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**A LEGAL PRIMER ON:  
ENFORCING THE FEDERAL CONTROLLED SUBSTANCE ACT  
IN STATES THAT HAVE LEGALIZED MARIJUANA**

**Issues Presented**

Some states have legalized the possession, production, growing and distribution of marijuana including for medical use. In several states this has been highly commercialized. Are these actions legal under federal law? If the actions are not legal, who is subject to prosecution or has other civil legal liability?

**Summary Conclusion**

Based on an analysis of federal statutes and case law, it is clear that under federal law anyone involved in the possession, production, growing or the sale of marijuana is subject to federal prosecution under the federal Controlled Substances Act (CSA) because the state marijuana laws are preempted by the CSA. [FN1]. They may also be civilly liable.

**The state laws are preempted by the CSA**

In Gonzales v. Raich, 545 U.S. 1 (2005), the U.S. Supreme Court concluded that local cultivation, possession and distribution of marijuana was prohibited by the CSA under the Commerce Clause of the U.S. Constitution. [FN2] The Supreme Court acknowledged Congress's Commerce Clause authority to ban marijuana production, consumption, and distribution. [FN3]

Marijuana is a Schedule I drug and under federal law and it cannot be prescribed for any medical purpose. A schedule I drug is one that has a high potential for abuse and for which there is no legitimate medical purpose in treatment in the United States and there is a lack of accepted safety for use of the drug or other substance under medical supervision. 21 U.S.C. 812. This was upheld in federal court in 2015 in US v. Pickford, 100 F.Supp.3d 981 (ED CA 2015).

Classification of marijuana as a Schedule I controlled substance is not arbitrary or capricious or a violation of due process. U.S. v. Greene, 892 F.2d 453 (CA6 1989), certiorari denied 110 S.Ct. 2179. As a Schedule I drug, the manufacture, distribution or possession of marijuana is a criminal offense under the CSA. For example:

1. It is unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance unless it is in accordance with the CSA. 21 U.S.C. 841(a)

2. It is unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner. This exception does not apply to Schedule I drugs such as marijuana, which has no accepted medical use. 21 U.S.C. 844(a)

3. It is unlawful to use any communication facility such as the Internet to commit felony violations of the CSA. 21 U.S.C. 843

4. It is illegal to conspire to commit any of the crimes set forth in the CSA. 21 U.S.C. 846

5. It is unlawful to knowingly open, lease, rent, maintain, or use property for the manufacturing, storing, or distribution of controlled substances. 21 U.S.C. 856. This applies to landlords.

6. It is unlawful to distribute or manufacture controlled substances within 1,000 feet of schools, colleges, playgrounds, and public housing facilities, and within 100 feet of any youth centers, public swimming pools, and video arcade facilities. 21 U.S.C. 860

Federal law also states that “[w]hoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.” (18 U.S.C. 3). Under 18 U.S.C. 4, “[w]hoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.”

### **Are state and local government employees immune from prosecution?**

If government employees are involved in affirmative actions to protect, facilitate or oversee the manufacture, distribution, and use of marijuana, they may be in direct violation of federal law. 18 U.S.C. § 4. In United States v. Rosenthal, 454 F.3d 943, 948 (CA 9 2006), it was held that implementation and facilitation of state marijuana laws contrary to the federal Controlled Substance Act (CSA) constitute federal crimes. The CSA provides limited immunity from prosecution for certain actions by State officials, but such immunity is not applicable when public officials in states that have legalized marijuana aid or abet such laws in any way inconsistent with the CSA. Section 885(d) of the CSA provides:

Except as provided in sections 2234 and 2235 of Title 18 [relating to illegal procurement and execution of search warrants], no civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter, or upon any duly authorized officer of any State,

territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

However, for an official to be “lawfully engaged” in the enforcement of a law relating to controlled substances, and therefore entitled to protection under statute creating immunity from federal drug laws, the law that the official is “enforcing” must itself be consistent with federal law and the state marijuana legalization laws are not. United States v. Rosenthal, 266 F.Supp.2d 1068, 1078 (ND CA 2003). 21 U.S.C.A. 885(d)

In a Colorado Supreme Court case the court considered whether article XVIII, section 14(2)(e) of the Colorado Constitution is preempted by the CSA. Section 14(2)(e) requires law enforcement officers to return medical marijuana seized from an individual later acquitted of a state drug charge. The court held that the CSA prohibits the distribution of marijuana, with limited exceptions. The court found that compliance with section 14(2)(e) requires law enforcement officers to distribute marijuana in violation of the CSA. Because section 14(2)(e) positively conflicts with the CSA, the court found that section 14(2)(e) is preempted. People v. Crouse, 388 P.3d 39 (CO 2017); People v. Crouse, 2015 WL 3745183 (Ct. App. 2015) [FN4]

### **Consequences of a violation of the CSA**

The consequences of violating the CSA include various fines and terms of imprisonment and civil fines and the forfeiture of any property used to facilitate a violation of the CSA. Anyone who possesses, cultivates or distributes marijuana, even if such acts are legal under state law, is subject to federal sanctions. See Gonzales v. Raich, 545 U.S. 1 (2005), and United States v. Oakland Cannabis Buyers’ Cooperative, 532 US 483 (2001).

### **Property owners and landlords**

Property owners and landlords who rent or provide a location for marijuana stores are subject to prosecution. It is unlawful to knowingly open, lease, rent, maintain, or use property for the manufacturing, storing, or distribution of controlled substances. 21 U.S.C. 856

### **Financiers and banks**

Those who provide financing for marijuana operations may be subject to prosecution. For example, federal anti-money laundering statutes make it illegal to engage in financial transactions designed to promote illegal activities, including drug trafficking, or to conceal or disguise the source of the proceeds of that illegal activity. 18 U.S.C.1956 and 1957

### **Physicians**

Under some state “medical” marijuana laws, physicians may assist a registered qualifying patient or his caregiver to obtain marijuana. This is far more than just a physician discussing with a patient the use of medical marijuana which may be protected by the First Amendment of the

Constitution. This is taking an action to facilitate the use of marijuana. These actions by a physician may violate federal law by acting with specific intent to provide the patient with the means to acquire marijuana knowing that the patient intends to acquire marijuana. Conant v. Walters, 309 F.3d 629 (CA 9 2002); cert denied Walters v. Conant, 540 U.S. 946 (U.S. Oct 14, 2003)

### **Medical malpractice**

A doctor may be civilly liable to his patient, or a third party, for the adverse consequences of recommending marijuana. A physician who assists a patient to obtain marijuana may face a professional negligence claim for recommending a drug for which no standard of care has been adopted and which has an unknown likelihood of future harm and for which the federal Food and Drug Administration has declared that “no sound scientific studies supported medical use of marijuana for treatment in the United States, and no animal or human data supported the safety or efficacy of marijuana for general medical use” [FN5]

### **Racketeer Influenced and Corrupt Organizations Act (RICO)**

The federal Department of Justice (DOJ) may initiate criminal proceedings under the Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C. 1962. All property constituting or derived from, directly or indirectly, the proceeds of racketeering activities is subject to forfeiture regardless of any provision of state law. 18 U.S.C. 1963(a)

The RICO statute also gives rise to a civil cause of action which may be brought by a private citizen injured by the racketeering activity where such activity proximately caused the injury. 18 U.S.C. 1964. This was recently upheld in a federal Colorado case. [FN6]

### **The tax consequences of trafficking in marijuana**

Trafficking in marijuana has negative tax consequences even if the sale of marijuana is legal under a state marijuana law. The Internal Revenue Code states:

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 of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted. 6 U.S.C. 280E (expenditures in connection with the illegal sale of drugs).

Marijuana is a schedule I controlled substance for tax purposes. Provision of marijuana constitutes “trafficking” within the meaning of the Internal Revenue Code section disallowing business expense deductions for expenditures “in connection with the illegal sale of drugs,” even though the activity was pursuant to a state statute. Californians Helping to Alleviate Medical Problems, Inc., v. Commissioner of Internal Revenue, 128 T.C. 173, 93 TCM 3973 (2007).

## Conclusion

Anyone who participates in the growing, possession, manufacturing, distribution, or sales of marijuana under state law or aids or facilitates or finances such actions is at risk of federal prosecution or other liability.

## About the author

David G. Evans, Esq. is admitted to practice in New Jersey and before the U.S. Supreme Court. He has written amicus briefs in several Supreme Court cases including those having to do with state marijuana laws that are in conflict with federal law. See: 2004 WL 1843964 (Gonzales v. Raich, 545 U.S. 1 (2005)); 2001 WL 30659 (U.S. v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483 (2001)).

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## References

[FN1] Congress enacted the CSA for the purposes of consolidating various drug laws into a comprehensive statute, providing meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthening law enforcement tools against international and interstate drug trafficking. 21 U.S.C. 801 et seq.

[FN2] See also, 21 U.S.C.A. 801 et seq.; 21 U.S.C. 841(a)(1), 844; See, United States v. Hicks, 722 F.Supp.2d 829 (E.D. Mich. 2010) (It is indisputable that state marijuana laws do not, and cannot, supercede federal laws that criminalize the possession of marijuana); United States v. \$186,416.00 in U.S. Currency, 590 F.3d 942, 945 (9th Cir. 2010) (there is no exception for marijuana distribution or possession under the federal Controlled Substances Act[.]); United States v. Scarmazzo, 554 F.Supp.2d 1102, 1109 (E.D.Cal. 2008) (Federal law prohibiting the sale of marijuana is valid); United States v. Landa, 281 F.Supp.2d 1139, 1145 (N.D.Cal.2003) (“[O]ur Congress has flatly outlawed marijuana in this country”); Assenberg v. Anacortes Housing Authority, 268 Fed. Appx. 643 (9th Cir. 2008) (holding that a plaintiff's use of marijuana rendered him ineligible to reside in federally subsidized housing pursuant to 42 U.S.C. 13661, and that there was no duty to accommodate his drug use), aff'd, cert. denied.

[FN3] The Congressional findings in the CSA provide the Commerce Clause and international treaty legal justification for the CSA.

21 U.S.C.A. 801 Congressional findings and declarations: controlled substances

The Congress makes the following findings and declarations:

- (1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.
- (2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.
- (3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce because--
  - (A) after manufacture, many controlled substances are transported in interstate commerce,
  - (B) controlled substances distributed locally usually have been transported in interstate commerce immediately before their distribution, and
  - (C) controlled substances possessed commonly flow through interstate commerce immediately prior to such possession.
- (4) Local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances.
- (5) Controlled substances manufactured and distributed intrastate cannot be differentiated from controlled substances manufactured and distributed interstate. Thus, it is not feasible to distinguish, in terms of controls, between controlled substances manufactured and distributed interstate and controlled substances manufactured and distributed intrastate.
- (6) Federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic.
- (7) The United States is a party to the Single Convention on Narcotic Drugs, 1961, and other international conventions designed to establish effective control over international and domestic traffic in controlled substances.

[FN4] For contrary cases in lower state courts see: State v. Okun, 296 P.3d 998, 1001–02 (Ariz. Ct. App. 2013); City of Garden Grove v. Superior Court, 68 Cal. Rptr.3d 656, 681 (Cal. Ct. App. 2007); Statev. Kama, 39 P.3d 866, 868 (Or. Ct. App. 2002)

#### [FN5] FDA STATEMENT - INTER-AGENCY ADVISORY REGARDING CLAIMS THAT SMOKED MARIJUANA IS A MEDICINE

Claims have been advanced asserting smoked marijuana has a value in treating various medical conditions. Some have argued that herbal marijuana is a safe and effective medication and that it should be made available to people who suffer from a number of ailments upon a doctor's recommendation, even though it is not an approved drug.

Marijuana is listed in schedule I of the Controlled Substances Act (CSA), the most restrictive schedule. The Drug Enforcement Administration (DEA), which administers the CSA, continues to support that placement and FDA concurred because marijuana met the three criteria for placement in Schedule I under 21 USC 812(b)(1) (e.g., marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and has a lack of accepted safety for use under medical supervision).

Furthermore, there is currently sound evidence that smoked marijuana is harmful. A past evaluation by several Department of Health and Human Services (HHS) agencies, including the Food and Drug Administration (FDA), Substance Abuse and Mental Health Services Administration (SAMHSA) and

National Institute for Drug Abuse (NIDA), concluded that no sound scientific studies supported medical use of marijuana for treatment in the United States, and no animal or human data supported the safety or efficacy of marijuana for general medical use. There are alternative FDA-approved medications in existence for treatment of many of the proposed uses of smoked marijuana.

FDA is the sole Federal agency that approves drug products as safe and effective for intended indications. The Federal Food, Drug, and Cosmetic (FD&C) Act requires that new drugs be shown to be safe and effective for their intended use before being marketed in this country. FDA's drug approval process requires well-controlled clinical trials that provide the necessary scientific data upon which FDA makes its approval and labeling decisions. If a drug product is to be marketed, disciplined, systematic, scientifically conducted trials are the best means to obtain data to ensure that drug is safe and effective when used as indicated. Efforts that seek to bypass the FDA drug approval process would not serve the interests of public health because they might expose patients to unsafe and ineffective drug products. FDA has not approved smoked marijuana for any condition or disease indication.

A growing number of states have passed voter referenda (or legislative actions) making smoked marijuana available for a variety of medical conditions upon a doctor's recommendation. These measures are inconsistent with efforts to ensure that medications undergo the rigorous scientific scrutiny of the FDA approval process and are proven safe and effective under the standards of the FD&C Act. Accordingly, FDA, as the federal agency responsible for reviewing the safety and efficacy of drugs, DEA as the federal agency charged with enforcing the CSA, and the Office of National Drug Control Policy, as the federal coordinator of drug control policy, do not support the use of smoked marijuana for medical purposes.

<https://wayback.archive-it.org/7993/20170113133051/http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2006/ucm108643.htm>

The FDA supports research into cannabinoids but has not yet approved crude/botanical marijuana as a medicine. The term "crude/botanical marijuana" describes the illicit Schedule I drug that people abuse. The drug is derived from the leaves and flowering tops of the Cannabis plant and is consumed in a variety of ways. Its leaves are smoked or it is concentrated as an oil (cannabidiol (CBD) or other products made from the plant that are ingested or smoked.

<https://www.fda.gov/NewsEvents/PublicHealthFocus/ucm421163.htm>  
<https://www.fda.gov/NewsEvents/PublicHealthFocus/ucm421168.htm>  
<https://www.fda.gov/NewsEvents/PublicHealthFocus/ucm484109.htm>

[FN6] Recreational marijuana facility adjacent to plaintiff's land has *both* interfered with their present use and enjoyment of the land and caused a diminution in its market value. Safe Streets Alliance v. Alternative Holistic Healing, LLC, No. 16-1048 (CA 10, June 7, 2017).

See: <https://www.ca10.uscourts.gov/opinions/16/16-1048.pdf>