

THE GRASS ISN'T ALWAYS GREENER: RECONCILING STATE AND FEDERAL MARIJUANA LAWS

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INTRODUCTION

Over the course of the past 40 years, public sentiment surrounding marijuana legalization has grown tremendously.¹ When Gallup first asked for public perception on whether marijuana should be made legal in 1969, only 12% favored legalization.² Forty-six years later, when the same question was posed in March 2015, 53% of Americans said the drug should be legal.³ While it took almost fifty years for marijuana proponents to go from being in the minority to the majority, the past decade and a half has been perhaps the most important.⁴ Between 2010 and 2013, public support rose a staggering eleven percent.⁵ Accompanying the change in perception are state and local laws that reflect a growing tolerance for the drug—especially in the medicinal realm.

In 1996, California became the first state in the union to legalize marijuana for medical purposes.⁶ At that time, only approximately 20% of Americans favored legalization in any form.⁷ As the first state in the country to legalize marijuana in the

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¹ Seth Motel, *6 Facts About Marijuana*, PEW RESEARCH CENTER (Apr. 14, 2015), <http://www.pewresearch.org/fact-tank/2015/04/14/6-facts-about-marijuana/>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Marijuana Timeline*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/dope/etc/cron.html> (last visited Oct. 12, 2015).

⁷ Motel, *supra* note 1.

medical form, California quickly found itself at the center of the Drug Enforcement Administration's (DEA) attention.⁸ Over the course of the next two decades, the federal government dramatically, yet quietly, changed its stance on states' autonomously enacting marijuana legislation.⁹

Part one of this paper will discuss the changing federal landscape as it pertains to marijuana. This section will trace back to the beginning of the federal prohibition and analyze the changing opinions through history, paying particular focus to the changes made in the past two decades. Since California became the first state to legalize medical marijuana, the federal government's policies have dramatically diverged from what they once were and federal prosecution of these businesses and patients has changed focus.¹⁰

Part two will discuss federal problems state marijuana laws face, including their treatment by the federal government. Taking the Department of Justice (DOJ) memos written in 2009, 2011, and 2013 together, it appears as though there is growing federal acceptance for marijuana as long as separate federal guidelines are followed. However, companies dealing in marijuana (CDMs) will soon find themselves violating some of the objectives before they even have a chance to open their doors to the public. This has been known as the first seed problem—CDMs must violate the Commerce Clause in order to obtain the seeds they need to grow the plants patients need. This leaves state CDMs in a legal limbo.

Part three will analyze the financial troubles that can accompany a CDM. Looking at the Financial Crimes Enforcement Network guidelines, it again looks as though the federal government is letting states govern themselves. Yet, as with before, looks can be deceiving. This section will analyze the special legal troubles that accompany an every day task for any business: storing profits in a safe and secure place.

Finally, part four will focus on the reality of the marijuana situation in the United States. Namely, this section will look at what the DOJ and Department of the Treasury Financial Crimes Enforcement Network (FinCEN) memos actually mean for CDMs in operations, as well as their patients. This section will also attempt to illustrate, using real life examples that the federal guidelines amount to little more than empty promises in the eyes of those who rely on the assurances.

I. PART ONE: MARIJUANA'S LEGAL HIGHS AND LOWS

Until the 1930s recreational use of marijuana was permitted in the United States.¹¹ On August 2, 1937, President Franklin Roosevelt signed legislation outlawing all forms of the plant, including industrial hemp,¹² which had been legally grown in the United States for hundreds of years.¹³ Due to lack of employment and a general fear that

⁸ See *Medical Marijuana in California: A History* (Mar. 6, 2009), <http://www.latimes.com/health/la-oe-w-gutwillig-imler6-2009mar06-story.html>.

⁹ Steph Sherer, *The Federal Government Recognizes Battle over Medical Marijuana*, HUFF POST POLITICS (Dec. 18, 2014, 5:01 PM), http://www.huffingtonpost.com/steph-sherer/the-federal-government-re_b_6341244.html.

¹⁰ *Id.*

¹¹ *Marijuana Law Reform Timeline*, NORML, <http://norml.org/about/item/marijuana-law-reform-timeline> (last visited Oct. 12, 2015).

¹² *Id.*

¹³ *Marijuana Timeline*, *supra* note 6.

Mexican immigrants would take jobs during this time, public and governmental opinion of the use began to change.¹⁴ During this time, the Federal Bureau of Narcotics was formed, the Uniform Narcotics Act was passed, and Congress authorized the Marijuana Tax Act, which effectively criminalized all possession of the substance.¹⁵ For only a brief period during World War II, the government implemented “Hemp for Victory,” which encouraged American farmers to cultivate hemp while the country was at war.¹⁶ Since World War II, the DEA was formed, minimum sentences for possession were instituted, and marijuana became the biggest target in the War on Drugs.¹⁷

Marijuana has always been used, despite its illegal status. During the 1960s, marijuana smoking became synonymous with hippies and counterculture.¹⁸ During this time, it was mainly white, upper class Americans in their youth who were using marijuana.¹⁹ Despite what is most widely known as a free spirited time full of teenagers with little inhibitions, a Gallup poll from 1969 indicates that only 12% of the United States believed marijuana should be made legal.²⁰

A few years later in 1972, the bipartisan Shafer Commission appointed by President Richard Nixon determined marijuana should be decriminalized, a recommendation not heeded by Nixon.²¹ While Nixon rejected the Commission’s recommendation, eleven states used it to decriminalize the drug during the 1970s.²² In response to this and his growing concern for the use of the drug, Nixon created the DEA in 1973.²³ The DEA’s duties include investigation and preparation for prosecution of criminals and drug gangs as well as major violators of controlled substance laws.²⁴ The DEA is also responsible for the management of a national drug intelligence program to collect, analyze, and disseminate operational drug intelligence information, as well as seizure and forfeiture of assets derived from, traceable to, or intended to be used in the illicit drug trade.²⁵ The DEA is charged to work in cooperation with state, local, and foreign officials to achieve their goals.²⁶ Since its inception in 1973, the DEA has worked to eradicate all drugs, not just marijuana.²⁷ For more than two decades, the DEA received unbridled discretion when it came to fighting the War on Drugs.²⁸ During the 1980s, the DEA focused on crack cocaine, but during the 1990s the focus changed to marijuana.²⁹ In the 1990s, there

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*; Dan Eggen, *Marijuana Becomes Focus of Drug War*, THE WASHINGTON POST (May 4, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/03/AR2005050301638.html>.

¹⁸ *Marijuana Timeline*, *supra* note 6.

¹⁹ *Id.*

²⁰ *Illegal Drugs*, GALLUP, <http://www.gallup.com/poll/1657/illegal-drugs.aspx> (last visited Oct. 12, 2015).

²¹ *Marijuana Timeline*, *supra* note 6.

²² *Id.*

²³ *Id.*

²⁴ *Organization, Mission and Functions Manual: Drug Enforcement Agency*, U.S. DEPARTMENT OF JUSTICE (Sept. 9, 2014), <http://www.justice.gov/jmd/organization-mission-and-functions-manual-drug-enforcement-administration>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See generally id.* (stating that generally the “DEA is to enforce the controlled substances laws and regulations of the United States,” not merely marijuana laws).

²⁸ *See generally id.* (listing out all of the DEA’s original responsibilities).

²⁹ Eggen, *supra* note 17.

was a dramatic rise in overall drug arrests—from 1.1 million to 1.5 million—for which marijuana accounted for 80% of that increase.³⁰

While the DEA spent the 1990s focusing on the eradication of marijuana, states were turning their attention to the other direction. Acting pursuant to the tenth amendment, California legalized medical marijuana in 1996.³¹ California's new law found itself squarely in contradiction with the DEA's mission at that time. Because of that, dispensaries in California became DEA targets during the first decade.³² This became the first of many constitutional questions surrounding the validity of medical marijuana laws; if the tenth amendment gives states the rights not explicitly delegated to the federal government, does the DEA have the power to shut down state-legal medical marijuana enterprises? The answer lies in DEA statistics from the time. Eighty percent of the increase of DEA arrests can be attributed to marijuana, which includes those people who were acting in accordance with state law at the time of their arrest.³³ The DEA was not carrying out these raids in contradiction of public opinion, however; in 1995, only 25% of respondents felt that marijuana, in any form, should be made legal.³⁴ During the next four years, between 1996 and 2000, seven states including Washington, Nevada, Maine, and Alaska joined California in legalizing medical marijuana.³⁵ During that same period, public opinion rose from 12% to 31% of respondents believing marijuana should be made legal.³⁶

The bulk of medical marijuana enforcement reform has happened within the past decade. Since 2000, sixteen additional states have legalized marijuana for medicinal purposes while four states have legalized marijuana for recreational purposes.³⁷ The DEA would have to be prepared to spend even more resources in order to combat these businesses without any realistic hope of eradicating the drug because the residents are acting in accordance with state laws. In October 2009, June 2011, and again in August 2013, the Department of Justice released guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA).³⁸ The DOJ states that it is committed to enforcement of the CSA, but it is also “committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way.”³⁹ Consistent with this commitment,

³⁰ *Id.*

³¹ *Marijuana Timeline*, *supra* note 6.

³² Steve Hymon, *DEA Raids 10 Pot Shops*, LA TIMES (July 26, 2007), <http://www.latimes.com/local/la-me-medpot26jul26-story.html>.

³³ Eggen, *supra* note 17.

³⁴ *Illegal Drugs*, *supra* note 20.

³⁵ *23 Legal Medical Marijuana States and DEC*, PROCON.ORG,

<http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last visited Sept. 22, 2015).

³⁶ Motel, *supra* note 1.

³⁷ *See State Marijuana Laws Map*, GOVERNING DATA, <http://www.governing.com/gov-data/state-marijuana-laws-map-medical-recreational.html> (last visited Sept. 22, 2015); *23 Legal Medical Marijuana States and DEC*, *supra* note 35.

³⁸ Memorandum from David W. Ogden, Deputy Attorney General, to Selected United States Attorneys (Oct. 19, 2009) [hereinafter Memorandum 2009]; Memorandum from James M. Cole, Deputy Attorney General, to United States Attorneys (June 29, 2011) [hereinafter Memorandum 2011]; Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys (Aug. 29, 2013) [hereinafter Memorandum 2013].

³⁹ Memorandum 2013, *supra* note 38, at 1.

DOJ determined it was not proper to use its limited resources to go after every legal CDM.⁴⁰ Instead, DOJ will prosecute legal CDMs only if they violate certain enforcement priorities that have been deemed important by the federal government.⁴¹ These priorities 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 trafficking of other illegal drugs or illegal activity; preventing violence and the use of firearms in the cultivation and distribution of marijuana; preventing drugged driving and 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.⁴²

These memos finally gave CDMs some of the guidance they were looking for without endorsing them outright. Owners now have a list of things to stay away from if they wish to stay off the DEA enforcement radar.

Change has not stopped with the DEA, however. Since 2000, public sentiment concerning the legalization of marijuana has risen rapidly.⁴³ In October 2013, for the first time since the poll began in 1969, more Americans—fifty eight percent—believed marijuana should be made legal than those who believed it should remain illegal.⁴⁴ In 2014, the House of Representatives took the first step to aligning its stance on medical marijuana with that of the general public. On May 27, 2014, a bipartisan coalition of House members restricted the DEA and DOJ from using funds to go after state-legal CDMs.⁴⁵ On December 13, 2014, the CRomnibus bill, which contained the amendment to defund DEA and DOJ, passed both houses.⁴⁶ Some believe this is an indication that Congress may try to legalize, or at the very least decriminalize, the drug soon.⁴⁷

While there has been a dramatic change of opinion—both governmental and public—during the past two decades, the fact remains the same: marijuana, whether medical or recreational, is illegal under federal law.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See *Illegal Drugs*, *supra* note 20.

⁴⁴ *Id.*

⁴⁵ Ryan J. Reilly and Matt Ferner, *House Blocks DEA from Targeting Medical Marijuana*, HUFFINGTON POST (May 30, 2014, 12:59 PM), http://www.huffingtonpost.com/2014/05/30/dea-medical-marijuana-house-vote_n_5414679.html.

⁴⁶ Mike Liszewski, *Congress Passes Historic Legislation to Defund DOJ's War on Patients*, AMERICANS FOR SAFE ACCESS (Dec. 13, 2014), http://www.safeaccessnow.org/congress_passes_historic_legislation_to_defund_doj_s_war_on_patients.

⁴⁷ *Id.*

II. PART TWO: IMMACULATE CULTIVATION AND FEDERAL INTERVENTION

While CDMs are afforded protection under state law, the operation of such dispensaries remains in a grey area in regards to federal law. This has become known as the first seed problem.⁴⁸ The federal government, through the DOJ memos in 2009, 2011, and 2013, stated that it would not target CDMs unless they are in violation of one of the enumerated evils defined by the department.⁴⁹ Included among these prosecution points are “preventing the diversion of marijuana from states where it is legal under state law in some form to other states” and “preventing state-authorized marijuana activity from being used as a cover or pretext for trafficking of other illegal drugs or illegal activity.”⁵⁰ In theory, in order to begin the CDM, the first seed must be acquired from outside the state. This is because, again in theory, there should be no marijuana seeds in the state because before the law all possession was illegal. To acquire these seeds, the CDMs must look outside of the state to obtain the first seed, which violates the federal priority of “preventing the diversion of marijuana from states where it is legal under state law in some form to other states.”⁵¹ The language in the DOJ memo, if taken on its face, means that it does not matter if the seeds are being sent from one state in which marijuana is legal into another state where marijuana is also legal.⁵² In other words, DOJ is giving notice to all CDMs that *any* product that crosses *any* state line is in violation of the directives, regardless of the legality of it in each state.⁵³

Adding to the uncertainty of the DOJ’s memo is the question of when federal officials will step in and take action. The 2013 memo, written by Deputy Attorney General James M. Cole details the federal government’s intervention plan. Cole states that outside of the enumerated directives, the federal government has long relied on state and local government and law enforcement entities to create and carry out drug laws.⁵⁴ He goes on to say traditionally it is only when one of the directives is in danger of being violated that the federal government will take action.⁵⁵ The memo also serves as a warning: marijuana laws threaten the narcotics enforcement relationship that has traditionally been between state and federal government.⁵⁶ Cole states the objectives are written assuming states have strict drug laws in place that are implemented with force.⁵⁷ Further, those states with “robust controls and procedures” will be less likely to see federal interference.⁵⁸ However, Cole is careful to stipulate that this does not mean that those states will *never* be subject to federal preemption, meaning the federal government has the ultimate right to intervene at any time, regardless of whether any directives are close to being

⁴⁸ See Phil Rogers, *Feds Must Look the Other Way in Acquisition of First Medical Marijuana Seeds*, NBC CHICAGO (Dec. 4, 2014), <http://www.nbcchicago.com/news/local/Seeds-for-Medical-Marijuana-Must-Magically-Appear-in-State--284818031.html>.

⁴⁹ See Memorandum 2009, *supra* note 38; Memorandum 2011, *supra* note 38, at 1; Memorandum 2013, *supra* note 38, at 1.

⁵⁰ Memorandum 2013, *supra* note 38, at 1.

⁵¹ *Id.*

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *Id.* at 2.

⁵⁵ *Id.*

⁵⁶ Memorandum 2013, *supra* note 38, at 2.

⁵⁷ *Id.*

⁵⁸ *Id.*

violated.⁵⁹ This leaves CDMs in a legal limbo; the federal government does not plan to intervene unless a directive is broken, but a DOJ directive must be violated in order to begin the CDM.

The only way for these CDMs to be semi-secure from federal prosecution is for states to implement and enforce strong anti-drug laws which closely reflect the federal directives.⁶⁰ Simply writing and passing laws that reflect the federal landscape are not enough; the state must make sure these laws are followed.⁶¹ This can be done in a number of ways. In Illinois, which is considered the country's toughest state, marijuana regulations were passed in order to monitor whether these entities were closely following the law.⁶² In order to become a CDM, the business must go through an extensive application process.⁶³ As part of the preliminary application process, a CDM must disclose detailed information about business and operation, security, and bookkeeping and inventory plans.⁶⁴ Any individual with any kind of monetary investment or stake in the company is also required to go through an extensive criminal background check as well as file detailed financial disclosure forms.⁶⁵ Also required is a list of any and all strains or products the entity plans on growing, buying from producers, or selling.⁶⁶ While the intense application process tends to appear to be tough and robustly following regulations, what is notably lacking is a requirement for entities to not only detail which strains they plan to buy or sell, but *where* they plan to purchase the marijuana for sale.⁶⁷ This "don't ask, don't tell" policy may be exactly what Cole was referring to when he said that states must implement and carry out strict laws or face federal prosecution. States are willfully ignoring the inevitable violation of one of the federal directives in order to allow CDMs to operate.⁶⁸ This creates a catch-22 for CDMs; states are being flexible in allowing these businesses to get the seeds they need in order to help the patients within the state who need it most, but they are also wholly unprotected when it comes to the federal government by clearly violating the one of the directives.

III. PART THREE: BANKS, DRUG MONEY, AND FINANCIAL CRIMES

Once the first seed problem is taken care of—or rather, once the CDM is able to open its doors and serve the population, no matter how the business started—there are many more hurdles to overcome. As discussed above, while medical marijuana is legal in many states, federal regulations prevent it from truly becoming legal. Most banks around

⁵⁹ *Id.*

⁶⁰ *Id.* at 2–3.

⁶¹ *Id.* at 3.

⁶² Kaitlyn Smith, *Medical Marijuana: 'Don't Ask, Don't Tell' for State Pot Growers*, DAILY HERALD (Sept. 7, 2014), <http://www.dailyherald.com/article/20140907/news/140908787/>.

⁶³ *Id.*

⁶⁴ Application for Dispensing Organization Authorization, Illinois Medical Marijuana Pilot Program (last visited Oct. 13, 2015), *available at* <http://www2.illinois.gov/gov/mcopp/Pages/update-08292014.aspx>.

⁶⁵ *Id.*

⁶⁶ *Smith, supra* note 62.

⁶⁷ *Id.*

⁶⁸ *See id.*; Memorandum 2013, *supra* note 38, at 1.

the country fall under at least some kind of federal regulation.⁶⁹ All financial institutions within the country must have the capability to clear checks and transfer money within the national system.⁷⁰ In order to accomplish this, those institutions must have a master account from the Federal Reserve System.⁷¹ Other safeguards bring financial institutions under federal purview as well; both the National Credit Union Administration (NCUA) and the Federal Deposit Insurance Corporation (FDIC) provide federal deposit insurance, which enables the US economy to be better regulated and safeguarded against any potential damages.⁷² In order to receive these benefits and become part of a broader network of banks, these financial institutions must agree to adhere to federal guidelines. So the problem remains: twenty-three states have legalized medical marijuana, but because the federal government still considers the drug a Schedule I narcotic, any interaction banks have with profits from marijuana are considered money laundering funds and are illegal federally, regardless of any state action to the contrary.⁷³

Generally, when money comes from a suspicious source, the bank is required to file a Suspicious Activity Report (SAR) to the Federal Reserve; the SAR then notifies federal authorities of suspicious entities and persons they should investigate.⁷⁴ As long as financial institutions files a SAR, whether they are under a regulatory obligation or do so voluntarily, they cannot be prosecuted for the actions taken by the customers.⁷⁵ Once a SAR is filed, the federal government then has the ability to monitor the actions taken on the account, including any deposits, money transfers, withdrawals, etc.⁷⁶ Because of the types of invasive monitoring that results from a SAR being filed, and because it could create financial uncertainty for the bank—i.e. the federal government can seize those assets at any time—banks have historically refused to accept funds from CDMs.⁷⁷

Handing security guards bags of cash—often in fives, tens, and twenties—for them to drive around to different ATMs in order to deposit that cash is not unheard of in the marijuana industry.⁷⁸ Armored bank trucks and financial institutions themselves steer clear of any interaction with CDMs.⁷⁹ This is because of the federal regulations they fall

⁶⁹ See Jeffrey Stinson, *States Find You Can't Take Legal Medical Marijuana Money to the Bank*, HUFF POST POLITICS (Jan. 5, 2015, 10:02AM), http://www.huffingtonpost.com/2015/01/05/marijuana-money_n_6416678.html.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*; *Understanding Deposit Insurance*, FDIC (last updated Jan. 5, 2015), <https://www.fdic.gov/deposit/deposits/>.

⁷³ Stinson, *supra* note 69.

⁷⁴ FINANCIAL CRIMES ENFORCEMENT NETWORK, FINCEN SUSPICIOUS ACTIVITY REPORT (FINCEN SAR) ELECTRONIC FILING INSTRUCTIONS 79, 80 (1.2 ed., Oct. 2012), *available at* <http://www.fincen.gov/forms/files/FinCEN%20SAR%20ElectronicFilingInstructions-%20Stand%20Alone%20doc.pdf> [hereinafter FINANCIAL FINCEN].

⁷⁵ *Id.* at 78.

⁷⁶ Shaheen Pasha, *Government Spying on Your Bank Accounts*, CNN MONEY (Aug. 9, 2006, 3:32PM), http://money.cnn.com/2006/08/09/news/economy/banks_secretcy/.

⁷⁷ Jacob Sullum, *Marijuana Money is Still a Pot of Trouble for Banks*, FORBES (Sept. 18, 2014, 5:42PM), <http://www.forbes.com/sites/jacobsullum/2014/09/18/local-banks-terrified-by-friendly-neighborhood-marijuana-merchants/>.

⁷⁸ Stinson, *supra* note 69.

⁷⁹ *Id.*

under; any interaction with a CDM, one that remains illegal federally, could have dire consequences for these institutions.⁸⁰

On February 14, 2014, FinCEN released a memo titled “BSA Expectations Regarding Marijuana-Related Businesses.”⁸¹ The purpose of the memo is to clarify Bank Security Act (BSA) expectations for businesses conducting marijuana transactions.⁸² Citing the “Cole Memo,” the DOJ memo written in 2013 that identifies the federal objectives in regards to the CDM; the FinCEN reiterates that those objectives are the guideline for all federal involvement with CDM.⁸³ In other words, all financial institutions must keep the federal objectives in the forefront of any interaction they have; if there is a suspicion that one of the federal objectives has been breached, the trouble begins.⁸⁴ What has changed, however, is the amount of business banks may conduct with CDMs without coming under any kind of prosecutorial fire.⁸⁵ As long as a bank can prove it has done due diligence in assessing the type of business and profits the company should have, and as long as the financial institution files the appropriate paperwork when mandated, the Safe Harbor provision still exists and protects banks from prosecution by the Department of Justice.⁸⁶ FinCEN states due diligence includes (while not being non-inclusive):

- (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 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.⁸⁷

Included in due diligence is ensuring the CDM does not implicate one of DOJ’s enforcement priorities or violate a state law in any way.⁸⁸ By doing its due diligence, the financial institution can not only ensure that the money is coming from where the

⁸⁰ *Id.*

⁸¹ FINANCIAL CRIMES ENFORCEMENT NETWORK, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES 1 (Feb. 14, 2014), available at http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf [hereinafter FINANCIAL BSA].

⁸² *Id.* at 1.

⁸³ *Id.* at 1–2.

⁸⁴ *See id.*

⁸⁵ *See generally id.* at 2.

⁸⁶ *See id.*

⁸⁷ FINANCIAL BSA, *supra* note 81, at 2–3.

⁸⁸ *Id.* at 3.

customer reports, but also so the financial institution can report more detailed, and accurate information to FinCEN.⁸⁹

While the first few pages of the memo suggest following the guidelines will prevent financial institutions from coming under federal prosecution, the appearance is misleading. The memo goes on to explain that the financial institution is still required to file a SAR any time money from a suspicious nature is deposited.⁹⁰ The SAR filings, as far as their use for CDM, have been modified.⁹¹ If there is no finding of suspicious activity after the financial institution does its due diligence, they must file a “Marijuana Limited” SAR.⁹² The information provided is limited, including identifying information of the customers, addresses of all parties involved, and the fact that the institution is filing the SAR solely because the business is engaged in marijuana-related activities.⁹³ The identifying information then goes to FinCEN and is used for the same purpose as a normal SAR.⁹⁴

When, after due diligence, the financial institution becomes suspicious about the funds for one reason or another, the institution then files either a “Marijuana Priority” or a “Marijuana Termination” SAR.⁹⁵ A “Marijuana Priority” SAR alerts FinCEN to suspicious activity, which then allows it to monitor the activity while a “Marijuana Termination” SAR alerts FinCEN that the account has been terminated for suspicious reasons, which then alerts it to the necessity to investigate.⁹⁶

Because the financial institutions must still file SARs when any suspicious activity occurs, regardless of the legal status in the state, the effect of the memo on current practices is virtually nothing. Financial institutions must still file SAR and they are still protected under the Safe Harbor provision, but the information sent to FinCEN is also still used to alert the federal government of CDMs.⁹⁷ This means that while the forms the financial institutions file are slightly different, they all have the same effect as before; if the federal government deems that a business is engaged in suspicious activity beyond what is legal within the state, the funds can be seized from the financial institution.⁹⁸ This leaves those institutions in a precarious position because of the way funds are used within each institution.

The federal guidance that has been released has failed to actually guide the banks working with CDMs. While it provides guidelines for the ways in which financial institutions can protect themselves from suspicious activity and from accepting money that comes from illegal sources, there are no protections in place to prevent the possible insecurity that results from funds being abruptly seized from financial institutions. The DOJ memos do not provide much insight; because of this, it becomes hard to predict how the federal government will act. On one hand, the government has stated that it will not

⁸⁹ *Id.*

⁹⁰ *Id.* at 3.

⁹¹ *See generally id.* at 3–7.

⁹² *Id.* at 3.

⁹³ FINANCIAL BSA, *supra* note 81, at 4.

⁹⁴ *Id.*

⁹⁵ *Id.* at 4–5.

⁹⁶ *Id.*

⁹⁷ FINANCIAL FINCEN, *supra* note 74, at 78–79.

⁹⁸ *See generally id.*

prosecute those businesses acting lawfully within the state.⁹⁹ On the other hand, the federal government has made clear that there is still a strong right of interference to take action when the government sees fit.¹⁰⁰

IV. PART FOUR: FEDERAL PROMISES CAN BE DECEIVING

At first glance, there appears to be a growing trend of federal acceptance for state marijuana laws. Taken together, it seems as though the 2009, 2011, and 2013 DOJ memos, as well as other advisory memos written by the Financial Crimes Enforcement Network, paint the picture that as long as CDMs are honest, follow the state laws, and do not act as a front for the illegal drug market, the federal government accepts the entities as legal.¹⁰¹ This may not be completely factual, however. What marijuana entities enjoy now is the federal government more or less turning a blind eye to their operations; at least until the federal government decides that it can no longer look the other way.¹⁰² In reality, the federal government has made no commitment and no real promises to allow state legal marijuana entities to go about their business. Instead, the memorandum written by DOJ points toward tentative tolerance—something marijuana businesses should pay close attention to and be weary of.

The current federal landscape may look very different now than it will in a matter of five years. Much like President Obama has repealed the Department of Defense’s “Don’t Ask, Don’t Tell” policy, many federal gun policies, and changed the way the federal government deals with immigration and immigrants, his successors will have the same option.¹⁰³

In most cases, in order to open a marijuana business, the owners and investors must have at least \$2 million at their disposal to pay for the application fees, start up expenses, licensing fees, and in many states, bond fees.¹⁰⁴ This poses an even greater risk for the marijuana industry. Business executives must spend an enormous amount of time making sure they comply with state regulations. These regulations range anywhere from site and security requirements, to cash on hand, or even the types and amount of equipment needed to get a license for the business.¹⁰⁵ Often states only permit a limited

⁹⁹ See Memorandum 2009, *supra* note 38; Memorandum 2011, *supra* note 38, at 1; Memorandum 2013, *supra* note 38, at 3.

¹⁰⁰ Memorandum 2009, *supra* note 38; Memorandum 2011, *supra* note 38, at 2; Memorandum 2013, *supra* note 38, at 4.

¹⁰¹ See generally Memorandum 2009, *supra* note 38; Memorandum 2011, *supra* note 38, at 1; Memorandum 2013, *supra* note 38, at 3; FINANCIAL BSA, *supra* note 81, at 2.

¹⁰² See generally Memorandum 2009, *supra* note 38; Memorandum 2011, *supra* note 38, at 2; Memorandum 2013, *supra* note 38, at 3.

¹⁰³ Jesse Lee, *The President Signs the Repeal of “Don’t Ask, Don’t Tell,”* THE WHITE HOUSE BLOG (Dec. 22, 2010, 12:35PM), <https://www.whitehouse.gov/blog/2010/12/22/president-signs-repeal-dont-ask-dont-tell-out-many-we-are-one>; Adriana Maestas, *Obama Signed More Repeals of Federal Gun Laws than Bush*, POLITIC365 (Dec. 17, 2012, 6:28PM), <http://politic365.com/2012/12/17/obama-signed-more-repeals-of-federal-gun-policies-than-gwb/>; Max Ehrenfreud, *Your Complete Guide to Obama’s Immigration Executive Action*, THE WASHINGTON POST (Nov. 20, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/11/19/your-complete-guide-to-obamas-immigration-order/>.

¹⁰⁴ *FAQ: Commonly Asked Questions About the Industry and Our Process*, CANNA ADVISORS, <http://thinkcanna.com/faq> (last visited Oct. 4, 2015) [hereinafter *FAQ*].

¹⁰⁵ See *id.*

number of licenses, which means only the potential CDMs with the best security, location, building, etc. will be picked; the few licenses make the initial financial investment into the business steeper, which in turn raises the risk.¹⁰⁶ It is well known within the marijuana industry that the actions are not considered legal in the federal sphere; there is an added element of concern with the federal government reserving the power to change policies or prosecute when they see fit.¹⁰⁷

On the surface, joining the marijuana industry does not seem too daunting and risky. Taken on their face, the DOJ memos appear to state that as long as the nine objectives are not violated the entities may operate in peace, away from the threat of federal prosecution.¹⁰⁸ But a closer look at the memos reveals the risky implications. *For now* businesses may operate as normal and *should not* expect federal prosecution unless they are violating one of the objectives.¹⁰⁹ A new administration, complete with a new United States Attorney General could mean a complete shift on national marijuana policy, leaving these companies and patients without any recourse. Patients will lose the medicine they need, citizens will lose a new found right in states where marijuana is recreationally legal, but perhaps most important: CDMs will lose the multi-million dollar investment it took to start the business in the first place.

In 2013, well after two DOJ memos and on the heels of another, a Michigan man was sentenced to ten years behind bars for growing 100 marijuana plants under Michigan's medical marijuana law.¹¹⁰ Jerry Duval, the patient, has undergone kidney and pancreas transplants, and also suffers from glaucoma and neuropathy, which has required almost two-dozen surgeries.¹¹¹ Duval was convicted in a federal court after being accused of being a local drug kingpin; federal court left him without any defense as marijuana is still illegal on that level.¹¹² Mr. Duval strictly adhered to the state law, yet federal prosecutors charged him with manufacturing with intent to distribute, conspiracy to manufacture marijuana, and maintaining a drug premises.¹¹³ Further, because of the nature of the charges, Duval faces federal seizure of his family's home and farmland, which is worth hundreds of thousands of dollars; this is in addition to the decade in prison.¹¹⁴ This illustrates the virtual emptiness of the federal assurances in the DOJ memo. The federal government has assured dispensaries, manufacturers, and patients that as long as they are not violating one of the federal objectives, they should be free from federal

¹⁰⁶ See generally, *Medical Marijuana*, COMPASSIONATE CARE NY, <http://www.compassionatecareny.org/medical-marijuana/> (last visited Oct. 4, 2015).

¹⁰⁷ Smith, *supra* note 62.

¹⁰⁸ See generally Memorandum 2009, *supra* note 38; Memorandum 2011, *supra* note 38; Memorandum 2013, *supra* note 38.

¹⁰⁹ *Id.*

¹¹⁰ Matthew Fleischer, *Weed Wars: Medical Marijuana Patient Sent to Same Prison as Boston Bomber*, TAKEPART (May 30, 2013), <http://www.takepart.com/article/2013/05/30/weed-wars-medical-marijuana-patient-same-prison-boston-bomber>.

¹¹¹ *Id.*

¹¹² Kris Hermes, *Michigan Medical Marijuana Patients Argue Their Federal Appeal Thursday Before Sixth Circuit*, AMERICANS FOR SAFE ACCESS (Jan. 22, 2014), http://www.safeaccessnow.org/michigan_medical_marijuana_patients_argue_their_federal_appeal_thursday_before_sixth_circuit.

¹¹³ *Id.*

¹¹⁴ *Id.*

prosecution.¹¹⁵ While this may appear like guidance, it also allows the federal government to take action on a number of situations—including a patient growing marijuana plants for personal use under a state sanctioned program.¹¹⁶ Without any official law or policy, patients and CDMs are left vulnerable to prosecution.

This issue has not been ignored by federal legislators—especially those from states with marijuana laws, whether medical or recreational, on the books. On March 9, 2015 Senators Cory Booker (D-NJ), Kristen Gillibrand (D-NY), and Rand Paul (R-KY) introduced a bill that essentially ends the federal prohibition on medical marijuana.¹¹⁷ This bill provides for reclassification of marijuana under DEA guidelines, allow limited inter-state transport, expand access to marijuana for research, and make it easier for doctors to recommend marijuana to veterans.¹¹⁸ The bill also makes it easier for banks to provide their services to CDMs.¹¹⁹ While this bill is likely to see some changes before a Republican controlled Congress passes it, the new law could solve the problems for patients and CDMs alike. Until then, however, those involved in the medical or recreational marijuana industries must remain in their legal limbo, relying on unchecked promises from the government.

V. CONCLUSION

Over the past century, the public perception of marijuana has changed. In the 1930s, the federal government took a hard stance on the drug, outlawing any use or cultivation.¹²⁰ From that moment forward, marijuana became highly stigmatized for which offenses were prosecuted with the utmost fervor.¹²¹ There were certain periods of acceptance within certain cultures, but it wasn't until California legalized medical marijuana that the overall public perception of the drug began to slowly change.¹²²

The change in public perception did not happen overnight, nor did it happen without any resistance. From 2000-2013, there was a dramatic jump in the number of Americans who believe marijuana should be legalized.¹²³ During that same time period, sixteen states and the District of Columbia passed legislation legalizing the drug for medical use.¹²⁴

Generally, states enjoy sovereignty to promulgate laws and regulations that govern the people of the state. While this power is usually respected by the federal government, laws that legalize marijuana within a state for either recreational or medical use are proof that the federal government will not always let states govern themselves. Over the past

¹¹⁵ See Memorandum 2009, *supra* note 38; Memorandum 2011, *supra* note 38; Memorandum 2013, *supra* note 38.

¹¹⁶ See Hermes, *supra* note 112.

¹¹⁷ Niraj Chokshi, *Sens. Booker, Gillibrand, Paul Unveil Federal Medical Marijuana Bill*, THE WASHINGTON POST (March 10, 2015), <http://www.washingtonpost.com/blogs/govbeat/wp/2015/03/10/sens-booker-gillibrand-and-paul-unveil-federal-medical-marijuana-bill/>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Marijuana Law Reform Timeline*, *supra* note 11.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Motel, *supra* note 1.

¹²⁴ See 23 *Legal Medical Marijuana States and DEC*, *supra* note 35.

two decades, there has been an emergence of scientific studies conducted on the medical uses of marijuana.¹²⁵ Of those studies conducted, 68% found marijuana had a positive medical use while only 10% found no medical benefit to the use of marijuana.¹²⁶ Using this information, states have undertaken the task of making the substance legal within certain medical parameters, for the benefit of the citizens within the state.

The problem, as laid out above, is that the federal government has long taken a hard stance on the illegality of the substance.¹²⁷ Since the 1970s when the Controlled Substances Act created a scheduling mechanism for controlled substances, marijuana has been deemed as “having a high potential for abuse, no medical use, and not safe to use without medical supervision.”¹²⁸ It has been incredibly difficult for medical marijuana advocates to change the opinions around the substance, but the tides started to turn in their favor in the late 90s and only took off from there with almost half of the states in the country passing some form of marijuana legislation by 2015.¹²⁹ With the number of Americans who believe marijuana should be made legal, even if just for medical purposes, at an all time high, it’s time for the federal government to step up and make a decision about the legality of the substance and the marijuana programs.

With over 1.1 million Americans using marijuana legally under the laws of their respective home state, how the federal government acts could have some very serious consequences.¹³⁰ These patients are prescribed medical marijuana for any number of afflictions such as Amyotrophic Lateral Sclerosis (ALS), cancer, glaucoma, HIV/AIDS, Huntington’s Disease, Crohns, multiple sclerosis, PTSD, and Tourette’s—just to name a few.¹³¹ By choosing to go after CDMs, the federal government is not only hurting those owners, but the patients in the state who depend on the substance to make them feel better, when other medications cannot achieve the same results. This is why the disconnect between state and federal governments is a dire situation that must be remedied.

While the many Department of Justice memos appear to allow marijuana as long as certain provisions are not violated, the actual effect of the memos is quite different. The language contained in each, when looked at as a whole, basically says as long as a company is not violating a provision *in any way*, the business *should* be free from prosecution *unless* the federal government decides otherwise.¹³² In other words, until the federal government decides otherwise (which could happen at any time for any reason) CDMs should not fear prosecution, but should be aware that the federal government reserves the right to prosecute.¹³³ This creates a kind of uncertainty that makes it nearly impossible for these businesses—or the patients—to fully take part in the system.

¹²⁵ See 60 Peer-Reviewed Studies on Medical Marijuana, PROCON.ORG (Feb. 27, 2015, 3:57PM), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000884>.

¹²⁶ *Id.*

¹²⁷ See Alexandra Cardinale, *A Brief History of How Marijuana Became Illegal in the U.S.*, POLICYMIC (Jan. 14, 2014), <http://mic.com/articles/78685/a-brief-history-of-how-marijuana-became-illegal-in-the-u-s>.

¹²⁸ *Id.*

¹²⁹ 23 Legal Medical Marijuana States and DEC, *supra* note 35.

¹³⁰ Number of Legal Medical Marijuana Patients, PROCON.ORG (Nov. 13, 2014, 12:28PM), <http://medicalmarijuana.procon.org/view.resource.php?resourceID=005889>.

¹³¹ 60 Peer-Reviewed Studies on Medical Marijuana, *supra* note 125.

¹³² See Memorandum 2009, *supra* note 38; Memorandum 2011, *supra* note 38; Memorandum 2013, *supra* note 38.

¹³³ See *id.*

Starting a CDM requires a lot of capital and a lot of time to invest in the process¹³⁴ While most business ventures are risky, the founders and operators of CDMs carry a special risk of losing their license or facing jail time, even though they are complying with state law; these consequences are the direct result of the disconnect between state and federal laws.¹³⁵ Further, it is nearly impossible to start a CDM without violating one of the federal objectives right away by either transporting seeds into the state from elsewhere or accepting seeds from the black market. All of these reasons make it especially risky to start a CDM and while that does not seem to dissuade many companies, any further action on the federal government could severely curtail this.

Patients could be affected by a decision the federal government makes as well. Over 1.1 million Americans count on medical marijuana for their illnesses;¹³⁶ any action on the part of the federal government could mean these citizens do not have access to the drugs on which they have come to depend. At first, these laws seemed like the saving grace for those suffering with serious conditions that cannot be cured or treated with Western medicine without devastating results.¹³⁷

Until Congress passes a law, the President signs an Executive Order, or the DEA reschedules marijuana, the state laws do not carry much weight. Just as the executive administration of the U.S. changes every four to eight years, so too does the ideology that dictates the country's laws and policies. Until there is a firm stance from the federal government, the medical and recreational marijuana industries are in an uncomfortable legal limbo. So while these state-made marijuana laws appear to be the answer marijuana advocates have been yearning for, a closer look shows the laws are not exactly what they appear to be. Without firmer guidance from the federal government, the uneasy relationship remains and millions of CDMs and patients are left praying nothing changes so they can continue to dispense and receive marijuana.

¹³⁴ See *FAQ*, *supra* note 104.

¹³⁵ See *id.*

¹³⁶ *Number of Legal Medical Marijuana Patients*, *supra* note 130.

¹³⁷ See *60 Peer-Reviewed Studies on Medical Marijuana*, *supra* note 125.