Insuring and Investing in the Cannabis Industry

What are the Federal Issues in 2018?



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Can Government Regulated Businesses Work With State Compliant Cannabis Businesses?

YES: WITH AN ATTORNEY THAT UNDERSTANDS CANNABIS AND THEIR CURRENT LEGAL ISSUES

This program is intended to address three areas that raise direct concerns:

1. **Federal Criminal Status**
2. **Banking and IRS Issues**
3. **Food and Drug Administration (FDA)**

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Criminal Law and the Limitations on the DEA

1. Marijuana is still illegal and it continues to be true that prosecution for marijuana offenses is at the discretion of federal law enforcement

HOWEVER

2. The guidance provided by the Cole Memo remains relevant, despite Sessions later memo which appears to undermine the Cole Memo
   a. The Cole Memo gives prosecutors and D.A.s the directive that marijuana businesses operating within their states regulations should not be prosecuted

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Criminal Law and the Limitations on the DEA

b. The Cole Memo gave 8 additional criteria that are the basis of most state's programs
   i. Prevent distribution of marijuana to minors
   ii. Prevent revenue from marijuana sales from going to gangs or cartels
   iii. Prevent diversion to states where it is not legal
   iv. Prevent state authorized distributors from being used as a cover for illegal trafficking of other drugs
   v. Prevent violence and the use of firearms in the cultivation of marijuana
   vi. Prevent drugged driving and exacerbation of other adverse public health consequences associated with marijuana use
   vii. Preventing growth of marijuana on public land or attendant public health issues and environmental dangers
   viii. Prevent marijuana possession or use on federal property

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Criminal Law and the Limitations on the DEA

3. The Sessions Memo, issued on January 4, 2018, states that the Cole Memo has been rescinded

HOWEVER

4. The Dana Rohrabacher Amendment that de-funded enforcement of state legal marijuana establishment has not been changed
   a. Skeptics will claim that Rohrabacher's concept was built on the foundation of the Cole Memo
   b. The budget has not been changed
   c. Current Administration is Pro-Business
   d. Opiates, including heroin, are claiming enormous amounts of attention
   e. There is no political momentum behind adding to the DEA's budget, or for elected DAs to reprioritize
   f. As attorneys, we can never make a guarantee under this scenario, but investors can and will continue to back marijuana

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BANKING AND THE IRS-WHERE THE MONEY IS (AND IS NOT)

1. BSA Expectations Regarding Marijuana Related Business
   a. Suspicious Activity Reports are required for activities that a reasonable financial services company should know may be linked with illegal activity like money laundering or drug dealing
   b. State regulated marijuana businesses require a SARS report
   c. Three categories of SARs
      i. Marijuana Limited – means that it does not implicate one of the Cole Memo Priorities
      ii. Marijuana Priority – means that it does implicate one of the Cole Memo Priorities
      iii. The bank has terminated the relationship

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BANKING AND THE IRS-WHERE THE MONEY IS (AND IS NOT)

2. Recommendations for Finance Institutions Working with Cannabis Companies
   a. Remember that the DOJ has always had the choice to enforce Federal Marijuana Laws
   b. Establish Expected Account Activity
   c. Identify all related parties involved with the account
   d. Engage an attorney knowledgeable in cannabis regulations to perform site visits
   e. Retain a copy of the business's state license
   f. Perform enhanced ongoing monitoring
   g. Obtain periodic financial statements and tax returns
   h. Monitor for check/debit and cash transactions
   i. Check publicly available sources of information
   j. File required SARS reports
   k. Consider maintaining separate accounts for payroll, ATM, expense and tax payments
   l. Banks who work with marijuana companies will have to stay alert to changes in state marijuana laws

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BANKING AND THE IRS-WHERE THE MONEY IS (AND IS NOT)

3. What does this mean for cannabis clients and financial institutions?
   a. Banks do not advertise for cannabis clients, but the number of Marijuana-Related SARs demonstrates that thousands of Marijuana related accounts have been opened
   b. About 20,000 of the SARs filed during the first quarter of 2017 were Non-Priority, but the next largest class was the close of an account
      i. An account can be closed for reasons not related to suspicious activity
   c. Compliance with state regulations is a business imperative
      i. Enforcement of marijuana laws against non-licensed dealers will likely increase with licensed businesses entering the market
      ii. Compliant licensees will sometimes report their non-compliant licensees
      iii. Federal law enforcement may increase, but they will still target non-compliant businesses

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BANKING AND THE IRS-WHERE THE MONEY IS (AND IS NOT)

4. Cannabis and the IRS – Remember Al Capone?
   a. 280(e) – Even attorneys need to know this section by name if they work in Cannabis
   b. You have to pay taxes on all earnings, including those from illegal enterprise, gambling, and state compliant cannabis companies
   c. The IRS has chosen to interpret dispensaries, businesses selling cannabis to the public, as engaging in illegal enterprise
   d. Impact: Dispensaries cannot write off most expenses that traditional businesses include in overhead
   e. A tax attorney and a specialized accountant are worth their cost to save in tax

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The FDA Has a Responsibility to Monitor and Regulate Consumables

FDA May Doze, But They Never Close and Various Agencies Have Been Working In Conjunction With The FDA on How To Regulate Marijuana Since 2009

1. DEA Provides the Statutory Guidelines for the FDA to Regulate
    a. FDA provided guidance on submitting investigational IND (regulations) for botanical drugs in January 2017
    b. FDA works with investigations drug sponsors to focus on measures to take to help assure quality manufacturing
    c. Expediting drug development using available tools: Orphan disease designation, Priority Review and Fast Track Designation
    d. Development under IND will lead FDA to authorize access to marijuana for testing
    e. FDA Marijuana WG to coordinate Agency work
    f. Providing Scientific Input (using the 8-factor analysis)
    g. Supporting Drug Development
    h. Enforcement Actions – Compare to State Regulated vs. Black Market

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The FDA Has a Responsibility to Monitor and Regulate Consumables

2. The FDA has started the process for regulation by publishing Guidance for Scientists Working With Botanicals (marijuana)
3. The next step after guidance is Warning Letters
   a. Two sets of Warning Letters have been issued
      i. One set warned against products making claims that CBD can cure cancer, prevent cancer or cure tumors
      ii. One set went to companies selling products labelled as 'CBD' that did not contain CBD
      iii. One company has brought its product to the FDA, and submitted to its procedures:
         1. GW Pharmaceuticals finished its double blind placebo testing and submitted its reports for FDA approval last year
         2. Newsweek reported that the placebo had an impact on 14% of the patients, and the CBD product had a 41% impact, which researchers say is the most promising ratio seen in blind placebo testing of cannabis. (Kate Sheridan, Newsweek, January 25, 2018)

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Eight Factor Analysis (Required Under CSA)

1. Actual and potential for abuse
2. Pharmacology
3. Other current scientific knowledge
4. History and current pattern of abuse
5. Scope, duration and significance of abuse
6. Public health risk
7. Physic or physiological dependence liability
8. If an immediate precursor of a controlled substance 21 USC 811(c)

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THANK YOU FOR ATTENDING!



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