Insuring Cannabis

By Margaret Nash

Evaluating Risk During Prohibition

Entrepreneurs are flocking to cash in on the green rush, now that medical marijuana is legal in twenty-nine states and recreational marijuana is legal in eight states and Washington, D.C. As these legal cannabis businesses begin to bloom, so does the demand for insurance. Like any other business, cannabis companies and marijuana related businesses (MRBs), such as companies selling or distributing vaporizers or agricultural equipment necessary to grow marijuana, need not only traditional commercial coverage, but also coverage unique to the risks associated with this nascent industry, including theft coverage, crop insurance, and disaster relief assistance. However, major insurance carriers have been hesitant to enter into the cannabis market since marijuana remains illegal under federal law.

Despite federal prohibition, the marijuana industry continues to take root across America. In 2016, California, Nevada, Maine, and Massachusetts joined Colorado, Washington, Alaska, and Ore-

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gon in legalizing recreational marijuana. Marijuana sales in the U.S. totaled $6.7 billion in 2016, and North American sales (including Canada, where marijuana will be legalized nationwide by July 2018) are projected to top $20.2 billion by 2021. Debra Borchardy, *Marijuana Sales Total $6.7 Billion in 2016,* Forbes (Jan. 3, 2017), available at https://www.forbes.com. Notwithstanding these huge sales numbers and predictions for rapid growth, what many insurers may be most concerned about is whether "legal marijuana" is actually permitted by law, and whether the decision to insure the cannabis industry and MRBs is a smart and enterprising choice, or a path toward potential civil and criminal liability.

This article discusses Obama era protections from federal prosecution, the current legal landscape impacting insurers' ability to comply with federal law while insuring cannabis companies, and what the future of the cannabis industry may look like under the Trump administration, with the goal of offering recommendations to insurers who are considering providing insurance services to cannabis companies and MRBs.

Federal Preemption

No matter how many states legalize medical or recreational marijuana, as long as marijuana remains classified as a "Schedule 1" substance under the Controlled Substances Act (CSA), it is illegal everywhere in America. The Supreme Court confirmed that the CSA supersedes state regulation of marijuana in *Gonzales v. Raich,* 542 U.S. 1 (2005). There, two medical marijuana patients sought injunctive and declaratory relief against the Attorney General and Drug Enforcement Administration (DEA) after their doctor-prescribed medical marijuana plants were seized by the federal government. The Supreme Court held that under the Commerce Clause, Congress is permitted to criminalize the production and use of homegrown cannabis, even if states approve its use for medicinal purposes. *Id.* at 9. Given the express language of the Supremacy Clause set forth in the Constitution, and the Court's holding in *Raich,* marijuana is indisputably illegal throughout the United States, regardless of the state laws legalizing it throughout the country.

Obama Era Protections Under Federal Law

In spite of the CSA, during the past nine years the government has not prioritized prosecution of medical and recreational marijuana businesses as a result of Justice Department policies enacted during the Obama administration and upheld during the first year of the Trump administration.

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The 2009 and 2011 Ogden Memoranda

To provide uniform guidance to focus federal investigation and prosecutions in states that authorized the medical use of marijuana, on October 19, 2009, Deputy Attorney General David Ogden issued a memorandum for selected U.S. Attorneys in these states. David Ogden, *Memorandum for Selected U.S. Attorneys: Investigations and Prosecutions in States Authorizing Medical Use of Marijuana,* (October 19, 2009), available at https://www.justice.gov. This memorandum made clear that, while it was still a priority for the federal government to prosecute significant traffickers of illegal drugs, including marijuana, prosecutorial efforts should not be directed toward individuals whose actions were in compliance with state laws providing for the medical use of marijuana. However, the Ogden Memorandum went on to state that it was not intended to provide a legal defense to violation of federal law, or to create any privilege, benefits, or rights enforceable by any individual or party in any administrative, civil, or criminal matter.

In June 2011, the Ogden Memorandum was updated to respond to inquiries regarding the Department of Justice's stance on enforcement of the CSA in jurisdictions that had approved the commercial cultivation and distribution of marijuana for medical use. David Ogden, *Memorandum for United States Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use*, (June 29, 2011), available at https://www.justice.gov. The 2011 Ogden Memorandum reaffirmed the position that the Department of Justice did not consider it a good use of federal resources to focus CSA enforcement efforts on medical marijuana patients or their caregivers. However, it further stated that the 2009 Ogden Memorandum was *not* intended to protect individuals and entities involved in the commercial cultivation of cannabis, or its sale and distribution, even where commercial operations complied with state law, and that persons in the business of cultivating, selling, or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the CSA. It reiterated that state laws and local ordinances are not a defense to civil or criminal enforcement of federal law.

The 2013 Cole Memorandum

On August 29, 2013, Deputy Attorney General James M. Cole issued a subsequent memorandum offering further guidance on marijuana enforcement. James M. Cole, *Memorandum for all United States Attorneys: Guidance Regarding Marijuana Enforcement,* (August 29, 2013), available at https://www.justice.gov. Like the Ogden Memoranda before it, the Cole Memorandum confirmed that, while the Department of Justice remained committed to enforcement of the CSA, it was also committed to using its limited prosecutorial resources in a rational way. To that end, it identified certain enforcement priorities that were particularly important to the federal government, including:

- preventing the distribution of marijuana to minors;
- preventing revenue from the sale of marijuana going to criminal enterprises;
- preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- preventing state-authorized marijuana activity from being used as a cover for

the trafficking of other illegal drugs or illegal activity;
- preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- preventing drugged driving and other adverse public health consequences;
- preventing growing marijuana on public lands; and
- preventing marijuana possession or use on federal property.

(Collectively referred to as "Federal Enforcement Priorities")

The Cole Memorandum acknowledged that jurisdictions that had enacted laws legalizing marijuana in some form, and that had also implemented strong and effective regulatory and enforcement systems to control cultivation, distribution, sale, and possession of marijuana in compliance with state law, were less likely to threaten Federal Enforcement Priorities. The Cole Memorandum affirmed the Ogden Memoranda's position that it was likely not an effective use of federal resources to focus enforcement on seriously ill individuals or their caregivers, but stated that the primary question in all cases and all jurisdictions was whether the conduct of the marijuana operation implicated a Federal Enforcement Priority. Like the Ogden Memoranda, the Cole Memorandum expressly stated that it did not provide a legal defense to a violation of federal law, including any civil or criminal violation of the CSA.

2014 FinCEN Guidance Regarding Marijuana Related Businesses

In the wake of the Cole Memorandum, in February 2014, the Financial Crimes Enforcement Network (FinCEN) issued guidance to financial institutions regarding marijuana related businesses to clarify the institutions' obligations under the Bank Secrecy Act ("BSA"). Department of the Treasury Financial Crimes Enforcement Network, *FIN-2014-G001: BSA Expectations Regarding Marijuana-Related Businesses,* (February 14, 2014), available at https://www.fincen.gov. FinCEN stated that, in assessing the risk of providing services to a marijuana-related business, a financial institution should conduct customer due diligence related to the Cole Memorandum Federal Enforcement Priorities, such as:

- verifying with the appropriate state authority whether the business is duly licensed and registered;
- reviewing the license application submitted to obtain a state license;
- requesting information available from state licensing and enforcement authorities about the business and related parties;

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- developing an understanding of the normal and expected activity for the business (*i.e.*, medical versus recreational);
- continually monitoring publicly available sources for adverse information about the business and related parties; and
- refreshing information obtained on a periodic basis and commensurate with risk.

The FinCEN guidance also requires all financial institutions that provide services to marijuana related business to file suspicious activity reports (SARs) if it knows, suspects, or has reason to believe that transactions conducted through the institution involve funds derived from illegal activity, or lack an apparent lawful purpose. Since all financial transactions involving MRBs necessarily involve funds derived from illegal activity, financial institutions are required to file an SAR regarding any MRB transaction under the BSA and FinCEN's guidelines, known as a "Marijuana Limited SAR."

Per the guidelines, financial institutions are required to file a separate type of SAR, known as a "Marijuana Priority SAR" if customer due diligence suggests that the MRB is engaged in activity that implicates one of the Cole Memorandum Federal Enforcement Priorities, or violates state law. The FinCEN guidelines identify certain "red flags" that may indicate that an MRB is engaged in an activity that violates state law. Examples identified in the guidelines include where 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; the business is unable to demonstrate the legitimate source of significant outside investments; or a customer seeks to conceal or disguise involvement in marijuana-related business activity through a holding company, consulting company, or management company, but makes large cash deposits that smell like marijuana. The FinCEN guidelines confirmed that FinCEN's enforcement priorities would focus on matters of systemic or significant failures, and not isolated lapses in technical compliance. The 2014 FinCEN guidelines remain in effect today.

In sum, during the past nine years the Ogden and Cole Memoranda and FinCEN guidelines have provided some comfort that federal prosecution is unlikely of individuals, entities, and financial institutions operating in legalized states and in compliance with state law. As a result, the legal marijuana industry has flourished, even though these protections were not codified as law, and merely acted as internal guidance on prosecutorial discretion and compliance with the BSA.

While the FinCEN guidelines remain in effect today, Attorney General Sessions rescinded the Ogden and Cole Memoranda

as of January 4, 2018, upsetting an already tenuous truce between legalized states and the federal government. The potential impact of Sessions' rescission is discussed in further detail below.

The Rohrabacher-Blumenauer Amendment

The only legislation with the force of law behind it providing protection to the *medical* marijuana industry is the Rohrabacher-Blumenauer Amendment, which was adopted as part of the 2014 federal spending bill. Consolidated and Further Continuing Appropriations Act 2015, 113 P.L. 235, §538. This amendment prohibits the Justice Department from spending funds to interfere with the implementation of state medical cannabis laws, and specifically provides that federal funds cannot be used to prevent certain states from implementing their own laws authorizing the use, distribution, possession, or cultivation of medical marijuana. It specifically identifies the following jurisdictions: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin. It is silent as to recreational marijuana laws. Because the amendment passed as part of an omnibus spending bill, it must be renewed each fiscal year to remain in effect. The Rohrabacher-Blumenauer Amendment is currently in effect through March 23, 2018.

Despite the passage of Rohrabacher-Blumenauer (previously known as the Rohrabacher-Farr Amendment) in 2014, the Department of Justice continued to prosecute medical marijuana providers who were complying with state laws based on an erroneous interpretation of the legislation's language. The legality of these prosecutions was challenged in *U.S. v Marin Alliance for Medical Marijuana*, 139 F.Supp.3d 1039 (N.D. Cal. 2015) (*app. dism.* Apr. 12, 2016). The government defended its right to prosecute individuals and businesses under the CSA, arguing that the amendment proscribes "the use of appropriated funds to 'prevent' states from 'implementing their own' medical marijuana laws" and that this prohibition does not "include CSA enforcement actions because such actions do not prevent a State from implementing its own laws." *Id.* at 1044. The United States District Court for the Northern District of California rejected the government's "tortured reading of the plain meaning of the statute" and held that the Department of Justice was prohibited from enforcing a permanent injunction enjoining a medical marijuana dispensary from distributing marijuana, to the extent the dispensary complied with California law. *Id.*

> Even while the Obama era protections described above were in place, and while the Rohrabacher-Blumenauer Amendment remains effective, all individuals and entities providing services to the legal marijuana industry, including insurers and attorneys, should be aware of several federal statutes that could give rise to criminal liability.

The Ninth Circuit recently echoed the California district court's decision, ruling that the Department of Justice may not use federal funds to continue prosecutions for violations of the Controlled Substances Act where the defendants' conduct was authorized by state medical marijuana laws. *U.S. v. McIntosh,* 833 F.3d 1163, 1177 (9th Cir. 2016). However, the court went on to caution that "Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding." *Id.*, at 1179, fn. 5. Any offenses could be prosecuted up to five years after the offense occurred. 18 U.S.C. §3282.

Potential Risks and Liability Under Existing Federal Law

Even while the Obama era protections described above were in place, and while the Rohrabacher-Blumenauer Amendment remains effective, all individuals and entities providing services to the legal marijuana industry, including insurers and attorneys, should be aware of several federal statutes that could give rise to criminal liability.

Controlled Substances Act, 21 U.S.C. §801, et al.

Marijuana is identified as a Schedule I drug under the CSA meaning that it has: a) a high potential for abuse; b) no currently accepted medical use in treatment in the United States; and c) there is a lack of accepted safety for use of the drug or other substance under medical supervision. 21 U.S.C. §812(b)(1). The CSA makes it illegal to manufacture, distribute, or possess marijuana, with the sole exception being use of the drug as part of a Food and Drug Administration pre-approved research study. 21 U.S.C. §841.

While insurance companies issuing policies to entities involved in the cannabis industry would not be susceptible to direct prosecution under the CSA, there is a theoretical risk of criminal liability for aiding and abetting violation of the CSA under 18 U.S.C. §2, which makes it a criminal offense to aid, abet, counsel, command, or induce another to violate federal law, or willfully causing an act to be done, which if performed by another, would violate federal law. Similarly, there is possible exposure to liability for conspiring to violate federal law.

To prosecute a claim for aiding and abetting violation of the CSA successfully, the government would have to prove beyond a reasonable doubt that the issuance of an insurance policy constituted "aiding and

abetting" the manufacture or distribution of marijuana, and that the insurer acted with criminal intent. "[A] conviction of aiding and abetting requires the government to prove four elements: (1) that the accused had the specific intent to facilitate the commission of a crime by another, (2) that the accused had the requisite intent of the underlying substantive offense, (3) that the accused assisted or participated in the commission of the underlying substantive offense, and (4) that someone committed the underlying substantive offense." *Conant v. Walters*, 309 F.3d 629, 635 (9th Cir. 2002), citing *United States v. Gaskins,* 849 F.2d 454, 459 (9th Cir. 1988). To establish criminal intent under the CSA, the government must show that an insurer knowingly aided and abetted violation of the CSA. *United States v. Ford*, 821 F.3d 63, 68 (1st Cir. 2016).

There is also a possibility that an insurer could be considered to have engaged in a criminal conspiracy to violate the CSA by insuring cannabis companies. "A criminal conspiracy exists when two or more persons agree to commit a crime." *United States v. Monserrate-Valentin*, 729 F.3d 31, 41 (1st Cir. 2013). However, defendant's mere knowledge of an illegal activity does not in and of itself demonstrate an agreement to join a conspiracy. *Id.* The evidence must demonstrate agreement to commit a crime or a tacit understanding. *Id.*

Research indicates that, to date, the federal government has not pursued any federal action against any service providers to the marijuana industry for aiding and abetting or conspiring to violate the CSA. While it is difficult to calculate insurers' risk of criminal liability precisely under the CSA, the Ninth Circuit decision in *Conant v. Walters, supra,* is instructive. In *Conant*, the Ninth Circuit affirmed a district court order granting a permanent injunction that prevented the federal government from revoking a doctor's DEA registration or initiating an investigation if he or she recommended medical marijuana on the grounds that the federal policy infringed upon doctors' and patients' First Amendment rights. *Conant,* 309 F.3d at 633–34. The court of appeals clarified that the injunction did not prohibit the federal government from prosecuting doctors "when government officials in good faith believe that they have 'probable cause to charge under federal aiding and abetting and/or conspiracy statutes,'" but went on to provide that "[a] doctor's anticipation of patient conduct [] does not translate into aiding and abetting, or conspiracy." *Id.* at 635–36. The court further clarified that:

> A doctor would aid and abet by acting with the specific intent to provide a patient with the means to acquire marijuana.…Similarly, a conspiracy would require that a doctor have knowledge that a patient intends to acquire marijuana, agree to help the patient acquire marijuana, and intend to help the patient acquire marijuana.…Holding doctors responsible for whatever conduct the doctor could anticipate a patient *might* engage in after leaving the doctor's office is simply beyond the scope of either conspiracy or aiding and abetting.

Id. at 636 (internal citations omitted).

Based on *Conant*, it is arguable that providing insurance to a MRB, particularly manufacturers or distributers of agricultural equipment that may or may not be used in the production of marijuana, or smoking paraphernalia that could be used for tobacco as well as cannabis, would not amount to aiding and abetting or conspiracy to violate the CSA, because the insurer cannot he held to anticipate in what activity its insured might engage. By comparison, an insurer issuing policies to a cannabis cultivator or distributor may be more susceptible to criminal liability for aiding and abetting or conspiracy to violate the CSA, because the government would likely be able to show that the insurer knowingly facilitated or assisted in the commission of a crime, and that its insured violated the CSA. Ultimately, an insurers' risk for criminal liability under the CSA will vary, depending on the nature of the potential insured's business and the particular facts unique to each situation.

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Federal Money Laundering Statutes

Under federal money laundering statutes, it is a crime for anyone to conduct or attempt to conduct a financial transaction that involves proceeds from an unlawful activity, with the intent to promote the carrying on of the unlawful activity, or evade taxes. 18 U.S.C. §1956(a)(1)(A). Federal law also prohibits anyone from conducting or attempting to conduct a financial transaction knowing that the transaction is designed to conceal or disguise the source of the proceeds, or to avoid a transaction reporting requiring under state or federal law. 18 U.S.C. §1956(a)(1)(B).

Arguably, an insurer accepting proceeds from its insured and depositing those funds into its bank account has violated the money laundering statute by conducting a financial transaction that involves proceeds from an illegal activity with the intent to promote the carrying on of the unlawful activity. An insurer may also be subject to liability for aiding and abetting or conspiracy to violate money laundering statutes by providing insurance services to cannabis companies and MRBs. However, the specific intent requirement of 18 U.S.C. §1956(a) remains a significant hurdle to prosecution. "Strictly adhering to the specific intent requirement of the promotion element of §1956(a)(1)(A)(i) helps ensure that the money laundering statute will punish conduct that is distinct from the underlying specified unlawful activity and will not simply provide overzealous prosecutors with a means of imposing additional criminal liability any time a defendant makes benign expenditures with funds derived from unlawful acts." *United States v. Brown*, 186 F.3d 661, 670 (5th Cir. 1999).

Of greater concern to service providers to the marijuana industry is 18 U.S.C. §1957(a), which eliminates the element of intent and imposes criminal liability on anyone who knowingly engages in or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000. Under this statute, the government is not required to show that the defendant knew that the offense from which the property was derived was unlawful activity. 18 U.S.C. §1957(c). Violators may be subject to fines and imprisonment. *Id*., §1957(b).

Research indicates that, to date, the Department of Justice has not sought any indictments against any service providers to the legal marijuana industry under federal money laundering statutes.

Looking to the Future of Cannabis in the U.S.

Attorney General Sessions' rescission of the Ogden and Cole Memorandum are a clear indication that he intends to make federal enforcement of the CSA and anti-marijuana laws more of a priority than the preceding Attorney General. Indeed, Sessions' has been a longtime opponent of legalization. In May of 2017, he personally sent a letter to congressional leaders voicing his opposition to any appropriations legislation that would prohibit the use of the Department of Justice funds or in any way inhibit its authority to enforce the CSA. Despite his request, the Rohrabacher-Blumenauer Amendment remains in place, and was recently extended through March 23, 2018.

The impact of Sessions' January 4, 2018, Memorandum to all U.S. Attorneys regarding marijuana enforcement remains to be seen. The Sessions Memorandum states that the CSA reflects Congress' determination that marijuana is a dangerous drug, and that marijuana activity is a serious crime, and directs all U.S. Attorneys to follow well-established principles that govern all federal prosecutions. It states that "these principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community." Jeffrey B. Sessions, III, *Memorandum for all United States Attorneys: Marijuana Enforcement*, (Jan. 4, 2018), available at https://www.justice.gov. While it expressly rescinds the Ogden and Cole Memoranda, it also leaves significant leeway regarding enforcement of the CSA to individual Assistant U.S. Attorneys, several of whom have indicated that the Sessions Memorandum will not result in increased prosecution against participants in the legal cannabis industry, including U.S. Attorneys from Colorado and Washington. Thomas Mitchell, *U.S. Attorney Robert Troyer: Pot Prosecutions Not Expected to Rise in Colorado* (Jan. 12, 2018), available at http://www.westword.com; U.S. Attorney Annette L. Hayes, *Statement on Federal Marijuana Prosecutions in the Western District of Washington*, (Jan. 4, 2018), available at https://www.justice.gov.

Despite Attorney General Sessions' apparent disapproval of the legalization of recreational marijuana, and the lack of guidance from the White House, cannabis advocates continue to pursue policy changes that would end prohibition on both the federal and state level. In June 2017, a bill called the Compassionate Access, Research Expansion, and Respect States (CARERS) Act was introduced in the House and referred to various subcommittees for further review. The CARERS Act would amend the CSA to exempt individuals and entities acting in compliance with state medical marijuana laws from prosecution. In August 2017, Senator Corey Booker introduced legislation that would legalize marijuana, expunge federal marijuana convictions, and penalize states with racially disparate arrest or incarceration rates of marijuana-related crimes. The proposed bill, known as the Marijuana Justice Act, would remove marijuana from the purview of the DEA and allow states to set their own policies. In an October 2017 interview, Senator Booker admitted that, while he thought it was unlikely that the bill would become law, the growing national support for legalization suggests that the momentum toward legalization will continue. Alex Suskind, *Corey Booker Explains Why He's Making Legal Weed His Signature Issue,* (Oct. 18, 2017), available at https://www.vice.com. A list of all pending bills related to marijuana and hemp is available at https://www.thecannabist.co.

The federal prohibition of medical marijuana is also being challenged through the courts. In particular, there is a case pending in U.S. District Court for the Southern District of New York, against Attorney General Sessions, the Department of Justice, the DEA, the acting director of the DEA, and the United States of America. (*Marvin Washington, et al v. Jefferson Beauregard Sessions, III et al.,* C.A. No. 17-Civ-5625). The plaintiffs there include two minor medical marijuana patients, a retired professional football player, an American military veteran, and a cannabis membership organization, and they seek a declaration that the CSA, as it pertains to the classification of cannabis as a Schedule I drug, is unconstitutional because it violates the Due Process Clause, an assortment of protections guaranteed by the First Amendment, and the fundamental right to travel. The goal of the lawsuit is to have medical cannabis reclassified under current DEA schedules. The defendants filed a motion to dismiss the action on October 23, 2017, which plaintiffs opposed. The court has not yet ruled on the motion. The plaintiffs have indicated that they intend to appeal any dismissal to the Supreme Court if necessary.

On the state level, decriminalization and legalization of marijuana continues to spread. Medical marijuana was recently legalized in West Virginia and Virginia, and there is currently pending legislation in North Carolina and Wisconsin. Advocates expect to introduce ballot initiatives to legalize medical cannabis in Missouri, Oklahoma, and Utah. With respect to recreational marijuana, the November 2017 elections were generally considered a win, particularly in New Jersey, given the election of Phil Murphy as governor, who campaigned in support of marijuana legalization and who has pledged to sign adult-use legislation, and in Virginia, where governor elect Ralph Northam made marijuana decriminalization a centerpiece of his campaign. In addition, recreational marijuana legislation recently passed in Vermont via the legislature and is expected to pass in Arizona, Michigan, Rhode Island, and Connecticut later in 2018.

Conclusion and Recommendations

While the future of the legal cannabis industry is anything but clear, and the end of federal prohibition is not quite on the horizon, with more than ninety-five percent of the U.S. population living in a state where there is some form of legal cannabis (including adult use, medical use, and cannabidiol only laws (also referred to as CBD, a non-psychoactive extract from the marijuana plant), the cannabis industry is likely to continue to expand in the years to come providing substantial business opportunities for insurers across the country.

While there is still a risk of criminal liability for any insurer providing business services to cannabis companies, including ancillary businesses such as distributers or manufacturers of smoking paraphernalia, there are measures that can be taken to minimize such risks. As a preliminary matter, insurers should only consider issuing policies in states that have enacted legislation legalizing marijuana, and that have established regulations governing the state marijuana market. For now, the medical marijuana industry poses less of a threat from any federal intervention than the recreational market since the Rohrabacher-Blumenauer Amendment does not apply to recreational marijuana.

For insurers who are already issuing policies to cannabis companies and MRBs, or insurers who are considering entering this market, it is important to implement policies that vet insureds to confirm that they are operating in compliance with state law and any local ordinances, using the Federal Enforcement Priorities outlined in the Cole Memorandum, and FinCEN regulations regarding customer due diligence as guidance for their own internal protocols.

Ultimately, the current risks to insuring the cannabis industry may outweigh the benefits, but insurers would be wise to monitor this evolving industry. While further roadblocks may arise on the path toward national legalization, with sixty-four percent of the current adult population in favor of legalization, and profits expected to exceed $20 billion within the next five years, the end of prohibition is likely a matter of when, not if.

Top Ten Things to Consider When Looking for Marijuana (or Hemp) Business Insurance

By Doug Banfelder

State-legal cannabis and hemp operations have all the same risk exposures as other businesses, perhaps more, many with interesting wrinkles. So, when looking for insurance, here are your Top Ten considerations:

1. There are just a handful of carriers offering GL, Property, Products, Auto and WC coverage for this niche
2. With few exceptions, these are Excess & Surplus rather than Admitted carriers—but all are A rated
3. Premiums are not unreasonable—for GL Packages, figure around 1 percent of gross annual revenues, perhaps less
4. Legal considerations and Losses make the market fluid; new carriers enter, while others leave
5. Beware the Exclusions! Especially with Products Liability and Professional Liability policies
6. The number of agents serving the industry is growing, but many lack experience in this specialty area
7. Be CERTAIN your agent fully discloses the true nature of operations, or the policy may well be moot
8. Covering Distribution and Security firms is especially challenging due to extremely limited markets
9. The DEA's current position on Hemp/CBD has made insuring some such operations quite difficult
10. Takeaway: Insurance is available for nearly every type of risk, but extra due diligence is required

To drill down to the real nitty-gritty, join us on June 26–27, 2018, in Chicago for the DRI Marijuana Law Seminar.

More than half of the states in the United States currently have laws legalizing Marijuana in some form (medicinal and/or recreational). But in the face of the Controlled Substances Act, regulatory uncertainty presents a barrier to full realization of the potential of the cannabis industry, even though economists predict $50 billion in annual sales by 2026. This quickly developing sector affects virtually all areas of the law and provides opportunities to those with the knowledge base to guide clients and companies deftly through a shifting regulatory and legal landscape. The DRI Marijuana Law Seminar provides you with subject matter experts who will share with you the knowledge and strategies needed by professionals, businesses, and insurers to successfully traverse the complex pitfalls and prospects of marijuana legalization.

For more information or to register, go to dri.org.

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