




**SUSSMAN SHANK<sup>LLP</sup>**  
— ATTORNEYS —

**Selling to the Cannabis (and Hemp)  
Industry: Risks & Guidelines**

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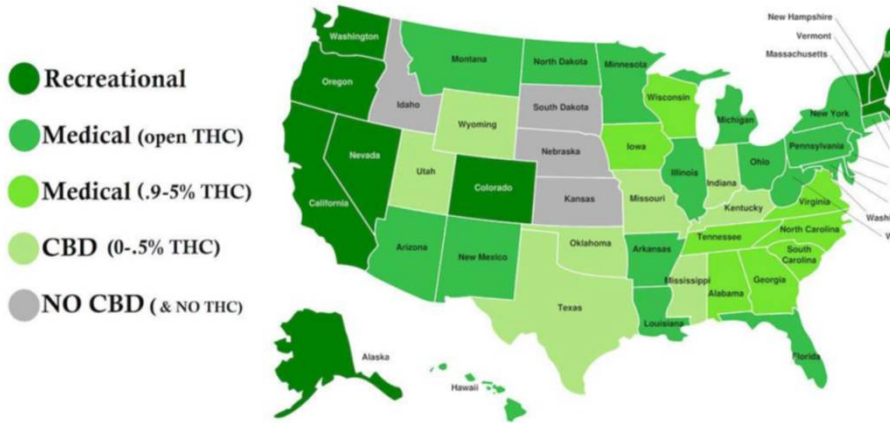
**+ Controlled Substances Act**



- Signed into law in October 1970.
- Created five Schedules for drugs with Schedule 1 being most highly regulated.
- Categories are based on potential for abuse and medical usage.
- Schedule 1 includes marijuana, heroin, LSD, peyote, mescaline and pretty much anything else reference by Hunter S. Thompson in *Fear and Loathing in Las Vegas*.

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## + State Treatment of Cannabis and CBD



■ <https://bloximages.chicago2.vip.townnews.com/edmondsun.com/content/tncms/assets/v3/editorial/c/0f/c0f66ada-5311-11e8-9048-97566e2b9c0c/5af2291304571.image.jpg?resize=1194%2C630>

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## + The Cole Memorandum (August 2013)

- Restated enforcement priorities for the Department of Justice with respect to cannabis.
  - Preventing distribution to minors;
  - Preventing revenue from going to criminal organizations;
  - Preventing diversion of cannabis to other states;
  - Preventing state-authorized activity from acting as a front;
  - Preventing violence and use of firearms;
  - Preventing drugged driving and adverse health consequences;
  - Preventing growing of cannabis on public lands; and
  - Preventing cannabis possession and use on federal property.

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## + Cole Memorandum (Cont.)

- Put a burden on states to have a system of appropriate regulations and to enforce their regulations.
- Reduced the focus of prosecutors on large operations in states where cannabis was legal in some form.
- Did not have the force of law. (Foreshadowing)



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## + Sessions Memo—Where Does This Leave Us?



- Attorney General Sessions rescinded the Cole Memorandum (and other subsequent and prior guidance with respect to cannabis enforcement).
- This leaves U.S. Attorneys to the general guidance on prosecutorial priorities.

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## + Rohrabacher-Blumenauer Amendment

- Prevents the DOJ from spending its appropriated funds to bring enforcement actions against **medical marijuana-related activities**.
- Subject to regular renewal in connection with annual appropriations bills.
- Does not address recreational/adult use cannabis businesses regulated at the state level.

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## + *Murphy v. NCAA*



- Holdings regarding the 10<sup>th</sup> Amendment could impact enforcement of Controlled Substances Act.
- Federal government cannot require states to enforce Federal law. ("Anti-commandeering")

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## + Risks to Those Supplying and Financing the Cannabis Industry on Credit



- Civil and Criminal Forfeiture
- Anti-Money Laundering Regulations
- Unavailability of bankruptcy
- Challenges in retaking collateral
- Civil RICO exposure
- Aiding and Abetting Liability

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## + Civil and Criminal Forfeiture



- **Racketeering Influence and Corrupt Organizations Act (RICO) (1970)**
- Further expanded by Comprehensive Crime Control Act of 1984
- **Civil Forfeiture**
  - Government has to have probable cause.
  - Burden of proof is a preponderance of the evidence.
- **Criminal Forfeiture**
  - Brought as part of a criminal case.
  - Burden of proof is beyond a reasonable doubt.

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## + Property Subject to Forfeiture



- Real property used or intended to be used in violation of the Controlled Substances Act.
- Raw materials, products, **and equipment** of any kind which are used, or intended for use, in manufacture, processing or delivery of controlled substances.
- **Moneys**, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.

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## + Anti-Money Laundering (AML) Statutes



- Money Laundering Control Act ("MLCA") makes it a crime to knowingly conduct a financial transaction with proceeds of a "specified unlawful activity," or for transporting, transmitting or transferring funds internationally for the purpose of promoting a "specified unlawful activity"
- Financial transactions is a broad term including movement of funds through wires, transfers of titles to real property and vehicles, involving one or more monetary instruments, etc.
- Each financial transaction can constitute a separate offense in most jurisdictions.
- Section 1957 prohibits a monetary transaction involving property valued at more than \$10,000 derived from a specified unlawful activity.

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## + Unavailability of Bankruptcy



- Bankruptcy courts have been almost universal in finding that both state-licensed cannabis businesses and **businesses that would depend on such businesses as a source of revenue** (ex. landlord) in connection with their bankruptcy plan,
- Chapter 11 and Chapter 13 bankruptcies require a bankruptcy plan that is proposed in good faith and is not prohibited by law.
- Chapter 7 bankruptcies (liquidation) are administered by the United States Trustee Program and the USTP will not administer sale of assets related to cannabis businesses.
- This may include businesses involved in selling “drug paraphernalia” which includes “equipment, product, or material or any kind which is primarily intended or designed for use” in manufacturing a controlled substance.

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## + Civil RICO



- Disgruntled neighbors are starting to resort to claims based on RICO's civil penalties, which include treble damages and attorneys fees.
- A Tenth Circuit case (*Safe Streets Alliance v. Hickenlooper*) found that the neighboring landowners could sue for alleged injuries to property related to a cannabis grow operation. However, the jury ultimately found for the defendant.
- In Oregon, *Ainsworth vs. Owenby*, granted defendant's motion to dismiss because plaintiff failed to show property injury.
- However, a vineyard was successful in surviving a motion to dismiss in its case against a cannabis producer/processor in *Momtazi Family, LLC v. Yamhill Naturals, LLC, et al.*
- These cases can include a number of parties as defendants with only a tangential connection to the business including insurance companies, lenders, suppliers, etc.

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## + Neighbor Disputes That May Lead to RICO Claims

- Odor
- Waste management
- Use of hazardous materials in processing
- Security
- Aesthetics and sensibilities



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## + Challenges In Retaking Collateral

- State licensure statutes may make it difficult to retake certain types of collateral, particularly inventory.
- Oregon and some other states have addressed the possibility of a receivership.
- Receivership may be a solution (and a way around bankruptcy issues) but is not without its challenges:
  - Some receivers will not take this type of case;
  - Receiver will have concerns about their ability to set up bank accounts;
  - Receiver will also have concerns about insurance; and
  - Receivership costs can be substantial depending on what is involved (liquidation, operating the business, etc.)

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## + Aiding and Abetting

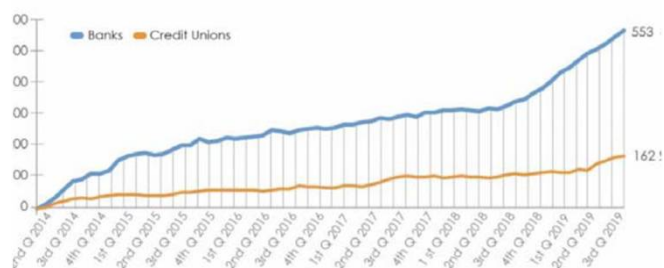
- Aiding and abetting someone in the violation of the CSA or conspiring with someone to do so is, in and of itself, a crime.
- However, there must be intent to facilitate the commission of the crime.
- Most suppliers and service providers are not intending to facilitate a violation of the CSA. For example, the equipment supplier does not care how the equipment they supply is used, even if they know that it is likely to be used in a cannabis business.
- The position of your local U.S. Attorney on enforcement may give you some guidance on their position on whether selling equipment to a cannabis business or providing them with financing could constitute aiding and abetting.

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## + Increased Banking of Cannabis Businesses

- As of June 30, 2019 there were 553 banks and 162 credit unions that submitted documents indicating that they are providing financial services to state legal cannabis businesses up from 493 and 140, respectively, the previous quarter. Source: Association of Certified Financial Crime Specialists

**Depository Institutions (by type) Providing Banking Services to Marijuana Related Businesses<sup>1</sup>**  
(SARs filed through 30 June 2019)



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## + 2018 Farm Bill: 1 Plant, 2 Different Treatments Under the CSA



- Removed “industrial hemp” (i.e. cannabis with less than 0.3% THC content) and derivative products with less than 0.3% THC content from Schedule I of the Controlled Substances Act.
- **Subject to USDA regulations or USDA-approved state regulations** (forthcoming for crop year 2020).
- States and Indian tribes may not prohibit interstate transportation of industrial hemp produced under a license issued pursuant to USDA-approved regulations or transportation of hemp produced under the 2014 Farm Bill.
- States may still prohibit growing hemp and the sale of hemp and hemp-derived products.

See, Memorandum of Stephen Alexander Vaden, General Counsel of the USDA, May 28, 2019

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## + Issues Related to CBD



- Both the Department of Health and Human Services and the Food and Drug Administration retain separate authority to regulate CBD products.
- The FDA has been slow to provide regulations for CBD in part because the FDA had already approved a drug (Epidiolex) for which CBD is the active ingredient. This has caused some concern about ability to market other CBD isolates.
- Majority Leader Mitch McConnell (Kentucky) and others have started to pressure the FDA to provide guidance on CBD.
- Transporting oil in an intermediate condition where THC level exceeds 0.3% is problematic and could result in seizure by local authorities or the USPS.

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## Is it SAFE Yet? House Passes SAFE Act, Awaits Senate Action



- The House has passed its version of the Secure and Fair Enforcement Banking Act ("SAFE Act")
- Eliminates civil, criminal and administrative forfeiture risk for depository institutions with respect to loan collateral.
- Prohibits Federal banking regulators from taking adverse actions against depository institutions for providing financial services to a "cannabis- related legitimate business or service provider."
- Opens door to lending to cannabis businesses and not just accepting deposits.
- Modifies MLCA such that proceeds from cannabis-related legitimate businesses and service providers are not treated as proceeds from an unlawful activity.
- Protections limited to depository institutions, insurers and an "entity performing a financial service for or in association with a depository institution."

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## Questions?



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