Marijuana Business Law in Washington

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Marijuana Business Law in Washington

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NEIL JUNEJA is the founder of Gleam Law, a cannabis-focused law firm with offices in Washington, Oregon, and California. The majority of his practice focuses on trademark protection of cannabis brands in state and federal law, as well as patent protection for cannabis inventions. In addition, Mr. Juneja has written numerous article on cannabis law and intellectual property and spoken at many events including in the National Mall in Washington, D.C., the Seattle Hempfest; and numerous CLEs and industry events. Mr. Juneja has also appeared in *Newsweek*, *Time Magazine*, and on several documentaries for his work in the cannabis legal industry. He has been awarded numerous accolades including the 40 under 40 most influential people in the cannabis industry. Mr. Juneja earned his J.D. degree from Seattle University Law School.

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Federal Responses to Washington Marijuana Law

Submitted by Ryan R. Agnew

A. Current Federal Enforcement Priorities

Post recision of the Cole memorandum by Attorney General Jeffrey B. Sessions on January 4th, 2018 (discussed below), current federal priorities remain much the same as before with the one possible exception coming out of Oregon.

One US Attorney has publicly indicated a greater emphasis in areas previously outlined as enforcement priorities in the Cole et al memos (discussed below). Namely, "overproduction" that leads to product-diversion.

"As noted by Attorney General Sessions, today's memo on marijuana enforcement directs all U.S. Attorneys to use the reasoned exercise of discretion when pursuing prosecutions related to marijuana crimes. We will continue working with our federal, state, local and tribal law enforcement partners to pursue shared public safety objectives, with an emphasis on stemming the overproduction of marijuana and the diversion of marijuana out of state, dismantling criminal organizations and thwarting violent crime in our communities."

-Billy J. Williams (US District Attorney for Oregon) Jan 4, 2018

On the same day USA Williams released his statement, US Attorney for Western District of Washington, Annette L. Hayes had this to say:

"Today the Attorney General reiterated his confidence in the basic principles that guide the discretion of all U.S. Attorneys around the country and directed that those principles shepherd enforcement of federal law regarding marijuana.

He also emphasized his belief that U.S. Attorneys are in the best position to address public safety in their districts and address the crime control problems that are pressing in their communities. Those principles have always been at the core of what the United States Attorney's Office for Western Washington has done – across all threats to public safety, including those relating to marijuana. As a result, we have investigated and prosecuted over many years cases involving organized crime, violent and gun threats, and financial crimes related to marijuana. We will continue to do so to ensure – consistent with the most recent guidance from the Department –

that our enforcement efforts with our federal, state, local and tribal partners focus on those who pose the greatest safety risk to the people and communities we serve.

USA for Eastern District of Washington, Joseph H. Harrington (Jan 5, 2018):

The Attorney General reiterated his confidence in the long-established principles of federal prosecution that guide the discretion of each United States Attorney around the country (U.S. Attorney's Manual, chapter 9-27.000), and directed that those principles shepherd enforcement of federal law regarding marijuana. With those principles in mind, the Attorney General emphasized his belief that United States Attorneys are in the best position to weigh all relevant considerations – to include the nature and seriousness of an offense, the potential deterrence effect of prosecution, a putative defendant's culpability in connection with an offense, a putative defendant's criminal history and other circumstances, and the limited federal resources -- when deciding which cases to prosecute in their respective communities. When weighing those considerations public safety is always at the fore.

Those principles have always been at the core of what the United States Attorney's Office for the Eastern District of Washington does – across all threats to public safety, including those that may relate to marijuana. This United States Attorney's Office will continue to ensure, consistent with the most recent guidance from the Department of Justice, that its enforcement efforts with our federal, state, local, and tribal law enforcement partners focus on those who pose the greatest safety risk to the communities in Eastern Washington, by disrupting criminal organizations, tackling the growing drug crisis, thwarting violent crime, and corralling white-collar fraudsters in this District.

B. Prior Guidance and Possible Conflict with Current Federal Memoranda

Ogden.

[Power point Ogden .pdf]

In 2009, Deputy US AG David Ogden authored a memorandum that suggested varying levels of Controlled Substances Act (CSA) prioritization to US Attorneys. The memo recommended that Medical cannabis patients and caregivers, when in compliance with state law, should not be the focus of federal investigation or prosecution. Large-scale producers and those that sought to use medical cannabis as a cover for other illicit activities on the other hand, should remain an enforcement priority.

While the Ogden memo was broadly about resource allocation, the distinction between end-users vs. large-scale enterprises & those using medical cannabis as a façade, formed the foundation of later memoranda, including the priorities cited in the Cole memos.

The Ogden priority set were:
• unlawful possession or unlawful use of firearms;
• violence;
• sales to minors;
• financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law;
• amounts of marijuana inconsistent with purported compliance with state or local law;
• illegal possession or sale of other controlled substances; or
• ties to other criminal enterprises.

Cole I.

[Power point Cole I .pdf]

In 2011, in response to questions from US Attorneys in light of increased production within the several medical cannabis marketplaces, Recently-appointed D.A.G. James Cole reiterated the Ogden guidance; both as to resource allocation and as a reminder that compliance with state laws do not serve as any sort of shield from federal prosecution.

Some commentators viewed the Cole I memo as a rejection of the 'otherwise compliant with state law' consideration. I think this misses the reality of DoJ budget constraints and other practical realities that go into enforcement decisions. Bear in mind that the enforcement memoranda are essentially commentary to the guidelines in the US Attorney practice manual and not new law (which of course requires an act of Congress).

Cole II.

[Power point Cole II pdf]

In 2013, after Washington and Colorado approved recreational cannabis by citizens' initiative the previous November, Deputy Cole authored the memorandum that most people mean when they say, "Cole Memo."

It was this 2013 memo that brought the eight enforcement objectives into public view, but its important to note that Cole describes the eight objectives as something that has been the practice of the DOJ for several years. This distinction is often overlooked as the common reaction to the 2013 memo was, "James Cole just came up with eight things to avoid and the Feds will be hands-off"

Cole II describes a scenario where state regulation of legalized cannabis can be congruent with the federal priorities, especially as it pertains to preventing diversion of product across state lines. D.A.G. Cole's hopefulness was backstopped with the implication that if state programs became at odds with the eight priorities, the DoJ may take a look at challenging the programs in court.

Cole II Priority Set:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- 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 or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

Between Ogden and Cole II; diversion of product, public health, and federal land-use considerations were added to the list of priorities, (although Cole II claimed that the eight have been of importance to the federal government in recent years).

The priorities remained quite similar even though product-diversion, public health, and federal land-use are obvious additions. Despite the fact that Cole II called on States to create regulations that gave adequate consideration to Justice Department's priorities; public health, product-diversion, and preventing sales to minors were the only realms in which states could honestly look to hold up their end of the bargain. Given the volumes that continually cross state lines, its clear that public health and preventing sales to minors is all that states seem capable to address.

Given the memo's threat of challenges to states that failed to hold up their end of the deal, it appeared as though the DoJ would actively monitor whether states were meeting the eight criteria. We came to find out however, that whatever data was compiled after Cole II, States were not evaluated on their level of compliance.

[Power point GAO Report to Senate Caucus on International Narcotics Control]

According to the Government Accountability Office (GAO) [DoJ officials] "have not

documented their monitoring process or provided specificity about key aspects of it, including potential limitations of the data they report using." [Also, DoJ officials] "did not identify how they would use the data from these various reports and studies to monitor the effects of marijuana legalization relative to each of the eight marijuana enforcement priorities." The report concluded, "officials also did not state how DOJ would use the information to determine whether the effects of state marijuana legalization necessitated federal action to challenge a state's regulatory system."

- GAO-16-418T Jennifer Grover, GAO Director of Homeland Security and Justice.

Sessions' Memo

[Power point Sessions' pdf.]

Given that the enforcement priorities predated Cole II, one might wonder at the purpose for rescinding the Cole guidance earlier this year. If you look closely, AG Sessions rescinded the guidance all the way back to Ogden, including two lesser-known memos from 2014 on financial crimes and cannabis issues in Indian Country.

Despite nixing everything back to 2009, it appears that the eight objectives survived. To be sure, neither Cole nor Ogden stated that the objectives originated with them and if you recall USA Hayes' memo, she states that US attorneys have always had the necessary discretion to enforce the CSA and that her office has been doing just that this whole time.

In his rescission memo, Sessions called the guidance from Cole et al. "unnecessary" and that the principals set out in the US Attorney's Practice Manual should serve as the primary guide.

In many ways, AG Sessions' memo was more of a political statement than a modification of enforcement priority because the Ogden and Cole memos were already congruent with the US Attorneys Practice Manual. Investigative and prosecutorial discretion was already a component.

The one distinction would be that under Section 9-27.220, US Attorney's are encouraged to commence prosecution if they believe that certain conduct constitutes a federal offense and that admissible evidence would be enough to likely convict.

[Power point § 9-27.200 US Attorney's Practice Manual]

If a US Attorney is following their manual to the letter, then prosecutions should be commencing daily. It seems then, that the key exercise of discretion occurs at the investigative stage, not the prosecutorial stage.

What then would guide DoJ resources into considering whom to investigate? You guessed it, the eight objectives; which of course survive Rorabacher-Blumenauer restrictions, as a violation of any of the eight means non-compliance with state law.

[power point Rorabacher-Blumenauer rider on DoJ spending in MMJ jurisdictions]

The practical effect of Cole & Ogden recission is that local US Attorneys can use the discretion they already had in consideration of departmental resources and congressionally-imposed restrictions.

C. Possible Legal Consequences to Cannabis Consumers Under Federal Law

1. Firearms and Cannabis

Gun Control Act of 1968 (In response to JFK assassination with a rifle purchased via a mail-order catalogue). Mainly, an is an act that restricted sales. Proposals to include a national licensing and registration requirements did not survive to final passage.

Brady Handgun Violence Prevention Act of 1993 (In response to the attempted assassination of Ronald Regan, leaving his Press Secretary, James Brady, severely disabled.)

Added background checks to (most) sales and expanded the prohibited sales elements of the Gun Control Act of 1968 to include prohibited possession and trafficking.

Sales prohibited - 18 U.S.C. 922(d)

[ppt] "It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person...(3) [that] is an unlawful user or addicted to any controlled substance (under the CSA).

Possession prohibited - 18 U.S.C. 922(g)

"It shall be unlawful for any person (3) who is an unlawful user or addicted to any controlled substance (under the CSA) (9) to ship or transport in interstate or foreign commerce, or **possess** in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce."

Okay, so what is an **unlawful** user?

[ppt 27 CFR 478.11 - Meaning of Terms.]

> "Unlawful user of, or addicted to any controlled substance. A person who uses a controlled substance and has lost the power of self-control with reference to the use of controlled substance; and any person who is a current user of a controlled substance **in a manner other than as prescribed by a licensed physician."**

Remember that physicians *recommend*, they don't prescribe.

When the DEA threatened to revoke physician authorization to prescribe controlled substances to any physician that recommended medical cannabis, the 9th Circuit held that since doctors were

not prescribing, merely recommending, cannabis as a form of therapy, the DEA could not infringe on a physician's first amendment right to discuss the pros and cons of a particular treatment. See *Conant v. Walters,* 309 F.3d 629 (9th Cir 2002). Using precedent set in the abortion context in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (recognizing a physician's First Amendment right not to speak); *Rust v. Sullivan*, 500 U.S.173, 200 (1991) (noting that regulations on physician speech may "impinge upon the doctor-patient relationship").

Caselaw: *Wilson v. Lynch* 9th Cir (2016) Is a case about standing, the administrative procedure act, and the government's interest in restricting gun sales and gun possession.

On the issue of firearm possession, the Court ruled that Wilson lacked standing to challenge the law because she claimed that she was not a user of cannabis, ergo she was not injured by the federal law preventing unlawful users to possess firearms.

On the issue of firearm purchases, the Court ruled that Wilson could relinquish her medical cannabis registry card and be free to make a purchase.

Finally, the Court ruled that the Government has a substantial interest in limiting firearm violence and that restricting access from illegal drug users was rationally related to that interest.

2. Federal Housing Assistance & Student Financial Aid:

Residents of federally subsidized housing risk losing their housing benefits if convicted or even charged with cannabis use or possession.

Admission may be denied, and tenants may be evicted for their use of cannabis, without penalty to the public housing agency or property owner, per a HUD memo from 2014. [ppt HUD memo] The agency or owner need only demonstrate a reasonable belief that the individual used or was in possession of cannabis.

Federal Financial Aid shall be denied or suspended under Section 484(r) for convictions of either possession or sales, though a student's eligibility for aid may be rehabilitated if they enter into drug treatment and pass two random drug screens.

However, for both housing benefits denied for charges or convictions and for student loans, the charge would mostly likely need to emanate from a federal prosecution, given the increasingly rare charges brought under state law and college administration's' frequent use of diversionary sanctions.

D. State Agencies and Federal Funding

As of this writing, I'm not aware of any states that have had federal grants or other appropriations restricted or blocked due exclusively to cannabis' legal status.

State research institutions, (primarily colleges and universities) are limited in their ability to conduct studies on cannabinoids due to the schedule-one status of *cannabis sativa* and its sup-species, *sativa*, *indica*, and *ruderalis*.

That's not to say that schedule one research protocol licenses are not issued. However, approvals take considerable time and the source of the cannabis must be from our one and only federally-approved lab in Oxford MS, which in-turn comes with its own limitations, namely a lack of varietal and phenotype diversity.

The application process includes permit-requests from not just the FDA but also the National Institute for Drug Abuse (NIDA) and the DEA.

NIDAs mission is to study the harmful effects of controlled substances, therefore, research proposals studying the potential positive effects of products, especially products derived from whole-plant (vs. synthesized compounds) are less likely to be approved.

Colleges and Universities remain reticent to engage in research not simply because of the arduous application process and limited availability of cultivated-varieties (cultivars a.k.a."strains") that are in circulation in legalized states (but not grown by the feds), but also because federal funds can be blocked or revoked if the institution is found to be non-compliant with the Drug-Free Schools and Communities Act of 1989 and The Higher Education Act of 1965, as amended, 20 U.S.C. § 1011(i), 34 C.F.R. Part 86.

Although, if the schools had read the Inspector General's Report from 2012, they would know that the Department of Education hasn't exercised any oversight regarding compliance with the drug abuse and prevention program. [ppt Inspector General Report on Drug-Free Schools and Campuses]

E. Preemption and the Controlled Substance Act

[ppt Supremacy Clause US Const.]

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

If Congress* enacts a law regulating an activity that States prohibit, the supremacy clause, when paired with an express or implied grant of Congressional authority (such as the commerce clause) render as unenforceable any state prohibitions that conflict with federal law.

*(or a SCOTUS ruling, see e.g. *Cooper v. Aaron*, 358 U.S. 1 (1958) - overturning Arkansas law that attempted to nullify *Brown v. Board of Education of Topeka*

If Congress prohibits an activity, that at the state level is free from either criminal or civil sanctions, that activity will typically *remain* in-place under state law.

[ppt Brandeis quote from New State Ice at 311]

"It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)

The preemption analysis concerns the often-blurry line between supremacy and anti-commandeering vis a vis the 10th Amendment.

Anti-commandeering prohibits Congress from requiring States to enact laws that enforce federal law.

Examples-

Requiring state law-enforcement officials to conduct background checks in an interim period during implementation of the "Brady-bill" held unconstitutional in *Printz v. US* 521 U.S. 898 (1997)

Requiring states to take title of nuclear waste generated within their borders if they didn't participate in a Federal waste disposal and containment program. *New York v. US* 505 U.S. 144 (1992)

Anti-commandeering can also serve as a check on purported uses of the commerce clause, but if the federal law at issue does not impose any affirmative duties on states, the 10th Amendment's anti-commandeering principle does not apply.

After *Gonzales v. Raich,* 545 U.S. 1 (2005) commerce clause power was extended to regulate intra-state activities that bear some tangential relation to interstate commerce. Keep in mind that the holding in Raich did not invalidate California law, it merely held that Congress may regulate certain activities that have interstate implications.

Of course, Congress can get around the 10th Amendment by *inducing* state action with monetary incentives, think *South Dakota v. Dole* (Speed limits and federal transportation dollars)

A recent anti-commandeering example is *Murphy v. NCAA* 548 US ___ 2018, wherein the Supreme Court invalidated the Professional and Amateur Sports Protection Act. The Act's provision prohibiting states from *allowing* sports betting was the basis of New Jersey's challenge. Additionally, the Act was invalided in its entirely due to the Court's approach to severability.

"Every form of (permissible) preemption is based on a federal law that regulates the conduct of private actors, not the States." Id. at 23-24

In some circles, Murphy v. NCAA has been lauded as a watershed moment for State's Rights and state cannabis legalization. But pay close attention to Alito's opinion in we'll see that it's not quite the victory advocates had been hoping for:

[ppt Murphy opinion at 24]

> "[I]t is clear that the PASPA provision prohibiting state authorization of sports gambling is not a preemption provision because there is no way in which this provision can be understood as a regulation of private actors. It certainly does not confer any federal rights on private actors interested in conducting sports gambling operations. (It does not give them a federal right to engage in sports gambling.) *Nor does it impose any federal restrictions on private actors.*" (Emphasis added).
>
> Id. at 24.

Consider the obvious difference between gambling and cannabis under federal law, wherein one is legal and the other is not. In other words, Murphy is of limited use for cannabis advocates given that gambling is only illegal if states prohibit it.

"Under §3702(2) [of PASPA], private conduct violates federal law only if it is permitted by state law. That strange rule is exactly the opposite of the general federal approach to gambling. Under 18 U. S. C. §1955, operating a gambling business violates federal law only if that conduct is illegal under state or local law."

Id. at 28

So, the Murphy opinion gets around preemption because Congress's attempted limit on state authority to authorize that which is federally *legal,* doomed the entire Sports Protection Act. Obviously the same cannot be said for the legality of cannabis under the CSA.

Despite the distinction between federally permitted gambling and federal prohibitions on cannabis, the Murphy decision does bolster the argument that the 10th Amendment allows states to repeal bans on certain activities. The substance of those repeals (in the spectrum between basic de-crim for possession to full tax & regulate) is what can trigger preemption.

Going back to Gonzales v. Raich, consider the distinction between preemption based on commerce-clause grounds that eliminate any plausible protection from federal criminal sanctions, and the type of preemption that would invalidate California law. As I mentioned earlier, I believe Raich only stands for the former proposition.

So, under what circumstances would state law be invalidated by preemption? I think it comes down to the substance of the actions of state officials that cause the type of direct conflict that would lead to preemption.

Under previous medical cannabis laws, the state was a passive actor; certain amounts were decriminalized for certain individuals, but the state was largely hands-off when it came to regulating, and thus was not in the business of facilitating, the activities of private actors violating federal law.

I think this was the logic behind Governor Gregoire's partial veto of SB 5073 in 2011. Once state officials begin actively participating in a federally proscribed activity, the preemption case becomes much more plausible because it poses a direct conflict.

States need not criminalize all that is forbidden under federal law and to sure, under the 10th Amendment, Congress cannot require states to do so. In some circumstances, like Arizona v. US 567 U.S. 387 (2012) (state officials checking "papers"), Federal immigration law covers the entire field and states may not add to it.

However, states are preempted from facilitating direct conflicts with federal law. At least one jurisdiction has found preemption prospectively.

> *Haumant v. Griffin*, 699 N.W.2d 774
>
> "In the event that appellant's proposed charter amendment directing the Minneapolis City Council to "authorize, license, and regulate a reasonable number of medical marijuana distribution centers in the City of Minneapolis" were to pass, it would be, at least for now, in conflict with current federal law and would thus be "without effect."

One scholar makes the case that preemption occurs only where state law directly conflicts with the CSA and that direct-conflict means only those circumstances where state law *requires* a private citizen to violate a federal statute.

> See, Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 23 (2013)

So, what does the CSA have to say about conflict with state law?

[ppt CSA § 903]

CSA: 21 USC Chapter 13 § 801-903

903 - Application of State Law:

> "No provision of this subchapter 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 subchapter and that State law so that the two cannot consistently stand together*." (emphasis added)

Here, Congress is expressly relinquishing their field-preemption authority, so long as there's no positive conflict. This is interesting because field-preemption is a bit of an all or nothing principle.

"Field Preemption" occurs when federal law occupies a "field" of regulation 'so comprehensively that is has left no room for supplementary state legislation."

Murphy at 23, quoting *R.J. Reyolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986).

I'm not convinced that Congress can reserve the right to field preemption. It appears then, that in the § 903 of the CSA, Congress is reserving the right to conflict preemption.

In *California Federal S. & L. Assn. v. Guerra*, 479 U.S. 272 (1987) the majority opinion stated that conflict preemption, not field preemption, was at issue in the case. Held, that California's Fair Employment and Housing Act was congruent with federal employment law under the 1964 Civil Rights Act.

Notice the similar language between the applicable portions of the 1964 Civil Rights Act and the section 903 of the CSA quoted above:

[ppt 42 USC § 2000h]

"*Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field* in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law *unless such provision is inconsistent with any of the purposes of this Act*, or any provision thereof." 78 Stat. 268, 42 U.S.C. § 2000h-4. (emphasis added)

Employment law (which Atty Halverson will get into later) represents a good example of direct conflicts. For the purposes of direct conflict preemption, consider an order from a state worker's compensation board to an employer, instructing the employer subsidize the cost of treatment for an injured worker. Where the costs of treatment include medical cannabis, such orders have been found to be in direct conflict with federal law.

See *Bourgoin v. Twin Rivers Paper Company LLC et al*.

In case you hadn't noticed, I'm not wearing an orange jumpsuit, and neither are officials from the WSLCB. Given that no state law requires citizens to violate federal law, did professor Mikos's article win the day? Not for that reason. Mikos also spends considerable time discussing in both of his papers on the subject, the limited resources of the DoJ.

I think it's a combination of factors; you have the DoJ memos that bolster a policy of pragmatism that was already available to them (and really can't be taken away), you have a majority of states have legalized or decriminalized in some form or fashion, and correspondingly, the members of Congress representing an ever-increasing constituency in favor of legalization for medical or adult-use.

Banking and Financing for the Marijuana Industry

Submitted by J. Daniel Bariault

BANKING AND FINANCING FOR THE MARIJUANA BUSINESS IN WASHINGTON

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Currently, Mr. Bariault's legal practice is limited exclusively to the representation of marijuana ventures and related companies. He has a broad business background with significant experience in antitrust, tax, securities law, and general business issues, and has represented many tech startups. He has taught graduate courses in finance, valuation analysis, business development, and international management and marketing. He practiced law in Taiwan and Puerto Rico before returning to Seattle and becoming involved in the marijuana industry in 2012.

A Brief History of Cannabis

Cannabis has been around for thousands of years. Hemp was widely cultivated in the American colonies as early as the seventeenth century and continued to be a major crop into the 20th century. Cannabis first appeared in a consumable form in the United States prior to 1850, and gained popularity as a harmless, over the counter medication. It was typically marketed as a tonic for the remedy of nervousness, weakness, melancholy, or confusion, and was taken as a form of health supplement.

It was around the 1850's that it also became popular as a recreational narcotic and hash parlors grew in major cities.

Cannabis began to develop a negative reputation when Mexican immigrants arriving in the United States introduced smoking cannabis for recreational purposes. It is widely believed that cannabis began to be demonized when it was associated with unwanted immigrants from Mexico.

It is noteworthy that some states began to regulate cannabis even before Mexican immigrants were associated with its use. Early regulation was similar to the regulations related

to medical cannabis use that we see today. These early laws were primarily directed at requiring labeling of drugs and/or prohibiting sales of certain drugs outside pharmacies or without a doctor's prescription.

The federal Pure Food and Drug Act was passed by Congress in 1906 and marked the beginning of drug regulation in the United States and included basic labeling as a requirement. This Act was replaced by the Federal Bureau of Narcotic and the Uniform State Narcotic Drug Act of 1934.

Interestingly, California became the first state to outlaw cannabis in 1913, although lacked enforcement. By 1931, 29 states had passed legislation prohibiting marijuana. It is likely that the trend against cannabis as a recreational drug was somewhat related to alcohol prohibition. The Eighteen Amendment outlawing alcohol was passed in 1919, and was overturned in 1931, so it is fair to assume that those behind a resurgent alcohol industry would view cannabis as a competitor worthy of demonizing. A similar and equally valid arguments can be established between the expanding timber industry and hemp. There exists little to explain why hemp became illegal, other than it looks like cannabis, although there also exists the theory that William Randolph Hearst, in addition to fearing competition for his timber holdings, also lost substantial holdings to Rancho Villa and therefore held it against Mexicans. His publications came out strongly against the Mexican menace and the crime driven by the use of cannabis. No facts support this historical contention. The confluence of these events successfully demonized marijuana and overturning alcohol prohibition appeared to be the death nail.

The Marihuana Tax Act of 1937 was passed which imposed federal taxes and other limitations on cannabis. All transfers were to be taxed, and the parties involved were required to file with the Internal Revenue Service. The Act was opposed by the American Medical Association (AMA) as it negatively impacted pharmacists and physicians who prescribed and sold cannabis for medical purposes. The legislation passed, notwithstanding the AMA's objections.

In 1937, the first two individuals were charged with violating the act, receiving sentences of eighteen months and four years, respectively. These convictions were followed by 1938 film

"Reefer Madness," originally slated to be "Tell Your Children," which portrayed the madness smoking cannabis would inflict on America's youth.

In 1944, the New York Academy of Medicine issued a report promoted by New York Mayor Fiorello LaGuardia. The "LaGuardia Committee Report" was one of the earliest comprehensive studies on the effects of cannabis use. Based on five years of research, the report concluded that cannabis use was not widespread, did not lead to medical addiction, did not lead to the use of morphine, heroin, or cocaine (don't forget the "gateway drug" theory); that it was not the driving factor in the commission of crimes; that it was not associated with juvenile delinquency; and that the publicity regarding its catastrophic effects was unfounded. Needless to say, those that viewed cannabis as a treat, either economically, politically, socially, or racially, were determined to outlaw its use.

Federal Rules and Regulations for the Marijuana Industry

Controlled Substances Act

In 1969, in the case of Leary v. United States, the U.S. Supreme Court held the Marihuana Tax Act of 1937 was unconstitutional. The Court noted that it Congress still had the ability to deal with cannabis, and Congress immediately passed Controlled Substances Act as Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The Drug Enforcement Administration (DEA) was established in 1973, consolidating several related agencies.

The Act created five classifications of substances, called Schedules. Substances included in Schedule I are deemed the most dangerous and are the most heavily regulated. They are defined as those substances that have "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use of the drug or other substance under medical supervision." Cannabis was classified as a Schedule I drug from passage. The Act makes it illegal to possess, use, distribute, sell, produce, or advertise marijuana. Those prohibited activities may be punishable by up to life in prison and significant financial penalties, depending on the offense. As a substance deemed to have "no currently accepted medical use in treatment," there is no exception for medical use.

Clearly, there are significant associated with advising, lending to, or participating in, a cannabis venture.

There is a lack of honest factual support for the scheduling of cannabis, but the tide is turning. The Federal Drug Administration just approved the first cannabis-based drug for epilepsy, and there are a host of other clinical studies being conducted for treatment of cancers, seizures, brain injury, Alzheimer's, and many other afflictions where cannabis offers hope. Little research has been completed on the individual cannabinoids, but early results are promising. Also, the focus on medical cannabis is also renewing interests in other pure plant extracts and their application to human health care.

U.S. Patent 6630507

The Department of Health and Human Services filed for this patent in 2001 after apparently extensive medical marijuana research where the government claimed, among other things, that;

"Cannabinoids have been found to have antioxidant properties, unrelated to NMDA receptor antagonism. This new-found property makes cannabinoids useful in the treatment and prophylaxis of wide variety of oxidation associated diseases, such as ischemic, age-related, inflammatory and autoimmune diseases."

The US DHHS provides evidence for a number of specific medicines and treatments to be included as part of the patent, and stated in the patent filing's "**Summary of the Invention**" that;

"It is an object of this invention to provide a new class of antioxidant drugs that have particular application as neuroprotectants, although they are generally useful in the treatment of many oxidation associated diseases."

Patent 6630507 raises a host of questions that the federal government will at some point have to answer. The lack of medical value has always been used by the federal government to avoid rescheduling of cannabis. Universities have been unwilling to risk federal grants and funding to engage in research that demonstrates that cannabis may have medical applications. Yet, the federal government has had conclusive proof, sufficient to issue itself a patent, that indeed, cannabis has medical value. Essentially, the federal government has been engaged in a lie, one that has extended some ninety years, plus or minus ten years.

Bank Secrecy Act

The Currency and Foreign Transactions Reporting Act of 1970 (which legislative framework is commonly referred to as the "Bank Secrecy Act" or "BSA") requires U.S. financial institutions to assist U.S. government agencies to detect and prevent money laundering. Specifically, the act requires financial institutions to keep records of cash purchases of negotiable instruments, file reports of cash transactions exceeding $10,000 (daily aggregate amount), and to report suspicious activity (SARS) that might signify money laundering, tax evasion, or other criminal activities. It was passed by the Congress of the United States in 1970.

18 U.S.C. § 1956 - Laundering of Monetary Instruments

(a)

(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)

(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B)knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside

the United States or to a place in the United States from or through a place outside the United States

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent—

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) PENALTIES.

(1) IN GENERAL. Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer

described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

(2) [omitted]

(3) [omitted]

(4) [omitted]

Interpreting the Latest FinCEN and Justice Department Guidance

Issued Date
February 14, 2014
Guidance Subject
BSA Expectations Regarding Marijuana-Related Businesses

The Financial Crimes Enforcement Network ("FinCEN") is issuing guidance to clarify Bank Secrecy Act ("BSA") expectations for financial institutions seeking to provide services to marijuana-related businesses. FinCEN is issuing this guidance in light of recent state initiatives to legalize certain marijuana-related activity and related guidance by the U.S. Department of Justice ("DOJ") concerning marijuana-related enforcement priorities. This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations, and aligns the information provided by financial institutions in BSA reports with federal and state law enforcement priorities. This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.

Marijuana Laws and Law Enforcement Priorities

The Controlled Substances Act ("CSA") makes it illegal under federal law to manufacture, distribute, or dispense marijuana.[1] Many states impose and enforce similar prohibitions. Notwithstanding the federal ban, as of the date of this guidance, 20 states and the District of Columbia have legalized certain marijuana-related activity. In light of these developments, U.S. Department of Justice Deputy Attorney General James M. Cole issued a memorandum

(the "Cole Memo") to all United States Attorneys providing updated guidance to federal prosecutors concerning marijuana enforcement under the CSA.[2] The Cole Memo guidance applies to all of DOJ's federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

The Cole Memo reiterates Congress's determination that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Cole Memo notes that DOJ is committed to enforcement of the CSA consistent with those determinations. It also notes that DOJ is committed to using its investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, the Cole Memo provides guidance to DOJ attorneys and law enforcement to focus their enforcement resources on persons or organizations whose conduct interferes with any one or more of the following important priorities (the "Cole Memo priorities"):[3]

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- 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 or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

Concurrently with this FinCEN guidance, Deputy Attorney General Cole is issuing supplemental guidance directing that prosecutors also consider these enforcement priorities

with respect to federal money laundering, unlicensed money transmitter, and BSA offenses predicated on marijuana-related violations of the CSA.

Interpreting the Latest FinCEN and Justice Department Guidance – Bank Forensic Audits

On January 19, 2018, FinCEN issued additional guidance in light of the Attorney General's rescinding the Cole Memorandum. FinCEN indicated that the FinCEN Guidance was still in effect, and banks were expected to comply with its compliance procedures, including continuing due diligence and the filing of the three special categories of marijuana-related SARs.

To summarize the FinCEN Guidance, a bank providing deposit or lending services to a cannabis business must conduct certain due diligence concerning the business, which includes:

- Verifying with the appropriate state authorities whether the business is duly licensed and registered;
- Reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business;
- Requesting from state licensing and enforcement authorities available information about the business and related parties;
- Developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (*e.g.*, medical versus recreational customers);
- Conducting ongoing monitoring of publicly available sources for adverse information about the business and related parties;
- Conducting ongoing monitoring for suspicious activity, including for any of the red flags described in the FinCEN Guidance or the Cole Memorandum; and
- Updating due diligence information on a periodic basis and commensurate with the risk.
- A bank must also determine whether a cannabis business violates state law or implicates one of the Cole Memorandum's priorities, which include:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- 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 or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

If the due diligence identifies state illegality or if the business conflicts with a Cole Memorandum priority, as noted above, the FinCEN Guidance requires that a bank file a SAR detailing the possible illegal conduct. If not, a bank providing deposit or lending services to a cannabis business must file a SAR notifying FinCEN that the bank is conducting banking business with a cannabis-related entity that is operating in accordance with state law.

Providing Financial Services to Marijuana-Related Businesses

This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations. In general, the decision to open, close, or refuse any particular account or relationship should be made by each financial institution based on a number of factors specific to that institution. These factors may include its particular business objectives, an evaluation of the risks associated with offering a particular product or service, and its capacity to manage those risks effectively. Thorough customer due diligence is a critical aspect of making this assessment.

In assessing the risk of providing services to a marijuana-related business, a financial institution should conduct customer due diligence that includes: (i) verifying with the appropriate state authorities whether the business is duly licensed and registered; (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business; (iii) requesting from state licensing and enforcement authorities available information about the business and related parties; (iv) developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational customers); (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties; (vi) ongoing monitoring for suspicious activity, including for any of the red flags described in this guidance; and (vii) refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk. With respect to information regarding state licensure obtained in connection with such customer due diligence, a financial institution may reasonably rely on the accuracy of information provided by state licensing authorities, where states make such information available.

As part of its customer due diligence, a financial institution should consider whether a marijuana-related business implicates one of the Cole Memo priorities or violates state law. This is a particularly important factor for a financial institution to consider when assessing the risk of providing financial services to a marijuana-related business. Considering this factor also enables the financial institution to provide information in BSA reports pertinent to law enforcement's priorities. A financial institution that decides to provide financial services to a marijuana-related business would be required to file suspicious activity reports ("SARs") as described below.

Filing Suspicious Activity Reports on Marijuana-Related Businesses

The obligation to file a SAR is unaffected by any state law that legalizes marijuana-related activity. A financial institution is required to file a SAR if, consistent with FinCEN regulations, the financial institution knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal

activity; (ii) is designed to evade regulations promulgated under the BSA, or (iii) lacks a business or apparent lawful purpose.[5] Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. Therefore, a financial institution is required to file a SAR on activity involving a marijuana-related business (including those duly licensed under state law), in accordance with this guidance and FinCEN's suspicious activity reporting requirements and related thresholds.

One of the BSA's purposes is to require financial institutions to file reports that are highly useful in criminal investigations and proceedings. The guidance below furthers this objective by assisting financial institutions in determining how to file a SAR that facilitates law enforcement's access to information pertinent to a priority.

"Marijuana Limited" SAR Filings

A financial institution providing financial services to a marijuana-related business that it reasonably believes, based on its customer due diligence, does not implicate one of the Cole Memo priorities or violate state law should file a "Marijuana Limited" SAR. The content of this SAR should be limited to the following information: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) the fact that the filing institution is filing the SAR solely because the subject is engaged in a marijuana-related business; and (iv) the fact that no additional suspicious activity has been identified. Financial institutions should use the term "MARIJUANA LIMITED" in the narrative section.

A financial institution should follow FinCEN's existing guidance on the timing of filing continuing activity reports for the same activity initially reported on a "Marijuana Limited" SAR.[6] The continuing activity report may contain the same limited content as the initial SAR, plus details about the amount of deposits, withdrawals, and transfers in the account since the last SAR. However, if, in the course of conducting customer due diligence (including ongoing monitoring for red flags), the financial institution detects changes in activity that potentially implicate one of the Cole Memo priorities or violate state law, the financial institution should file a "Marijuana Priority" SAR.

"Marijuana Priority" SAR Filings

A financial institution filing a SAR on a marijuana-related business that it reasonably believes, based on its customer due diligence, implicates one of the Cole Memo priorities or violates state law should file a "Marijuana Priority" SAR. The content of this SAR should include comprehensive detail in accordance with existing regulations and guidance. Details particularly relevant to law enforcement in this context include: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) details regarding the enforcement priorities the financial institution believes have been implicated; and (iv) dates, amounts, and other relevant details of financial transactions involved in the suspicious activity. Financial institutions should use the term "MARIJUANA PRIORITY" in the narrative section to help law enforcement distinguish these SARs.[7]

"Marijuana Termination" SAR Filings

If a financial institution deems it necessary to terminate a relationship with a marijuana-related business in order to maintain an effective anti-money laundering compliance program, it should file a SAR and note in the narrative the basis for the termination. Financial institutions should use the term "MARIJUANA TERMINATION" in the narrative section. To the extent the financial institution becomes aware that the marijuana-related business seeks to move to a second financial institution, FinCEN urges the first institution to use Section 314(b) voluntary information sharing (if it qualifies) to alert the second financial institution of potential illegal activity. *See Section 314(b) Fact Sheet* for more information.[8]

Red Flags to Distinguish Priority SARs

The following red flags indicate that a marijuana-related business may be engaged in activity that implicates one of the Cole Memo priorities or violates state law. These red flags indicate only possible signs of such activity, and also do not constitute an exhaustive list. It is thus important to view any red flag(s) in the context of other indicators and facts, such as the financial institution's knowledge about the underlying parties obtained through its customer due diligence. Further, the presence of any of these red flags in a given transaction or business arrangement may indicate a need for additional due diligence, which could include seeking information from other involved financial institutions under Section 314(b). These

red flags are based primarily upon schemes and typologies described in SARs or identified by our law enforcement and regulatory partners and may be updated in future guidance.

- 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).

Currency Transaction Reports and Form 8300's

Financial institutions and other persons subject to FinCEN's regulations must report currency transactions in connection with marijuana-related businesses the same as they would in any

other context, consistent with existing regulations and with the same thresholds that apply. For example, banks and money services businesses would need to file CTRs on the receipt or withdrawal by any person of more than $10,000 in cash per day. Similarly, any person or entity engaged in a non-financial trade or business would need to report transactions in which they receive more than $10,000 in cash and other monetary instruments for the purchase of goods or services on FinCEN Form 8300 (Report of Cash Payments Over $10,000 Received in a Trade or Business). A business engaged in marijuana-related activity may not be treated as a non-listed business under 31 C.F.R. § 1020.315(e)(8), and therefore, is not eligible for consideration for an exemption with respect to a bank's CTR obligations under 31 C.F.R. § 1020.315(b)(6).

Federal Rules and Regulations Affecting Financing

The marijuana industry is highly regulated. Regulation places a higher burden on the operations of a business start-up. The marijuana industry is particularly unique in that the state laws regulating "legal" marijuana vary significantly from state-to-state and, to make matters more complicated for investors, it is illegal under federal law and the marijuana plant is placed in the same category as heroin and LSD. This includes the non-psychotropic components in marijuana, such a cannabinoids (CBD). As a Schedule I drug, it is deemed to have no currently accepted medical use and a high potential for abuse.

Anyone participating in this industry must do so with their eyes wide open, with a clear understanding of the risks and constantly changing regulatory and business environment.

Taxation

Taxation – 26 U.S. Code § 280E – Expenditure in connection with the illegal sale of drugs.

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.

You are allowed to make an adjustment to income for cost of goods sold, however, what may be included in cost of goods sold varies from business type to business type. In the State of Washington, you have three business categories, producer, processor, and retail sales, and each is impacted differently in terms of what may be included in cost of goods sold.

The impact of § 280E varies by state and business type. Typically, it has the most negative impact on retail operations which are only allowed to adjust gross revenues by the cost of inventory.

It is important to involve an accountant or tax attorney familiar with marijuana taxation to develop a strategy to maximize cost of goods sold while minimizing disallowed expense deductions or shifting those disallowed expenses to other entities, if possible.

Getting the Loan – Providing Transparency to Lenders

Interestingly, although raising capital is a major issue for any marijuana business, the federal government is not a major direct impediment. That being said, many attorneys and most individuals, sophisticated or otherwise, unwittingly violate federal and state securities laws, and related anti-fraud statutes, when raising money.

In the early stages of a start-up venture, it is common to raise money from family and friends. This practice is common and encouraged by many venture firms. My comment here is a failed venture can alienate family members and result in the loss of friends, so whenever borrowing funds from third parties, make sure you both consider failure as a likely result.

Another more concerning issue is the unwitting violation of the 1933 Securities Act when raising capital. In most cases, when a marijuana business (and most others) raises money from a third party who will be a passive participant in the venture, the transaction is subject to the ’33 Act. One of the earliest tests to determine whether an investment constitutes a “security” subject to the ’33 Act was laid out in *Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (1946). What has become known as the “*Howey Test*” and still a general test for defining a security, the majority laid out four requirements:

1. An investment of money;
2. An expectation of profit;

3. A common enterprise;
4. Depending solely on the efforts of a promoter or third party.

Although the *Howey Test* may have been expanded upon, the test is still relevant in today's capital raising activities.

Most money raising activity will be subject to the *'33 Act*, as amended. A business owner raising money, absent appropriate counsel (or his/her attorney) does so at their own risk. The *'33 Act* lays out a framework for raising money, which includes whether the money raise is public or private, what investors can be approached and by what methods, characterization of investors, how much money can be raised and in what period of time, required disclosures and registration, and sanctions for violations. Money raising is also subject to state securities laws and anti-fraud statutes. Violating these federal or state provisions may require returning the investors' money upon demand and criminal sanctions. Each case is fact and jurisdiction dependent, and extreme caution is advised. Advice from an attorney experienced in securities law is imperative.

General Business Considerations

Failure is the norm for start-ups, including non-cannabis start-ups, and bad things often happen as a consequence. Friends can become enemies, a scorned suitor will seek to create issues with the regulators, individuals will lose their life savings, and attorneys will face malpractice claims. These possible outcomes can be mitigated, should the client care to get appropriate legal and financial advice, and by attending to the basics. Just a few basic questions that need to be considered follow:

1. Does the founder have the financial resources to launch the venture?
2. Has a written business plan been prepared, together with financial models?
3. Are there other founders, and if so, have they been properly vetted?
4. Do the founders have the needed skills?
5. Do the founders have the necessary financial staying power?
6. Has an entity been formed with all appropriate formation documents and agreements?
7. Do the founders have the necessary advisers (can they afford them)?
8. Do the founders have access to capital for expansion or unexpected downturns?

9. By what method, if any, are founders vested in their ownership interest?
10. Is the management structure clear and responsibilities defined in writing?

My experience is that most ventures are launched without addressing a single item on this relatively short list. It is part of the reason that startups have such a high failure rate, typically 70 to 90%. It is also a reflection on the overly burdensome cost to retain legal counsel. Most start-ups launch without counsel, and this leads to later disaster. That is why it is common for law firms serving venture clients to offer basic services for greatly reduced rates or a percentage of the venture. But only a few ventures are so lucky. Most will go it alone with all the optimism common among the uninitiated, but the result will generally be failure.

Conclusion

The marijuana industry is fraught with issues and the landscape in a constant state of change. Individuals and corporations alike are staking large bets for the future of marijuana, regardless of federal politics. The road to success will be littered with failed dreams, loss of capital, loss of licenses, lawsuits, indictments, sanctions, and an occasional disbarment. The lure of riches can cause individuals to bend the rules and ignore the rigors of operating a business in a highly-regulated industry. The industry is still in its infancy, so new opportunities will arise over the next several years for those that can plan, organize, and execute in a highly regulated, high risk – high return industry.

Marijuana Businesses Law in Washington

Submitted by Erik Halverson

RECREATIONAL MARIJUANA BUSINESS LAW IN WASHINGTON

Erik Halverson &
Chris Larsen
Halverson Law

Recently Adopted Rules

- Retail License Forfeiture
  - "Fully Operational"
- Cannabis Packaging and Labeling Requirements
  - New Universal Symbol Introduced
  - Optional Harvest, Best Buy, and Manufactured Dates
  - Loosely packaged products with WSLCB approval

- Repeal of Cole Memo by Sessions Memo

Powers of State Regulatory Agencies

- Powers are broad.
  - WAC 314-55-087 - Full access to:
    - Records for three years demonstrating the financial health of the business
    - Video records
    - Purchase invoices
    - Accounting and tax records related to the licensed business "and each true party of interest" – arguably granting broad access to the full financial records of each owner.
- Access is broad.
  - 314-55-087(1) grants WSLCB employees mandatory access.
    - Access is not completely unfettered; if completely unrelated, the request can be fought. LCB has to have a rational basis for their request. *Example – unrelated police investigations and "CSI: LCB Enforcement" mentality*
- Violations are broken into 5 Categories (WAC 314-55-520 – 537)
  - (1) Violations against public safety; (2) Regulatory violations; (3) License violations; (4) Nonretail Violations; and (5) Transportation/Freight violations.
- LCB is difficult to work with when seeking to advise clients. Their position on matters changes "on a day to day basis." The most effective method to assure your client is in compliance is to take a distinctly defensive approach and:
  - work directly with the enforcement officer or their supervisor
  - seek approval through confirmation correspondences outlining the inquiry, the guidance, and the intended course of action.

Powers continued…

- Some violations directly result in the cancellation of the license with progressively stiffening penalties (sale to a minor); while others don't directly affect the license (minor frequenting.)
- Some actions by the licensee result in multiple administrative violations.
- The grid codified in the regulations indicates each violation independently results in certain consequences; however, the LCB may take a harsher approach and determine single violations are cumulative.

Business Types Allowed

- No overt ban on any business type.
- Each owner, member, manager, corporate officer, stockholder, entity/person exercising control over the business, entity/person having a right to gross or net profits is considered a “True Party of Interest.” WAC 314-55-035.
  - Every True Party of Interest (TPI) and their spouses needs to be vetted by the LCB, which can take 2-6 months.
- Different entity forms carry different challenges:
  - Sole proprietorships present tenuous process for sale of the license since it has to first be transferred to an entity.
  - Privately held corporations require all stockholders and their spouses to be vetted as true parties of interest.
  - Greater number of true parties of interest, the more cumbersome the ownership structure is.
- Multilevel ownership structures allowed, but all persons that make up the ownership and control are considered a TPI.

Marketing/Advertising Restrictions

- See WAC 314-55-155 and LCB FAQs
  - Frequently changing with inconsistent application.
- GENERAL RULES OF THUMB:
  - Seek WSLCB Enforcement guidance and approval
  - Be overly conservative
  - When you interface with the public in any medium, include all necessary disclaimers
  - Reliance on third parties is not an excuse for non-compliance (e.g., if you hire an ad agency and the agency fails to include the statutory warning language on the advertising, the licensee will still receive a violation)
  - Observe the buffers for placement of stationary ads.
- Signage is limited to 2 fixed on premises signs, and marijuana leafs are not permitted. **Recently, LCB started recommending violations for signage located within the store but facing outside.**
- Creative efforts are common in the industry, including separately leasing “ad” space on a neighboring parcel, or even leasing an exterior wall on your premises to have a sign or mural that appears to exceed the statutory maximums.

Zoning Requirements

- Some jurisdictions remain opposed to marijuana and have zoned marijuana out of their land use code.
- Per 314-55-050(10), cannot license a marijuana license within a 1000 feet, as the crow flies, from
  - (a) Elementary or secondary school;
  - (b) Playground;
  - (c) Recreation center or facility;
  - (d) Child care center;
  - (e) Public park;
  - (f) Public transit center;
  - (g) Library; or
  - (h) Any game arcade (where admission is not restricted to persons age twenty-one or older).
- With the exception of elementary/secondary schools and playgrounds, a local jurisdiction can create its own zoning restrictions, including reducing the buffer distance to no less than 100 feet.
- Some points are questionable. Some “Parks” are not really parks. Some “transit centers” are not considered transit centers.
- Resources exist to assist in finding compliance location – www.cannazoning.com

Employment Rules and Restrictions for Cannabis Businesses

- All employees must be 21 years old. 314-55-015
- Employees are the biggest source of administrative violations.
  - ID: Employees tend to forget to look at IDs, or look at IDs but not truly look at the birthdate to verify they are over 21. Employees need to understand they have criminal exposure for sales to minor, and that cases are in fact referred to the prosecutors for prosecution.
    - Use of electronic scanners are essential – INCLUDING PASSPORT SCANNERS
    - Use of designated ID checker staff is recommended
  - Traceability: Licensees have challenges with imprinting the importance of maintaining traceability on their employees. Mistakes can happen when lot numbers are combined, when employees ring up products using only the name instead of the lot numbers, etc. Practical methods to hold employees accountable are critical to the license.
  - Firing employees when they cause a violation will not necessarily get you out of a violation.
  - Video should be reviewed around violations so see how business practices can be changed. Cell phone usage on the floor often leads to violations due to the budtenders being distracted.
  - **The responsibility for compliance always falls on the licensee, and arguing that certain duties were left out of the control of the licensee may give rise to another “true party” violation.**

Negotiating Third Party Agreements with Cultivators, Managers, Etc

- True Party, defined in 314-55-035.
- Disclosure of Licensing and Consulting Agreements
- Significant care has to be used in delegating responsibility to non-true parties to avoid violations.
  - The core business activity that cannot be delegated is the final purchasing decisions. Purchasing agents and managers can be designated to create “pre-orders,” but all orders must be approved by a true party of interest.
- Exclusive contracts are not allowed, including prepayment for pre-orders, which is viewed as a banned loan to another licensee.

Premises Security Regulation Compliance

- Security is paramount in this industry. WAC 314-55-083.
- It is a cash heavy industry and robberies and employee theft occur. Security is also required to prevent diversion of product to black market and minors.
- Cameras:
  - 24/7 continuous footage, saved for 45 days. Recommend saving 50+ days in case enforcement requests footage from 44 days prior, allowing the client a few days to download the footage.
  - Resolution of video must be 640x470.
  - Cameras must be IP compatible.
  - Time and date must be on the footage.
  - There can’t be any dead spots.
  - The camera system is the primary checklist item during final inspection for licensing. Any failures or dead spots in the system’s coverage will cause the inspection to fail.
- Other security items:
  - Badges. Employees must wear their badge, including name of the business, the employee’s picture and name.
  - Visitor log. Visitors coming into the restricted (what you would consider “employee only” areas) must sign in and out.
  - Producers must have grow operations fenced in.
  - Traceability. Traceability is considered a security measure and is strictly enforced by LCB. The MJ Examiner’s unit regularly prepares audits to make sure traceability is maintained by licensees.

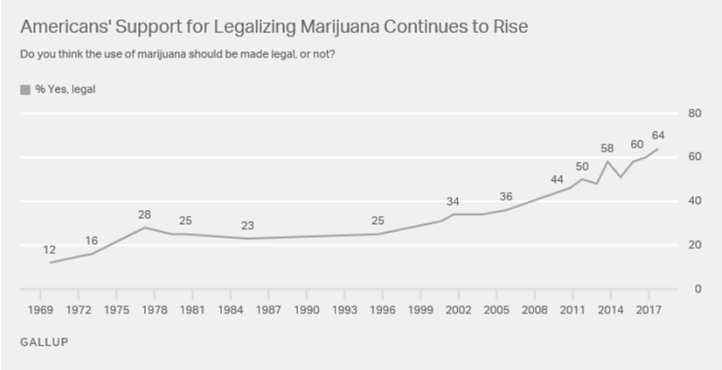
Preparing for State Regulatory Agency Inspections

- Preparing for inspections is the wrong approach—it is reactive and traceable.
- Clients should be proactive and ensure ongoing compliance.
- Do not let your clients wait for a WSLCB inspection to confirm compliance. It will be an much more difficult to untangle at that point.

Some pointers, given current political climate…

- What would a shut down look like?
  - We've seen this before. In 2011, California co-ops faced a difficult decision: they were presented with a letter from the Federal DA's simply stating: You have 45 days to shut down or face prosecution.
- Is a shut down likely? No.
  - Jeff Sessions, our current US Attorney General, has strong views in opposition of cannabis legalization, comparing it to opioid addiction.
  - However, Gallup polls from October 2017 show 64% approval rating amongst adults for legalization of marijuana. Notable approval even amongst republicans.
  - Trump's circle are not all opposed to cannabis however. Peter Thiel, silicone valley giant and billionaire investor, has been a long supporter of Trump and a part of his transition team. **Peter Theil is a major investor in Leafly, a marijuana directly and community website widely used in the cannabis industry.**
  - Marijuana excise tax is bringing in almost $1,000,000 per day for the State of Washington. So far, the industry in Washington has generated over half a billion dollars in tax revenues.
  - There is growing support for cannabis in Washington DC. Recently, Senator Elizabeth Warren of Massachusetts and Senator Corey Gardner of Colorado offered a bipartisan bill that would prevent 280e from applying to marijuana businesses in states where marijuana is legalized. That would, on its face, have major benefits to marijuana businesses. And, it shows growing bipartisan support for cannabis.

Growth of Cannabis Approval



What can we do to advise our clients in case of a shutdown?

- Obtain medical endorsement as a backup. If there is a shutdown, it could be a partial shutdown – i.e., preserve the medical operations but gut the recreational.
- Leases – when drafting leases for Cannabis clients, make sure you include a provision providing for reasonable termination of the lease in the event a communication from a public sources, federal, state or local, indicating that legal cannabis sales must cease, that your client may, in their sole discretion, terminate the lease.
- Provide guidance on whether a corporation is the right entity structure, as to limit personal tax burdens in the event of a shut down.

The main points to take away from this:

- **Be proactive and maintain compliance.**
  - Help your client introduce systems to grow with their business, keep things organized, and keep a keen eye on maintaining traceability and ID checking compliance.
- **Working with the LCB leaves much to be desired**.
  - Paper your file well, and operate in the defensive.
- **Play it safe.**
  - Check with the enforcement officer before any changes to the business, and retain records.
- **Help your client understand the risks.**
  - Marijuana is federally illegal and regulations are rapidly changing. Even the most sophisticated operations make mistakes and the consequences are harsh.

If you need additional information…

Reach out with questions!
We're here to help.

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Obtaining a Washington Cannabis Business License

Submitted by Lindsey J. Weidenbach

Obtaining a Washington Cannabis License

Presented by Lindsey Weidenbach, Partner – JDSA Law

Overview of Seminar Topics

1. Application Procedures; Avoiding Mistakes
2. Grounds for License Refusal
3. Appealing Application Denials
4. License Renewals
5. License Transfers

Application Procedures

- In November/December, 2013, the State opened a 21 day window to apply for a marijuana license
- The Washington State Liquor and Cannabis Board (WSLCB) is not issuing new licenses for producers, processors or retail stores – if you want a license, you must purchase a licensed entity or assume an existing license
- The WSLCB is continuing to issue licenses for research and transportation

Application Procedures

Marijuana Retail License, Producer License or Processor License:

- Licensee entity purchase:
  - Change of Governing Person form
  - Submitted to Business Licensing Services (BLS) and then to WSLCB
- License assumption:
  - Business License Application and Marijuana Addendum
  - Submitted to BLS and then to WSLCB

Marijuana Transportation License:

- Business License Application and Marijuana Addendum
- Submitted to BLS and then to WSLCB

Application Procedures

Marijuana Research License:

- Business License Application and Marijuana Addendum
- Submitted to BLS and then to WSLCB

Marijuana Cooperative License:

- Application to Register a Cooperative
- Email to Mjcooperatives@lcb.wa.gov

Once the WSLCB receives the application, it is assigned a Licensing Specialist (LS) who then contacts the person listed on the application to schedule an initial interview. If the attorney is going to be on the call, instruct your client to ask the assigned LS to send the client an authorized representative form prior to the call. The form is sent via DocuSign. The paper form is no longer accepted.

Application Procedures
Types of Changes

- Application for Additional Funding
- Application for Added Medical Marijuana Endorsement
- Cooperatives Change Authorization Application
- Expanding Plant Canopy to Maximum Allotted
  - Email plantcanopy@lcb.wa.gov
  - https://lcb.wa.gov/mjlicense/expanding-plan-canopy
- Request to Alter Marijuana Site and/or Operating Plan
- Request to Add a Processor License
- Splitting a Producer and Processor License
  - Send in a paper business application to BLS via post and check the "change of location" option
  - On the application specify which endorsement is moving and to what location
  - Ensure it is clearly stated that you are splitting your privileges and will have 2 locations
  - File a change in operating plan with the WSLCB for the license that is remaining at the current location
  - These two applications must be approved simultaneously, to ensure both business locations are compliant at all times
- Change in Governing Person/TPOI

Application Procedures: Initial Interview

- The Initial Interview generally does two things:
  - Confirms the information in the application
  - Determines what information must be provided to the Licensing Specialist through DocuSign
- Questions asked in the initial Interview:
  - Entity structure
  - Names, addresses and SSNs of all involved parties (members/shareholders, financiers)
  - Amount of funds being contributed
  - Source of funds
  - Location: is it leased or owned? Term of lease, name of landlord
  - License affiliation
  - Depending on the type of license, specific questions about the utility and operations of the license:
    - Retail: types of cannabis being sold (medical endorsement?)
    - Producer: square footage, indoor or outdoor
    - Processor: types of processing and products being created
    - Transportation: Vehicle information
    - Research: Type of research, purpose and goal
    - Cooperative: Square footage

Application Procedures: Avoiding Mistakes

- Know your Licensing Specialist – each is different and you'll find they ask different questions and request different documents
- A TPOI on a producer or processor license cannot be the landlord of a retail store. RCW 69.50.328 states: "Neither a licensed Marijuana producer nor a licensed marijuana processor shall have a direct or indirect financial interest in a licensed marijuana retailer."
- Consulting agreements must be disclosed – especially if the buyer is an employee and working for the company during the license transfer. RCW 69.50.395
- Licensing agreements must be disclosed. RCW 69.50.395
- The process of making changes to a license can be time consuming - turn the form into BLS during the negotiation period if buying or assuming the license, just to get the ball rolling – saves time
- During the wait, get the client prepared: bank statements, leases, Purchase and Sale Agreement & Bill of Sale

Application Procedures: Avoiding Mistakes

- After the initial interview, all parties will receive two emails:
  - One containing a DocuSign portal
  - Another attaching the Request for Required Documents letter
- Read the Request for Required Documents letter first. It is an outline of the DocuSign packet and tells you what each party is to include
- Typically, the letter requests the following information to provided via DocuSign:
  - Entity Business Structure form
  - Operating Plan
  - Total Costs and Source of Funds
    - Substantiation: bank records, loan documents, line of credit information
  - License Associations
  - Business/Real Property
    - Lease
    - Assumption Agreement
    - Bill of Assumption
  - Financial Records (if getting a loan)

Application Procedures: Avoiding Mistakes
Lease

Lease must include:

- **Visitors**: All nonemployee visitors, to include landowners and landlords, must sign a visitors log, wear a visitor's badge, and have a licensee/employee escort them while they are on the marijuana business's licensed premise
- **Default/Right of Reentry**: Upon default, exercising the right of reentry or any other situation in which the landlord will reenter the property without the presence of the tenant, notice must first be given to the WSLCB, so that any remaining marijuana and/or marijuana products can be properly removed from the licensed premise

Application Procedures: Avoiding Mistakes
Assumption Agreement

Assumption Agreement must include:

- Name of transferor
- Name of transferee
- Type of property transferred (percentage of ownership interest or asset)
- Location address of property
- Purchase price
- Transfer reason
  - They are looking for a narrative as to how the parties came to the agreement and why the seller is selling
- Terms of the purchase/transfer
  - All funds due at closing? Funds on down payment? Promissory Note? Complete on transfer?
- Signature and Date of Transferor and Transferee
  - If either party is an entity with multiple members or shareholders, all members or shareholders must sign – not just the authorized signatory party (manager, president)
- All Exhibits or Addendums

Application procedures: Avoiding Mistakes
Bill of Sale/Bill of Assumption

Bill of Sale/Bill of Assumption must include:

- Name of transferor
- Name of transferee
- Date of sale/transfer
- Type of property sold/transferred (ownership interest or license itself)
- Signature and date of seller/transferor

Application Procedures: Avoiding Mistakes

- After the items are submitted, the LS reviews and more often than not has follow up questions
- Prior to final inspection, the applicant must supply the following:
  - Pictures of the premise
    - Inside and outside: The photos from the outside must show the front entrance and any outdoor grow fencing. The photos from the inside must show where the business operations take place
    - LS's often ask for more pictures, using the site plan, to indicate where the pictures need to be taken
  - Scales must be registered (if processor)
  - Cannabis Examiner Approval (if processor and processing extractions)
  - Fire Marshall Approval (if processor and processing extractions)
  - Proof of insurance
  - Common Carrier Permit (if transportation)
  - Floor/Site plan
  - Research plan (if research license)
  - Camera/Security Requirements
  - Signs

Application Procedures: Avoiding Mistakes

- If there are no issues and all of the information has been submitted, the Licensing Specialist (LS) contacts the licensee's resident Enforcement Officer (EO) to schedule an inspection
  - Make sure the site plan submitted to LS matches the facility exactly as the EO will see it – EO often brings the site plan with him or her
- If inspection is approved, the EO will have the new licensee sign the inspection report and EO submits same to WSLCB
- WSLCB sends notice that inspection was approved and provides the fee information. Once the fee is paid, a temporary license is emailed to the licensee
- The actual "license" is only an endorsement on the entity's business license. A new business license, with approved endorsement, will follow in the mail. Usually takes a few weeks to arrive

Grounds for License Refusal

WAC 314-55-050 "Reasons the WSLCB may seek denial, suspension, or cancellation of a marijuana license application or license"

- Per RCW 69.50.331, the WSLCB has broad discretionary authority to approve or deny a license application
  - (1) Failure to meet qualifications or requirements for the specific marijuana producer, processor, or retail license, as outlined in this chapter and chapter 69.50 RCW
  - (2) Failure or refusal to submit information or documentation requested by the WSLCB during the evaluation process
  - (3) The applicant makes a misrepresentation of fact, or fails to disclose a material fact to the WSLCB during the application process or any subsequent investigation after a license has been issued
  - (4) Failure to meet the criminal history standards outlined in WAC 314-55-040
  - (5) Failure to meet the marijuana law or rule violation history standards outlined in WAC 314-55-045

Grounds for License Refusal

- (6) The source of funds identified by the applicant to be used for the acquisition, startup and operation of the business is questionable, unverifiable, or determined by the WSLCB to be gained in a manner which is in violation by law
- (7) Denies the WSLCB or its authorized representative access to any place where a licensed activity takes place or fails to produce any book, record or document required by law or WSLCB rule
- (8) Has been denied or had a marijuana license or medical marijuana license suspended or canceled in another state or local jurisdiction
- (9) Where the city, county, tribal government, or port authority has submitted a substantiated objection per the requirements in RCW 69.50.331 (7) and (10)
- (10) The WSLCB shall not issue a new marijuana license if the proposed licensed business is within one thousand feet of the perimeter of the grounds of any of the following entities:
  - (a) Elementary or secondary school; (b) Playground; (c) Recreation center or facility; (d) Child care center; (e) Public park; (f) Public transit center; (g) Library; or (h) Any game arcade (where admission is not restricted to persons age twenty-one or older)

Grounds for License Refusal

- (11) A city or county may by local ordinance permit the licensing of marijuana businesses within one thousand feet but not less than one hundred feet of the facilities listed in subsection (10) of this section except elementary and secondary schools, and playgrounds
- (12) Has failed to pay taxes or fees required under chapter 69.50 RCW or failed to provide production, processing, inventory, sales and transportation reports to documentation required under this chapter
- (13) Failure to submit an attestation that they are current in any tax obligations to the Washington state department of revenue
- (14) Has been denied a liquor license or had a liquor license suspended or revoked in this or any other state
- (15) The operating plan does not demonstrate, to the satisfaction of the WSLCB, the applicant is qualified for a license
- (16) Failure to operate in accordance with the WSLCB approved operating plan
- (17) The WSLCB determines the issuance of the license will not be in the best interest of the welfare, health, or safety of the people of the state

Appealing Application Denials

- WAC 314-55-070 "Process if the WSLCB denies a marijuana license application"
- If the WSLCB denies a marijuana license application, the applicants may:
  - Request an administrative hearing per chapter 34.05 RCW, the Administrative Procedure Act
  - Reapply for the license no sooner than one year from the date on the final order of denial
- If you disagree with a licensing specialists interpretation of a WAC or RCW, ask to speak with his or her supervisor
- If you continue to disagree, you can appeal the interpretation and ask for a "threshold decision" which is made by the enforcement division of WSLCB. If you do not prevail on the threshold decision, you can appeal through an administrative hearing
  - This entire process could last in excess of a year

License Renewals

- Each year the license is renewed with the licensee's business license application
  - Practitioner tip: If your firm is the registered agent for a licensee company, you may want to have the client perform its own business license renewal because the fee is over a thousand dollars
- Objections to the license renewal are handled pursuant to WAC 314-55-165
- Local cities, counties, tribal governments, and port authorities can object to the renewal – the WSLCB provides notice to local governments 90 days prior to the renewal date
- The local government objects by submitting a letter to the WSLCB detailing the reasons for the objection and a statement of the facts on which the objections are based
  - The letter must be received within 30 days of the renewal (though the time can be extended for a showing of good cause)
  - Letter must include specific reasons and facts that show issuance of the marijuana license at the proposed location or the applicant will detrimentally impact the safety, health or welfare of the community
- If the WSLCB decides to renew, it will inform the local jurisdiction, which is then provided time to request a hearing
- If the WSLCB decides not to renew, it will inform the licensee, who is then provided time to request a hearing. A temporary license is provided until a final decision is made

License Transfers

There are two ways to transfer a license:

- Purchase of the licensee entity itself, or
- Purchase of just the license, which is called a license assumption

License Transfers: Purchase of the Licensee Company

- Triggered by submitting a Change of Governing Person Form
  - The form is routed first to Business Licensing Services and then to the WSLCB where it is assigned to a Licensing Specialist and the process discussed previously begins
- The WSLCB will need:
  - A copy of the Purchase and Sale Agreement
  - A Bill of Sale

License Transfers: Purchase of the Licensee Company

If you represent the Buyer:

- Pro: This process is sometimes faster than a license assumption but the WSLCB has really improved its efficiencies
- Con: All of the typical pit-falls of purchasing an entity still apply, with the added concern that the inventory is cannabis
  - While the license is transferring, build in feasibility periods during which your client reviews tax returns, traceability software, actual health and quality of the crop, payroll records, corporate records, all contracts entered into by the Company, balance sheets, profit and loss statement. Also, try and get interviews with the employees
- Warranties for Buyer: that the financial and other corporate records provided are accurate, that there are no liens, license violations, or other encumbrances, no known legal claims or lawsuits
- Double check the facts against Securities Laws

License Transfers: Purchase of the Licensee Company

If you represent the Seller:

- Boilerplate language is important: make sure that the person signing is authorized to bind the company
- Representations and warranty: the federal illegality of the crop, the speculative nature of the industry, that there are no undisclosed funds, the buyer has the funds to close and is not relying on undisclosed funds
- Indemnification from Seller against actions which arise from the Company's operations prior to *CLOSING*. Indemnification from Buyer against actions which from the Company's operations after *CLOSING*

License Transfers: License Assumption

- Triggered by filing a new business license application for the assuming company (the company that will be the licensee after the transfer is complete) and a marijuana addendum
  - Must be submitted by regular mail (cannot be filed online)
  - On page 1, under "other endorsements" write: "assumption of cannabis license No._____"
- The WSLCB will need:
  - A copy of the Assumption Agreement (Asset Purchase and Sale Agreement)
  - A Bill of Sale
- The license assumption is more straight forward from a drafting stand-point because the seller's entity remains with the seller

License Transfers: Avoiding Mistakes

- When purchasing a licensee company or a license, your client must first determine whether they are assuming the current licensee's lease or if they are moving the license
- You cannot make two license changes at once: If the new licensee wants to change locations, the license must first be transferred to the new licensee's name and then the new licensee must submit a Change of Location application
- In the alternative, you can draft the purchase/assumption agreement to be contingent upon the seller moving its location to the new location. Once the license move is approved, then the parties can submit the applicable change of ownership documentation

Questions?

- Lindsey Weidenbach, Partner
- Phone: (509) 662-3685
- Email: lindseyw@jdsalaw.com
- www.jdsalaw.com
- Jeffers, Danielson, Sonn & Aylward, P.S.
  2600 Chester Kimm Rd.
  Wenatchee, WA 98801

For Validation Only

Washington State Liquor and Cannabis Board

Licensing and Regulation
3000 Pacific Ave SE
PO Box 43098
Olympia WA 98504-3098
Phone: 360-664-1600

Application for Added Medical Marijuana Endorsement
This endorsement allows a Marijuana Retailer to sell marijuana for medical use to qualifying patients and designated providers. To apply for the Medical Marijuana endorsement you must have a recreational Marijuana Retailer license.

To qualify for this endorsement, you must adhere to the following requirements:

- Carry marijuana concentrates and infused products that have been identified as medical grade by the Department of Health (DOH)
- Enter qualifying patients and designated providers in a medical marijuana database administered by DOH
- Issue medical marijuana patient recognition cards developed by DOH
- Keep records of qualifying patients and designated provider's recognition cards and other records required by DOH and Department of Revenue
- Ensure that all employees are trained on medical marijuana including the ability to identify authorizations and recognition cards
- Enter information about medical sales in the traceability system

For more information, please visit lcb.wa.gov. If you have any questions, please contact the Licensing Division at 360-664-1600.

Name of Applicant	License Number
Location Address *(Street, City, State, Zip)*	
Mailing Address *(Street, City, State, Zip)*	
Primary contact	Contact Telephone Number(s)
Email Address	

I understand that these are continuing requirements and failure to meet any of these requirements at any time may result in the revocation of this authorization by the WSLCB.

Signature	Date
Print Name	Title

LIQ1276 9/15

Washington State Liquor and Cannabis Board

PO Box 43085
Olympia WA 98504-3085
(360) 664-1600
www.lcb.wa.gov

For Office Use Only	
Date	
Check No.	
Amount Rec'd	
Rec'd by	

Cannabis Additional Funding Application

$75 processing fee (All fees are non-refundable. Make checks payable to WSLCB)

This application must be submitted and approved prior to receiving a loan, investment or gift from:

- An existing business member
- A previously approved or new financier

If this financial contribution will result in the right to receive any percentage of business profits or a change in the currently licensed entity structure, the Change in Governing People, Percentage Owned and/or Stock Unit ownership application will need to be completed instead of this form.

Please attach additional sheets if funds are coming from more than one individual.

Business/Contact Information

Trade Name	Marijuana License No.	UBI #
Licensee's Point of Contact Name(s)		
Email Address		Phone #

Financier/Investor Information

Financier/Investor Name	Date of Birth	Social Security
Mailing Address		Phone #
Email Address		Married? ☐ Yes ☐ No
Spouses Name	Date of Birth	Social Security
Email Address	Amount of Loan/Gift/Investment and source	

As the applicant, I certify the following:

- All parties are aware they will undergo financial and criminal background checks.
- Funds cannot be exchanged prior to WSLCB approval.

Refer to WAC 314-55-010 (10) and WAC 314-55-035 (3) for information regarding financiers.

Signature (Licensee) Title Date

LIQ1248 04/18

State of Washington
Business Licensing Service
PO Box 9034
Olympia WA 98507-9034
1-800-451-7985
bls.dor.wa.gov

UBI number
Liquor/Lottery license number
For validation only

03N-400-925-0003

Change In Governing People, Percentage Owned and/or Stock/Unit Ownership
(this does not replace your annual report)

* A different form is required to make changes to officers, members, managers or your Resident Agent with the Office of the Secretary of State. Please contact them at corps@sos.wa.gov or 360-725-0377.

	Amount Due
▶ Liquor.....**$75.00** Change in more than 10% of stock, election of new officers or changes in members or managers.	$
▶ Marijuana.....**$75.00**	$
▶ All other Licenses..... Required for all governing people and/or stock changes regardless of the amount of percentage of ownership.	$ NO FEE
Make check payable to the Department of Revenue Total amount due (Add Row 1 and 2)	$

Ownership type ☐ Partnership ☐ Corporation ☐ LLC ☐ LP/LLP/LLLP ☐ Non Profit Corporation

▶ _____ (Name) _____ (UBI Number) _____ (FEIN)

_____ (Company mailing address (Street or route)) _____ (City) _____ (State) _____ (Zip code) ( ) _____ (Company telephone number)

_____ (Contact name (Last, First, Middle)) ( ) _____ (Contact telephone number) _____ (Contact email address)

Stock ownership (if applicable)

Total stock authorized: _____ Number of shares issued: _____ Par value per share: _____

At the completion of this change, the governing persons and/or stockholders will be:
Title examples: *owner, partner, president, vice president, secretary, treasurer, member, manager, director*

* ▶ _____ (Name (Last, First, Middle)) _____ (Title) _____ (Social security number) _____ (Date of birth)

_____ (Home/business address (Street or route)) _____ (City) _____ (State) _____ (Zip code) ( ) _____ (Telephone number)

_____ (Date became owner/officer) _____ (Number of shares owned) _____ (Percent owned) _____ (Date(s) issued or enter "pending" if not yet issued)

_____ (Name of spouse (Last, First, Middle)) _____ (Spouse social security number) _____ (Spouse date of birth)

* Is this person related to other officers who own 10 percent or more? ☐ Yes ☐ No
(i.e. parent, stepparent, grandparent, spouse, children, brother, sister, stepchildren, adopted children or grandchildren)

▶ _____ (Name (Last, First, Middle)) _____ (Title) _____ (Social security number) _____ (Date of birth)

_____ (Home/business address (Street or route)) _____ (City) _____ (State) _____ (ZIP code) ( ) _____ (Telephone number)

_____ (Date became owner/officer) _____ (Number of shares owned) _____ (Percent owned) _____ (Date(s) issued or enter "pending" if not yet issued)

_____ (Name of spouse (Last, First, Middle)) _____ (Spouse social security number) _____ (Spouse date of birth)

Is this person related to other officers who own 10 percent or more? ☐ Yes ☐ No
(i.e. parent, stepparent, grandparent, spouse, children, brother, sister, stepchildren, adopted children or grandchildren)

Please continue on to the next page.

To receive this document in an alternate format, please call 1-800-647-7706. Teletype (TTY) users may use the Washington Relay Service by calling 711.
BLS 700-306 (10/12/17)

Name (Last, First, Middle) | Title | Social security number | Date of birth

Home/business address (Street or route) | City | State | Zip code | ( ) Telephone number

Date became owner/officer | Number of shares owned | Percent owned | Date(s) issued or enter "pending" if not yet issued

Name of spouse (Last, First, Middle) | Spouse social security number | Spouse date of birth

Is this person related to other officers who own 10 percent or more? ☐ Yes ☐ No
(i.e. parent, stepparent, grandparent, spouse, children, brother, sister, stepchildren, adopted children or grandchildren)

Name (Last, First, Middle) | Title | Social security number | Date of birth

Home/business address (Street or route) | City | State | Zip code | ( ) Telephone number

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Name of spouse (Last, First, Middle) | Spouse social security number | Spouse date of birth

Is this person related to other officers who own 10 percent or more? ☐ Yes ☐ No
(i.e. parent, stepparent, grandparent, spouse, children, brother, sister, stepchildren, adopted children or grandchildren)

If necessary, attach additional sheets using the same format as shown above.

Removal of governing people

Name of governing person or stockholder | Social security number | Date of birth | Title | Removal Date

Name of governing person or stockholder | Social security number | Date of birth | Title | Removal Date

Name of governing person or stockholder | Social security number | Date of birth | Title | Removal Date

Name of governing person or stockholder | Social security number | Date of birth | Title | Removal Date

Additional forms or documents may be required by the individual agency.
Liquor and Cannabis Board (360) 664-1600 • Lottery (360) 753-2155

Certification

Under penalty of perjury, I hereby certify there have been no changes in officers or stockholders that have not been reported, and that each officer and stockholder is the real party in interest with respect to his/her position and is not acting directly or indirectly as agent, employee or representative of any other person not reported. I certify on behalf of the corporation that it is understood a misrepresentation of fact is cause for rejection of this application or revocation of any license issued.

Print Name_____Title_____

Signature_____Date_____Phone #_____

To receive this document in an alternate format, please call 1-800-647-7706. Teletype (TTY) users may use the Washington Relay Service by calling 711.
BLS 700-306 (10/12/17)

Washington State Liquor and Cannabis Board

Marijuana Unit
PO Box 43098
3000 Pacific Ave SE
Olympia WA 98504
Phone: (360) 664-1600

For Validation Only

Cooperatives Change Authorization
Application to Add or Remove Participants

This application is to add or remove qualified patients or designated providers from an existing cooperative.

- If adding a new participant, sixty days needs to have passed since the previous qualifying patient or designated provider ceased participation in the cooperative.
- Additional documentation will be requested at a later date.
- Complete this form, obtain initials, sign and then scan and email to mjcooperatives@lcb.wa.gov.

For more information, please visit lcb.wa.gov. If you have any questions, please contact the Licensing Division at 360-664-1600.

Location Address	
Mailing Address	
Primary contact for cooperative	Contact Telephone Number(s)
Email Address	

Note: The person(s) listed above will be the person(s) the Liquor and Cannabis Board contacts to complete this application and will serve as an on-site contact for the Liquor and Cannabis Board. You must inform the Liquor and Cannabis Board within 15 days of the date the qualifying patient or designated provided ceases participation.

Name of Participants and/or Designated Providers	Date of Birth	Mailing Address	Designated Provider?
			Yes ☐ No ☐
			Yes ☐ No ☐
			Yes ☐ No ☐
			Yes ☐ No ☐

Each participant and/or designated provider listed on page one of this application is required to sign and date:

Signature _____ Date _____

Print Name _____

Signature _____ Date _____

Print Name _____

Signature _____ Date _____

Print Name _____

Signature _____ Date _____

Print Name _____

Washington State Liquor and Cannabis Board

Marijuana Unit
PO Box 43098
3000 Pacific Ave SE
Olympia WA 98504
Phone: (360) 664-1600

For Validation Only

Cooperatives Registration
Application to Register a Cooperative

This application is for qualified patients or designated providers to form a cooperative. Cooperatives may share responsibility for acquiring and supplying the resources needed to produce and process medical marijuana. Only members of the cooperative may use medical marijuana produced by the cooperative.

- To qualify for this authorization, the cooperative must meet all of the requirements outlined on the following page.
- Additional documentation will be requested at a later date.
- Complete this form, obtain initials, sign and then scan and email to mjcooperatives@lcb.wa.gov.

For more information, please visit lcb.wa.gov. If you have any questions, please contact the Licensing Division at 360-664-1600.

Location Address	
Mailing Address	
Primary contact for cooperative	Contact Telephone Number(s)
Email Address	

Note: The person(s) listed above will be the person(s) the Liquor and Cannabis Board contacts to complete this application and will serve as an on-site contact for the Liquor and Cannabis Board. You must inform the Liquor and Cannabis Board within 15 days of the date the qualifying patient or designated provided ceases participation.

Name of Participants and/or Designated Providers	Date of Birth	Mailing Address	Designated Provider?
			Yes ☐ No ☐
			Yes ☐ No ☐
			Yes ☐ No ☐
			Yes ☐ No ☐

COOPERATIVE REQUIREMENTS

To qualify for this authorization, I certify under penalty of perjury that the cooperative will meet the following requirements as listed in WAC 314-55(410-430), RCW 69.51A.250, and all other requirements of the law and rules.

- All participants or designated providers are at least twenty-one years old.
- All members must hold valid recognition cards; no more than four members are allowed; a member can only belong to one cooperative; a member may only grow plants in the cooperative and may not grow plants elsewhere.
- The cooperative is not located within one mile of a licensed marijuana retailer; within the smaller of either: One thousand feet of the perimeter grounds of any elementary or secondary school, playground, recreation center or facility, child care center, public park, public transit center library, or any game arcade that admission to is not restricted to persons aged twenty-one years or older; or where prohibited by a city, town, or county ordinance or zoning provision.
- Members may grow up to the total amount of plants for which each member is authorized on their recognition cards. At the location, the qualifying patients or designated providers may possess the amount of usable marijuana that can be produced with the number of plants permitted, but no more than seventy-two ounces.
- The proposed location is the domicile of one of the participants. Only one cooperative may be located per tax parcel.
- To obscure public view of the premises, outdoor marijuana production must be enclosed by a sight obscure wall or fence at least eight feet high.
- Maintain the recordkeeping and reporting requirements.
- Qualifying patients or designated providers in the cooperative, may extract or separate the resin from marijuana using only the following noncombustible methods:
    - Heat, screens, presses, steam distillation, ice water, and other methods without employing solvents or gases to create kief, hashish, or bubble hash;
    - Dairy butter, cooking oils or fats derived from natural sources, or other home cooking substances;
    - Food grade glycerin and propylene glycol solvent based extraction;
    - CO2 may be used if in a closed loop system as referenced in WAC 314-55-104.
- Only food grade substances will be used in any stage of processing.
- Use of combustible materials, including but not limited to butane, isobutane, propane, heptane, and ethanol is expressly forbidden.
- Members of the cooperative may not sell marijuana or marijuana products, or give products to persons who are not part of their cooperative.
- WSLCB may inspect a cooperative between the hours of 8:00am and 8:00pm.
- WSLCB must be notified within **15** days of adding a new member or removing a member.
- If adding a new fourth participant, sixty days needs to have passed since the previous qualifying patient or designated provider ceased participation in the cooperative.
- I understand that failure to meet any of these requirements at any time may result in the revocation of this authorization by the WSLCB.

Each participant and/or designated provider listed on page one of this application is required to sign and date:

Signature _____ Date _____

Print Name _____

Signature _____ Date _____

Print Name _____

Signature _____ Date _____

Print Name _____

Signature _____ Date _____

Print Name _____

Washington State Liquor and Cannabis Board

PO Box 43085
Olympia WA 98504-3085
(360) 664-1600
lcb.wa.gov

For Office Use Only	
Date	
Check No.	
Amount Rec'd	
Rec'd by	

Request to Add Processor License
$250 processing fee (All application fees are non-refundable. Make checks payable to WSLCB.)

Use this request form to add a Processor license if you are currently operating a Producer license only. You may only add one Processor license. Your application will be assigned to a Marijuana Licensing Investigator to process your change. This change will require a new application process.

Licensee Information

Licensee Name _____ Trade Name _____

License # _____ UBI # _____

Location Address _____ , _____

Street and Suite/Room/Unit # City State, Zip

Contact Person _____ Phone # ( ) -

Email Address _____

Processor License
I would like to add a Processor license to my existing Producer license? Yes ☐

_____

Signature (Licensee) Date

LIQ1280 6/17

Washington State Liquor and Cannabis Board

PO Box 43085
Olympia WA 98504-3085
(360) 664-1600
www.lcb.wa.gov

For Office Use Only	
Date	
Check No.	
Amount Rec'd	
Rec'd by	

Request to Alter Marijuana Site and/or Operating Plan
$75 processing fee (All fees are non-refundable. Make checks payable to WSLCB.)

Use this form to request physical alterations to your licensed premise, or to change your previously submitted operating plan. Changes to the operating plan which require approval are the addition of extraction operations and/or the production of edibles (an edible is any ingestible marijuana product). Alteration requests must be accompanied by a site plan which includes all of the relevant elements listed on the attached key.

Note: this form cannot be used to request a change to your license tier.

Licensee Information

Licensee Name _____ Trade Name _____

License # _____ UBI # _____

Location Address _____ ,

Street and Suite/Room/Unit # City State, Zip

Contact Person _____ Phone # ( ) -

Email Address _____

Alteration Information

Describe the alteration (attach additional sheets of paper if needed): _____

Operating Plan Information

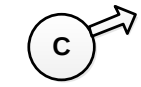
Describe the change being made to your operating plan such as extraction methods, types of edibles, etc. (attach additional sheets of paper if needed): _____

_____

Signature (Licensee) Date

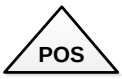
LIQ1249 6/17

KEY FOR RETAIL/NON-RETAIL MARIJUANA FLOOR PLANS



Surveillance Camera (draw arrow to indicate which way the camera is pointing)

Retail Display Case



Retail Point of Sale

XXX Sight Obscure Fence

- - - - Fencing

Security Alarm (sensor that is required on all doors and windows)

Surveillance System Storage (Room, Closet, Lockbox or other secured location)

Door or entry point into a Retail and Non-Retail premise

Window

Gate through fenced area

LABEL THE FOLLOWING AREAS

- **Quarantine Area** – the area that Marijuana or Marijuana Infused products are kept before they are removed or transported
- **Security Room/Controlled Access Area** – all areas restricted to the general public
- **Grow Area** – area where Marijuana is grown

Note: If architectural plans are submitted or other form please ensure a key is included

Legal Best Practices for Marijuana Product Packaging and Testing

Submitted by Neil Juneja

Legal Best Practices for Marijuana Product Packaging & Testing

By Neil Juneja, Founder & Managing Partner, Gleam Law PLLC.

Interim Policy BIP-05-2018

Licensees may continue to use existing packaging up to January 1, 2019. After January 1, 2019, all packaging must comply with the new rules.

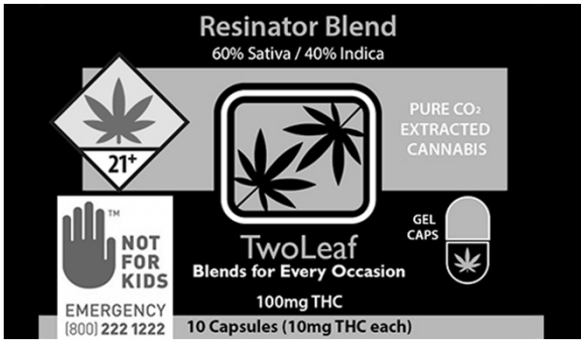
Licensees may choose to use current rule requirements or new rule requirements, but must use all the requirements under each scheme (cannot combine elements of both requirements), with the following exceptions:

Licensees may choose not to include the following when using the current rules:

1. Retailer business/trade name and UBI
2. Harvest date (where required under current rules)
3. "Best by" date
4. Manufactured date

NEW Rules go into effect January 1, 2019

The LCB issued an interim policy, BIP-05-2018, to allow licensees a 6-month "phase-in" to the new packaging and labeling rule requirements to allow flexibility in implementation and reduce the impact and costs on the industry.



Labeling Essentials: (WAC 314-55-105)

Be ready to disclose the third-party testing lab on demand.

Don't claim organic (unless you're USDA organic – which you are not).*

*WSDA *currently in rulemaking on a state organic "lite" certification.*

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Required Warnings: Current Rules

(a) "Warning: This product has intoxicating effects and may be habit forming. Smoking is hazardous to your health";

(b) "There may be health risks associated with consumption of this product";

(c) "Should not be used by women that are pregnant or breast feeding";

(d) "For use only by adults twenty-one and older. Keep out of reach of children";

(e) "Marijuana can impair concentration, coordination, and judgment. Do not operate a vehicle or machinery under the influence of this drug";

(f) Statement that discloses all pesticides applied to the marijuana plants and growing medium during production and processing.

All this can be attached to the package or given separately to the customer.

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Warning Symbol

Eaten or swallowed products need the "Not For Kids" symbol.

- On principal display panel or front of packaging.
- Size must be legible and effective.
- Don't change it or crop it (only resize it).
  - Put a black box around the symbol on a label with a white background.
- Washington Poison Center (WPC) has the image to use for free and they sell stickers.
  - Don't use the stickers to cover any other required part of the packaging.

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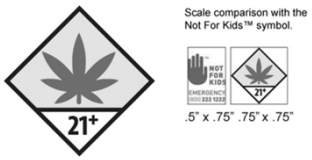
Required Warnings: New Rules

(i) “Warning – May be habit forming”;

(ii) “Unlawful outside Washington State”;

(iii) “It is illegal to operate a motor vehicle while under the influence of marijuana”; and

(iv) The marijuana universal symbol as provided in WAC 314-55-106.



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Previously Proposed Symbols

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Other Cannabinoids and Terpenes

Has the producer or processor done the lab test?

Are those lab tests available to a customer on demand?

If it's on the package, you need to back it up with the lab test.

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Packaging: WAC 314-55-105

Always behind the counter, out of reach.

Packaging can not contaminate product.

Producers and processors can not use anything to change the color, appearance, weight, or smell of usable marijuana.

Nothing that looks appealing to children (cartoon characters, etc.)

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Infused and Concentrate Products

Require child resistant packaging in accordance with Title 16 C.F.R. 1700 of the Poison Prevention Packaging Act.

- Complex, federal, and requires testing.

OR – use standards from WAC 314-55-105.

- Four-mil thick plastic.
- No easy-open tab, dimple, corner, or flap.
- Edibles must be individually wrapped (per serving).*
- Liquids require a measuring device.
  - Marks on the bottle are not a measuring device.

* NEW RULE Exception: Products such as capsules, lozenges, and similar products approved by the WSLCB on a case-by-case basis may be packaged loosely within a resealing outer package that is child resistant in accordance with Title 16 C.F.R. 1700 of the Poison Prevention Packaging Act.

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Purpose of a Trademark

- Source Identifier
- Good Will
- Loyalty
- Reputation

Tradenames are NOT trademarks

Domain names are NOT trademarks

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What can the law protect?

Names

Logos

Trade dress

- Product packaging
- Interior/exterior design
- Look and feel

Color

Smell

Sound

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Strengths

Generic	Legal Weed		**WEAK**	**Not Distinctive**
Descriptive	Green Buds			**Secondary Meaning Required**
Suggestive	High-Flyer			**Inherently Distinctive**
Arbitrary	Honu			
Fanciful	Coined word - Kodak		**STRONG**	

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Protecting the Brand

- Federal
- State
- Common Law (regional)

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Federal Trademarks

- Nationwide Rights
- After five years of continuous use – incontestable
- ® can be used
- Trademark can last forever as long as use in commerce is continuous
- Issues – must be used in interstate commerce
- Marijuana is considered scandalous and immoral
  - Limited by the Controlled Substances Act

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State Trademarks

Oregon

- Unexamined

Washington

- Unexamined
- Issues with licensing - TPI may prevent variable royalties

California

- Examined
- Cannabis marks permitted - Jan 1, 2018!

Colorado

- Unexamined
- Issues with sharing medical and recreational trademarks

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Common Law

- Protection in the region of actual use in commerce
- Cannot expand into others' territory
- Grandfathered-in, with limitations
- Cannot expand beyond use

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How to Choose a Great Mark

Don't Copy

Be Original

Look for the Strength of a Trademark

- Distinctiveness

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Hershey Co.

Hershey Company, The et al v. Tincturebelle, LLC et al

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Don't:

Merely describe the product

Geographical descriptions

Use your last name

Trade on the goodwill of other brands

Appeal to kids – e.g. cartoon characters

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Words Not to Use

- Canna-
- Mari-
- THC
- Sativa
- Indica
- Kush
- Weed
- 420
- Green *
- Ganja

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Gorilla Glue #4

The Gorilla Glue Company v. GG Strains LLC

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GG Strains Settlement

- 1 year transition period
- Protection for licensees
- No damages award
  - (each side paid their own attorneys' fees)

- What can also be negotiated:
  - Sell-off period
  - Expenses for rebranding

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Proper Food Safety Procedures for Edibles
(WAC 314-55-077)

Any "Potentially Hazardous Foods" (WAC 246-215-01115) may not be infused with marijuana.

Any food that requires refrigeration, freezing, or a hot holding unit to keep it safe for human consumption may not be infused with marijuana.

Anything requiring cooking or baking by the consumer is prohibited.

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Additional Limits

- Any food that has to be acidified to make it shelf stable;
- Food items made shelf stable by canning or retorting;
- Fruit or vegetable juices (this does not include shelf stable concentrates);
- Fruit or vegetable butters;
- Pumpkin pies, custard pies, or any pies that contain egg;
- Dairy products of any kind such as butter, cheese, ice cream, or milk; and
- Dried or cured meats.
- Anything else the WSLCB wants to restrict.

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A Note on Butter and Oil

Butter and natural fats are allowed to be infused by the processor.

Infused butter and fats may not be sold as stand-alone products.

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Inspections

Processing facilities require inspection.

WSLCB contracts with the Dept. of Agriculture for inspectors.

Cost of inspection is on the processor at $60/hr.

Any time during business hours, without advance notice.

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Product Testing and Third-Party Testing Laboratories

Labs all must be WSLCB certified

Don't use a lab in which you have a financial interest

- Or one with a financial interest in your operation

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Samples

Samples must be the most representative of the lot or batch

Maintain the structure of the marijuana sample

Each quality assurance sample must be clearly marked "quality assurance sample" and be labeled with the following information:

- The sixteen digit identification number generated by the traceability system;
- The license number and name of the certified lab receiving the sample;
- The license number and trade name of the licensee sending the sample;
- The date the sample was collected; and
- The weight of the sample.

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Flower Samples

Minimum of four samples from each lot

From different quadrants of the lot

The lab can reject or fail a sample they believe was collected inappropriately, contaminated, or adulterated

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Quality Assurance Testing
(WAC 314-55-102)

Potency Analysis

Moisture Analysis

Foreign Matter Screening

Microbiological Screening

Mycotoxin Screening

Residual Solvent Screening

Heavy Metal Screening

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Avoiding Product Liability Pitfalls

Rest.2nd of Torts § 402A

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

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Product Liability: Who is liable?

Manufacturers and some Resellers:

“"Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs, or remanufactures the relevant product or component part of a product before its sale to a user or consumer. The term also includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer.

A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a "manufacturer" but only to the extent that it designs, produces, makes, fabricates, constructs, or remanufactures the product for its sale. A product seller who performs minor assembly of a product in accordance with the instructions of the manufacturer shall not be deemed a manufacturer. A product seller that did not participate in the design of a product and that constructed the product in accordance with the design specifications of the claimant or another product seller shall not be deemed a manufacturer for the purposes of RCW 7.72.030(1)(a).(RCW 7.72.010(2))

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Products Liability and Cannabis: What kinds of defects could affect marijuana?

Per se design defect?

- Controlled Substance Act → Marijuana is a Schedule 1 drug, therefore it has:
  - No useful purpose
  - High likelihood of abuse
  - No safe dosage, even under the supervision of a doctor
- Is there any possible safe use of marijuana?
  - Consumer Expectation Test vs. Federal law
  - Risk/Utility Test vs. Federal Law

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Cannabis Labeling / Warning Defects

Regulatory Non-Compliant labeled products may be *per se* defective

Consumer Expectations:

- Regardless of applicable state labeling requirements, national food product label regulations have led consumers to expect certain types of information to be on the label for food products.
- Clearly marked dosage strength and serving size.

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Cannabis Manufacturing defects

Contaminants

- Solvents
  - E.g.: some processor solvents may be harmful or addictive when inhaled
- Pesticides
  - E.g.: Eagle 20 turns into cyanide when exposed to heat
- The Usual Suspects
  - Rat droppings, mold, salmonella, e. coli,

Human Error:

- Non-homogenous batch may result in some edibles with 10x usual dose.

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Is cannabis defective by design?

- Schedule 1 Drugs: (21 U.S.C.§812(b)(1))
  - No useful purpose
  - High potential for abuse
  - No safe dose, even under doctor's supervision.
- Consumer Expectations & Risk / Utility
  - Useful for myriad medical conditions
  - Almost no possibility of overdose
  - Ordinary user knows it will impair

No court has ruled on this question yet.

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Defense

Contributory or Comparative Negligence

Voluntary Assumption of Risk

Attacking Causation

Laches / Statute of Limitations

Warranty Disclaimer

Offense

Regulatory Compliance & Industry Custom

Thoroughly documented due diligence & Quality Assurance

Adequate warnings

- Will alter the Consumer Expectation Test analysis

Employ a full time Safety & Compliance Officer to track industry best practices, regulatory changes, inadvertent non-compliance, employee negligence, etc.

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Cannabis Disposal Protocols (WAC 314-55-097)

Is it hazardous? The following must be weighed against hazardous waste regulations:

- Waste from marijuana flowers, trim and solid plant material used to create an extract (per WAC **314-55-104**).
- Waste solvents used in the marijuana process (per WAC **314-55-104**).
- Discarded plant waste, spent solvents and laboratory wastes from any marijuana processing or quality assurance testing.
- Marijuana extract that fails to meet quality testing.

NOTE: Before disposing of anything:

- Give 72 hours notice in the traceability system.
- Keep a record of what was destroyed.

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Non-hazardous Waste

Plants

Usable Marijuana

Trim

Other Plant Material

Anything contaminated by a solvent is hazardous.

Compost or Landfill?

Compostable waste can be mixed with:

- Food waste
- Yard waste
- Vegetable grease or oil
- Anything the WSLCB approves

Landfill or incinerator? Mix it with:

- Paper waste
- Cardboard waste
- Plastic waste
- Soil
- Anything the WSLCB approves

gleam law
California • Oregon • Washington

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a cannabis law firm

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Chapter 314-55 WAC

MARIJUANA LICENSES, APPLICATION PROCESS, REQUIREMENTS, AND REPORTING

WAC Sections

WAC 314-55-105

Packaging and labeling requirements.

(1) All usable marijuana and marijuana-infused products must be stored behind a counter or other barrier to ensure a customer does not have direct access to the product.
(2) Any container or packaging containing usable marijuana, marijuana concentrates, or marijuana-infused products must protect the product from contamination and must not impart any toxic or deleterious substance to the usable marijuana, marijuana concentrates, or marijuana-infused product.
(3) Upon the request of a retail customer, a retailer must disclose the name of the certified third-party testing lab and results of the required quality assurance test for any usable marijuana, marijuana concentrate, or marijuana-infused product the customer is considering purchasing.
(4) Usable marijuana, marijuana concentrates, and marijuana-infused products must not be labeled as organic unless permitted by the United States Department of Agriculture in accordance with the Organic Foods Production Act.
(5) The certified third-party testing lab and required results of the quality assurance test must be included with each lot and disclosed to the customer buying the lot.
(6) A marijuana producer must make quality assurance test results available to any processor purchasing product. A marijuana producer must label each lot of marijuana with the following information:
(a) Lot number;
(b) UBI number of the producer; and
(c) Weight of the product.
(7) Marijuana-infused products and marijuana concentrates meant to be eaten, swallowed, or inhaled, must be packaged in child resistant packaging in accordance with Title 16 C.F.R. 1700 of the Poison Prevention Packaging Act or use standards specified in this subsection. Marijuana-infused product in solid or liquid form may be packaged in plastic four mil or greater in thickness and be heat sealed with no easy-open tab, dimple, corner, or flap as to make it difficult for a child to open and as a tamperproof measure. Marijuana-infused product in liquid form may also be sealed using a metal crown cork style bottle cap.
Marijuana-infused solid edible products. If there is more than one serving in the package, each serving must be packaged individually in childproof packaging (see WAC 314-55-105(7)) and placed in the outer package.
Marijuana-infused liquid edible products. If there is more than one serving in the package, a measuring device must be included in the package with the product. Hash marks on the bottle do not qualify as a measuring device. A measuring cap or dropper must be included in the package with the marijuana-infused liquid edible product.
(8)
(9) A producer or processor may not treat or otherwise adulterate usable marijuana with any organic or nonorganic chemical or other compound whatsoever to alter the color, appearance, weight, or smell of the usable marijuana.
(10) Labels must comply with the version of NIST Handbook 130, Uniform Packaging and Labeling Regulation adopted in chapter **16-662** WAC.
(11) **All marijuana and marijuana products when sold at retail must include accompanying material that is attached to the package or is given separately to the consumer containing the following warnings:**

(a) "Warning: This product has intoxicating effects and may be habit forming. Smoking is hazardous to your health";
(b) "There may be health risks associated with consumption of this product";
(c) "Should not be used by women that are pregnant or breast feeding";
(d) "For use only by adults twenty-one and older. Keep out of reach of children";
(e) "Marijuana can impair concentration, coordination, and judgment. Do not operate a vehicle or machinery under the influence of this drug";
(f) Statement that discloses all pesticides applied to the marijuana plants and growing medium during production and processing.
(12) **Labels affixed to the container or package containing marijuana or marijuana products sold at retail must include:**
(a) The business or trade name and the sixteen digit Washington state unified business identifier number of the licensees that produced, processed and sold the marijuana or marijuana products. The marijuana retail licensee trade name and Washington state unified business identifier number may be in the form of a sticker placed on the label;
(b) Sixteen digit inventory ID number assigned by the WSLCB's traceability system. This must be the same number that appears on the transport manifest;
(c) Net weight in ounces and grams or volume as appropriate;
(d) Statement that discloses all pesticides applied to the marijuana plants and growing medium during production of the base marijuana used to create the extract added to infused products; and
(e) If solvents were used, statement that discloses the type of extraction method, including any solvents, gases, or other chemicals or compounds used to produce or that are added to the extract.
(f) Warnings that state: "This product has intoxicating effects and may be habit forming";
(g) Statement that "This product may be unlawful outside of Washington state";
(h) The WSLCB may create a logo that must be placed on all usable marijuana and marijuana-infused products.
(13) **In addition to requirements in subsection (10) of this section, labels affixed to the container or package containing usable marijuana, or packaged marijuana mix sold at retail must include:**
(a) Concentration of THC (total THC and activated THC-A) and CBD (total CBD and activated CBD-A);
(b) Date of harDvest.
(14) **In addition to requirements in subsection (10) of this section, labels affixed to the container or package containing marijuana-infused products meant to be eaten or swallowed sold at retail must include:**
(a) Date manufactured;
(b) Best by date;
(c) Serving size and the number of servings contained within the unit;
(d) Total milligrams of active THC, or Delta 9 and total milligrams of active CBD;
(e) List of all ingredients and major food allergens as defined in the Food Allergen Labeling and Consumer Protection Act of 2004;
(f) "Caution: When eaten or swallowed, the intoxicating effects of this drug may be delayed by two or more hours."
(15) **In addition to requirements in subsection (10) of this section, labels affixed to the container or package containing marijuana-infused extract for inhalation, or infused marijuana mix sold at retail must include:**
(a) Date manufactured;

(b) Best by date;
(c) Concentration of THC (total Delta 9 and Delta 9 THC-A) and CBD (total CBD and activated CBD-A).
(16) **In addition to requirements in subsection (10) of this section, labels affixed to the container or package containing marijuana topicals sold at retail must include:**
(a) Date manufactured;
(b) Best by date;
(c) Total milligrams of active tetrahydrocannabinol (THC), or Delta 9 and total milligrams of active CBD.
(17) **Other cannabinoids and terpenes may be included on the label if:**
(a) The producer or processor has test results from a certified third-party lab to support the claim; and
(b) The lab results are made available to the consumer upon request.
[Statutory Authority: RCW **69.50.342** and **69.50.345**. WSR 16-11-110, § 314-55-105, filed 5/18/16, effective 6/18/16; WSR 15-11-107, § 314-55-105, filed 5/20/15, effective 6/20/15; WSR 14-10-044, § 314-55-105, filed 4/30/14, effective 5/31/14. Statutory Authority: RCW **69.50.325**, **69.50.331**, **69.50.342**, **69.50.345**. WSR 13-21-104, § 314-55-105, filed 10/21/13, effective 11/21/13.]

WAC 314-55-106

Marijuana warning symbol requirement.

The following requirements are in addition to the packaging and labeling requirements provided in WAC **314-55-105**.

(1) Marijuana-infused products meant to be eaten or swallowed sold at retail must be labeled on the principal display panel or front of the product package with the "not for kids" warning symbol created and made available in digital form to licensees without cost by the Washington poison center (WPC). The warning symbol may be found on the WPC's web site.

(a) The warning symbol must be of a size so as to be legible, readily visible by the consumer, and effective to alert consumers and children that the product is not for kids, but must not be smaller than three-quarters of an inch in height by one-half of an inch in width; and

(b) The warning symbol must not be altered or cropped in any way other than to adjust the sizing for placement on the principal display panel or front of the product package, except that a licensee must use a black border around the edges of the white background of the warning symbol image when the label or packaging is also white to ensure visibility of the warning symbol.

(2) Licensees may download the digital warning symbol from the WPC and print stickers, or purchase and use a sticker made available by the WPC, in lieu of incorporating the warning symbol on its label or packaging as required under subsection (1) of this section. If a licensee elects to use a warning symbol sticker, the sticker:

(a) Must meet all requirements of subsection (1) of this section; and

(b) Must not cover or obscure in any way labeling or information required on marijuana products by WAC **314-55-105**.

(3) For the purposes of this section, "principal display panel" means the portion(s) of the surface of the immediate container, or of any outer container or wrapping, which bear(s) the labeling designed to be most prominently displayed, shown, presented, or examined under conditions of retail sale. "Immediate container" means the external container holding the marijuana product.

Office of the Secretary of State
Corporations & Charities Division

This Box For Office Use Only

Washington Trademark

See attached detailed instructions

☐ **New Filing $55 per classification number**

☐ **5 Year Renewal $50 per classification number**

☐ **Add $50 to your fee for Expedited Service**

5 Year Expiration Date:

Registration Number:

TRADEMARK REGISTRATION/RENEWAL

Chapter 19.77 RCW

SECTION 1

TRADEMARK OWNER: *(May be a company, organization or an individual - see instructions page)*

_____

Address: _____

City_____ State_____ Zip Code _____

SECTION 2

IF TRADEMARK OWNER IS AN ENTITY LIST STATE/COUNTRY OF ORIGIN:_____

If recorded in the State of Washington, provide the UBI Number:_____

SECTION 3

TRADEMARK SPECIFIC INFORMATION:

Attach three (3) samples of the trademark, including one original *(see instructions page)*

Describe the trademark as it is to be registered:_____

_____

_____

Goods or Services Classification Number(s): *(see list on page 2):*_____

Trademark is used for: □ Goods □ Services of the following description:_____

_____

_____

_____

Continued on page 2

***SECTION 3** (continued)*

Describe the exact manner in which the trademark is affixed to goods or displayed with services:_____

_____

_____

_____

_____

SECTION 4

WASHINGTON TRADEMARK TO BE RENEWED BY APPLICANT

Registration Number: _____ Original Date Filed:_____

SECTION 5

DATE TRADEMARK WAS FIRST USED BY APPLICANT OR APPLICANT'S PREDECESSOR

Date used in any state or country:_____ Date used in Washington State:_____

SECTION 6

SIGNATURE OF OWNER OR AUTHORIZED REPRESENTATIVE

Applicant is the owner of and is now using the trademark identified above; I believe no other individual or entity has the right to use such trademark in connection with the same or similar goods or services in this state either in identical form or in such a near manner as might be mistaken therefore.

X _____

Signature Printed Name & Title Date Phone Number

GOODS OR SERVICE CLASSIFICATION NUMBERS:
(See WAC 434-12-015 for a complete description of each classification)

Goods
1. Chemical
2. Paints
3. Cosmetic & Cleaning
4. Lubricants & Fuel
5. Pharmaceuticals
6. Metal Goods
7. Machinery
8. Hand tools
9. Electrical & Scientific
10. Medical Apparatus
11. Environmental Control Apparatus
12. Vehicles
13. Firearms
14. Jewelry
15. Musical Instruments
16. Paper Goods & Printed Matter
17. Rubber Goods

Goods
18. Leather Goods
19. Nonmetallic Building Materials
20. Furniture & Other Articles
21. House wares & Glass
22. Cordage and Fibers
23. Yarns and Threads
24. Fabrics
25. Clothing
26. Fancy Goods
27. Floor Coverings
28. Toys & Sporting Goods
29. Meats & Processed Foods
30. Staple Foods
31. Natural Agricultural Products
32. Light Beverages
33. Wines and Spirits
34. Smoker's Articles

Services
35. Advertising & Business
36. Insurance & Financial
37. Construction & Repair
38. Telecommunications
39. Transportation & Storage
40. Treatment of Materials
41. Education & Training
42. Scientific & Technological
43. Food, Drink & Lodging
44. Medical, Veterinary & Hygienic
45. Personal & Social

INSTRUCTIONS – TRADEMARK REGISTRATION/RENEWAL

Please complete all sections of the Trademark Registration/Renewal. **USE DARK INK ONLY.** For an electronic, fillable version of this form, please visit our website at www.sos.wa.gov/corps

Registration Number: If available, please enter your existing registration number as currently recorded with the Office of the Secretary of State, in the box in the upper right hand corner of page 1.

Section 1
Provide the name and address of the individual, company, or organization that owns the trademark.

Section 2
Provide the state or country where the trademark was originally formed. If owner is an entity registered in the State of Washington provide the UBI Number.

Section 3

- Attached 3 samples of the trademark that can be scanned including one original as currently used, demonstrating that the trademark is in use in commerce; preliminary design artwork is not acceptable.
- Provide a detailed description of the trademark, text and/or logo.
- Provide the Goods or Services classification number. The number can be found on the attached page.
- Indicate if the trademark is used for goods or services.
- Describe the exact way the trademark is affixed to goods. For example, is it on letterhead, building signs, included on packages or labels, etc.
- FOR RENEWALS ONLY: All descriptions of the trademark, text and/or logo must match that of original filing.

Section 4
You must provide current registration number and original file date of the trademark to be renewed. Renewal must be received no later than the date of expiration. If received after expiration date, this filing will be considered a new registration. Trademark renewals are good for a five (5) year period.

Section 5
Trademark must be in use in the State of Washington prior to registration.

Section 6
Must be signed by an owner or authorized representative.

Additional Information:

FEES: The filing fee for a new trademark registration is $55.00 per classification. The filing fee for a renewal is $50 per classification. If expedited service is request then add $50 to your total.

Mail completed forms and payment to:
Secretary of State
Corporation Division
801 Capitol Way S
PO Box 40234
Olympia WA 98504-0234

If you have questions, need assistance or would like to provide feedback please visit the Corporations Division website at www.sos.wa.gov/corps or call 360-725-0377.

Print Form

Trade and Service Marks - Registration

Secretary of State - Corporation Division - 255 Capitol St. NE, Suite 151 - Salem, OR 97310-1327 - http://www.FilingInOregon.com - Phone: (503) 986-2200

REGISTRY NUMBER: _____
For office use only

In accordance with Oregon Revised Statute 192.410-192.490, the information on this application is public record.
We must release this information to all parties upon request. For office use only

Please Type or Print Legibly in **Black** ink. Attach additional Sheets if Necessary.

1) **CORRESPONDENT NAME:** **MAILING ADDRESS:**

2) **APPLICANT'S NAME:** (Owner: ☐ Individual or ☐ Entity) **ADDRESS:**

3) **IF THE APPLICANT IS AN ENTITY, ENTER THE STATE OF FORMATION:**

4) **IF ENTITY IS A PARTNERSHIP, LIST NAMES OF GENERAL PARTNERS:**

5) **DESCRIPTION OF TRADE OR SERVICE MARK:** (Include all words, designs and borders that comprise the mark) (**Attach additional page if needed.**)

6) **SPECIMEN OF MARK IS REQUIRED:** ☐ Attach a drawing or photocopy of the mark as it is actually used to this application.

7) **GOODS OR SERVICES WITH WHICH THE MARK IS USED:** (Examples of goods are pizzas, shirts; examples of services are serving food and selling clothing.)

8) **EXPLAIN MODE OR MANNER IN WHICH THE MARK IS USED:** (Example: on goods, tags, labels, containers, etc.)

9) **CLASS NUMBER(S) OF GOODS OR SERVICES:** (See form 290-a)

10) **DATE (MONTH, DAY, YEAR) MARK WAS FIRST USED ANYWHERE BY APPLICANT OR APPLICANT'S PREDECESSOR IN INTEREST:**

11) **DATE (MONTH, DAY, YEAR) MARK WAS FIRST USED IN OREGON BY APPLICANT OR APPLICANT'S PREDECESSOR IN INTEREST:**

12) **EXECUTION:**
I, the applicant, own the mark, the mark is in use, and no other person has registered the mark with the federal government or in Oregon or has the right to use the mark or a mark that so resembles the mark as to be likely to cause confusion or mistake or deceive when applied to the goods or services of the other person. I declare under penalties of perjury that this application is true, correct and complete.

(If applicant is an entity, a member of a firm, officer of the corporation, officer of the limited liability company, or officer of an association must sign.)

Signature: Title: Date:

CONTACT NAME: (To resolve questions with this filing.)

PHONE NUMBER: (Include area code.)

FEES

Required Processing Fee $50.00

Processing Fees are nonrefundable. Please make check payable to "Corporation Division."

290 - Trade and Service Marks - Registration (09/15)

Classes of Goods and Services

GOODS

101 Chemical Products used in industry;
Artificial & Synthetic Resins;
Plastics in the Form of Powders, Liquids or Paste;
Fertilizers;
Tanning & Adhesive Substances.

102 Paints, Varnishes & Lacquers;
Coloring Matters & Natural Resins.

103 Laundry, Cleaning & Polishing Substances;
Cleansing & Cosmetic Items;
Perfumery & Essential Oils.

104 Industrial Oils & Greases;
Lubricants & Absorbing Compositions;
Fuels & Illuminants.

105 Pharmaceutical, Veterinary & Sanitary Substances;
Infants' & Invalids Food;
Bandaging Material;
Dental Wax;
Disinfectants & Weed Killers.

106 Metal & Articles Made from Metal & Not included in Other Classes.

107 Machines & Machine Tools;
Motors (Except for Land Vehicles);
Large Size Agricultural Implements;
Incubators.

108 Hand Tools & Cutlery

109 Scientific, Nautical, Surveying & Electrical Apparatus & Instruments;
Photographic, Cinematographic, Optical, Lifesaving, & Teaching Apparatus;
Cash Registers & Calculating Machines.

110 Surgical, Medical, Dental & Veterinary Instruments & Apparatus.

111 Installations for Lighting, Heating, Steam Generating, Cooking, Refrigerating, Drying, Ventilating, Water Supply & Sanitary Purposes.

112 Vehicles.

113 Firearms, Ammunitions, & Fireworks.

114 Precious Metals & Jewelry.

115 Musical Instruments & Supplies;
Phonographs, Recording Tapes, Records, & Tape Recorders.

116 Paper Articles & Bookbinding Materials;
Printed Matter, Photographs & Stationary;
Artists' Materials & Paint Brushes;
Instructional & Teaching Material.

117 Plastics in the Form of Sheets, Blocks & Rods;
Packing or Insulating Materials;
Hose Pipes (Non-metallic).

118 Leather, Imitations & Articles Made from Both & not included in Other Classes;
Skins & Hides;
Travel Gear, Umbrellas & Walking Sticks;
Saddlery.

119 Building & Road Materials;
Stone, Stone Products;
Cement & Earthenware Pipes.

120 Furniture, Mirrors, Picture Frames;
Articles (not included in other Classes) of Wood, Wicker, Ivory, Shell, Substitutes for all These Materials, or of Plastics.

121 Small Domestic Utensils & Containers;
Combs, Sponges & Brushes (Other than Paint Brushes);
Brush Making Materials;
Glassware, Porcelain & Earthenware, not included in Other Classes.

122 Ropes, String & Nets;
Canvas Products & Stuffing Materials.

123 Yarns & Threads.

124 Bed & Table Covers;
Textile Articles not included in Other Classes.

125 Clothing & Footwear.

126 Garment Decorations & Buttons.

127 Floor Coverings & Non-textile Wall Hangings.

128 Toys;
Sporting Articles (Except Clothing);
Decorations.

129 Meats;
Fruits & Vegetables (Except Fresh);
Dairy Products;
Jams;
Oils;
Fats;
Preserves & Pickles.

130 Coffee, Tea, Cocoa & Coffee Substitutes;
Rice, Tapioca, Sago, Flour, Cereals, Yeast, Baking Powder & Condiments, Breads, Pastry, Confectionary & Honey.

131 Agricultural, Horticultural, Forestry Products & Grains not included in Other Classes;
Living Animals, Plants & Flowers;
Fruits, Vegetables & Seeds;
Foodstuffs for Animals.

132 Beer & Nonalcoholic Drinks.

133 Wines, Spirits & Liqueurs.

134 Tobacco & Smokers' Articles.

SERVICES

135 Advertising & Business.
136 Insurance & Financial.
137 Construction & Repair.
138 Communication.
139 Transportation & Storage.
140 Material Treatment.
141 Education & Entertainment.
142 Miscellaneous.

Instructions for Completing the Trademark / Service Mark - Application for Registration (Form TM-100)

To protect your trademark/service mark that is used in California, you must file a Trademark / Service Mark Application for Registration (Form TM-100) with the California Secretary of State. Duration of a registration of Trademark or Service Mark is five (5) years. The registration is active for five (5) years from the date filed by the Secretary of State. Within six (6) months of the end of five (5) years, the mark may be renewed for another five (5) years. The mark may be renewed every five (5) years as long as the mark is in continual use.

- A **trademark** is any words, names, symbols or devices, or any combination thereof, used to distinguish a **good or product** from those manufactured or sold by others.
- A **service mark** is any words, names, symbols or devices, or any combination thereof, used to identify and distinguish **services** from those services provided by others.

Registration of the mark in and of itself does not guarantee exclusive ownership of a mark. To ensure that all issues are considered and addressed appropriately, you should consult with private legal counsel.

To register your Trademark or Service Mark in California (Checklist):

- You must be using the mark in commerce in California.
- If the mark is merely descriptive (i.e. the mark describes an ingredient, quality, characteristic, function, feature, purpose or use of the goods or services), it may not be registerable.
- You must complete a separate Application if the mark is both a Trademark and a Service Mark.
- You must have a drawing of your mark on an 8 ½" x 11" sheet of paper.
- If any part of your mark is not in English, you must submit a certified translation in English.
- You must have Three (3) Identical (three of the same) Specimens that show the mark in use in commerce. If the Application is signed by an individual on behalf of the Owner (Registrant), you must include a copy of the agreement signed by the Owner (Registrant) authorizing the individual to sign the Application on behalf of the Owner (Registrant).
- Include filing fee(s) of $70.00 per classification code. If more than one classification code is listed, then a $70.00 filing fee is required for each classification.

Fees: $70.00 per Classification Code

Copies: Upon filing, we will return one (1) plain copy of your filed Application for Registration for free and will certify the copy upon request and payment of a $5 certification fee. To obtain additional copies or certified copies of the filed Application of Registration, include payment for copy fees and certification fees at the time the Application for Registration is submitted. Additional copy fees are $1.00 for the first page and $.50 for each attachment page. For certified copies, there is an additional $5.00 certification fee, per copy. In addition to the copy, you will receive a one-time Certificate of Registration of Trademark/Service Mark.

Payment Type: Check(s) or money orders should be made payable to the Secretary of State. Do not send cash by mail. If submitting the document in person in our Sacramento office, payment also may be made by credit card (Visa or MasterCard).

If you are not completing this form online, please type or legibly print in black or blue ink. **Complete the Application for Registration (Form TM-100)** as follows:

Item	Instruction	Filing Tips
1.	Check the appropriate box: Trademark or Service Mark	• A **trademark** is any words, names, symbols or devices, or any combination thereof, used to distinguish a good or product from those manufactured or sold by others. • A **service mark** is any words, names, symbols or devices, or any combination thereof, used to identify and distinguish services from those services provided by others. • Trademarks and service marks must be filed on separate Applications. They require separate fees and submittal of separate specimens.
2.	Enter information related to the Owner (Registrant) of the Mark	
2.a.	Enter the complete name of Owner (Registrant).	• If the owner of the mark is an entity, use the complete name of the entity. • If the owner of the mark is an entity, the entity structure must match in Item 3.

2.b.	Enter the complete business address, city, state and zip code of the Owner (Registrant).	• The complete business address is required, including the street name and number, city, state and zip code. • Do not abbreviate the name of the city. • A post office box address is acceptable.
2.c.	The Declaration of Ownership is required. **Do not** alter.	• This declaration is required by law and must not be altered.
3.	Identify the business structure of the (Owner) Registrant by checking the appropriate box. • If the Owner (Registrant) is a corporation, limited liability company, limited partnership or general partnership, **list the state or country of origin**. • If none of the boxes apply, check the box: Other and describe.	• If the owner of the mark is an entity, the entity structure must be consistent with the entity name in Item 2.a. (i.e., if the business structure listed in Item 3 is a Corporation, Limited Liability Company, Limited Partnership, or General Partnership, the name of the business entity must be listed as the owner or registrant in Item 2.a.)
4.	Enter the name(s) of the general partner(s), if the Owner (Registrant) is a limited partnership.	
5.	If the mark is **words** without a design, list only those words. If the mark is **words and a design**, provide the words and a brief written description of the design. If the mark is a **design only**, provide a brief written description of the design in the space provided without making any reference to the specimens. **Drawing Page:** Submit a drawing of your mark on an 8 ½" x 11" sheet of paper with your Application. A drawing is a visual representation of the mark. Do not include phrases or designs that are not included in Item 5. The drawing can be hand written, hand drawn, or computer generated. If your mark is a "word mark," list only those words on the 8 ½ x 11" sheet of paper.	• Do not paste, tape, or staple a specimen in Item 5. • If the mark or any part of the mark is not in English, you must submit a certified translation in English with your application. You may wish to consult the following websites for assistance with a certified translation: o California *Government Code section 27293* o Judicial Council of California at *www.courtinfo.ca.gov/programs/courtinterpreters/master.htm* o American Translators Association at *www.atanet.org/* • If a name and design are used together and constitute one complete mark, they may be filed on the same application. • If a name and design are used separately, as two separate marks, then two separate applications with separate fees and two sets of specimens must be submitted. • If the mark is merely descriptive (i.e. the mark describes an ingredient, quality, characteristic, function, feature, purpose or use of the goods or services) it may not be registerable.
6.	If your mark includes a design element, using the *Design Search Code Manual* developed by the U.S. Patent and Trademark Office, include the appropriate design code(s) that describe your design element.	• Include the design code(s) that relate to the significant elements of the design as represented on the drawing page. • Do not include a design code for marks containing only words. • If you do not provide a design code, one or more design codes will be assigned by the California Secretary of State upon review and filing.
7.	Disclaimer – if the mark includes a descriptive word or design, it must be disclaimed.	• A disclaimer is an acknowledgment by the registrant that words included within the mark are "merely descriptive" and may not be owned by anyone. (i.e., if the applied for mark is "Westside Dry-Cleaning" and dry-cleaning is listed as the services provided in Item 9.a., the words "Dry-Cleaning" must be disclaimed.
8.a.	Enter the date the mark was first used anywhere.	• The date the Mark was first used anywhere must be the same or earlier than the date the Mark was first used in California.
8.b.	Enter the date the mark was first used in California. If this date is the same as Item 8.a.,	• The mark must be in use in California prior to registration.

	enter "same."	• If a Trademark, the goods or products must have actually been sold or otherwise distributed in California. • If a Service Mark, the advertised services must actually be provided in California. • The mere advertising of future goods or services does not constitute use of a Trademark or Service Mark.
9.a.	Enter the specific goods or services. • If a Trademark, list only the specific goods or products sold or distributed with the mark affixed. • If a Service Mark, list only the specific services provided or advertised.	• Do not use general terms. • Be specific.
9.b.	Enter the Classification Code(s) for the goods or services listed. • If more than one classification of goods or services are listed, a $70.00 filing fee is required for each Classification Code.	• The list of Classification Codes of goods and services can be found through the *United States Patent and Trademark Office* website or at *37 Code of Federal Regulations, part 6, section 6.1*.
10.	U.S. Patent and Trademark Information. If the Registrant or a predecessor in interest has attempted to file your mark at the U.S. Patent and Trademark Office, please provide all information regarding registration or refusal to register.	• If this section is not applicable, ensure to mark the box in 10.e. indicating this item does not apply.
10.a.	Enter the File Date of the Federal Registration.	
10.b.	Enter the Serial/File Number of the Federal Registration.	
10.c.	Enter the Status of the Federal Registration.	Examples of the current filing statuses with the U.S. Patent and Trademark Office Include: • Abandoned • Allowed or In Use • Amended • Incomplete • New • Refused • Reserved
10.d.	If refused, enter the reason why the Federal Registration was refused.	
10.e.	Check the box you or a predecessor in interest has not attempted to file your mark at the U.S. Patent and Trademark Office.	
11.	Indicate how the mark is used? Check the appropriate box. • If a Trademark, how is it applied to the goods or products? By label, tag, or imprinting on the goods or their containers? • If a Service Mark, how is the mark used, in advertising, on brochures, or business cards?	• If you are applying for registration of a Trademark, check each of the Trademark boxes that apply. Do not select boxes relating to Service Marks. • If you are applying for registration of a Service Mark, check each of the Service Mark boxes that apply. Do not select boxes relating to Trademarks.
12.	Specimens are required to show current use of the mark. Include with the Registration three (3) identical (meaning: three of the same) original specimens that show the mark in use in commerce on the goods or in connection with services provided in California. • The original specimens should be no larger than 8 ½" x 11" and should lay flat. Original specimens that have been altered or defaced in any manner are not acceptable.	• A specimen demonstrates how the mark is being presented to the public. • Specimens can be in a wide variety of forms. Examples include: • **Trademarks:** Labels, tags, wrappers, or three clear identical photographs of the goods or products showing the mark clearly affixed.

	• **Trademark**: Submit 3 identical specimens that are affixed to your goods or products. • **Service Mark:** Submit 3 identical specimens from which the type of services listed in Item 9.a. can be determined.	•**Service Marks:** Business cards, brochures, flyers, or other forms of advertisements are acceptable if identifying the services as indicated in Item 9.a. Envelopes, invoices and matchbooks are not acceptable. Note: Business cards may be used as specimens only if the business cards display the services indicated in Item 9.a. • Photocopies, computer printouts, or camera-ready layouts are not accepted as specimens. The Registrant must have gone into production and have released the product or service into the market prior to registration of the trademark or service mark with the Secretary of State. • Do not submit metal of any kind, words typed on cards or sheets of paper. Computer generated prototypes are not acceptable.
Declaration and **Signature**	Declaration of Accuracy. The registrant must make a Declaration of Accuracy and will be subject to a civil penalty of not more than $10,000.00 for willfully stating in the application any material fact known to be false. Date, sign, and print the name and title of the person signing the Registration.	• Declaration of Accuracy is required. Do not alter Declaration. • If the Registrant is a corporation, an officer of the **corporation** must sign the Registration. Include the title of the officer (i.e. **President, Vice-President, Secretary**, etc.) • If the Registrant is a **limited liability company**, a member or manager of the limited liability company must sign the Registration. Include the title; either **Member or Manager**. • If the Registrant is a limited partnership, a general partner of the **limited partnership** must sign the Registration. Include the title, **General Partner**. • If the Registrant is a **general partnership**, a partner of the general partnership must sign the Registration. Include the title, **Partner**. • This office will accept a statement attached to the application that the individual signing the application is authorized to do so for the Registrant.

Mail Submission Cover Sheet (Optional): To make it easier to receive communication related to **this document**, including the copy of the filed document, complete the Mail Submission Cover Sheet. For the Return Address: enter the name of a designated person and/or company and the corresponding mailing address. Please note the Mail Submission Cover Sheet will be treated as correspondence and will not be made part of the filed document.

Where to File: Mail your completed Registration along with drawing, specimens, and filing fee of $70.00 **per** classification, to the Secretary of State, Trademark Unit, P.O. Box 942870, Sacramento, CA 94277-2870 or delivered in person (drop off) to the Sacramento office, 1500 11th Street, Sacramento, CA 95814. Confirm the following are included with your submission:

- Completed Registration (Form TM-100)
- Drawing Page
- 3 Identical Specimens Showing the Mark Used in Commerce
- $70.00 **per** Classification Code
- Mail Submission Cover Sheet (Optional)
- If applicable, a certified English Translation
- If applicable, an agreement signed by the Owner (Registrant) authorizing an individual to sign on behalf of the Owner (Registrant).

Legal Authority: General statutory filing provisions are found in the Model State Trademark Law, California Business and Professions Code sections *14200 et seq.* unless otherwise indicated.

Secretary of State
Business Programs Division
Trademark Unit, P.O. Box 942870, Sacramento, CA 94277-2870

Mail Submission Cover Sheet

Return Address: For written communication from the Secretary of State related to this document, or if purchasing a copy of the filed document enter the name of a person or company and the mailing address.

Name: ⌜ ⌝

Company:

Address:

City/State/Zip: ⌞ ⌟

Instructions:

- Complete and include this form with your submission. **This information only will be used to communicate with you in writing about the submission**. This form will be treated as correspondence and will not be made part of the filed document.
- Make all **checks or money orders** payable to the Secretary of State.

Optional Copy and Certification Fees:

- If applicable, include optional copy and certification fees with your submission.
- For applicable copy and certification fee information, refer to the instructions of the specific form you are submitting.

Contact Person: (Please type or print legibly)

First Name: _____ Last Name: _____

Email Address: _____ Phone Number: ( ) _____

Mark Information: (Please type or print legibly)

Name of Mark: _____

Name of Owner (Registrant): _____

Comments: _____

_____

_____

_____

_____

Secretary of State

Trademark / Service Mark Application for Registration

TM-100

REG. NO. _____

CLASS NO.(S) _____

IMPORTANT — Read instructions **before completing this form.**

Filing Fee – $70.00 per Classification

Copy Fees – First page $1.00; each attachment page $0.50; Certification Fee - $5.00 plus copy fees

Above Space for Office Use Only

1. Application for Registration of (Check one): ☐ Trademark ☐ Service Mark

2. Owner (Registrant) Name, Address and Declaration of Ownership

a. Name of Owner(Registrant)

b. Business Address	City (no abbreviations)	State	Zip Code

c. Declaration of Ownership (Do not alter.)

Registrant declares that the Registrant is the owner of the mark, that the mark is in use, and that to the Registrant's knowledge, no other person has registered the mark in this state, or has the right to use the mark, either in the identical form or in such near resemblance as to be likely, when applied to the goods or services of the other person, to cause confusion, to cause mistake, or to deceive.

3. Business Structure of Registrant (Only **check one** and **fill in the blank**)

☐ Corporation (State of Incorporation): _____
☐ Limited Liability Company (State of Organization): _____
☐ Limited Partnership (State of Organization): _____
☐ General Partnership (State of Organization): _____
☐ Sole Proprietor
☐ Spouses, as Community Property
☐ Domestic Partners, as Community Property
☐ Other (Describe): _____

4. Name(s) of General Partner(s), if the Registrant is a Limited Partnership

5. Name and/or Design of Mark (For design, provide a brief written description that can be pictured in one's mind without reference to the specimens. Attach a drawing of the mark to the Application. Do not draw the design on the Application.)

6. Design Code(s) (If your mark includes a design element, using the *Design Search Code Manual* developed by the U.S. Patent and Trademark Office, please include the appropriate design code(s) that describe your design element.)

Design Code(s): _____ _____ _____ _____ _____ _____

7. Disclaimer (If Applicable) No claim is made to the exclusive right to use the term(s) below:

8. Dates of First Use of Mark

a. Date the Mark was First Used Anywhere	b. Date the Mark was First Used in California

Continue on Next Page

9. Identification of Goods or Services

a. If a Trademark, list specific Goods or Products. If a Service Mark, list specific Services.

b. Classification Code(s): _____ _____ _____ _____ _____ _____

10. U.S. Patent and Trademark Information (Indicate whether an application to register the mark, or portions, or a composite of the mark, has been filed by the Registrant or a predecessor in interest with the United States Patent and Trademark Office.)

a. File Date	b. Serial/File Number	c. Status of Application

d. If Refused, Why?

e. ☐ Check here if this Item 10 does not apply

11. How is the Mark Used (If Trademark, only check Trademark options; If Service Mark, only check Service Mark Options)

For Trademark Only (Check all that apply to Trademark)	**For Service Mark Only** (Check all that apply to Service Mark)
☐ On Labels and Tags Affixed to the Goods	☐ On Business Signs
☐ On Labels and Tags Affixed to Containers of the Goods	☐ On Advertising Brochures
☐ By Printing Mark Directly onto the Goods	☐ On Advertising Leaflets
☐ By Printing Mark Directly onto the Containers of the Goods	☐ On Business Cards
☐ Other _____	☐ On Letterhead
	☐ On Menus
	☐ Other _____

12. Specimens (If Trademark, only check Trademark option; If Service Mark, only check Service Mark Option. Include three (3) identical original specimens showing current use of the Mark.)

For Trademark Only (Check one box and enclose three (3) specimens)	**For Service Mark Only** (Check one box and enclose three (3) specimens)
☐ Actual Labels	☐ Business Cards
☐ Actual Tags	☐ Advertising Brochures
☐ Photographs of Goods / Containers showing the Trademark	☐ Advertising Leaflets
☐ Front Panels of a Paper Container Bearing the Trademark	☐ Menus showing the Service Mark
☐ Other _____	☐ Other _____

Declaration of Accuracy and Signature

I declare that all the foregoing information contained in this Application is accurate, true and correct and that I am authorized to sign this application. I understand that if I willfully state in the Application any material fact that I know to be false, I will be subject to a civil penalty of not more than ten thousand dollars ($10,000.00).

Date	Type or Print Name of Authorized Person	Signature
_____	_____	_____

WAC 314-55-077

What is a marijuana processor license and what are the requirements and fees related to a marijuana processor license?

(1) A marijuana processor license allows the licensee to process, dry, cure, package, and label usable marijuana, marijuana concentrates, and marijuana-infused products for sale at wholesale to marijuana processors and marijuana retailers.

(2) A marijuana processor is allowed to blend tested usable marijuana from multiple lots into a single package for sale to a marijuana retail licensee providing the label requirements for each lot used in the blend are met and the percentage by weight of each lot is also included on the label.

(3) A marijuana processor licensee must obtain label and packaging approval from the WSLCB for all marijuana-infused products meant for ingestion prior to offering these items for sale to a marijuana retailer. The marijuana processor licensee must submit a picture of the product, labeling, and packaging to the WSLCB for approval.

If the WSLCB denies a marijuana-infused product for sale in marijuana retail outlets, the marijuana processor licensee may request an administrative hearing per chapter 34.05 RCW, Administrative Procedure Act.

(4) With the exception of the marijuana, all ingredients used in making marijuana-infused products for oral ingestion must be a commercially manufactured food as defined in WAC 246-215-01115.

(5) Marijuana-infused edible products in solid form must meet the following requirements:

(a) If there is more than one serving in the package, each serving must be packaged individually in childproof packaging (see WAC 314-55-105(7)) and placed in the outer package.

(b) The label must prominently display the number of servings in the package.

(c) Marijuana-infused solid edible products must be homogenized to ensure uniform disbursement of cannabinoids throughout the product.

(d) All marijuana-infused solid edibles must prominently display on the label "This product contains marijuana."

(6) Marijuana-infused edible products in liquid form must meet the following requirements:

(a) If there is more than one serving in the package, a measuring device must be included in the package with the product.

(b) The label must prominently display the number of servings in the package and the amount of product per serving.

(c) Marijuana-infused liquid edibles must be homogenized to ensure uniform disbursement of cannabinoids throughout the product.

(d) All marijuana-infused liquid edibles must prominently display on the label "This product contains marijuana."

(7) A marijuana processor is limited in the types of food or drinks they may infuse with marijuana. Marijuana-infused products that require cooking or baking by the consumer are prohibited. Marijuana-infused products that are especially appealing to children are prohibited. Marijuana-infused edible products such as, but not limited to, gummy candies, lollipops, cotton candy, or brightly colored products, are prohibited.

(a) To reduce the risk to public health, potentially hazardous foods as defined in WAC 246-215-01115 may not be infused with marijuana. Potentially hazardous foods require time-temperature control to keep them safe for human consumption and prevent the growth of pathogenic microorganisms or the production of toxins. Any food

that requires refrigeration, freezing, or a hot holding unit to keep it safe for human consumption may not be infused with marijuana.

(b) Other food items that may not be infused with marijuana to be sold in a retail store are:

(i) Any food that has to be acidified to make it shelf stable;

(ii) Food items made shelf stable by canning or retorting;

(iii) Fruit or vegetable juices (this does not include shelf stable concentrates);

(iv) Fruit or vegetable butters;

(v) Pumpkin pies, custard pies, or any pies that contain egg;

(vi) Dairy products of any kind such as butter, cheese, ice cream, or milk; and

(vii) Dried or cured meats.

(c) Vinegars and oils derived from natural sources may be infused with dried marijuana if all plant material is subsequently removed from the final product. Vinegars and oils may not be infused with any other substance, including herbs and garlic.

(d) Marijuana-infused jams and jellies made from scratch must utilize a standardized recipe in accordance with 21 C.F.R. Part 150, revised as of April 1, 2013.

(e) Per WAC 314-55-104, a marijuana processor may infuse dairy butter or fats derived from natural sources and use that extraction to prepare allowable marijuana-infused solid or liquid products meant to be ingested orally, but the dairy butter or fats derived from natural sources may not be sold as stand-alone products.

(f) The WSLCB may designate other food items that may not be infused with marijuana.

(8) The recipe for any marijuana-infused solid or liquid products meant to be ingested orally must be kept on file at the marijuana processor's licensed premises and made available for inspection by the WSLCB or its designee.

(9) The application fee for a marijuana processor license is two hundred fifty dollars. The applicant is also responsible for paying the fees required by the approved vendor for fingerprint evaluation.

(10) The annual fee for issuance and renewal of a marijuana processor license is one thousand dollars. The WSLCB will conduct random criminal history checks at the time of renewal that will require the licensee to submit fingerprints for evaluation from the approved vendor. The licensee will be responsible for all fees required for the criminal history checks.

(11) A marijuana processor producing a marijuana-infused solid or liquid product meant to be ingested orally in a processing facility as required in WAC 314-55-015 (10) and (11) must pass a processing facility inspection. Ongoing annual processing facility compliance inspections may be required. The WSLCB will contract with the department of agriculture to conduct required processing facility inspections. All costs of inspections are borne by the licensee and the hourly rate for inspection is sixty dollars. A licensee must allow the WSLCB or their designee to conduct physical visits and inspect the processing facility, recipes and required records per WAC 314-55-087 during normal business hours or at any time of apparent operation without advance notice. Failure to pay for the processing facility inspection or to follow the processing facility requirements outlined in this section and WAC 314-55-015will be sufficient grounds for the WSLCB to suspend or revoke a marijuana license.

(12) The WSLCB will initially limit the opportunity to apply for a marijuana processor license to a thirty-day calendar window beginning with the effective date of this section. In order for a marijuana processor application license to be considered it must be received no later than thirty days after the effective date of the rules adopted by the WSLCB. The WSLCB may reopen the marijuana processor application window after the

initial evaluation of the applications that are received and processed, and at subsequent times when the WSLCB deems necessary.

(13) A currently licensed marijuana producer may submit an application to add a marijuana processor license at the location of their producer license providing they do not already hold three processor licenses.

(14) Any entity and/or principals within any entity are limited to no more than three marijuana processor licenses.

(15) Marijuana processor licensees are allowed to have a maximum of six months of their average usable marijuana and six months average of their total production on their licensed premises at any time.

(16) A marijuana processor must accept returns of products and sample jars from marijuana retailers for destruction, but is not required to provide refunds to the retailer. It is the responsibility of the retailer to ensure the product or sample jar is returned to the processor.

[Statutory Authority: RCW 69.50.342 and 69.50.345. WSR 16-11-110, § 314-55-077, filed 5/18/16, effective 6/18/16; WSR 15-11-107, § 314-55-077, filed 5/20/15, effective 6/20/15; WSR 14-10-044, § 314-55-077, filed 4/30/14, effective 5/31/14. Statutory Authority: RCW 69.50.325, 69.50.331, 69.50.342, 69.50.345. WSR 13-21-104, § 314-55-077, filed 10/21/13, effective 11/21/13.]

WAC 314-55-102

Quality assurance testing.

A third-party testing lab must be certified by the WSLCB or the WSLCB's vendor as meeting the WSLCB's accreditation and other requirements prior to conducting quality assurance tests required under this section.

(1) **Quality assurance fields of testing.** Certified labs must be certified to the following fields of testing by the WSLCB or its designee and must adhere to the guidelines for each quality assurance field of testing listed below, with the exception of mycotoxin, heavy metal, or pesticide residue screening. Certification to perform mycotoxin, heavy metals and pesticides may be obtained but is not required to obtain certification as a testing lab. A lab must become certified in all fields of testing prior to conducting any testing or screening in that field of testing, regardless of whether the test is required under this section.

(a) **Potency analysis.**

(i) Certified labs must test and report the following cannabinoids to the WSLCB when testing for potency:

(A) THCA;

(B) THC;

(C) Total THC;

(D) CBDA;

(E) CBD; and

(F) Total CBD.

(ii) Calculating total THC and total CBD.

(A) Total THC must be calculated as follows, where M is the mass or mass fraction of delta-9 THC or delta-9 THCA: M total delta-9 THC = M delta-9 THC + (0.877 x M delta-9 THCA).

(B) Total CBD must be calculated as follows, where M is the mass or mass fraction of CBD and CBDA: M total CBD = M CBD + (0.877 x M CBDA).

(iii) Regardless of analytical equipment or methodology, certified labs must accurately measure and report the acidic (THCA and CBDA) and neutral (THC and CBD) forms of the cannabinoids.

(b) **Potency analysis for flower lots.**

(i) Certified labs must test and report the results for the required flower lot samples as described in WAC 314-55-101(3) for the following required cannabinoids:

(A) THCA;

(B) THC;

(C) Total THC;

(D) CBDA;

(E) CBD; and

(F) Total CBD.

(ii) Calculating total THC and total CBD.

(A) Total THC must be calculated as follows, where M is the mass or mass fraction of delta-9 THC or delta-9 THCA: M total delta-9 THC = M delta-9 THC + (0.877 x M delta-9 THCA).

(B) Total CBD must be calculated as follows, where M is the mass or mass fraction of CBD and CBDA: M total CBD = M CBD + (0.877 x M CBDA).

(c) Certified labs may combine in equal parts multiple samples from the same flower lot for the purposes of the following tests after the individual samples described in WAC 314-55-101(3) have been tested for potency analysis.

(i) **Moisture analysis.** The sample and related lot or batch fails quality assurance testing for moisture analysis if the results exceed the following limits:

(A) Water activity rate of more than 0.65 a_w; and

(B) Moisture content more than fifteen percent.

(ii) **Foreign matter screening.** The sample and related lot or batch fail quality assurance testing for foreign matter screening if the results exceed the following limits:

(A) Five percent of stems 3mm or more in diameter; and

(B) Two percent of seeds or other foreign matter.

(iii) **Microbiological screening.** The sample and related lot or batch fail quality assurance testing for microbiological screening if the results exceed the following limits:

	Enterobacteria (bile-tolerant gram-negative bacteria)	***E. coli*(pathogenic strains) and *Salmonella spp.***
Unprocessed Plant Material	10^4	Not detected in 1g
Extracted or processed Botanical Product	10^3	Not detected in 1g

(iv) **Mycotoxin screening.** The sample and related lot or batch fail quality assurance testing for mycotoxin screening if the results exceed the following limits:

(A) Total of Aflatoxin B1, B2, G1, G2: 20 µg/kg of substance; and

(B) Ochratoxin A: 20 µg/kg of substance.

(d) **Residual solvent screening.** Except as otherwise provided in this subsection, a sample and related lot or batch fail quality assurance testing for residual solvents if the results exceed the limits provided in the table below. Residual solvent results of more than 5,000 ppm for class three solvents, 50 ppm for class two solvents, and 2 ppm for class one solvents as defined in *United States Pharmacopoeia*, *USP 30 Chemical Tests / <467> - Residual Solvents (USP <467>)* not listed in the table below fail quality assurance testing. When residual solvent screening is required, certified labs must test for the solvents listed in the table below at a minimum.

Solvent*	**ppm**
Acetone	5,000
Benzene	2
Butanes	5,000
Cyclohexane	3,880
Chloroform	2
Dichloromethane	600
Ethyl acetate	5,000
Heptanes	5,000
Hexanes	290
Isopropanol (2-propanol)	5,000
Methanol	3,000
Pentanes	5,000

Solvent*	ppm
Propane	5,000
Toluene	890
Xylene**	2,170

*And isomers thereof.

**Usually 60% *m*-xylene, 14% *p*-xylene, 9% *o*-xylene with 17% ethyl benzene.

(e) **Heavy metal screening.** A sample and related lot or batch fail quality assurance testing for heavy metals if the results exceed the limits provided in the table below.

Metal	µ/daily dose (5 grams)
Inorganic arsenic	10.0
Cadmium	4.1
Lead	6.0
Mercury	2.0

(2) **Quality assurance testing required.** The following quality assurance tests are the minimum required tests for each of the following marijuana products, respectively. Licensees and certified labs may elect to do multiple quality assurance tests on the same lot or testing for mycotoxin, pesticides, or heavy metals pursuant to chapter 246-70 WAC.

(a) **General quality assurance testing requirements for certified labs.**

(i) Certified labs must record an acknowledgment of the receipt of samples from producers or processors in the WSLCB seed to sale traceability system. Certified labs must also verify if any unused portion of the sample was destroyed or returned to the licensee after the completion of required testing.

(ii) Certified labs must report quality assurance test results directly to the WSLCB traceability system when quality assurance tests for the field of testing are required within twenty-four hours of completion of the test(s).

(iii) Certified labs must fail a sample if the results for any limit test are above allowable levels regardless of whether the limit test is required in the testing tables in this section.

(b) **Marijuana flower lots and other material lots.** Marijuana flower lots or other material lots require the following quality assurance tests:

Product	Test(s) Required
Lots of marijuana flowers or other material that will not be extracted	1. Moisture content 2. Potency analysis 3. Foreign matter inspection 4. Microbiological screening 5. Mycotoxin screening

(c) **Intermediate products.** Intermediate products must meet the following requirements related to quality assurance testing:

(i) All intermediate products must be homogenized prior to quality assurance testing;

(ii) For the purposes of this section, a batch is defined as a single run through the extraction or infusion process;

(iii) A batch of marijuana mix may not exceed five pounds and must be chopped or ground so no particles are greater than 3 mm; and

(iv) All batches of intermediate products require the following quality assurance tests:

Product	Test(s) Required Intermediate Products
Marijuana mix	1. Moisture content* 2. Potency analysis 3. Foreign matter inspection* 4. Microbiological screening 5. Mycotoxin screening
Concentrate or extract made with hydrocarbons (solvent based made using n-butane, isobutane, propane, heptane, or other solvents or gases approved by the board of at least 99% purity)	1. Potency analysis 2. Mycotoxin screening* 3. Residual solvent test
Concentrate or extract made with a CO_2 extractor like hash oil	1. Potency analysis 2. Mycotoxin screening* 3. Residual solvent test
Concentrate or extract made with ethanol	1. Potency analysis 2. Mycotoxin screening* 3. Residual solvent test
Concentrate or extract made with approved food grade solvent	1. Potency analysis 2. Microbiological screening* 3. Mycotoxin screening* 4. Residual solvent test
Concentrate or extract (nonsolvent) such as kief, hash, rosin, or bubble hash	1. Potency analysis 2. Microbiological screening

Product	Test(s) Required Intermediate Products
	3. Mycotoxin screening
Infused cooking oil or fat in solid form	1. Potency analysis 2. Microbiological screening* 3. Mycotoxin screening*

* Field of testing is only required if using lots of marijuana flower and other plant material that has not passed QA testing.

(d) **End products.** All marijuana, marijuana-infused products, marijuana concentrates, marijuana mix packaged, and marijuana mix infused sold from a processor to a retailer require the following quality assurance tests:

Product	Test(s) Required End Products
Infused solid edible	Potency analysis
Infused liquid (like a soda or tonic)	Potency analysis
Infused topical	Potency analysis
Marijuana mix packaged (loose or rolled)	Potency analysis
Marijuana mix infused (loose or rolled)	Potency analysis
Concentrate or marijuana-infused product for inhalation	Potency analysis

(e) End products consisting of only one intermediate product that has not been changed in any way are not subject to potency analysis.

(3) No lot of usable flower, batch of marijuana concentrate, or batch of marijuana-infused product may be sold or transported until the completion and successful passage of quality assurance testing as required in this section, except:

(a) Business entities with multiple locations licensed under the same UBI number may transfer marijuana products between the licensed locations under the same UBI number prior to quality assurance testing; and

(b) Licensees may wholesale and transfer batches or lots of flower and other material that will be extracted and marijuana mix and nonsolvent extracts for the purposes of further extraction prior to completing required quality assurance testing. Licensees may wholesale and transfer failed lots or batches to be extracted pursuant to subsection (5) of this section.

(4) **Samples, lots, or batches that fail quality assurance testing.**

(a) Upon approval by the WSLCB, failed lots or batches may be used to create extracts. After processing, the extract must pass all quality assurance tests required in this section before it may be sold.

(b) **Retesting.** At the request of the producer or processor, the WSLCB may authorize a retest to validate a failed test result on a case-by-case basis. All costs of the retest will be borne by the producer or the processor requesting the retest. Potency retesting will generally not be authorized.

(c) **Remediation.** Producers and processors may remediate failed harvests, lots, or batches so long as the remediation method does not impart any toxic or deleterious substance to the usable marijuana, marijuana concentrates, or marijuana-infused product. Remediation solvents or methods used on the marijuana product must be disclosed to a licensed processor the producer or producer/processor transfers the products to; a licensed retailer carrying marijuana products derived from the remediated harvest, lot, or batch; or consumer upon request. The entire harvest, lot, or batch the failed sample(s) were deducted from must be remediated using the same remediation technique. No remediated harvest, lots or batches may be sold or transported until the completion and successful passage of quality assurance testing as required in this section.

(5) **Referencing.** Certified labs may reference samples for mycotoxin, heavy metals, and pesticides testing to other certified labs by subcontracting for those fields of testing. Labs must record all referencing to other labs on a chain-of-custody manifest that includes, but is not limited to, the following information: Lab name, certification number, transfer date, address, contact information, delivery personnel, sample ID numbers, field of testing, receiving personnel.

(6) Certified labs are not limited in the amount of usable marijuana and marijuana products they may have on their premises at any given time, but a certified lab must have records proving all marijuana and marijuana-infused products in the certified lab's possession are held only for the testing purposes described in this section.

(7) Upon the request of the WSLCB or its designee, a licensee or a certified lab must provide an employee of the WSLCB or their designee samples of marijuana or marijuana products or samples of the growing medium, soil amendments, fertilizers, crop production aids, pesticides, or water for random compliance checks. Samples may be screened for pesticides and chemical residues, unsafe levels of heavy metals, and used for other quality assurance tests deemed necessary by the WSLCB.

[Statutory Authority: RCW **69.50.342** and **69.50.345**. WSR 17-12-032, § 314-55-102, filed 5/31/17, effective 8/31/17; WSR 16-11-110, § 314-55-102, filed 5/18/16, effective 6/18/16; WSR 15-11-107, § 314-55-102, filed 5/20/15, effective 6/20/15; WSR 14-07-116, § 314-55-102, filed 3/19/14, effective 4/19/14. Statutory Authority: RCW **69.50.325**, **69.50.331**, **69.50.342**, **69.50.345**. WSR 13-21-104, § 314-55-102, filed 10/21/13, effective 11/21/13.]

§ 402A. SPECIAL LIABILITY OF SELLER OF PRODUCT FOR PHYSICAL HARM TO USER OR CONSUMER

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Caveat:

The Institute expresses no opinion as to whether the rules stated in this Section may not apply

(1) to harm to persons other than users or consumers;

(2) to the seller of a product expected to be processed or otherwise substantially changed before it reaches the user or consumer; or

(3) to the seller of a component part of a product to be assembled.

§ 402B. MISREPRESENTATION BY SELLER OF CHATTELS TO CONSUMER

One engaged in the business of selling chattels who, by advertising, labels, or otherwise, makes to the public a misrepresentation of a material fact concerning the character or quality of a chattel sold by him is subject to liability for physical harm to a consumer of the chattel caused by justifiable reliance upon the misrepresentation, even though

(a) it is not made fraudulently or negligently, and

(b) the consumer has not bought the chattel from or entered into any contractual relation with the seller.

Caveat:

The Institute expresses no opinion as to whether the rule stated in this Section may apply

(1) where the representation is not made to the public, but to an individual, or

(2) where physical harm is caused to one who is not a consumer of the chattel.

Comment:

a. The rule stated in this Section is one of strict liability for physical harm to the consumer, resulting from a misrepresentation of the character or quality of the chattel sold, even though the misrepresentation is an innocent one, and not made fraudulently or negligently. Although the Section deals with misrepresentation, it is inserted here in order to complete the rules dealing with the liability of suppliers of chattels for physical harm caused by the chattel. A parallel rule, as to strict liability for pecuniary loss resulting from such a misrepresentation, is stated in s 552 D.

b. The rule stated in this Section differs from the rule of strict liability stated in s 402 A, which is a special rule applicable only to sellers of products for consumption and does not depend upon misrepresentation. The rule here stated applies to one engaged in the business of selling any type of chattel, and is limited to misrepresentations of their character or quality.

314-55-097

Marijuana waste disposal

—Liquids and solids.

(1) Solid and liquid wastes generated during marijuana production and processing must be stored, managed, and disposed of in accordance with applicable state and local laws and regulations.
(2) Wastewater generated during marijuana production and processing must be disposed of in compliance with applicable state and local laws and regulations.
(3) Wastes from the production and processing of marijuana plants must be evaluated against the state's dangerous waste regulations (chapter **173-303** WAC) to determine if those wastes designate as dangerous waste. It is the responsibility of each waste generator to properly evaluate their waste to determine if it is designated as a dangerous waste. If a generator's waste does designate as a dangerous waste, then that waste(s) is subject to the applicable management standards found in chapter **173-303** WAC.
(a) Wastes that must be evaluated against the dangerous waste regulations include, but are not limited to, the following:
(i) Waste from marijuana flowers, trim and solid plant material used to create an extract (per WAC **314-55-104**).
(ii) Waste solvents used in the marijuana process (per WAC **314-55-104**).
(iii) Discarded plant waste, spent solvents and laboratory wastes from any marijuana processing or quality assurance testing.
(iv) Marijuana extract that fails to meet quality testing.
(b) Marijuana wastes that do not designate as dangerous shall be managed in accordance with subsection (4) of this section.
(c) A marijuana plant, usable marijuana, trim and other plant material in itself is not considered dangerous waste as defined under chapter **173-303** WAC unless it has been treated or contaminated with a solvent.
(4) Marijuana waste that does not designate as dangerous waste (per subsection (3) of this section) must be rendered unusable following the methods in subsection (5) of this section prior to leaving a licensed producer, processor, or laboratory. Disposal of the marijuana waste rendered unusable must follow the methods under subsection (6) of this section.
(a) Wastes that must be rendered unusable prior to disposal include, but are not limited to, the following:
(i) Waste evaluated per subsection (3) of this section and determined to not designate as "Dangerous Waste."
(ii) Marijuana plant waste, including roots, stalks, leaves, and stems that have not been processed with solvent.
(iii) Solid marijuana sample plant waste possessed by third-party laboratories accredited by the WSLCB to test for quality assurance that must be disposed of.
(iv) Other wastes as determined by the WSLCB.
(b) A producer or processor must provide the WSLCB a minimum of seventy-two hours notice in the traceability system described in WAC **314-55-083**(4) prior to rendering the product unusable and disposing of it.
(5) The allowable method to render marijuana plant waste unusable is by grinding and incorporating the marijuana plant waste with other ground materials so the resulting mixture is at least fifty percent nonmarijuana waste by volume. Other methods to

render marijuana waste unusable must be approved by the WSLCB before implementation.
Material used to grind with the marijuana falls into two categories: Compostable waste and noncompostable waste.
(a) Compostable mixed waste: Marijuana waste to be disposed as compost feedstock or in another organic waste method (for example, anaerobic digester) may be mixed with the following types of waste materials:
(i) Food waste;
(ii) Yard waste;
(iii) Vegetable based grease or oils; or
(iv) Other wastes as approved by the WSLCB.
(b) Noncompostable mixed waste: Marijuana waste to be disposed in a landfill or another disposal method (for example, incinerator) may be mixed with the following types of waste materials:
(i) Paper waste;
(ii) Cardboard waste;
(iii) Plastic waste;
(iv) Soil; or
(v) Other wastes as approved by the WSLCB.
(6) Marijuana wastes rendered unusable following the method described in subsection (4) of this section can be disposed.
(a) Disposal of the marijuana waste rendered unusable may be delivered to a permitted solid waste facility for final disposition. Examples of acceptable permitted solid waste facilities include:
(i) Compostable mixed waste: Compost, anaerobic digester, or other facility with approval of the jurisdictional health department.
(ii) Noncompostable mixed waste: Landfill, incinerator, or other facility with approval of the jurisdictional health department.
(b) Disposal of the marijuana waste rendered unusable may be managed on-site by the generator in accordance with the standards of chapter **173-350** WAC.
(c) A record of the final destination of marijuana waste rendered unusable.
[Statutory Authority: RCW **69.50.342** and **69.50.345**. WSR 16-11-110, § 314-55-097, filed 5/18/16, effective 6/18/16; WSR 15-11-107, § 314-55-097, filed 5/20/15, effective 6/20/15. Statutory Authority: RCW **69.50.325**, **69.50.331**, **69.50.342**, **69.50.345**. WSR 13-21-104, § 314-55-097, filed 10/21/13, effective 11/21/13.]

Washington Marijuana Taxation: The Latest Rules

Submitted by James W. Angell

Marijuana businesses in Washington are subject to a variety of taxes, most of which would be familiar to any other business, but the application, calculation and payment of those taxes looks quite unique. From the structure and collection of the excise tax that has provided massive revenue to the state of Washington to the unusual federal tax burden due to marijuana's federal illegality, there are many nuances for the marijuana business owner to be aware of. Beyond awareness of the unique aspects of these rules, capably developing business strategies to overcome difficulties with marijuana taxation takes further forethought and consistent implementation. These materials provide an overview of the local, state and federal tax issues effecting Washington marijuana businesses, outline useful business tax strategies and explore emerging issues.

A. STATE AND LOCAL TAXATION PROTOCOLS FOR RECREATIONAL MARIJUANA BUSINESSES

1. Excise Tax

Beginning July 1, 2015, the process of collecting excise tax from marijuana businesses was simplified. Previously producers, processors, and retailers were all responsible for collecting this tax, but now only retailers carry this burden. Currently, an excise tax of 37 percent is collected from consumers on each retail sale of useable marijuana.

Retailers do not include this amount in the total sales price of their product when computing sales tax, a benefit to the consumer, or when computing business and occupation tax, a benefit to the retailer.

The burden of collecting the excise tax falls solely on the retailer. Additionally, unlike most other tax obligations Washington businesses may have, excise tax is paid directly to the Washington Liquor and Cannabis Board. Confirmation and payment of the excise tax are due no later than the 20th of each month for the previous month.

2. Sales Tax

There are several aspects of retail sales tax to be aware of in the marijuana industry. Even though some cannabis products are sold as food, or food ingredients, there is no sales tax exemption for these products. Similarly, retailers are not eligible to claim exemption under the guidelines offered to prescription drugs, at least in the context of recreational use.

It should also be noted that while there are some exemptions under Washington law allowing non-residents to avoid sales tax, those exemptions do not apply to marijuana sales. Thus, even non-residents must pay sales tax on marijuana products.

Since July 1, 2016, retailers who hold a medical endorsement can qualify for sales and use-tax exemptions within a narrow scope. For example, sales and donations of marijuana products that are determined by the Washington Department of Health to be beneficial for medical use may be exempt when sold to qualifying patients. Likewise, sales and donations of low-THC products to qualifying patients may also be exempt from sales tax as. Finally, sales of high-CBD, compliant marijuana products to all consumers may also be sales tax-exempt, but again, the medical endorsement is required for this exemption to be permitted.

It should also be noted that processors do not qualify for the Manufacturer's Machinery and Equipment Sales and Use Tax Exemption. This means a processor may need to pay sales or use tax on equipment purchases that other types of manufacturers would be exempt from.

3. Business and Occupation (B&O) Tax

For those unfamiliar with Washington's business and occupation tax, it is essentially a gross receipts tax, and gross receipts from the sale of useable marijuana are subject to it. There are very few deductions available and most businesses will have none. This differs from the federal income tax and other state income taxes with the tradeoff being the B&O tax rate is very low, less than one percent.

Retailers file under the 'Retailing' classification on the state's B&O tax return. Currently the rate is .00471, so as an example, the tax due on $10,000 of gross receipts for a marijuana retailer would be $47.10. This tax is paid by the business to the Department of Revenue and is not borne by the consumer.

B&O tax is not limited to marijuana retailers. Producers and processors are also subject to B&O tax. Producers growing marijuana are specifically excluded from the definition of an "agricultural product" under RCW 82.04.213. Marijuana growers are not, therefore, farmers, and do not qualify for tax exemptions ordinarily available to farmers. Producers are taxed under the 'Wholesaling' classification.

Processors can be subject to multiple classifications under the B&O tax, and their B&O tax filings can be more complex than other business types. A processor would

report B&O tax under both the 'Manufacturing' and 'Wholesaling' classifications. They would then potentially be able to take a tax credit called the Multiple Activities Tax Credit ("MATC"). This credit aims to prevent a business from being taxed under more than once classification for the same product. As an example, a processor reports $500,000 in manufacturing receipts, and $500,000 in wholesaling receipts, capturing the transformation of the flower (manufacturing) into some other product then sold to retailers (wholesaling). They would report that $500,000 as both activities, and then take the MATC to only pay on one activity. While B&O tax is generally quite a bit less complex than federal taxes, the MATC is one example of where it can be a little more complicated for non-tax professionals to navigate.

4. Local Taxes

It should be briefly mentioned that a number of municipalities also have taxes that apply to all businesses, including marijuana businesses. Most larger cities in Washington have their own B&O tax, including Seattle, Tacoma, and Bellevue. In all, more than 40 Washington cities have some form of B&O tax. The state has model rules for how this tax is collected and enforced, so while the tax rate may vary, the computation of this local B&O tax is fairly uniform across the state.

Many smaller jurisdictions have an employee or "head" tax, with a fixed cost per employee. Kirkland, Redmond, and Renton assess this on many businesses in their boundaries. This may also take the form on an "employee hours" tax, with the idea that two part-time employees are taxed similarly to a single full-time employee.

Finally, while it is less common, and unlikely to apply to most marijuana businesses, there are some cities that have a square footage tax, too. This typically applies to a business physically located in a Washington city, but that does not generate gross receipts within that city. A corporate headquarters is a common example. This tax exists in Bellevue, Algona, and Kent, among other cities. So a marijuana business that had its headquarters in Bellevue, but its retail stores outside the city, may be subject to their square footage tax.

B. FEDERAL TAX ISSUES

1. IRC Section 280E – Deduction of Business Expenses

Even cursory research of federal taxation of marijuana businesses will lead to a discussion of the Internal Revenue Code ("IRC") Section 280E ("280E"). This IRS rule prevent producers, processors and retailers from deducting expenses from their income. The exception is for expenses considered cost of goods sold (COGS). As a result, most federal tax avoidance is focused on maximizing those expenses for marijuana businesses. While the IRS has issued a memo interpreting this rule, they also noted their memo, "may not be used or cited as precedent." C.C.A. 2015-04-011 (December 10, 2014).

The history of 280E is based in Tax Court rulings addressing criminal drug dealers not paying taxes on their ill-gotten gains. In 1981, the Tax Court allowed an illegal business to recover the cost of cocaine obtained on consignment, and also to claim certain business deductions such as a home office deduction and the cost of a scale.

Jeffrey Edmondson v. Commissioner, T.C. Memo. 1981-623. The next year Congress enacted 280E, which reversed the holdings in *Edmondson*.

A court case that remains relevant on this issue is *Californians Helping to Alleviate Medical Problems, Inc. v. Commissioner*, 128 T.C. 173 (2007). Known as *CHAMP*, this case saw the government concede that 280E does not prohibit a taxpayer from claiming COGS deductions. *Id.* at 178. In *CHAMP*, the court held that only some of the business activity was about trafficking drugs, while most of the business was about helping patients identify the types of marijuana that were best-suited for their particular ailment. Thus, the expenses related to the consulting part of the business were not barred.

To make use of a COGS deduction, the taxpayer must use an inventory method and must also use accrual-based accounting for purchases and sales of merchandise. Common inventory methods are first-in first-out (FIFO), last-in first-out (LIFO), and average cost. These methods are simply a way for a company to provide a monetary value for the items in their inventory. Accrual-based accounting just refers to the practice where a business records revenues and expenses when they are incurred, regardless of when cash is exchanged.

Once those systems are in place, a marijuana business can typically deduct COGS expenses, which includes direct material costs (seeds), direct labor cost (planting the seeds), and certain indirect costs, such as maintenance and utilities. While these types of expenses are common and easy to identify for producers, they are less common for

retailers. But even so retailers may be able to capitalize the invoice price of purchased marijuana, or things like transportation charges.

2. Cash Payments

The marijuana industry is well-known to have difficulty in accessing banking services. As a result, some marijuana businesses must occasionally make tax payments in cash, a process which can be difficult for the taxing agency to accommodate, as well as a potential safety risk for the marijuana business when it comes time to transport large amounts of cash.

When paying state taxes to the Department of Revenue, they prefer online payment, with checks and money orders being a second choice. When state taxes must be paid in cash, the Department of Revenue indicates that safety is their primary concern, and they strongly encourage cash payments in excess of $20,000 to be paid by appointment at any of the twelve field offices they have around the state. Cash payments also require a Denomination Form, which counts how many of each type of bill are being paid (e.g. five $1s, ten $20s). But even with twelve field offices around the state, that can still mean certain businesses have very long trips with large amounts of cash, which presents a risk of theft, robbery, challenging conversations with law enforcement, and potentially a risk of civil forfeiture hazards. The difficulty in making these payments has led the Liquor and Cannabis Board to make emergency rules to accommodate these types of payments, again with safety being the primary goal. Those emergency rules are discussed in greater detail in the Current Updates section below.

Cash payments with federal taxes can be a hassle, too. In April this year, the IRS announced a program to facilitate cash payments for taxpayers involving a three-step process that culminates with cash payments being made at participating 7-Eleven stores in 34 states, including Washington. But this option may not be suitable for most businesses, as there is a $1,000 payment limit per day. Other cash payment options require travel to a Taxpayer Assistance Center. This has the same risks as traveling to a Department of Revenue field office, and there are only five TACs currently open in Washington state.

3. Other Emerging Issues

Recent news reporting indicates that IRS audits of cannabis businesses in Colorado have been scrutinizing the large, cash transactions that are common throughout the industry. Trades and businesses that receive more than $10,000 in cash in a single transaction, or in related transactions, must file an IRS Form 8300 within 15 days of the transaction. They must also furnish by January 31 of the following year a written statement to each person whose name is required to be included on the Form 8300.

This cash reporting is required by the Code, as well as the Bank Secrecy Act, and is designed to assist the IRS and the Financial Crimes Enforcement Network in combatting money laundering. Penalties for violation of the Form 8300 filing and furnishing requirements were increased in 2015. Failure to file a Form 8300 now carries a penalty of $250 and if there is a finding of "intentional disregard," IRC 6721(e)(2)(C) provides a penalty of the greater of $25,000 or the amount of cash received in such transaction not to exceed $100,000.

C. BUSINESS STRATEGIES TO OVERCOME TAXATION DIFFICULTIES

The key tax business strategy for marijuana businesses to overcome taxation difficulties is to try and maximize as much expense as possible to inventory. This allows the business to take full advantage of deductions for COGS. The expenses relating to producing and storing marijuana can possibly be allocated to inventory, as well as salaries for employees engaged in the task of managing inventory. Direct costs are usually easy to identify, but for indirect costs it is important to keep in mind an IRS guideline providing that allocations must not materially distort income. For example, it is not appropriate to assign selling and marketing costs to COGS.

Another common strategy for marijuana businesses is to segregate and try to isolate the marijuana business from other activities that are usually deductible. Caution must be taken to actually segregate them, however, and not just pay lip service to this requirement. The IRS may or may not recognize other business entities as separate and they will conduct a 'facts and circumstances' analysis. This means the IRS will attempt to determine if the separate businesses have separate origins, if they are run at the same location, to what extent the various entities support each other, if the businesses share management and employees and if there are shared accounting records. Done poorly, the establishment of these separate entities may not survive IRS scrutiny and the various deductions might then be disallowed.

D. CURRENT TAX UPDATES

The Liquor and Cannabis Board issued permanent rules adopted on September 7, 2016 (effective October 8, 2016) creating a process for electronic payment of marijuana excise tax, and creating alternatives to the electronic payment requirement. Given the challenges with cash payments, and the fact that excise tax payments are made directly to the Liquor and Cannabis Board in Olympia, the issuance of these rules provides improvements to both the safety and efficiency of that process. The new rules do establish a ten percent penalty for continued cash payment, but 'for-cause' waivers are available. Previous emergency rules had been in place to facilitate these payments, but the issuance of permanent rules provides marijuana businesses with greater assurance that the current system is stable and worth incorporating into their permanent business practices. Washington State Register (WSR) 16-19-002.

Ethics

Submitted by Ryan R. Agnew

A. Marijuana and Rules of Professional Conduct

Colorado 2012:

A lawyer cannot comply with Colo.RPC 1.2(d) and, for example, draft or negotiate (1) contracts to facilitate the purchase and sale of marijuana or (2) leases for properties or facilities, or contracts for resources or supplies, that clients intend to use to cultivate, manufacture, distribute, or sell marijuana, even though such transactions comply with Colorado law, and even though the law or the transaction may be so complex that a lawyer's assistance would be useful, because the lawyer would be assisting the client in conduct that the lawyer knows is criminal under federal law.

Colorado 2014:

Comment 14 to Rule 1.2, specifically allowing attorneys to "counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, §§ 14 & 16" (governing the personal use and regulation of marijuana), and to assist such clients "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." However, the lawyer "shall also advise the client regarding related federal law and policy."

Arizona State Bar Ethics Opinions 11-01 (2011) Scope of Representation:

[W]e decline to interpret and apply ER 1.2(d) in a manner that would prevent a lawyer who concludes that the client's proposed conduct is in "clear and unambiguous compliance" with state law from assisting the client in connection with activities expressly authorized under state law, thereby depriving clients of the very legal advice and assistance that is needed to engage in the conduct that the state law expressly permits. The maintenance of an independent legal profession, and of its rights to advocate for the interests of clients, is a bulwark of our system of government. . . . A state law now expressly permits certain conduct. Legal services are necessary or desirable to implement and bring to fruition that conduct expressly permitted under state law.

Washington - RPC 1.2 Scope of Representation:

(d) 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.

RPC 1.2 Comment 9 - Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."

Comment 18 Rule 1.2(d) - "**At 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 (Laws of 2013, ch. 3) (governing the legalization of marijuana), and to 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." (emphasis added).

"A change in federal enforcement policy" is a bit loosely worded, isn't it? Did Sessions' Jan 4th memo result in a "change in federal enforcement policy"?

Oregon RPC 1.2(d)

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.

Many jurisdictions require advising on federal and state conflict and while Washington does not expressly demand mention of the CSA and possible federal sanctions, it's a good idea to do so for two reasons. The first being that I don't think it's possible to fully discuss the validity of i502 without contrasting it with federal law, and second, [ppt WA RPC 1.4 - Communication] your duty to communicate sufficient information to your client so that they can make informed decisions implies that they should be informed as to the discrepancy between state and federal laws.

> WA RPC 1.4 - COMMUNICATION [ppt RPC 1.4]
>
> (a) A lawyer shall;
>
> (1) promptly inform the client of any decision of circumstance with respect to which the client's
>
> informed consent, as defined in Rule 1.0A(e), is required by these Rules;
>
> (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
>
> (3) keep the client reasonably informed about the status of the matter;
>
> (4) promptly comply with reasonable requests for information; and
>
> (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
>
> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

B. <u>Duty to Pursue Justice</u>

ABA Model Rules of Professional Conduct - Preamble and Scope [ppt ABA Model Rules Preamble] (WA Preamble is the same)

> [6] As a public citizen, a lawyer should **seek improvement of the law**, **access to the legal system, the administration of justice and the quality of service rendered by the legal profession**. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, **employ that knowledge in reform of the law** and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. **A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.** Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

We are implored to improve access to, engagement with, and understanding & administration of, the justice system. In the context of cannabis, this takes several forms. The most urgent of which, if we take our charge seriously, is to work to eliminate disparate treatment and sentencing of persons of color under state and federal drug laws, and where cannabis has been legalized, we must work to provide methods to vacate judgments and expunge records for what were clearly *malum prohibitum* offenses.

I think we also owe a duty to our clients to be mindful of other jurisdictions that have taken better regulatory approaches and work to implement those approaches locally. A good example of this is states like Oregon and California recognize the production of cannabis as an agricultural activity. This recognition protects licensed operators from private nuisance causes of action, clean air regulations, and overly-burdensome local zoning.

Federal Regulatory Compliance:

Securities and Exchange Commission. While it's true that some cannabis companies are going public, the common SEC compliance issue that arises concerns the sale of securities. The SEC requires that companies file their intent to solicit investment, and these filings include statements regarding the specific business activity for which investment is sought. Even where you seek an exception to filing, say, using accredited investors, the exception request (Rule 506 of Regulation D) nonetheless requires filing. [ppt 506 Form D]

This means preparing and submitting information to the federal government about your client's intent to violate the controlled substances act. Though the exception for accredited investors doesn't contain the specifics that full registration would entail, its still evidence that can support a case against your client (and potentially you as well). So why would you advise filing the form? The same reason that its important to pay taxes. Penalties for non-compliance with SEC regulations are more likely than being the subject of a federal prosecution under the CSA or RICO. Chances are good that if your client is the target of a federal prosecution, the US Attorney has enough to bring charges independent of your client's SEC filing or tax-returns. As a practical matter, bureaucrats at the SEC or IRS aren't in the habit of sending forms, on their own volition, to the DoJ.

IRS: As Jim covered addressed earlier, a cannabis business, even a plant-touching cannabis business, must still pay taxes.

C. Attorney Use of Cannabis Products

First, we must consider if the use of a controlled substance in a manner that is considered a violation of federal law, constitutes misconduct under RPC 8.4(i)

In pertinent part: "It is professional misconduct to (i) commit any...other act which reflects disregard for the rule of law, whether...committed in the course of his or her conduct as a lawyer, or otherwise"

My personal opinion is that a private action, permissible under the laws of the state in which you reside, in a subject matter area traditionally within the domain of that jurisdiction's police

powers, does not reflect a disregard for the rule of law. Further, I feel it reflects a regard for federalism and the constitution of the United States that both imbues the several states the ability to regulate certain activities within their jurisdiction and provides a check on Congressional power (via the 10th amendment).

To consider other ethical implications of an attorney's personal use, misconduct or not misconduct notwithstanding, we examine two competing interests; on the one hand, its important for the attorney to be competent.

Competence: RPC 1.1 [ppt RPC 1.1]

> "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Therefore, direct exposure to industry products, services, and technology can aid in the counselor's responsibility to be thorough and prepared.

On the other hand, diligence (and promptness) is a critical component of your ethical responsibilities.

> Diligence: RPC 1.3 [ppt RPC 1.3]
>
> "A lawyer shall act with reasonable diligence and promptness in representing a client."

Excessive use of cannabis products can prevent an attorney from being as prompt and as diligent as they otherwise should be.

> > RPC 1.3. Comment [2] "A lawyer's work load must be controlled so that each matter can be handled competently."

Balancing work-load demands so that each matter receives its due attention strongly implies that an attorney must consider and address any lifestyle choices that might impact their ability to handle their work load.

D. Attorney Ownership of Cannabis Businesses

1. Investment in non-client cannabis business. Permitted under WA RPC 1.7 and 1.8, however...

RPC 1.7 - Conflict of Interest [ppt RPC 1.7]:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a **personal interest of the lawyer.**

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

There are a finite number of licensees in a given jurisdiction, so representation of cannabis clients increases the likelihood of conflicts to current and former clients.

An attorney can more readily avoid conflicts if they work with the range of license types (Retail, Processor, Producer, Transport, etc) versus trying to represent only a subset. Again, in a geographically limited market, everyone in a specific license area is a competitor to another, with retail being the possible exception. Spokane and Seattle retailers are competitors only in a broad sense. In any event, it's still a conflict, and the avoidance, withdrawal, or informed consent rules apply as the facts dictate.

2. Client-business investment? As a practical matter, it's a bad idea to invest in a client's business. As an ethical matter, the challenges are several.

RPC 1.8 - CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES [ppt RPC 1.8]

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of an independent lawyer on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, expect as permitted or required by these Rules.

RPC 1.8 Comment 3 [ppt 1.8 Comment 3]:

> The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. **Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction**, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

RPC 1.5 - Fees [ppt RPC 1.5]

(a) A lawyer shall not make an agreement for, charge, **or collect an unreasonable fee** or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent; and

(9) the terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

First, say you forgo your fee in exchange for equity in the business. If the client's business does exceedingly well, is it still "fair and reasonable" to receive compensation at such significant valuations?

While we're on compensation in general, given the nascent nature of the industry, what is fair and reasonable if we each possess a relative short tenure of experience in the subject matter? Let me point out say that fees in this practice area vary widely, and what may appear exorbitant has been upheld as a reasonable fee. I'm talking $14k for one appearance to quash a judgment regarding rights to a cannabis retail license, plus one motion and two affidavits. I certainly do not condone excessive fees, I'm just saying that Courts have limited guidance in this area.

Competence can be viewed in a similar vein. In a jurisdiction like California, where cannabis has represented an active marketplace for 20 plus years, the competence of even a transactional attorney may be substantially broader than here in Washington.

Secondly, if the client's business does very poorly, are you still meeting your obligations to your client in the event that you seek your share of the remnants of the business?

Third, when is it ethically permissible to divest from the company or vote against additional capital raises?

Disqualification from representation:

Consider a scenario where the attorney has invested in a client's company, only to be sued by a competitor with which the attorney had a previous or existing attorney/client relationship. The attorney would be disqualified from representing either party in the matter.

Possible disqualification is an important issue irrespective of investing in a client's company, given the relatively low number of practitioners in this space. Especially in markets that operate entirely intra-state, attorneys in any given jurisdiction are going to have a geographically limited range of clientele, thereby increasing the likelihood that they are doing business or seek to do business with a competitor with whom you also have an ethical obligation towards.

Loss of Attorney Client Privilege - Crime-Fraud Exception for Communications in Furtherance of a Contemplated or On-going Crime or Fraud:

Only communications concerning past wrongdoings are protected. An investor in a cannabis business is potentially a co-conspirator under federal criminal statutes. Where the attorney-investor is asked for legal advice regarding any business-related activity, the crime-fraud exception may apply.

E. Other considerations

There is a strong tendency in this space to rush and ignore common practices found in well-established industries. This tendency is borne of a few factors;

namely,

-the prior experience of the parties in an un-regulated or under-regulated cannabis space (where formal agreements were few)

And,

-entrepreneurs continually face limited access to capital and regulatory restrictions that invite unscrupulous agents and brokers (who often impress the need to expedite the transaction to exploit a fear of "missing out.")

Thus, the nature of the new economy sets conditions where groups and individuals are confronted with a lack of identifiable business records and references. So, due diligence is all the more important.

I recommend that you review with your clients the pitfalls of rushing through a transaction and as a general rule, if it sounds too good to be true, it is.

Malpractice insurance: Are you covered? Does your carrier respect the commentary to the RPCs that permit advising clients regarding the validity, scope, and meaning of Washington law or will they automatically deny a claim for coverage on the belief that you were a co-conspirator in violation of federal law?

Business advice is not legal advice. Given the limited number of attorneys in this practice area, its common to want to use your knowledge of the industry to add value to your representation. Clients often ask about the implications of certain business decisions in a dynamic market where regulations (or their enforcement) are in a near constant state of flux. Be very careful to distinguish legal advice from business advice, as the latter may not be within the scope of your representation and even where contemplated in your engagement letter, has the potential to fall outside of privileged communications.

In-house counsel and board membership:

RPC 1.7 Comment 35 [ppt 1.7 Comment 35]: A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the

corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings w**hile the lawyer is present in the capacity of director might not be protected by the attorney-client privilege** and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

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