle preemption”).<sup>40</sup>

What constitutes an obstacle for preemption purposes is a matter “to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”<sup>41</sup> When Congress acts within an area traditionally within the purview of the states, it will be assumed not to have intended to give its words preemptive force unless a contrary purpose is manifestly clear.<sup>42</sup>

Despite this well-settled interpretation of the relationship between conflicting federal and state laws, it is not entirely clear how courts will resolve conflicts between the CSA and state laws legalizing or decriminalizing medical marijuana. The problem is made all the more difficult because the CSA itself contains a clear expression of federal intent *not* to completely pre-empt state legislative action in respect of the regulation of controlled substances.<sup>43</sup>

The extent to which there is a positive conflict between the CSA and a particular state’s medical marijuana laws has already been the subject of much debate. The Supreme Court of Oregon has found that the CSA preempted the Oregon Medical Marijuana Act to extent that the state law affirmatively authorized medical marijuana use, and that the state law was not permitted under 21 USCS § 903 to extent that it authorizes persons holding medical marijuana licenses to engage in conduct that the CSA explicitly prohibits.<sup>44</sup> However, the Supreme Court of Michigan held that no conflict existed between the CSA and applicable provisions of the Michigan Medical Marihuana Act, as it was “not impossible” to comply with both CSA’s federal prohibition of marijuana and the Michigan act’s limited state-law immu-

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39. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012).

40. *See Hillman v. Maretta*, 13 S. Ct. 1943, 1950 (2013); *see also Gonzales v. Raich*, 545 U.S. 1, 23 (2005).

41. *Arizona v. United States*, 132 S. Ct. 2492 at 2501.

42. *Hillman v. Maretta*, 133 S. Ct. 1943, 1950 (2013).

43. 21 U.S.C. § 903 (“No provision of [the CSA] 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 title and that State law so that the two cannot consistently stand together.”).

44. *Emerald Steel Fabricators, Inc. v Bureau of Labor & Indus.*, 348 Or. 159, 230 P.3d 518 (2010).

nity for certain medical marijuana use, and the Michigan act did not stand as an obstacle to the full purposes and objectives of the CSA.<sup>45</sup> Similar results have been reached in cases in Colorado<sup>46</sup> and California.<sup>47</sup>

Legal scholars and commentators have suggested a novel resolution to this apparent conflict, which has been viewed favorably by some courts. For example, Professor Robert A. Mikos, of Vanderbilt University Law School, has stated that “states retain both *de jure* and *de facto* power to exempt medical marijuana from criminal sanctions, in spite of Congress’s uncompromising—and clearly constitutional—ban on the drug. States may continue to legalize marijuana because Congress is unable to preempt state laws that merely permit (i.e., that refuse to punish) private conduct the federal government deems objectionable.”<sup>48</sup> Mikos goes on to argue that “as long as states go no further [than passive legalization] — and do not actively assist marijuana users, growers, and so on — they may continue to look the other way when their citizens defy federal law.” As a result, “[t]he federal ban may be strict — and its penalties severe — but without the wholehearted cooperation of state law enforcement authorities, its impact on private behavior will remain limited. Most medical marijuana users and suppliers can feel confident they will never be caught by the federal government.”<sup>49</sup>

The Mikos argument was cited with approval in *In re Arenas*,<sup>50</sup> a bankruptcy proceeding involving assets used in a medical marijuana business legal under Colorado law. The bankruptcy judge interpreted Prof. Mikos’s analysis thusly:

He does not suggest that state legalization somehow nullifies federal law and prevents federal enforcement of the CSA within state borders. To the contrary, he frankly recognizes that marijuana production and distribution continue to be federal crimes even in those states that have legalized those activities. State legalization works, in his view, only because it is the states that have been on the forefront of enforcement of marijuana laws. Once the states decriminalize marijuana and stop enforcing a prohibition on its distribution and use, the federal government lacks the resources to fill that void.<sup>51</sup>

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45. *Beek v. City of Wyo.*, 495 Mich. 1, 846 N.W.2d 531 (2014).

46. *People v. Crouse*, 2013 Colo. App. LEXIS 1971 (2013).

47. *County of San Diego v. San Diego NORML*, 165 Cal.App. 4th 798 (2008).

48. Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1424 (2009).

49. *Id.*

50. *In re Arenas*, 514 B.R. 887 (Bankr. D. Colo., Tallman, J., 2014).

51. *Id.* at 890.

## The Justice Department Memoranda

DOJ exercises broad discretion in the prosecution of violations of the CSA. Given the long-standing and well-established proscription of marijuana cultivation, processing, use and sale, as embodied in the CSA, and the “growing” divergence from that approach as evidenced by the various state legalization statutes, DOJ has been asked to develop policies and guidelines to aid federal officials in the exercise of their prosecutorial discretion in enforcing the CSA. Since 2009 DOJ has promulgated four memoranda (collectively, the “DOJ Memoranda”) which represent the official response from the administration of President Obama (the “Obama Administration”) to the divergent federal-state positions in respect of marijuana activities.

In the first of these, a memorandum to selected U. S. Attorneys dated October 19, 2009 (the “Ogden Memorandum”)<sup>52</sup>, Deputy Attorney General David W. Ogden provided guidance to federal prosecutors in states that have authorized the use of medical marijuana, in which he advised that while the prosecution of “significant traffickers of illegal drugs, including marijuana,”<sup>53</sup> remained a priority of DOJ, federal prosecutors should not focus federal resources on individuals whose actions are in “clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”<sup>54</sup> Ogden was at pains to emphasize that the guidance should not be read to preclude investigation or prosecution, even in cases involving activities which otherwise complied with existing state law, but in spite of this reservation the Ogden Memorandum was widely considered to have established just such a safe harbor exception to federal CSA enforcement activity.

In the two years following the promulgation of the Ogden Memorandum it became increasingly clear that the vast majority of “medical” marijuana was being distributed not to the legitimately old and sick, but rather to youthful recreational users, and that several states had frankly adopted laws authorizing large-scale commercial marijuana cultivation and distribution facilities. In response, by Memorandum dated June 29, 2011 (the “2011 Cole Memorandum”),<sup>55</sup> Deputy Attorney General James M. Cole drew a distinction between the potential prosecutions of individual patients who require marijuana in

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52. U.S. DEP’T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GEN., INVESTIGATIONS AND PROSECUTIONS IN STATES AUTHORIZING THE MEDICAL USE OF MARIJUANA (2009), *available at* <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>.

53. *Id.*

54. *Id.*

55. U.S. DEP’T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GEN., GUIDANCE REGARDING THE OGDEN MEMO IN JURISDICTIONS SEEKING TO AUTHORIZE MARIJUANA FOR MEDICAL USE (2011), *available at* <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>.

the course of medical treatment and “commercial” dispensaries, stating “[t]he Ogden memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the [CSA] regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution.”<sup>56</sup>

Following the enactment of laws in Colorado and Washington, legalizing wide-spread and large-scale growing and distribution facilities, Deputy Attorney General James M. Cole responded on behalf of the Obama Administration and DOJ by issuing a further memorandum dated August 29, 2013 (the “2013 Cole Memorandum”),<sup>57</sup> to provide guidance to all U.S. Attorneys in their exercise of investigative and prosecutorial discretion in respect of civil and criminal enforcement of the CSA. In essence, the 2013 Cole Memorandum stated DOJ’s decision that it would not challenge jurisdictions that authorize intra-state marijuana growth, distribution sale and use so long as those state and local statutory schemes embodied “strong and effective” regulatory and enforcement controls on marijuana cultivation, distribution, sale, and possession that limit the risks to “public safety, public health, and other law enforcement interests.”<sup>58</sup>

The 2013 Cole Memorandum instructed federal prosecutors to prioritize their “limited investigative and prosecutorial resources to address the most significant [marijuana-related] threats” and identified the following “enforcement priorities that are particularly important to the federal government”: (i) Preventing the distribution of marijuana to minors; (ii) Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (iii) Preventing the diversion of marijuana from states where it is legal under state law in some form to other states; (iv) Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; (v) Preventing violence and the use of firearms in the cultivation and distribution of marijuana; (vi) Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (vii) Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by mari-

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56. *Id.* at 2.

57. U.S. DEP’T OF JUSTICE, OFFICE OF THE DEPUTY ATTORNEY GEN., GUIDANCE REGARDING MARIJUANA ENFORCEMENT (2013), *available at* <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

58. *Id.*

juana production on public lands; and (viii) Preventing marijuana possession or use on federal property.<sup>59</sup>

The 2013 Cole Memorandum observed that the traditional or historical congruence between federal and state drug laws, and their enforcement, had been undermined by the passage of laws in the several states that endeavored to authorize marijuana production, distribution and possession by establishing regulatory schemes for these purposes. Given this, DOJ's guidance was predicated 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 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."<sup>60</sup> The 2013 Cole Memorandum concluded on this point by issuing the following warning: "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."<sup>61</sup>

Turning to the implications of states' licensure of large-scale cultivation and distribution operations, the 2013 Cole Memorandum referred to DOJ's previous guidance, and modified it, to the effect that the size of such operations, standing alone, would no longer be read to implicate a compelling federal interest mandating federal enforcement. According to the 2013 Cole Memorandum, "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

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59. *Id.* at 1-2.

60. *Id.* at 2-3.

61. *Id.* at 3.

whether the conduct at issue implicates one or more of the enforcement priorities listed above.”<sup>62</sup>

The 2013 Cole Memorandum, like its predecessors, concluded with the following caveat:

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.<sup>63</sup>

The 2013 Cole Memorandum made no reference to the application of various federal money-laundering or banking or other financial regulatory statutes that were implicated by marijuana-related activities and that—apart from the CSA—have made it increasingly difficult for marijuana-related businesses to become established and to function. Deputy Attorney General James M. Cole responded on behalf of the Obama Administration and DOJ by issuing a further memorandum dated February 14, 2014 (the “2014 Cole Memorandum”) on this topic. It cited the same federal enforcement priorities and rationale for the application of prosecutorial discretion in the allocation of prosecutorial resources with respect to marijuana-related violations of federal money laundering, money transfer and related statutes, particularly the Bank Secrecy Act of 1970, as amended (the “BSA”).<sup>64</sup>

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62. *Id.*

63. *Id.* at 4.

64. 31 U.S.C. § 1051 *et seq.*

## The FinCEN Guidance

The federal banking laws have been specifically designed to prohibit access to national and state banking systems by persons engaged in activities involving controlled substances and in violation of the CSA. In fact, through mandated transactional record-keeping and reporting requirements, financial participants in the federal banking system have been made to serve as active sentinels on behalf of federal law enforcement offices and departments in the enforcement of the CSA. As a result, participants in state-sanctioned marijuana programs have been effectively frozen out of the banking system. Most have been unable to open or to maintain bank accounts, to deposit the proceeds of their operations into the banking system, or to use that system to make customary banking transactions. Many participants have been reduced to operating on a cash-only basis.

On February 14, 2014, in concert with the issuance of the 2014 Cole Memorandum, the U.S. Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") issued guidance with respect to marijuana-related financial crimes.<sup>65</sup>

The FinCEN Guidance acknowledges that the CSA "makes it illegal under federal law to manufacture, distribute, or dispense marijuana," and it advises banking institutions, as part of their customer due diligence, to consider whether a marijuana-related business implicates one of the 2013 Cole Memorandum priorities.<sup>66</sup> Although purporting to clarify how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations, FinCEN reminds such institutions that, "[b]ecause federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity," they must file a "suspicious activity report"<sup>67</sup> ("SAR") on activity involving a marijuana-related business. However, a more limited report may be filed if the institution reasonably believes that the business does not implicate one of the Cole memorandum priorities or violate state law.<sup>68</sup>

Banks must file SARs with FinCEN relating to any transaction involving \$5,000 or more that they have reason to suspect are derived from illegal activity and, regardless of any suspicion of illegal activity, they must file a currency transaction report ("CTR") with respect to any transaction involving \$10,000 or more. Willful failure to do so is punishable by imprisonment for not more than five years (not more than

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65. DEP'T OF THE TREASURY, FINANCIAL CRIMES ENFORCEMENT NETWORK, FIN-2014-G001, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESS (2014) [hereinafter FINCEN GUIDANCE], available at <https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>.

66. *Id.* at 1.

67. *Id.*

68. *Id.* at 3.

10 years in cases of a substantial pattern of violations or transactions involving other illegal activity). Breaking up a transaction into two or more transactions to avoid the reporting requirement (“structuring”) subjects the offender to the same maximum terms of imprisonment. Banks must also establish and maintain anti-money laundering programs, designed to ensure that bank officers and employees will have sufficient knowledge of the banks’ customers and of the business of those customers to identify the circumstances under which filing SARs and CTRs is appropriate.

Banks, their officers, employees, and customers may also face criminal liability under the money laundering statutes for marijuana-related financial transactions: it is a federal crime,<sup>69</sup> punishable by imprisonment for up to ten years, to deposit or withdraw \$10,000 or more in proceeds derived from the distribution of marijuana and any other controlled substances. It is also a federal crime,<sup>70</sup> punishable for imprisonment for up to twenty years, to engage in a financial transaction involving such proceeds conducted with the intent to engage in further offenses as, for example, by withdrawing marijuana-generated funds in order to pay rent for the use of marijuana-operations facilities, or to pay the salaries of employees engaged in marijuana-related activities. The same penalties apply to persons who conspire to do so, or who aid and abet others in so doing.<sup>71</sup>

The FinCEN Guidance advised financial institutions that if they provided financial services to customers operating a marijuana-related business then they were required to file one of three special forms of the SAR: (i) a “marijuana limited SAR” (appropriate when the bank determines, after the exercise of due diligence, that its customer is not engaged in any of the activities that violate state law or that would implicate any of the eight DOJ investigation and prosecution priorities listed in the 2013 Cole Memorandum and the 2014 Cole Memorandum); (ii) a “marijuana priority SAR” (appropriate when an alternative determination is made); or (iii) a “marijuana termination SAR” (if it determines that it must “fire its customer” in fulfillment of its anti-money laundering obligations).<sup>72</sup>

FinCEN also provides examples of “red flags” that may indicate that a marijuana priority SAR is appropriate, and it may be instructive to reproduce these examples as presented in the FinCEN Guidance, if only for the purpose of prompting the reader to reflect on the sheer weight of the regulatory and administrative burdens which have been placed on banking industry participants as they struggle to “know their customer,” in order to comply with their BSA obligations:

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69. 18 U.S.C. §1957 (2012).

70. 18 U.S.C. § 1956 (2016).

71. *Id.*; 18 U.S.C. §2; 18 U.S.C. §§ 981, 982.

72. FINCEN GUIDANCE, *supra* note 58, at 3-5.



- A customer appears to be using a state-licensed marijuana-related business as a front or pretext to launder money derived from other criminal activity (i.e., not related to marijuana) or derived from marijuana-related activity not permitted under state law. Relevant indicia could include:
  - The business receives substantially more revenue than may reasonably be expected given the relevant limitations imposed by the state in which it operates.
  - The business receives substantially more revenue than its local competitors or than might be expected given the population demographics.
  - The business is depositing more cash than is commensurate with the amount of marijuana-related revenue it is reporting for federal and state tax purposes.
  - The business is unable to demonstrate that its revenue is derived exclusively from the sale of marijuana in compliance with state law, as opposed to revenue derived from (i) the sale of other illicit drugs, (ii) the sale of marijuana not in compliance with state law, or (iii) other illegal activity.
  - The business makes cash deposits or withdrawals over a short period of time that are excessive relative to local competitors or the expected activity of the business.
  - Deposits apparently structured to avoid Currency Transaction Report (“CTR”) requirements.
  - Rapid movement of funds, such as cash deposits followed by immediate cash withdrawals.
  - Deposits by third parties with no apparent connection to the accountholder.
  - Excessive commingling of funds with the personal account of the business’s owner(s) or manager(s), or with accounts of seemingly unrelated businesses.
  - Individuals conducting transactions for the business appear to be acting on behalf of other, undisclosed parties of interest.
  - Financial statements provided by the business to the financial institution are inconsistent with actual account activity.
  - A surge in activity by third parties offering goods or services to marijuana-related businesses, such as equipment suppliers or shipping servicers.
- The business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law.
- The business is unable to demonstrate the legitimate source of significant outside investments.

- A customer seeks to conceal or disguise involvement in marijuana-related business activity. For example, the customer may be using a business with a non-descript name (e.g., a “consulting,” “holding,” or “management” company) that purports to engage in commercial activity unrelated to marijuana, but is depositing cash that smells like marijuana.
- Review of publicly available sources and databases about the business, its owner(s), manager(s), or other related parties, reveal negative information, such as a criminal record, involvement in the illegal purchase or sale of drugs, violence, or other potential connections to illicit activity.
- The business, its owner(s), manager(s), or other related parties are, or have been, subject to an enforcement action by the state or local authorities responsible for administering or enforcing marijuana-related laws or regulations.
- A marijuana-related business engages in international or interstate activity, including by receiving cash deposits from locations outside the state in which the business operates, making or receiving frequent or large interstate transfers, or otherwise transacting with persons or entities located in different states or countries.
- The owner(s) or manager(s) of a marijuana-related business reside outside the state in which the business is located.
- A marijuana-related business is located on federal property or the marijuana sold by the business was grown on federal property.
- A marijuana-related business’s proximity to a school is not compliant with state law.
- A marijuana-related business purporting to be a “non-profit” is engaged in commercial activity inconsistent with that classification, or is making excessive payments to its manager(s) or employee(s).<sup>73</sup>

The FinCEN guidance ends with the observation that a bank is not absolved of its obligation to file a currency transaction report for any financial transaction involving more than \$10,000 in cash, regardless of how it resolves its marijuana SAR obligations.<sup>74</sup>

### Congressional Responses

In recent years a number of marijuana-related legislative proposals have been made in the U.S. Congress, some of which have passed and been enacted into law. For example, P.L. 113-235 §809(b), the 2015

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73. *Id.* at 5-7.

74. *Id.* at 7.

Consolidated and Further Continuing Appropriations Act, was passed in an effort to stymie the passage of the District of Columbia's Initiative 71, legalizing the recreational use of marijuana in D.C. The relevant provision of the act states that "[n]one of the funds contained in this Act may be used to enact any law, rule, or regulation to legalize or otherwise reduce penalties associated with the possession, use, or distribution of any Schedule I substance under the Controlled Substances Act (21 U.S.C. 801, et seq.) or any tetrahydrocannabinols derivative for recreational purposes." The proponents of the act intended that the provision bars the District from using FY2015 appropriated funds to implement Initiative 71 and that any employee who takes official acts to implement the law could be subject to civil or criminal liability under the Antideficiency Act, but the District government's position is that the act is ineffective to do that inasmuch as the initiative was enacted into law *before* passage of the act.

In addition, the Consolidated Appropriations Act of 2016, H.R. 2029, 114th Cong. § 542, Pub. L. No. 114-113 (2015), passed and signed into law in late 2015, bars the DOJ from expending funds to prosecute the use, possession, and sale of medical marijuana in states that legalized medical marijuana prior to December 18, 2015. Specifically, Section 542 of the omnibus bill prohibits the DOJ from using FY2016 funds to block those U.S. jurisdictions that have legalized medical marijuana from "implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."<sup>75</sup> The language of the omnibus bill, coupled with the DOJ Memoranda, suggests that medical marijuana businesses that are operating properly under state law are unlikely to become the targets of federal prosecution prior to September 30, 2016. However, there can be no guarantee that such parties would avoid prosecution under federal law, particularly after the end of the 2016 fiscal year, or at any rate after the Obama Administration ends on January 20, 2017.

Finally, S. 683/H.R. 1538, the so-called Compassionate Access, Research Expansion, and Respect of States Act of 2015 also referred to as the "CARERS Act", though not yet enacted, would exempt from the CSA "any person acting in compliance with State law relating to the production, possession, distribution, dispensation, administration, laboratory testing, or delivery of medical marihuana,"<sup>76</sup> and it would also reclassify marijuana as a Schedule II substance, meaning that marijuana would be recognized under federal law as having medical benefits and could be prescribed to patients for legitimate medical reasons in accordance with the CSA. A further provision of the CARERS Act would also expressly provide legal protections to banks and other federally regulated depository institutions in order to permit

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75. *Id.*

76. *Id.*

them to safely provide financial services to marijuana businesses, including by adding a provision stating that “[a] Federal banking regulator may not prohibit, penalize, or otherwise discourage a depository institution from providing financial services to a marijuana-related legitimate business.” The proposed act would also lessen current BSA reporting burdens, which have been exacerbated—or at any rate not lessened in practice—as the result of the DOJ Memoranda and the FinCEN Guidance.

### Practical Effects of the Federal and State Responses

The 2014 Cole Memorandum and FinCEN Guidance have done little to persuade banks and other financial participants in the U.S. banking system to extend financial services to persons and entities engaged in state-sanctioned marijuana-related activities—regardless how tangential or attenuated those connections might be. Reports in national newspapers have confirmed banks’ prompt action to close accounts, however denominated, once information of a marijuana connection is brought to their attention.<sup>77</sup> Other national newspapers have reported that banks intend to refuse to renew or re-finance mortgage loans on commercial properties being leased or operated in marijuana-related businesses, or offer new loans secured by property in which pre-existing marijuana-related businesses are in occupancy.

It takes very little imagination to conclude why this has occurred. One need only conduct a simple thought experiment, applying the FinCEN Guidance and its “red flags” to a common hypothetical banking relationship, to conclude that banking system participants have been placed in a well-nigh impossible situation in attempting to comply with their BSA obligations. For example, exactly how is a bank officer to go about determining that a prospective marijuana-related business customer receives “substantially more” revenue than may “reasonably be expected” given the “relevant” limitations imposed by the state in which it operates; or that it receives “substantially more” revenue than its “local competitors” or than “might be expected given the population demographics”? Or what sort of investigative force will the bank be obliged to create and maintain in order to make—or to negate—a determination that its customer is depositing “more cash than is commensurate” with the amount of marijuana-related revenue it is reporting for federal and state tax purposes? Or that it is making cash deposits or withdrawals over a “short period of time” that are

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77. See, e.g., Deirdre Fernandes, *Banks Shun Fledgling Marijuana Firms in Mass.*, THE BOSTON GLOBE (Jan. 29, 2014), <https://www.bostonglobe.com/business/2014/01/29/medical-marijuana-firms-face-cash-economy-banks-steer-clear/88tfUTUbcaYvZfA7fpuENN/story.html>; Eric Gorski, *Reluctance of Banks Leaves Pot Shops Looking for Secure Practices*, THE DENVER POST (June 15, 2014), <http://www.denverpost.com/2014/06/14/reluctance-of-banks-leaves-pot-shops-looking-for-secure-practices/>.

“excessive relative to local competitors” or the “expected activity of the business”? Or that its customer is “seeking to conceal or disguise involvement in marijuana-related business activity” by using a “non-descript name” (e.g., a “consulting,” “holding,” or “management” company) that “purports to engage in commercial activity unrelated to marijuana, but is depositing cash that smells like marijuana”? Or that the marijuana-related business’s “proximity to a school” is not “compliant with state law” (ignoring for the moment that all MMM Law locations are approved by the Commission as a matter of course, in the first place)? Given all this, one is impelled to conclude that the only prudent course for banking industry participants is to ensure that they have no exposure to, and no dealings with, any parties even remotely related to state-sanctioned marijuana related businesses.

In fact, the federal courts have upheld elements of the U.S. banking system in their determination to prevent access to the system by marijuana-related enterprises. For example, on January 5, 2016, in the case of *Fourth Corner Credit Union v. FRB of Kansas City*,<sup>78</sup> the U.S. District Court for the District of Colorado refused to direct the Federal Reserve Bank of Kansas to grant a “master account” to a Colorado credit union founded to provide financial services to marijuana-related businesses, on the grounds that marijuana remains an illegal substance under the CSA. As the Court explained, even if prosecutors and bank regulators are willing to “look the other way” by condoning the sale of marijuana under state law, “[a] federal court cannot look the other way.”<sup>79</sup>

The Court’s response and observations in *Fourth Corner Credit Union* highlight the many other obstacles and elements of resistance that marijuana-related business participants can expect to face when their business ventures intersect with the federal, legal, and regulatory spheres. Tax and bankruptcy law provide just two additional examples. For instance, it has long been a well-established principle for federal income tax purposes that unlawful, as well as lawful, gains are comprehended within the term “gross income.”<sup>80</sup> Though a medical marijuana business is illegal under federal law, it remains obligated to pay federal income tax on its taxable income because the Internal Revenue Code does not differentiate between income derived from legal sources and income derived from illegal sources.<sup>81</sup> But Section 280E of the Internal Revenue Code provides that no deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists

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78. See *Fourth Corner Credit Union v. FRB of Kan. City*, 154 F. Supp. 3d 1185 (D. Colo. 2016).

79. *Id.* at 4.

80. 26 U.S.C. § 61 (1984).

81. See *James v. United States*, 366 U.S. 213, 218 (1961).

of trafficking in controlled substances (within the meaning of Schedules I and II of the CSA), which is prohibited by federal law or the law of any state in which such trade or business is conducted.<sup>82</sup> As a result of this provision, marijuana merchants, unlike most businesses,<sup>83</sup> may not deduct operating expenses (e.g., general labor, rent, and utilities) in order to compute net taxable income for the purpose of calculating federal income tax liability.<sup>84</sup> For owners of real property leased to operating marijuana-related enterprises, there is some question whether normal and customary costs and expenses in operating the property (e.g., taxes, insurance, utilities, maintenance and other operating costs and the like, interest on mortgage indebtedness, leasing transactions or enforcement costs) would be deductible.

In the bankruptcy arena, federal bankruptcy courts have been uniformly reluctant to extend the protections of the U.S. Bankruptcy Code<sup>85</sup> to debtors engaged in medical marijuana businesses that are legal under state law. For example, in *In re Arenas*,<sup>86</sup> on appeal from a decision of the United States Bankruptcy Court for the District of Colorado dismissing a petitioner's Chapter 7 filing, the Bankruptcy Appellate Panel for the Tenth Circuit court upheld the dismissal of the would-be debtor's Chapter 7 case, holding that a debtor in the marijuana business cannot obtain relief in the federal bankruptcy court. The appellate panel agreed with the Chapter 7 trustee, the United States trustee, and the lower court that the marijuana-related assets could not be administered under federal law, since selling and distributing proceeds from marijuana-related assets would be federal offenses under the CSA. The debtors jointly owned commercial property in Denver, Colorado, occupying one portion for the production of marijuana, and leasing out the remainder to others, who operated a marijuana dispensary in it. The activities, while lawful under Colorado law, violated the CSA. The United States Trustee filed a motion to dismiss for cause under § 707(a) of the Bankruptcy Code, asserting that it would be impossible for a Chapter 7 trustee to administer the assets of the debtors' estate without violating federal law. In response, the debtors moved to convert their case to Chapter 13 and objected to the motion to dismiss. After an evidentiary hearing on both motions, the bankruptcy court issued a written order denying the debtors' motion to convert and granting the U.S. Trustee's motion to dismiss. The Bankruptcy Appellate Panel reasoned that in light

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82. 26 U.S.C. § 280E (2016).

83. See 26 U.S.C. § 162(a) (2014).

84. See, e.g., *Olive v. Comm'r*, 792 F.3d 1146 (9th Cir. 2015) (ruling that a San Francisco marijuana dispensary was precluded from taking a business expense deduction under the Internal Revenue Code because its "trade or business . . . consists of trafficking in controlled substances . . . prohibited by federal law.").

85. 11 U.S.C. §§ 101-112.

86. *In re Arenas v. U.S. Tr.*, 535 B.R. 845 (BAP 10th Cir. 2015).

of the fact that the debtors' conduct constituted an on-going criminal enterprise under federal law, the Bankruptcy Appellate Panel cited *Marrama v. Citizens Bank of Mass.*<sup>87</sup> for the proposition that debtor who is involved in unlawful or deceitful conduct may not seek the protections afforded by the U.S. Bankruptcy Code because the conduct betrays a lack of good faith that would bar confirmation.

Further, courts have determined that an involuntary Chapter 7 petition cannot be filed against a medical marijuana business. In *In re Medpoint Management, LLC*,<sup>88</sup> a nonprofit was authorized to operate a medical marijuana dispensary under Arizona law, and engaged Medpoint Management, LLC ("Medpoint") as a dispensary-management company to receive and hold revenue derived from marijuana, as provided by Arizona law. Creditors of Medpoint filed a Chapter 7 involuntary petition against it. Medpoint opposed the involuntary petition and argued that the trustee would not be able to administer marijuana-related assets against federal law. The court concluded that there was sufficient cause to dismiss the involuntary petition against Medpoint, because under the CSA a trustee had to place the government's interest in protecting public health first, and that the risk of a forfeiture or seizure of the marijuana-related assets or a charge for facilitating a CSA offense was not acceptable for a trustee and the estate.

In a case of particular interest to commercial landlords who lease industrial or retail space to state-licensed marijuana growers, processors or dispensers, a bankruptcy court for the District of Colorado has ruled that such activity itself amounts to an on-going criminal enterprise under the CSA, and thus tainted the would-be landlord debtor with "unclean hands," barring it from seeking relief and the right to reorganize under Chapter 11. In *In re Rent-Rite Super Kegs West Ltd.*,<sup>89</sup> the debtor leased warehouse space to tenants who legally grew marijuana under Colorado law, and derived about 25% of its income from those leases. The debtor's property was subject to mortgage liens, and secured creditor, on learning of such activities, called the loan, and sought to foreclose its mortgage lien. The debtor sought protection under Chapter 11 and the secured creditor moved to dismiss the case, arguing that the debtor's activities amounted to an on-going violation of the so-called "crack-house" statute provisions of the CSA,<sup>90</sup> thereby subjecting the debtor's property to federal criminal and civil forfeiture, which would completely divest the secured lender's lien. The court held that, whether characterized, strictly speaking, as an application of the "unclean hands" doctrine or simply as a part of the court's totality of the circumstances "cause" analysis, the Chapter 11 debtor's

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87. *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 374-75 (2007).

88. *In re Medpoint Management, L.L.C.*, 528 B.R. 178 (Bankr. D. Ariz. 2015).

89. *In re Rent-Rite Super Kegs West Ltd.*, 484 B.R. 799 (Bankr. D. Colo. 2012).

90. 21 U.S.C. §§ 856 (2003); 21 U.S.C. §§ 881 (2002).

continued criminal activity, in deriving roughly 25% of its revenues from leasing warehouse space to tenants who, to debtor's knowledge, were engaged in the business of growing marijuana without a certificate of approval from the Drug Enforcement Agency (DEA), satisfied requirement of "cause" and required dismissal or conversion of its Chapter 11 case, whichever was in the best interests of creditors and estate. The court further held that the Chapter 11 debtor, in leasing out a portion of its warehouse to parties to cultivate marijuana there and thereby subjecting the secured creditor's collateral to potential forfeiture under the CSA, "grossly mismanaged the estate," and provided "cause" for dismissal or conversion of case, notwithstanding debtor's belief that the possibility of federal narcotics prosecution, and of loss of its warehouse to forfeiture, was remote in light of Colorado's legalization of recreational production and sale of marijuana. The court reasoned that it could not use the adjudicative authority granted to it by Congress to force a creditor to bear even a highly improbable risk of the total loss of its collateral. The court stated that "[u]nless and until Congress changes [federal drug] law, the Debtor's operations constitute a continuing criminal violation of the CSA and a federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a Debtor whose activities constitute a continuing federal crime."<sup>91</sup>

The *Rent-Rite* court specifically considered and dismissed the debtor's claims that DOJ's expressions of prosecutorial discretion, as reflected in the DOJ Memoranda referred to above, ought to bear any weight in its determinations. According to the court:

In light of Colorado's laws and constitutional amendment legalizing marijuana, federal prosecutors may well choose to exercise their prosecutorial discretion and decline to seek indictments under the CSA where the activity that is illegal on the federal level is legal under Colorado state law. Be that as it may, even if the Debtor is never charged or prosecuted under the CSA, it is conducting operations in the normal course of its business that violate federal criminal law. See, e.g., *U.S. v. Stacy*, 734 F.Supp.2d 1074, 1078–81 (S.D. Cal. 2010) (criminal defendant cannot rely on public statements of non-prosecution policy issued by administration officials or justice department). Unless and until Congress changes that law, the Debtor's operations constitute a continuing criminal violation of the CSA and a federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a Debtor whose activities constitute a continuing federal crime.<sup>92</sup>

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91. *Rent-Rite*, 484 B.R. at 805.

92. *Id.*



On the other hand, the unclean hands doctrine might not bar a creditor's request for relief in all situations. In *Northbay Wellness Group, Inc. v. Beyries*,<sup>93</sup> the U.S. Court of Appeals for the Ninth Circuit reversed a lower court's decision preventing a creditor—a company that was engaged in marijuana-related activity—from seeking the non-dischargeability of a claim against an individual Chapter 7 debtor who was not engaged in marijuana-related activity. The debtor was a former member of the company's board of directors, and had served and was paid as the company's attorney. He was accused of stealing \$25,000 from a legal defense trust fund that the company entrusted with the debtor. The lower court denied the company a judgment of non-dischargeability because the nature of its business was illegal under federal law. But the court of appeals concluded that the debtor's wrongful conduct outweighed the illegality of the company's business and that “[a]llowing [the debtor] to avoid through bankruptcy his responsibility for misappropriating his client's money would undermine the public interest in holding attorneys to high ethical standards.”<sup>94</sup>

#### Some Implications for MMM Law Participants and their Counsel

The remainder of this article will focus on some of the most obvious implications which are likely to arise in Maryland as the result of the divergent Federal and Maryland state approaches to medical marijuana, as reflected in the CSA and the MMM Law, and in particular (i) from a real estate transactional perspective, (ii) in the zoning and land use arena, with regard to the problems which will arise due to the ambiguities contained in the MMM Law itself and its failure to account for the necessary interplay between its terms and various local land use regulations and finally, (iii) with respect to the ethical problems that lawyers can be expected to face in advising would-be MMM Law participants.

#### Marijuana-related Activities and the Landlord/Tenant Relationship

As noted earlier, under the MMM Law the number of licenses allowed to be issued by the Commission during this initial round of application, though limited, is still sizable: up to fifteen grower licenses,<sup>95</sup> up to two dispensary licenses per State senatorial district (i.e., 94 licenses in total)<sup>96</sup> and an unlimited number of processing licenses may be issued. The Commission was unexpectedly inundated

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93. *Northbay Wellness Group, Inc. v. Beyries*, 789 F.3d 956 (9th Cir. 2015).

94. *Id.* at 961.

95. MD CODE REGS. 10.62.01.01.A.1. This limitation on grow licenses shall only be in effect until May 31, 2016, in accordance with Health General Article, Section 13-3309(a)(2), MD Ann. Code.

96. MD CODE REGS. 10.62.15.07.A.1.

with applications for these three types of licenses.<sup>97</sup> Given the nature of all of the contemplated facilities it is reasonable to suppose that the vast majority of these operations will be conducted on leased sites, as opposed to within owner-occupied premises, and therefore it may be most instructive to consider the prospective transactional impact of the MMM Law in light of a hypothetical landlord-tenant relationship.

The late Nancy Reagan was no lawyer, but she may have had the last word in advice for would-be Maryland landlords when approached by MMM Law licensees looking to lease commercial, industrial or retail space for use in the operation of growing and production facilities, distribution centers or retail dispensaries: “JUST SAY NO.”

Given the existence of the MMM Laws, the clear statement of DOJ with respect to federal prosecutorial discretion, as reflected in the DOJ Memoranda and FinCEN Guidance, the congressional budgetary directives embodied in The Consolidated Appropriations Act of 2016, the implications of the CARERS Act, and the growing trend toward legalization in the states, commercial landlords and property owners in Maryland might be tempted to think that it would be a good and profitable idea for them to lease commercial, industrial or retail space to MMM Law licensees, for use in the operation of growing and production facilities, distribution centers and retail dispensaries. But they would be wrong.

There is simply no question that, in engaging in such leasing transactions, landlords violate the CSA and, in so doing, effectively engage in an on-going criminal enterprise, in violation of federal law; and, indirectly, they violate separate federal laws in aiding and abetting the MMM Law licensees in activities which also directly violate the CSA. Some Landlords will be tempted to rationalize this activity, concluding that current federal enforcement priorities make prosecution unlikely, even though there can be no guarantees in that regard. But a landlord's analysis cannot be permitted to end there because, quite apart from any theoretical and remote risk of criminal prosecution, there are any number of very practical, very predictable and very probable consequences which are likely to result from such a decision, and which will inevitably cripple, if not destroy, that landlord's real estate enterprise. One need only consider the hypothetical lease transaction from the limited standpoints of (i) the FinCEN Guidance and the banking community's response to it, (ii) the reactions of the federal bankruptcy court and federal judiciary generally, and (iii) the Internal Revenue Code and Regulations to see why this is so.

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97. The Commission received 1,081 applications consisting of 146 applications for a grower license, 124 applications for processor license, and 811 applications for dispensary license. *See* Press Release, Maryland Medical Cannabis Commission, Natalie M. LaPrade Maryland Medical Cannabis Commission Announces Revised Scoring Timeline for Grower and Processor License Applications (Dec. 21, 2015).

As indicated earlier, a landlord is not prohibited under Maryland law from providing leasehold space to the MMM Law licensee, but it will clearly be criminally liable under the CSA for knowingly aiding the MMM Law licensee in violating the CSA, in an on-going criminal offence. Additionally, the landlord as well as its owners and employees, separately and personally, will be liable to federal criminal prosecution for conspiracy and for aiding and abetting the MMM Law licensee in violating the CSA, in an on-going criminal offence. All of the landlord's real property which is leased to its tenant for such activities is subject to criminal as well as civil forfeiture under the CSA. If the leased premises consist of an un-subdivided part of landlord's larger holdings (as, for example, one warehouse or unit in a larger industrial complex) it is almost certain that the entirety of the un-subdivided holding would be liable to forfeiture proceedings. Penalties for violating the federal drug laws may also include imprisonment, fines, criminal forfeitures, civil forfeitures and civil penalties.

Though current federal enforcement priorities make prosecution unlikely, there can be no guarantee that the enforcement priorities embodied in the DOJ Memoranda will remain in effect, or that DOJ will determine that the MMM Laws, generally applied or pertaining to a particular location or operation, do not constitute, or no longer constitute "strong and effective" regulatory and enforcement controls on marijuana cultivation, distribution, sale, and possession, so that such operations pose unacceptable practical risks to "public safety, public health, and other law enforcement interests," sufficient to warrant federal intervention.

Funds that a marijuana business has paid to a landlord as rent are subject to forfeiture if either the business or the landlord is prosecuted for violation of federal drug laws. Moreover, as indicated above, in a civil forfeiture proceeding the criminal prosecution of the landlord or the MMM Law licensee is not even necessary. And in any event, to the extent that the landlord receives greater than \$10,000 in cash in connection with the services (whether such cash is received in one lump sum, or over time), the landlord will be required to file certain information about each transaction with the IRS, in accordance with the FinCEN Guidance. The landlord will have to ensure that its licensee tenant acknowledges and agrees to these reporting requirements in its lease. Better yet, the landlord will need to ensure that its tenant understands and agrees that cash payments of rent WILL NOT be accepted, which in turn means that the landlord will need to ensure that its tenant, or some guarantor on behalf of its tenant, is able to access the banking system in order to make regular payments of rent by check or wire transfer. As indicated above, in practice this has proved practically impossible for many licensees in other states.

This last point highlights a further concern for landlords, which is that by leasing space to MMM Law licensees, and thereby aiding and abetting these licensees in violating the CSA, these landlords must inevitably subject themselves to the same scrutiny and ostracism by the financial community as experienced by those licensees. The FinCEN Guidance makes no distinction between the licensees and their landlords in this respect. As indicated above, experience in other states has shown that the banking community's response to the FinCEN Guidance has been to wall off all aspects of state-sponsored marijuana activities, even to the point of denying federal reserve licensure to a state-chartered credit union which was created for the purpose of providing banking services to licensees.<sup>98</sup>

Under these circumstances a landlord desiring to lease space to a MMM Law licensee must consider the very real and practical risk of one or more of the following consequences. If landlord's property is subject to existing secured lending, then by entering into such a lease it is likely that the landlord will violate fairly standard mortgage loan covenants which require the landlord to operate the mortgaged property in compliance with "all laws." If and when this is discovered a mortgagee's response may well be to call a default and seek to foreclose its mortgage lien.<sup>99</sup> Obviously, if the loan has been personally guaranteed this presents very significant problems for the guarantor. Even if the loan is guaranteed on a qualified non-recourse basis, care ought to be given in order to analyze the scope of the "bad-boy carve-outs" in order to determine whether one or more of these might apply. As indicated in *In re Rent-Rite*,<sup>100</sup> bankruptcy protection may not be available to protect the landlord—or any personal guarantors of landlord's loan—from lien enforcement claims by an aggrieved mortgagee. Furthermore, the landlord's lender's established policies in applying the FinCEN Guidance with respect to its marijuana-related customers may well prompt the lender to close, or to restrict, landlord's depository accounts, or at a minimum to subject landlord's to onerous reporting and monitoring requirements, in order for the lender to feel justified in permitting the accounts to remain open.

Even if a landlord manages to fly below its lender's radar from the standpoint of operational oversight, it is almost inevitable that, in connection with any refinancing of landlord's mortgage loan, landlord's connection to the marijuana industry will be discovered, and in that case it is likely that landlord will be unable to obtain refinancing within the commercial banking community. If it can find mortgage refinancing anywhere it may be forced to resort to "hard money" lending sources, on comparatively extortionate terms.

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98. See *Fourth Corner Credit Union v. FRB of Kan. City*, No. 15-cv-01633-RBJ, 2016 U.S. Dist. LEXIS 517 (D. Colo. Jan. 5, 2016).

99. *Rent-Rite*, *supra* note 81.

100. *Id.*

The same considerations will apply should a landlord seek to sell its property: any prospective buyer will face the same barriers to access to purchase money mortgage financing as the selling landlord faced in the first instance. Moreover, any buyer for cash will inevitably seek to discount the purchase price in order to reflect the property's practical restriction to access to financing.

From the standpoint of income taxation, the landlord will be required to pay federal income tax on the proceeds of its leasing activities to medical marijuana businesses, but under certain circumstances it may not be able to deduct the expenses incurred in connection with such leasing activities. And, as indicated above, the landlord may not be able to seek relief from the bankruptcy courts if a medical marijuana business customer is unable to satisfy its obligations to the landlord, and the landlord's project fails.

Finally, the landlord's lease enforcement activities, for monetary and non-monetary defaults, will inevitably be made more problematic by the fact that the space is occupied and operated for marijuana-related activities. For example, how is an eviction to be conducted? How will controlled substances be removed? By whom? To where? To what extent will the landlord be forced/required/permitted to take custody or control of controlled substances, in vacating the premises and regaining possession? What increased costs will landlord incur in restoring the premises for re-occupancy (removal of all traces of contraband substances for example, or disposal of marijuana-related by-products or waste, which have been left over).

This parade of horrors is neither far-fetched nor by any means exhaustive. Taken together, they demonstrate fairly conclusively that, given the divergence in approach to medical marijuana-related activities, as embodied in the CSA and the MMM Laws, leasing space to a would-be MMM Law participant is surely a hard and risky way for a landlord to make a buck.

### Zoning and Land Use Perspectives

When one considers the applications and approvals processes under the MMM Laws in light of local governmental zoning and land use regulations it is fairly easy to conclude that few if any land development practitioners were present at the legislative drafting sessions. The disconnects, the ambiguities and the omissions between the MMM Laws and most local zoning and land use permitting processes are simply too large to be ignored, and they point to real practical difficulties which are likely to arise as state officials and would-be market participants seek to take advantage of the law.<sup>101</sup>

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101. There are 15 commissioners serving on the Commission. The qualifications of these Commissioners include experience in the medical and pharmacy industries, academia, government administration, police, two lawyers,

Under the MMM Laws, the Commission will grant approvals in two phases: “pre-approvals” of license applications will occur in Stage-One, with final approval (involving the issuance of a license to grow, process or dispense, either separately or in combination) being granted in Stage-Two. The Commission anticipates that all approvals required for Stage-Two final approval will be obtained by applicants within one year following the Commission’s Stage-One pre-approval. Evidence of zoning approval is not required to be provided by an applicant to the Commission until after Stage-One pre-approval from the Commission is granted. Therefore, any applicant successfully pre-approved in Stage-One must obtain all required local development approvals within the one-year gap between Stage-One and Stage-Two approval (unless such approvals had been obtained before-hand, which seems unlikely, given the nature of the proposed uses and the current state of most local jurisdictions’ zoning and land use ordinances, discussed below).

Applicants who receive Stage-One approval will have a lot to do during this one year period. At present very few municipalities have enacted zoning code provisions to specifically regulate the growth, processing, and dispensing of “Medical Cannabis,” including “Medical Cannabis Concentrate,” “Medical Cannabis Finished Product” or “Medical Cannabis Infused Products.”<sup>102</sup> The vast majority of Maryland counties and municipalities with independent zoning and land use authority have no regulatory provisions which specifically address these proposed uses.

It is standard practice for any person seeking information on the zoning designation of a particular property to refer to the applicable zoning code and zoning map in order to determine whether, within a given zoning district, a proposed use is either (i) permitted by right, (ii) permitted by special exception or conditional use, or (iii) not permitted at all. Given that, for the majority of Maryland counties or municipalities, the applicable zoning code or land use regulation is silent when it comes to medical cannabis-related uses, it is reasonable to ask some fairly simple questions: Will these municipalities inadvertently or intentionally “zone out” medical cannabis-related uses by restricting where any of these uses may lawfully locate? Will Stage-One pre-approved applicants need to wait until the municipality amends its ordinance in order to approve the proposed location for use? If so, for how long? And how will that delay affect the viability of the Stage-One

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and a mother of twins with life limiting forms of epilepsy. Based on the individual biographies for each Commissioner posted on the Commission’s website, no Commissioner has a background in real estate, zoning, and land use principles. *Commissioners, MEDICAL MARYLAND CANNABIS COMMISSION*, (last updated 5/19/2016), <http://mmcc.maryland.gov/pages/home/commissioners.aspx>.

102. MD CODE REGS. 10.62.01-10.62-35.

approval? Will the public hearing requirements that usually pertain to requests for special exceptions and conditional uses under most land use ordinances, together with third-party protestants' appeal rights, be expected to further delay required final zoning approvals well beyond the one-year period between Stage-One and Stage-Two approvals? And, if so, once again, how will that delay be expected to affect the conditional, Stage-One approval?

As indicated earlier, on December 21, 2015, the Commission announced that it had received 146 grower license applications (for the fifteen available grower licenses), 124 processor license applications and 811 dispensary license applications (for the 94 available dispensary license locations—two per state senatorial district) and that, in response to the overwhelming number of applications received, the Commission revised its schedule and stated that it anticipated issuing Stage-One awards for grower and processor applicants by summer 2016. The revised schedule for the issuance of Stage-One approval of dispensary applicants was stated to be announced “in the near future.” Observers of the Stage-One pre-approval process will be interested to learn where the proposed pre-approved licensed facilities will be located, and whether, or to what extent, their geographical distributions correspond to the purposes and intent of the MMM Laws. It may be, for example, that multiple licensed grower facilities are proposed to be situated in one given county or municipality, while other jurisdictions are left with none.

Furthermore, not all real estate is created equal. Desirable site attributes or requirements will certainly vary depending upon the nature of the licensed activity which is proposed to be located, and not all jurisdictions may be suitable to accommodate all medical cannabis-related uses. For example, applicants looking to site a growing and processing facility may well place a premium on appropriately zoned properties affording maximum privacy and seclusion, in order to enhance site security, accommodate required or desired security features, mandated setbacks from neighboring uses, and the availability of adequate or redundant sources of water and power. Additional accommodations would need to be made for “volatile processing,” of medical cannabis, using butane or other similar materials, since federal regulations impose separate setback requirements (at least 200 feet) for the use of these products in the manufacturing process.<sup>103</sup> Obviously, any such property should not be subject to development permit moratoria or other restrictions affecting the supply of public water, storm water management and sewer service, electric service, gas service, and telephone service. If outdoor growing facilities are to be installed then site security and set-back issues, as well as favorable soil quality and groundwater conditions become more important. All of

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103. 49 C.F.R. §173.5 (2016).

these attributes or considerations will apply regardless whether the facility is to be leased or owner-operated.

On the other hand, proposed dispensary applicants will be expected to seek sites affording proximity to a large customer base, as well as affording adequate parking and visible signage, along with the ability to comply with any setback and security requirements. As with growing and processing facilities, all of these features would be important regardless whether the subject property is to be leased by the applicant or owner-occupied. And, if a purchase is contemplated, then obviously, from an applicant-purchaser's perspective, any contract of sale should ideally condition the applicant-purchaser's obligation to close upon its receipt of the relevant Stage-Two license approval, in which case the purchase agreement should include a clause requiring the seller to cooperate with the applicant-purchaser's efforts to obtain required zoning and land use approvals.

A review of the COMAR provisions implementing the MMM Laws suggests that the impact of local planning and zoning ordinances was not deeply considered in the development of the State regulatory scheme. Although applicants are required to submit a detailed application to the Commission<sup>104</sup> most of the required submittals relate to the applicant itself, its constituent owners and operators and its capitalization and prior experience in the medical cannabis industry (and additionally, for grower license applications, knowledge of commercial horticulture or agronomic production).<sup>105</sup> Information respecting the proposed facility itself appears to have been included in the application as an afterthought. For example, according to the Commission applicants can choose any location in Maryland for their proposed facilities as long as local zoning laws permit the activity and location. As part of its Stage-One application for a grower, processor or dispensary license, the applicant must include a "preliminary site plan," a "security plan," a "plan for quality control," a "plan for inventorying, safekeeping and tracking," and a "disposal plan." But the details pertaining to the actual real estate that would host the licensed facility are limited to "a description of the proposed premises, including a preliminary site plan."<sup>106</sup>

COMAR provides that the Commission's review of all submitted applications will be ranked using an "impartial and numerically scored competitive bidding process."<sup>107</sup> As respects the ranking of dispensary applications, zoning and land use considerations are not mentioned at all; rather, the racial, ethnic, and geographic diversity of the proposed applicants is listed as the first criterion.<sup>108</sup> In the case of grower

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104. MD CODE REGS., 10.62.06.02 and MD CODE REGS. 10.62.15.02.

105. MD CODE REGS., 10.62.06.02(B) and MD CODE REGS. 10.62.15.02.

106. MD CODE REGS., 10.62.06.02(C.7).

107. MD CODE REGS., 10.62.06.05(H).

108. MD HEALTH-GEN. CODE ANN. § 13-3306 (2016).



license applications, the location of the proposed licensed grower facility in “an agricultural zone” is listed as the first criterion for the Commission to consider, but no further information about the meaning of “agricultural zone” is offered in COMAR. It is interesting to note that some Maryland counties or other jurisdictions having zoning authority, such as Baltimore City, have no “agricultural zones” whatsoever. Other jurisdictions, such as Carroll County, allow agricultural uses in all zoning districts. It is by no means certain that any Maryland jurisdiction would treat—or could be compelled by the Commission or other element of State government to treat—the growing of medical cannabis as an agricultural use. But assuming that it were so considered by such a jurisdiction then grower facilities would theoretically be permitted throughout the entirety of that jurisdiction. Therefore, by operation of the applicable zoning and land use ordinances throughout the State we may well see that licensed grower facilities are wholly barred in some jurisdictions while in others grower facilities might be established throughout the jurisdiction, as agricultural uses, as being permitted “as of right.”

COMAR also provides that a licensed dispensary may co-locate with a grower facility if either: (i) an entrance for the dispensary is available separate from the primary entrance of the portion of the facility used for growing, or (ii) the dispensary is located “at premises that are located in close proximity to the premises at which the licensee grows medical marijuana.”<sup>109</sup> From a zoning and land use perspective this provision is problematic on at least two grounds. First, if a grower facility and a dispensary are co-located in the same premises then the relevant jurisdiction will need to consider how to treat the proposed mixed use for zoning purposes. For example, under a given ordinance the dispensary use might disqualify the facility for approval as an agricultural use. Second, given that COMAR requires that the co-located dispensary be located within “close proximity” to the grower facility, it is unclear that the provision requires the co-located uses to occupy the same legal lot of record, or whether neighboring parcels will qualify. But this may in turn affect the zoning and land use application process, as these typically apply to a single parcel.

COMAR’s definition of “licensed dispensary” also poses potential zoning and land use applications problems. The definition does not contain a reference to the medical nature of the cannabis it would be dispensing. COMAR defines “licensed dispensary” as “[. . .] a dispensary licensed by the Commission that acquires, possesses, repackages, processes, transfers, transports, sells, distributes, or dispenses, products containing marijuana, related supplies, related products including tinctures, aerosols, oils, or ointments, or educational materials for

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109. MD CODE REGS., 10.62.13.02.

use by a qualifying patient or caregiver.”<sup>110</sup> But this definition does not include any reference to the defined term, “finished medical marijuana product.”<sup>111</sup> Therefore, a jurisdiction might elect not to treat a “licensed dispensary” as the equivalent as a pharmacy for zoning classification purposes since the medical component—“finished medical marijuana product”—is missing from the defined term. Conversely, the definition for “licensed grower” specifically references the cultivation, manufacturing, processing, packaging, and dispensing of “medical marijuana”<sup>112</sup> to provide such product to a qualifying patient, caregiver, or licensed dispensary.<sup>113</sup>

COMAR provides that the Commission will notify each of the fifteen pre-approved grower license applicants of their selection within ten business days following the Commission’s determination,<sup>114</sup> at which point these Stage-One grower license applicants must commence to secure all relevant zoning approvals sufficient to permit the operation of grower facilities at their respective designated locations. Receipt of all required zoning and land use approvals is a precondition to the issuance of Stage-Two final approval for these facilities by the Commission. COMAR provides that a final grower license may be issued to either grow, or to both grow and distribute “medical marijuana” upon the Commission’s determination that the proposed location of the facility, among other requirements, complies “with all zoning and planning requirements.”<sup>115</sup> In describing any licensed grower facility, COMAR simply requires that the applicant and its use of the proposed facility shall, among other requirements, “conform to local zoning and planning requirements.”<sup>116</sup> But COMAR does not address how a mixed use—a combination grower/dispensary facility—would be treated for zoning purposes if dispensaries are not permitted in an agricultural zoning districts. Furthermore, if under COMAR the location of a grower facility on an agriculturally zoned parcel satisfies a preferred criterion, then would the co-location of a grower facility and a dispensary violate this criterion if the grower facility would, by being co-located, no longer be eligible, under the local zoning ordinance, to be located in an agricultural district?

Other local planning and land use and development requirements potentially will be implicated by the need to comply with the COMAR provisions for site location and construction. For example, if an applicant for a grower license wishes to cultivate medical cannabis outdoors or in a greenhouse at ground level at a licensed premises, then

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110. MD CODE REGS., 10.62.01.01.13.

111. MD CODE REGS., 10.62.01.01.20.

112. MD CODE REGS., 10.62.01.01.14.

113. MD CODE REGS., 10.62.01.01.13-14.

114. MD CODE REGS. 10.62.08.07. (D).

115. MD CODE REGS. 10.62.19.06. (B).2. (b).

116. MD. CODE REGS. 10.62.08.02(B) (3) (2015).

COMAR requires that, as part of its security plan, the proposed licensee must install chain-linked fencing surrounding either the open field or the greenhouse that is at least 8 feet in height and topped with multiple strands of barbed wire.<sup>117</sup> However, many jurisdictions restrict the type or size or material of fencing in a given zone, or impose set-backs for their location. COMAR provides no guidance for a case in which compliance with its detailed regulations is forbidden under the applicable zoning, land use or development regulations.

Finally, COMAR provides that the Commission reserves the right to “rescind pre-approval of a grower license if the grower is not operational within 1 year of pre-approval”<sup>118</sup> but the regulation does not define what “operational” means. To the extent that it is interpreted to mean that the facility is in operation in the normal course, for its stated purpose, i.e., for the planting of seed for the production of medical cannabis, then it should be obvious that that would not be possible unless the final, Stage-Two, license approval had been issued for the operation of the grower facility, in the first place, in which case the provision is a nonsense. Or does the provision merely mean to suggest that the applicant be “operational” in the sense that it is an entity in good standing in Maryland and ready to commence operations? We will not know the answer to this question until and unless an applicant fails to meet this requirement and the Commission actually exercises its discretionary right to rescind.

As of April 2016, the zoning and land use regulatory response of the various Maryland jurisdictions has been spotty. Only Anne Arundel, Baltimore County and Prince Georges Counties have enacted amendments to their zoning ordinances that specifically regulate the location of licensed grower facilities. The Anne Arundel County Council amended its County Code to permit dispensaries as a special exception in certain commercial and industrial zoning districts and as a conditional use in certain industrial zoning districts.<sup>119</sup> The County Code was further amended to permit both growing and processing facilities as a conditional use in the RA district and in certain commercial and industrial zoning districts.<sup>120</sup> The definition of “farming” in the County Code was also amended to specifically exclude any use relating to the growing, processing, or dispensing medical cannabis.<sup>121</sup>

The Baltimore County Council amended the County’s zoning regulations in 2015 in anticipation of the new uses.<sup>122</sup> Pursuant to the

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117. MD. CODE REGS. 10.62.08.03(B)(2), 10.62.08.04(D)(1) (2015).

118. MD. CODE REGS. 10.62.08.06(E) (2015).

119. Anne Arundel County, MD, County Council Bill 95-15 (2015).

120. *Id.*

121. *Id.*

122. BALTIMORE COUNTY, MD., COUNTY COUNCIL BILL 61-15 (2015); BALTIMORE COUNTY, MD., COUNTY COUNCIL BILL 83-15 (2015).

newly adopted amendments, dispensaries will be permitted by right in the County's business districts, BR, BM, BL, BLR, and O-R unless the property is located in one of these zoning districts as well as in the County's Commercial Revitalization District. If the property falls within the Commercial Revitalization District, any application for zoning approval for a dispensary would require the County to grant a special exception for that use. Special exceptions in the County require community input meetings and public hearings before the County's hearing officer and zoning commissioner. These hearings require additional time for the County's review and approval than if the use was permitted by right – to say nothing of protestants' rights to appeal any grant of approval over protestants' objections. The Baltimore County zoning amendments also impose additional setback requirements: no dispensary in the County may be located within 500 feet of a public or private elementary, middle, or high school, or within 2,500 feet from another medical cannabis dispensary.<sup>123</sup> The County zoning amendments also allow growing and processing facilities to be located as of right in RC2, SE, and ML-IM zoning districts unless the property is located in the ML-IM zoning district and in the Chesapeake Enterprise Zone. In any such case, a special exception approval would be required for any growing or processing facility in that combination of the enterprise zone and the ML-IM zoning district. Special exception approvals would also be required for any growing or processing facility in the County's RC7 and RC8 zoning districts.<sup>124</sup>

Amendments made to the Prince George's County zoning code in 2016 are more stringent than those adopted by Baltimore County. Special exceptions are required for any growing, processing, or dispensing licensed facility in the County and dispensaries and growers must be within, or adjacent to, a County medical facility, including a doctor's office, medical clinic, or hospital. Processing would be treated as an accessory use to a growing facility.<sup>125</sup> Once again, special exceptions in the County would require public hearings, and, once again, one need also consider potential protestants' rights to appeal any grant of approval over protestants' objections.

Carroll County has made no formal amendments to its zoning and land use ordinances and development regulations but the County Zoning Administrator has stated that the County plans to treat medical cannabis growing as an agricultural use, processing as an industrial use, and dispensing as a pharmacy use.<sup>126</sup> He also stated that if the growing and processing uses are combined at one facility then the

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123. BALTIMORE COUNTY, MD., COUNTY COUNCIL BILL 61-15 (2015).

124. *Id.*

125. PRINCE GEORGE'S COUNTY, MD., COUNTY COUNCIL CB-5-2016.

126. Telephone Interview with Jay Voight, Zoning Administrator for Carroll County, Maryland (Mar. 7, 2016).

combined use will be treated as a commercial nursery for zoning approval purposes.<sup>127</sup> Furthermore, if new construction is involved for any of these uses then applicant would be required to comply with the County's site plan review requirements. Even if no new construction is required a "change of tenant" permit would still be required. And if open-field cultivation is planned, then the County has stated that it will require the applicant to obtain a "zoning certificate."

In Baltimore City the City Council has considered imposing new regulations on these uses but no zoning code amendments have been adopted. City officials have indicated that they plan to treat growing and processing as industrial uses that would be allowed in the industrial zoning districts, while dispensaries would be treated in the same manner as a retail drug store or pharmacy, and permitted in the City's business districts.

Other Maryland jurisdictions have considered the subject but have not amended their zoning codes, nor have they evidenced an intent to do so by adapting their existing zoning classifications to include reference to the relevant definitions in COMAR for growing, processing, and dispensing medical cannabis. This means that many potential Stage-One grower applicants will need to apply for all necessary zoning approvals, as well as required inspections and permits in jurisdictions whose zoning and land use and development ordinances make no specific provision for their proposed uses.

So throughout most of Maryland the processes by which a Stage-One pre-approved applicant will obtain final zoning and land use approvals remain unclear, and is likely to remain so until after Stage-One approvals are granted by the Commission and applicants seek to obtain all required zoning approvals within the time prescribed for Stage-Two approvals. COMAR is presently vague about the sort of zoning or land use approvals that will be required as a precondition to the issuance of Stage-Two or final issuance of any of the license types, or about what will happen to Stage-One approvals, previously granted, when zoning or land use applications are mired in local zoning and land use hearings or appeals processes extending beyond the one year Stage-Two processing period. Without adequate guidance from the Commission or the State generally, the burden of establishing effective zoning and land use regimes for medical cannabis facilities has been left up to the local governments to handle (as has been the case traditionally), on a jurisdiction-by-jurisdiction basis.

#### Ethical Perspectives for Maryland Counsel

Maryland lawyers have been practicing under the Maryland Lawyers' Rules of Professional Conduct since they became effective Janu-

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127. *Id.*

ary 1, 1987.<sup>128</sup> At least two rules, Rule 1.2(d)<sup>129</sup> and Rule 8.4(b)<sup>130</sup>, are directly relevant to would-be counsel to marijuana industry participants. The first prohibits a lawyer from counseling or otherwise assisting a client in engaging in conduct that the lawyer knows is criminal or fraudulent; the second states that it is misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. The Maryland Rules of Professional Conduct are based on the American Bar Association's Model Rules of Professional Conduct, which have been adopted by 49 states, the District of Columbia and the Virgin Islands. Accordingly, lawyers in each state (other than California which has not adopted the Model Rules) with some form of legalized marijuana industry have to deal with the implications of Rule 1.2(d) and Rule 8.4(b).

A sizable number of state bar associations have yet to address the issue,<sup>131</sup> leaving attorneys in those states without any practical guidance or assistance in approaching the conflict between federal and state laws as respects state-sanctioned marijuana-related activities. Those state bar associations which have addressed the topic have generally adopted three approaches.

The first approach has been to apply Rule 1.2(d) strictly, that is, to prohibit lawyers from assisting clients engaged in marijuana-related businesses as long as the conduct continues to violate federal law. To date, the only state with legalized marijuana to take this position has been Maine.<sup>132</sup>

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128. 2 *The Maryland Lawyers' Rule of Professional Conduct*, Appendix.

129. MD R ATTORNEYS Rule 19-301.2 (d) (quoting "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.").

130. MD R ATTORNEYS Rule 19-308.4 (b) (quoting "It is professional misconduct for a lawyer to: . . . Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects").

131. *Infra* chart, STATE BAR POSITIONS ON LEGALIZED MARIJUANA.

132. *Opinion #199. Advising clients concerning Maine's Medical Marijuana Act*, BOARD OF OVERSEERS OF THE BAR: STATE OF MAINE, Jul 7, 2010, [http://www.mebaroverseers.org/attorney\\_services/opinion.html?id=110134](http://www.mebaroverseers.org/attorney_services/opinion.html?id=110134). The Pennsylvania bar has taken a similar position (Paul Kazaras, *Philadelphia and Pennsylvania Bars Weigh In on Propriety of Providing Advice to Marijuana Related Businesses*, UPON FURTHER REVIEW, Oct.26, 2015, <https://uponfurtherreview.philadelphiabar.org/page/Article?articleID=caceb2c4-f23c-4669-96b6-5fc4d018b980>), even though Pennsylvania has not legalized medical or recreational marijuana. The opinion was issued in response to inquiries from Pennsylvania Bar members about the propriety of providing legal services to clients interested in engaging in activities that are subject to another state's marijuana laws or in preparation for the possible legalization of medical marijuana in Pennsylvania.

The second approach, adopted by the Florida and Massachusetts Bars, has been to grant immunity to lawyers from disciplinary action for assisting clients engaged in marijuana-related businesses. The Florida Bar Board of Governors and the Massachusetts Board of Bar Overseers and the Office of Bar Counsel have issued identical statements that they “will not prosecute a . . . Bar Member solely for advising a client regarding the validity, scope, and meaning of [state] statutes regarding medical marijuana or for assisting a client in conduct that the lawyer reasonably believes is permitted by the [state] statutes, regulations, orders, and other state or local provisions implementing them, as long as the lawyer also advised the client regarding related federal law and policy.”<sup>133</sup>

The third, adopted by the largest number of states that have considered the issue allows lawyers to represent clients engaged in marijuana related businesses, provided that they also advise on related federal law and policy.<sup>134</sup> Maryland joined this group on February 29, 2016, when the Maryland State Bar Association’s Committee on Ethics<sup>135</sup> released Ethics Docket No. 2016–10 (the “Maryland Opinion”), which addressed the question whether the Maryland Rules of Professional Conduct prohibit attorneys from advising clients seeking to engage in conduct pursuant to Maryland’s Medical Marijuana Laws. The Committee also addressed whether the Rules prohibit Maryland attorneys owning an interest in medical marijuana businesses. The Maryland Opinion examined the extraordinary landscape surrounding medical marijuana laws and policy coupled with federal acquiescence in state authorization of marijuana,<sup>136</sup> and observed that an attorney’s ethical obligations are unclear.

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133. *Board of Bar Overseers/Office of Bar Counsel Policy on Medical Marijuana*, MASS.GOV, <http://www.mass.gov/obcbbo/marijuana.pdf>.

134. *Infra* chart, STATE BAR POSITIONS ON LEGALIZED MARIJUANA.

135. The Maryland State Bar Association has a standing Committee on Ethics, with a mandate derived from Article VII of the MSBA Bylaws to provide interpretations of ethics rules covering lawyers and judges in Maryland. The Committee on Ethics has published written opinions interpreting the Maryland ethics rules since 1978. These opinions, while having no precedential effect, have become a resource to which Maryland lawyers frequently resort. *See Attorney Grievance Comm’n of Maryland v. Gregory*, 311 Md. 522, 531-32, 536 A.2d 646, 651 (1988) (stating MSBA ethics opinions are advisory only and therefore not binding on the court, but may be helpful before the Attorney Grievance Commission “where reasonable reliance upon an Ethics Opinion on point. . . is likely to have a significant effect.”). The Committee can issue an opinion on its own initiative, on the request of a member of the Bar, a professional organization, a Court, or upon a request from a member of the public. In response, formal analyses are prepared by volunteer lawyers serving on the Committee. Prior opinions of the Committee are indexed and available online via the Bar Association’s website, [www.msba.org](http://www.msba.org)).

136. *See* DOJ Memoranda, *supra* notes 49-56.

With some carefully crafted caveats, the Committee concluded that Maryland attorneys are *not* prohibited under the Maryland Rules of Professional Conduct from advising clients as to medical marijuana business related activities in Maryland, or providing legal services such as contracting or negotiating to advance such projects. The Committee also determined that Maryland attorneys are *not* prohibited by the Rules of Professional Conduct from owning a business interest in such ventures. Acknowledging that its opinions are advisory only, the Committee observed that it would be beneficial for the Court of Appeals (assuming it is in agreement with the Maryland Opinion) to amend the Maryland Rules of Professional Conduct<sup>137</sup> to reflect the ethical nature of assisting in or conducting business activities under the MMM Laws.<sup>138</sup>

Regarding these caveats, the Committee first noted the unique nature of the federal/state conflict, and cautioned that the Maryland Opinion should not be extrapolated to any other context. Next, it observed that the Committee's position is largely predicated on the assumption that the federal government's position, as reflected in the DOJ Memoranda, would remain unchanged, and if the Justice Department altered its stance then the Committee's views might well change. The Committee carefully noted that the Maryland Opinion is not legal advice, and that it does not immunize lawyers from disciplinary actions or prosecution by authorities with such powers. The Committee then further observed that the Local Rules of the U.S. District Court for the District of Maryland contain rules contemplating potential attorney discipline before the federal bar for violations of ethical obligations, and warned that the Committee's position may not necessarily be acknowledged and observed by the federal bar.<sup>139</sup>

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137. Several states have modified their ethics rules to address the federal/state conflict posed by legalized marijuana (*e.g.*, Colorado and Connecticut). Under Md. Code Ann., Cts. & Jud. Proc. § 13-301, the Maryland Court of Appeals has authority to appoint a standing committee to assist the Court in the exercise of its rulemaking power to regulate Maryland courts. The Standing Committee on Rules of Practice and Procedure, referred to simply as the Rules Committee, meets regularly to consider proposed amendments and additions to the Maryland Rules and to submit recommendations for change to the Court of Appeals. Currently, it is not considering any Rule changes to accommodate the matters discussed here.

138. The actual text of the Opinion in its last paragraph references "Maryland's Medical *Malpractice* Law. Presumably it was intended to reference "Maryland's Medical *Marijuana* Law."

139. The U.S. Supreme Court has recognized the inherent power of the federal district courts to disbar or discipline attorneys before them. *In re Snyder*, 472 U.S. 634, 642-45, 105 S. Ct. 2874, 2879-82, 86 L. Ed. 2d 504 (1985) (providing that the federal court has an inherent authority to suspend or disbar an attorney). On November 17, 2014, the U.S. District Court for the District of Colorado announced an amendment to its local rules that arguably will preclude members of the U.S. District Court Bar there from representing marijuana related businesses. The U.S. District Court opted out of a comment to Rule 1.2(b) of the Colorado Rules of Professional Conduct,



The Maryland Opinion offers much-needed guidance for Maryland lawyers, but it suffers from some shortcomings. First, and most importantly, the Maryland Opinion does not state whether a lawyer may buy marijuana for personal use under the MMM Laws. Several states have issued guidance on whether Rule 8.4(b) (*criminal acts reflecting adversely on honesty, trustworthiness, or fitness to practice*) would bar a lawyer from purchasing or using marijuana,<sup>140</sup> but the Maryland Opinion is silent on this point.

Next, the Maryland Opinion offers no guidance for Maryland lawyers in deciding whether to accept an engagement, or in setting terms specific to an engagement to offer counsel in connection with MMM Law-sanctioned activities. For example, many ethics opinions provide that a lawyer may not undertake an engagement to advise a client about a state's medical marijuana laws, or to represent a client and assist it in state-sanctioned marijuana-related business activities, unless the lawyer first fully advises the client that such activities may violate federal laws, including the CSA. The Maryland Opinion does not require this.

So while the guidance contained in the Maryland Opinion is helpful, it is incomplete.<sup>141</sup> With that in mind, Maryland lawyers who are considering whether to accept an engagement to advise and assist a client in MMM Law-related activities would themselves be well advised to adopt some of the following "best practices" in order to support a satisfying and straight-forward attorney-client relationship:<sup>142</sup>

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which allows Colorado attorneys to assist clients with conduct permitted under the Colorado marijuana laws. The U.S. District Court rule would not allow attorneys to "assist a client in conduct that the lawyer reasonably believes is permitted by" Colorado's marijuana laws. This creates a significant split in the ethical rules applicable to state and federal practitioners in Colorado. See Lino S. Lipinsky de Orlov et. al., *New Federal Ethics Rules Precludes Colorado Attorneys Practicing in U.S. District Court From Assisting Clients in Complying with State Marijuana Laws*, LAW WEEK COLORADO, Nov. 24, 2014, <http://cbaclegalconnection.com/2014/12/law-week-new-federal-ethics-rule-precludes-colorado-attorneys-practicing-u-s-district-court-assisting-clients-complying-state-marijuana-laws/>.

140. See, e.g., Minnesota Lawyers Professional Responsibility Board Opinion No. 23 (April 6, 2015); Washington State Bar Association Advisory Opinion 201501 (June, 2015).

141. Exposure to federal criminal prosecution and possible state bar sanctions aside, a lawyer is well advised to insure that his malpractice insurance coverage will not be jeopardized by accepting an engagement to represent a state-sanctioned marijuana-related business participant. See, Debra Cassens Weiss, *Lawyer Loses Malpractice Insurance Because She Represents Medical Pot Clients*, ABA JOURNAL, May 8, 2012, [http://www.abajournal.com/news/article/lawyer\\_loses\\_malpractice\\_insurance\\_because\\_she\\_represents\\_medical\\_pot\\_client/](http://www.abajournal.com/news/article/lawyer_loses_malpractice_insurance_because_she_represents_medical_pot_client/).

142. See generally Steven Schain, *Marijuana Law: Protecting Your Client and License*, CANNABIS BUSINESS EXECUTIVE, May 17, 2016, <https://www.cannabisbusinessexecutive.com/2016/05/16593/>.

- Add written warnings on federal law in engagement letters, websites and written memoranda for marijuana clients.
- Perform a background check on each individual involved with the client. This would include criminal and financial background checks.
- Use marijuana-specific engagement letters that clearly detail the risks and also include language:
  - Advising the client to comply with state law.
  - Advising the client about the risks of prosecution under federal law and potential consequences associated with violations of federal law that may be practice specific.
  - Advising the client that because aspects of its proposed business likely violate federal law, it may have difficulty developing banking relationships. Counsel would be well advised to consider whether it will accept cash payments for its fees and expenses in connection with the engagement, or whether it will insist that its proposed client make other arrangements so that counsel can be assured of being paid through regular banking channels. Counsel should carefully consider the possibility that it may have to accept payment of its fees in cash, and consider whether it is comfortable with that. In that case, the engagement letter should specifically advise the proposed client that, depending upon the amount of cash paid to counsel, counsel will be required to obtain from the client certain information that the client may deem confidential, and that counsel may in turn be required to disclose such information to banking regulatory participants. In that case the client should specifically consent to provide counsel with such information and agree that counsel is authorized to disclose such information in connection with its own banking relationships.
  - Reserving the lawyer's right to withdraw from the representation if the client acts in a ways that invite federal prosecution, or that violate state law, or that subject counsel to disciplinary proceedings or sanctions before any state or federal bar.
  - Advising the client of the possible limitations on confidentiality and the attorney-client privilege in the event of civil or criminal litigation.

Other practice-specific engagement letter limitations, disclosures and disclaimers may be appropriate depending on the scope of the prospective engagement. Some of the more obvious limitations might include advice and caution that MMM Law related activities may jeop-

ardize a client's ability to seek federal bankruptcy protection, or to deduct business expenses under the Internal Revenue Code, or to obtain federal trademark protection.<sup>143</sup> Also, thought should be given as to whether to require a personal guaranty from each owner for fees, as is routinely requested in engagement letters for representing startup companies.

The MMM Laws signal the growth and development of a new and potentially lucrative new industry in Maryland; and these laws present significant opportunities for Maryland lawyers. Given the number of growing, processing and dispensary facilities to be licensed, it is likely that many Maryland real estate lawyers will face the ethical issues discussed here. So far, the trend among the state bar associations has been to liberalize the ethical rules, or, at a minimum, to accommodate interpretations of these rules in order to allow attorneys to assist clients engaged in marijuana-related businesses. In Maryland, we now have some helpful guidance, even if limited or incomplete. The legal landscape in this area is rapidly shifting under foot, so practitioners will need to remain nimble and diligent so as not to stumble.

#### STATE BAR POSITIONS ON LEGALIZED MARIJUANA

STATE	DATES	STATUS
Alaska	June 23, 2015	<i>Allowed by Rule with Certain Requirements</i> Rule 1.2 was amended to add new paragraph (f) stating that "[a] lawyer may counsel a client regarding Alaska's marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. If Alaska law conflicts with federal law, the lawyer shall also advise the client regarding related federal law and policy." Alaska also added new Comment [5] to Rule 8.4 stating that "[a]lthough assisting a client under Rule 1.2(f) may violate federal drug laws, it is not a violation of Rule 8.4(b)."
Arizona	February 2011	<i>Allowed by Opinion with Certain Requirements</i> The State Bar issued Ethics Opinion 11-01 stating that lawyers may counsel or assist a client in conduct permissible under state marijuana laws, subject to three conditions: (1) at the time the advice or assistance is provided, no court has ruled that the state marijuana law is preempted, void or otherwise invalid; (2) the lawyer reasonably concludes that the client's conduct complies with state law; and (3) the lawyer advises the client about the possible federal

143. See, e.g., *Olive v. C.I.R.*, 792 F.3d 1146, 1148 (9th Cir. 2015) (finding that a San Francisco marijuana dispensary was precluded from taking a business expense deduction under the Internal Revenue Code because it is a "trade or business. . . consists [ing] of trafficking in controlled substances. . . prohibited by federal law"); *In re Arenas*, 535 B.R. 845, 848 (10th Cir. BAP (Colo.) 2015), *supra* note 47; *In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799, 804 (Bankr. D. Colo. 2012), *supra* note 77.

STATE	DATES	STATUS
		consequences, or recommends that the client seek other legal counsel regarding those issues.
California	June 2015; August 12, 2015	<p><b><i>Allowed by Opinion in two local jurisdictions, with Certain Requirements</i></b></p> <p>The Bar Association of San Francisco issued Opinion 2015-1 stating that a lawyer may represent a client in forming and operating a marijuana dispensary even though the lawyer may thereby aid and abet violations of federal law. However, the lawyer “should also advise the client of potential liability under federal law and relevant adverse consequences and should be aware of the attorney’s own risks.”</p> <p>The Los Angeles Bar Association Professional Responsibility and Ethics Committee issued Opinion No. 527 stating that laws may advise or assist clients provided that the lawyer “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.” Further, the scope of representation must be limited to “exclude any advice or assistance to violate federal law with impunity” and advise the client regarding the violation of federal law and potential penalties.</p>
Colorado	March 24, 2015; November 17, 2015	<p><b><i>Allowed by Rule with Certain Requirements; but Prohibited by Federal Bar</i></b></p> <p>Rule 1.2 was amended to add new Comment [14] stating that “[a] lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, [Sections] 14 &amp; 16, 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.”</p> <p>On November 17, 2015, the U.S. District Court for the District of Colorado amended its local rules and opted out of Comment 14, so that practitioners in the U.S. District Court will be permitted to advise clients regarding the “validity, scope, and meaning” of Colorado’s marijuana laws, but they may not “assist a client in conduct that the lawyer reasonably believes is permitted by” such laws. <i>See</i> D.C.COLO.LAttyR 2. This creates a significant split in the ethical rules applicable to state and federal practitioners and also arguably precludes members of the U.S. District Court Bar from representing marijuana-related businesses.</p>
Connecticut	January 1, 2015	<p><b><i>Allowed by Rule with Certain Requirements</i></b></p> <p>Connecticut revised Rule 1.2 to add new subparagraph (d)(3) stating that “a lawyer may . . . counsel or assist a client regarding conduct expressly permitted by Connecticut law,</p>

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STATE	DATES	STATUS
		<p>provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct." The Commentary states that subsection (d)(3) "is intended to permit counsel to provide legal services to clients without being subject to discipline under these Rules notwithstanding that the services concern conduct prohibited under federal or other law but expressly permitted under Connecticut law."</p>
Florida	May 23, 2014	<p><b><i>Immunity from Disciplinary Action, Provided Client also Advised on Federal Law</i></b>                      The Florida Bar Board of Governors issued statement that they "will not prosecute a . . . Bar member solely for advising a client regarding the validity, scope, and meaning of [state] statutes regarding medical marijuana or for assisting a client in conduct that the lawyer reasonably believes is permitted by [state] statutes, regulations, orders, and other state or local provisions implementing them, as long as the lawyer also advised the client regarding related federal law and policy."</p>
Hawaii	October 20, 2015	<p><b><i>Allowed by Rule with Certain Requirements</i></b>                      Hawaii revised Rule 1.2 to add new language to subparagraph(d) stating that a lawyer "may counsel or assist a client regarding conduct expressly permitted by [Hawaii] law, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the client's proposed course of conduct."</p>
Illinois	October 15, 2015	<p><b><i>Allowed by Rule with Certain Requirements</i></b>                      Illinois revised Rule 1.2 to add new subparagraph (d)(3) stating that a lawyer may "counsel or assist a client regarding conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences." New Comment [10] was also added stating that subparagraph (d)(3) "was adopted to address the dilemma facing a lawyer in Illinois after the passage of the [state's marijuana laws]."</p>
Maine	July 7, 2010	<p><b><i>Prohibited by Opinion</i></b>                      In Ethics Opinion 199 (July 7, 2010), the Maine Professional Ethics Commission concluded that Rule 1.2(d) "forbids attorneys from counseling a client to engage in the business of medical marijuana distribution or to assist a client in doing so." Further, the Commission noted that "[w]here the line is drawn between permitted and forbidden activities needs to be evaluated on a case by case basis" and that "participation in this endeavor by an attorney involves a significant degree of risk which needs to be carefully evaluated."</p>
Maryland	February 29, 2016	<p><b><i>Allowed by Opinion with Certain Requirements</i></b>                      Maryland State Bar Association, Inc.'s Committee on Ethics released Ethics Docket No. 2016-10</p>

STATE	DATES	STATUS
		<p>which concluded that, subject to certain limitations, the Maryland Rules of Professional Conduct “[d]o not prohibit attorneys from advising and assisting medical marijuana businesses by providing legal services to advance the business’s interests and to ensure compliance with Maryland’s statutory regulation scheme, nor do they prohibit ownership of such ventures by attorneys.” Suggests that the Court of Appeals amend the Maryland Rules of Professional Conduct to reflect the ethical nature of assisting in or conducting business activities under Maryland’s Medical Marijuana Law. Does not address attorney possession or use of medical marijuana.</p>
Massachusetts	June 1, 2014	<p><b><i>Immunity from Disciplinary Action, Provided Client also Advised on Federal Law</i></b>  The Massachusetts Board of Bar Overseers and the Office of the Bar Counsel adopted policy identical to Florida, stating they “will not prosecute a . . . Bar member solely for advising a client regarding the validity, scope, and meaning of [state] statutes regarding medical marijuana or for assisting a client in conduct that the lawyer reasonably believes is permitted by [state] statutes, regulations, orders, and other state or local provisions implementing them, as long as the lawyer also advised the client regarding related federal law and policy.”</p>
Minnesota	April 6, 2015	<p><b><i>Allowed by Opinion with Certain Requirements</i></b>  The Minnesota Lawyers Professional Responsibility Board issued Opinion No. 23 stating that “[a] lawyer may advise a client about the Minnesota Medical Marijuana Law and may represent, advise and assist clients in all activities relating to and in compliance with the Law, including the manufacture, sale, distribution and use of medical marijuana, without violating the Minnesota Rules of Professional Conduct, so long as the lawyer also advises his or her client that such activities may violate federal law, including the [CSA].”</p>
Nevada	May 7, 2014	<p><b><i>Allowed by Rule with Certain Requirements</i></b>  Nevada revised Rule 1.2 to add new Comment [1] stating that “[a] lawyer may counsel a client regarding the validity, scope, and meaning of Nevada Constitution Article 4, Section 38, and NRS Chapter 453A, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and statutes, including 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.”</p>
New York	September 29, 2014	<p><b><i>Allowed by Opinion with Certain Requirements</i></b>  The New York State Bar issued Ethics Opinion 1024 stating that “[i]n light of current federal enforcement policy, the New York Rules permit a</p>

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STATE	DATES	STATUS
		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.”
Oregon	February 19, 2015	<b>Allowed by Rule with Certain Requirements</b> Oregon amended Rule 1.2 to add new subsection (d) stating that “a lawyer may counsel and assist a client regarding Oregon’s marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy.”
Pennsylvania <sup>144</sup>	October 2015	<b>Prohibited by Opinion</b> The Ethics Committees for the Pennsylvania and Philadelphia bar associations issued Joint Formal Opinion 2015-100 stating that, as currently written, Rule 1.2(d) “forbids” a lawyer from counseling or assisting clients in the marijuana industry by “drafting or negotiating contracts for purchase, distribution or sale of marijuana.” However, the Committees have recommended that Rule 1.2(d) be amended to authorize lawyers to “counsel or assist a client regarding conduct expressly permitted by the law of the state where it takes place or has its predominant effect, provided that the lawyer counsels the client about the legal consequences, under other applicable law, of the clients’ proposed course of conduct.”
Washington	November 6, 2014	<b>Allowed by Rule with Certain Requirements</b> Washington amended Rule 1.2 to add new Comment [18] stating that “[a]t least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope and meaning of Washington Initiative 502. . .and may assist a client in conduct that the lawyer reasonably believes is permitted by this statute and the other statutes, regulations, orders, and other state and local provisions implementing them.”

\*The following states have not taken an ethics position:

Delaware	New Jersey
Michigan	New Mexico
Montana	Rhode Island
New Hampshire	Vermont
	District of Columbia

144. Pennsylvania has not legalized medical or recreational marijuana. The opinion was issued in response to inquiries from Pennsylvania Bar members about the propriety of providing legal services to clients interested in engaging in activities that are subject to another state’s marijuana laws or in preparation for the possible legalization of medical marijuana in Pennsylvania