An Issue Brief on State Marijuana Laws and the CPA Profession

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Introduction
In November 2014, voters in Alaska and Oregon approved measures to legalize the recreational use of marijuana, making it a regulated product. In Alaska, Measure 2 legalized recreational marijuana for individuals over the age of 21, allowing the state to both create a control board to regulate and tax it. The law will be effective mid-February 2015, and the state will develop rules for marijuana businesses – including marijuana cultivation facilities, product manufacturing facilities, testing facilities, and retail stores – by early fall 2015.\(^1\) Similarly, in Oregon voters approved Measure 91, allowing adults 21 and older to possess up to one ounce of marijuana in public and eight ounces at home. The law, which will go into effect July 1, 2015, delegates marijuana production and sale regulation to the Oregon Liquor Control Commission.\(^2\)

Voters in Washington, DC, also approved a ballot initiative in November 2014 to decriminalize the recreational use of marijuana. Initiative 71 would have allowed residents to grow up to six marijuana plants in their home and possess up to two ounces for their personal use. City lawmakers in the District would have had the authority to create a regulatory structure for the sale and taxation of marijuana. However, the federal spending bill Congress passed in December 2014 blocks the District from using any

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\(^1\) A Summary of Measure 2, an Act to Tax and Regulate the Production, Sale, and Use of Marijuana
\(^2\) Recreational marijuana passes in Oregon: Oregon election results 2014
federal or local funds from implementing the referendum – effectively upending the November vote.  
However, that same spending bill also prohibits the U.S. Justice Department from using funds to go after medical marijuana programs and individuals acting in accordance with state law – somewhat easing the dichotomy between federal law and some states’ laws.  
Additionally, in November 2014 Guam became the first U.S. territory to legalize the use of medicinal marijuana.

Movement in these states follows up on ballot initiatives in November 2012, when Colorado and Washington state voters approved ballot initiatives that legalized the recreational use of marijuana in each of those states. Amendment 64 in Colorado amends the state constitution to legalize and regulate the production, possession, and distribution of marijuana for persons age 21 and older. It also imposes an excise tax on sales of marijuana in the state.  
Initiative 502 in Washington licenses and regulates marijuana production, distribution, and possession for persons age 21 and older. Initiative 502 imposes multiple taxes on the growth, production, and sales of marijuana in the state. It also authorizes the Washington State Liquor Control Board to regulate and tax marijuana sales.

This issue brief gives an overview of U.S. recreational and medicinal marijuana laws, the current legislative/regulatory environment, and information for CPAs considering providing services to businesses that operate in these industries (pages 11-12 include a list of questions for CPAs to ask themselves before considering this line of work).

**Background**

Marijuana is classified as a Schedule 1 controlled substance under the federal Controlled Substances Act of 1970 and is subject to federal prosecution. The U.S. Department of Health and Human Services has taken the position that marijuana has a high potential for abuse, has no currently-accepted medical use in treatment in the U.S., and lacks acceptable safety for use under medical supervision.

A significant number of states (see U.S. States and Marijuana Laws map) have passed laws allowing the use of marijuana as a medical treatment for certain conditions.  
California was the first state to do so
when, in 1996, voters passed Proposition 215. The National Conference of State Legislatures (NCSL) maintains a list of states that allow medical marijuana under individual state laws.\footnote{Ibid.}

Despite states’ assertion of their own respective drug laws, the U.S. Supreme Court has ruled in favor of the Federal Government in \textit{United States v. Oakland Cannabis Buyers’ Coop}\footnote{United States v. Oakland Cannabis Buyers’ Coop, 532 U.S. 483 121 SCT 211, 149 L.Ed.2d 722 (2001)} and \textit{Gonzales v. Raich}.\footnote{Gonzales v. Raich, 545 U.S. I, 125 SCt. 2195, 162 L.E.2d 1 (2005)} These are cases in which the Federal Government sought to enforce the Controlled Substances Act in California and demonstrate that the Federal Government may regulate and criminalize cannabis even when state law allowed use of marijuana for medical purposes. However, the December 2014 federal budget indicates a shift in national policy, as it bans DOJ funds from being used to go after state-legal medical marijuana programs.

In October 2009, U.S. Attorney General Eric Holder announced formal guidelines for federal prosecutors which stated, in part, “The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department’s efforts against narcotics and dangerous drugs, and the Department’s investigative and prosecutorial resources should be directed towards these objectives.”\footnote{U.S. Department of Justice Blog, Memorandum for Selected United State Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana} The guidelines further state that, “claims of compliance with state or local law may mask operations inconsistent with the terms, conditions, or purposes of those laws, and federal law enforcement should not be deterred by such assertions when otherwise pursuing the Department’s core enforcement priorities.”\footnote{Ibid.} The guidelines conclude with the following statement: “Finally, nothing herein precludes investigation or prosecution where there is a reasonable basis to believe that compliance with state law is being invoked as a pretext for the production or distribution of marijuana for purposes not authorized by state law. Nor does this guidance preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests.”\footnote{Ibid.}

In January 2011, the Drug Enforcement Agency (DEA) released the “DEA Position on Marijuana” report which referenced Holder’s October 2009 comments. The report stated, “While some people have
interpreted these guidelines to mean that the Federal Government has relaxed its policy on ‘medical’ marijuana, this in fact is not the case. Investigations and prosecutions of violations of state and federal law will continue. These are the guidelines DEA has and will continue to follow.”14 These guidelines state that entities involved in legalized marijuana efforts -- even in states that permit use of marijuana for medical purposes, such as California -- are all too often fronts for drug dealers.15 It also explains that because of abuses, law enforcement and localities have cracked down on fronts for marijuana dealers.16 The guidelines also describe law enforcement efforts against marijuana dispensaries in California.

Recent Updates on Federal and State Marijuana Law Enforcement

There has been a flurry of activity at the state and federal levels dealing with implementation of state recreational and medical marijuana laws and programs, and how to ensure they co-exist with federal laws. The state and federal landscape appears to be moving towards more lenient penalties for the activities of marijuana-related businesses and consumers. However, even in states that have enacted measures that authorize marijuana, state enforcement and/or prosecution of entities involved in producing, dispensing, and consuming the drug is continuing.

In August 2013, the DOJ announced an update to its federal marijuana enforcement policy that made clear that marijuana remains an illegal drug under the Controlled Substances Act, and federal prosecutors will continue to aggressively enforce this statute. The DOJ identified eight enforcement areas that federal prosecutors should prioritize (generally the same enforcement priorities that the DOJ has followed in its efforts in this area). However, as noted above, this will not necessarily apply to the use of medicinal marijuana in states where such use is legal.

Moreover, the DOJ has stated that the guidance will continue the policy of the Federal Government’s reliance on state and local authorities to address marijuana activity through enforcement of their own narcotics laws. For states such as Alaska, Colorado, Oregon, and Washington that have enacted laws to authorize the production, distribution, and possession of recreational marijuana, the DOJ expects these states to establish strict regulatory schemes that protect the federal interests identified in the DOJ’s

14 The DEA Position on Medical Marijuana
15 U.S. Department of Justice Blog, Memorandum for Selected United State Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana
16 Ibid.
Based on assurances that those states will impose an appropriately-strict regulatory system, the DOJ has decided to defer its right to challenge their legalization laws at this time.

Also in January 2014, the DOJ and the U.S. Department of the Treasury announced that federal regulations would be changed to permit banks to do business with recreational and medical marijuana dispensaries in states where those businesses are legal. Marijuana dispensaries are forced to operate cash-only businesses, which require expensive security measures and leave them susceptible to theft and robberies, because banks have been hesitant to accept money from businesses engaging in activities considered illegal under federal laws. Current law requires banks to file a Marijuana Priority Suspicious Activity Report (SAR) with federal authorities if they believe a business is operating illegally. Under the change, banks must file a Marijuana Limited SAR that says the business is following the government’s guidelines with regard to revenue coming exclusively from legal sales.

It has been reported that some Congressional Republicans have objected to the moves by the Obama Administration to relax prosecution of marijuana-related crimes. In August 2013, the Ranking Member of the U.S. Senate Judiciary Committee, Chuck Grassley (R-IA), said that “instructing law enforcement not to prioritize the prosecution of the large-scale distribution and sale of marijuana in certain states...sends the wrong message to both law enforcement and violators of federal law.” In March 2014, the U.S. House of Representatives (House) passed the “Enforce the Law Act,” a bill to allow either or both houses of Congress to sue members of the executive branch, including the President of the United States, for failing to execute the laws. However, in May 2014, the House also passed a bill to block the federal government from interfering with states that have passed medical marijuana laws. Congress underscored its commitment to this policy with its December 2014 budget approval prohibiting federal funds from being used to go after individuals acting under state-approved medicinal marijuana laws.

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17 Department of Justice press release, August 29, 2013.
20 Ibid.
21 Ibid.
22 Grassley Comments on Obama Administration’s Decision to Not Enforce Federal Marijuana Laws, August 29, 2014
23 Ibid.
24 GOP House Backs State Medical Marijuana Laws, AP, May 30, 2014
25 Congress Passes Historic Medical Marijuana Protections in Spending Bill
Even with the announced changes, the Justice Department continues to prosecute banks engaged in drug-related money laundering. *The New York Times* reported that in December 2012, HBSC agreed to pay a record $1.92 billion settlement with DOJ after the bank was accused of enabling Mexican drug cartels to move money illegally through its American subsidiaries. 26 *The New York Times* also reports that, since 2006, more than a dozen banks have reached settlements with the DOJ regarding violations related to money laundering. 27

Investments in marijuana-related businesses are also being closely examined by the U.S. Securities and Exchange Commission (SEC). In May 2014, the SEC issued an Investor Alert that warned investors about the potential for fraud in microcap (those with a market capitalization between $50-300 million) marijuana-related companies. 28 The SEC stated it had temporarily suspended the trading of securities in five companies that operate in the marijuana industry. 29

**State Medical Marijuana Guidance and Legislation**

A significant number of states (see U.S. States and Marijuana Laws map) have passed laws that allow for public medical marijuana programs. 30 A majority of those states provide guidance for physicians who prescribe, and for patients who grow/transport/consume, medical marijuana. For example, Hawaii law permits the use of marijuana for certain medical needs; however, it does not allow for dispensaries. 31

By comparison, Michigan operates a state medical marijuana program with 126,000 active, registered, qualified patients and 26,000 active, registered, primary caregivers within the Department of Licensing and Regulatory Affairs, the Michigan umbrella agency that also regulates the CPA profession. In 2012, the Michigan Legislature passed three bills that amended the “Michigan Medical Marihuana Act” to allow transportation of marijuana in an enclosed case in the trunk of a vehicle or that is not readily accessible from the interior of the vehicle. It also provided qualifying patients protections in the transportation and use of medical marijuana. 32 Montana’s Board of Medical Examiners has issued guidance in response to “reports of physicians who are certifying patients to use marijuana for medical conditions in a mass screening format and physicians who are conducting certifying evaluations

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27 Ibid.
29 Ibid.
30 [National Conference of State Legislatures](https://www.ncsl.org/research/cannabis-policy/marijuana-laws.aspx), State Medical Marijuana List, March 2014
31 Alaska State Board of Pharmacy 2012 Annual Report
32 Michigan Medical Marihuana Program
exclusively through Internet consultations. New Jersey’s Department of Health runs a medicinal marijuana program and offers guidance on physician requirements and patient eligibility. New Mexico’s Medical Cannabis Program was created in 2007 and allows any qualified patient to obtain a Personal Production License (PPL) to grow medical cannabis for personal use.

In 2014, 26 states considered legislation related to medical marijuana (Alabama, Florida, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, Oklahoma, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, West Virginia, and Wisconsin). Nineteen jurisdictions introduced legislation to treat and regulate marijuana similar to alcohol (Alabama, Alaska, Arizona, the District of Columbia, Florida, Hawaii, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Vermont, and Wisconsin).

Additionally, on December 31, 2013, Governor Rick Snyder (R-MI) signed SB 661, which permits the sale of pharmaceutical-grade cannabis through licensed facilities in the state. On March 4, 2014, the D.C. Council passed a bill that decriminalized marijuana possession in the District of Columbia. The bill, which went into effect on July 17, removes all criminal penalties for possession of up to one ounce of marijuana, replacing those penalties with a fine of $25. On May 28, 2014, Governor Mark Dayton (D-MN) signed a bill to allow medical marijuana to be administered through “alternative care centers” in the state.

33 Medical Marijuana: Physician’s Written Certification for Medical Marijuana and the Bona Fide Physician-Patient Relationship
34 New Jersey Medicinal Marijuana Program
35 New Mexico Medical Cannabis Program
36 Key Marijuana Policy Reform Bills and Initiatives, 2014
37 Ibid
38 D.C Decriminalization Bill Takes Effect
39 Governor Dayton Signs Medical Marijuana Law, Valley News Live, May 29, 2014
CPAs and Good Moral Character

CPAs who are considering providing services to a marijuana-related business need to consider whether their State Board of Accountancy may consider such activity as grounds to refuse to grant or renew a license based on the failure to satisfy the good moral character requirement or as grounds for disciplinary action. It is possible that a CPA from a state that allows marijuana use who has provided services to a “marijuana business” could face licensing difficulties if he or she seeks a reciprocal license in a state where marijuana is illegal. It’s not yet clear how State Boards of Accountancy will apply “good moral character” requirements or impose discipline when it comes to supporting marijuana-related businesses, or if they will take a position at all. Many State Boards do not define what “good moral character” means -- only that a CPA has to have it in order to become licensed in that particular state. License applications typically require character/reference letters from individuals attesting to the applicant’s “good moral character.” In addition, CPAs who are contemplating providing services to marijuana-related businesses should consider whether a State Board would consider it to be an act discreditable when a CPA provides services to businesses that violate federal drug laws, even in a state that allows those businesses to operate legally.
CPAs who are AICPA members must also consider the AICPA’s bylaws and Code of Professional Conduct. If a CPA is disciplined by a State Board of Accountancy or convicted of a felony the Institute is **REQUIRED** to sanction the member pursuant to the automatic discipline bylaws (AICPA Bylaw Section 7.3). \(^{40}\) For more information about how the AICPA’s ethical standards apply, please contact the AICPA Ethics Hotline at 1-888-777-7077 or ethics@aicpa.org.

**Impact of Legalized Marijuana on the CPA Profession**

Since 1996, CPAs have been dealing with the issue of whether they may provide services for medical marijuana dispensaries in states where that activity is legal. Businesses operating in this industry might want CPAs to manage their books, help with tax compliance, and provide a host of other services. Now, with Colorado, Washington, Oregon, and Alaska state laws that legalize the *recreational* use of marijuana in those states, **CPAs have an additional emerging industry to navigate that is state-legal/federally-illegal.**

CPAs considering whether to provide services for medical and/or recreational marijuana businesses need to proceed with caution. Even though the Obama Administration has indicated that prosecution of recreational and medicinal use of marijuana should not be a “top priority”\(^ {41}\) and Congress has prohibited the DOJ from using federal funds to go after medicinal marijuana programs in states where such usage is legal, the U.S. Supreme Court has ruled that the Federal Government has the right to regulate and criminalize cannabis, even for medical purposes. In addition, the material in the aforementioned DEA guidance illustrates that federal and state enforcement efforts continue.

Internal state regulatory conflicts are also emerging. In early 2012, a CPA was approached by marijuana growers in New Mexico to provide accounting services for them. The CPA researched the request and found that the New Mexico Department of Health mandated audits for state medical marijuana dispensaries. The CPA sent a letter to the New Mexico Department of Health for guidance. The Department of Health in turn sent a letter to the New Mexico Public Accountancy Board (Board) asking for the Board to provide guidance on the issue. In February 2012 at its monthly meeting, the Board considered the legal issues surrounding audits of medical cannabis producers in response to the licensee. Board staff were seeking direction regarding how to respond to licensees who inquire about

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\(^{40}\) AICPA Bylaws and Implementing Resolutions of Council  
\(^{41}\) ABC News, Marijuana Not High Obama Priority
this issue and how to proceed in terms of developing an action plan for dealing with the implementation
due to the development of an action plan for dealing with the implementation
issues surrounding the legislation. The issue was considered at the meeting.

Later in February 2012, however, the Board issued a letter to the Department of Health stating that the
issue was “beyond its scope” and declined to issue a letter permitting New Mexico CPAs to conduct
audits of medical cannabis producers because it had “no authority to do so.”42 The Board’s
recommendation to CPAs considering this line of work is similar to the AICPA’s – seek independent legal
advice before considering this line of work. The Board also recommended that the Department of Health
remove the requirement that medical cannabis producers have an independent audit conducted until
“such time that federal and state laws regarding medical cannabis do not conflict with one another.”43
Other state boards of accountancy have addressed the issue for CPAs. Board members at an early 2014
Arizona Board of Accountancy meeting considered the issue of CPAs providing services for marijuana-
related businesses and suggested that each CPA and CPA firm should conduct a risk assessment as they
do with all of their clients to determine whether they want to take on this type of client.

Questions CPAs Should Ask when Considering Working for Marijuana Producers/Distributors
In the states that have passed laws or referendums allowing medicinal or recreational marijuana use,
State Boards of Accountancy have not yet provided any guidance for CPAs looking to provide services to
businesses that grow/sell marijuana. This dynamic puts CPAs in a gray legal area. They need to satisfy
the requirements of their State Boards of Accountancy for “good moral character” and the “acts
discreditable” requirements in their respective states, while at the same time considering the potential
business opportunities.

In light of the ambiguous information available from state and federal authorities, CPAs need to ask
themselves a series of questions:

1. What, if any, is the position of my State Board of Accountancy on CPAs providing services to
marijuana growers/distributors?
2. What are the legal risks of providing services to these businesses in my state?
3. Is there a risk of prosecution to a CPA firm that provides services to marijuana-related
businesses?

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42 Letter from New Mexico Public Accountancy Board to New Mexico Department of Health, re: Public Accountancy Board
Ruling Regarding Audits of Medical Cannabis Producers, dated February 23, 2014
43 Ibid.
4. What is the likelihood that the Drug Enforcement Administration (DEA) or the Department of Justice is going to prosecute this marijuana-related business?

5. How are CPAs in my state currently offering services to state-recognized medical marijuana dispensaries?

6. How will providing the contemplated services affect my malpractice insurance? How will it affect my professional liability insurance?

7. What is the likelihood that I may be disciplined, sanctioned, or lose my license by providing services to these businesses?

8. What procedures/policies should I consider to assess whether the prospective client understands the laws of their state concerning marijuana-related businesses and does the client follow those rules?

CPAs considering or providing services for the medicinal or recreational marijuana industries should consult their legal counsel and their State Board of Accountancy for guidance. Ultimately, it is up to each individual CPA and his/her firm as to whether they are comfortable providing services, while the law and ethical requirements remain uncertain.

**What does this mean for my Firm’s Drug-Free Workforce Policy?**

Finally, the arrival of this new legal environment raises questions not only about the provision of services, but also about workplace drug laws and company drug-free policies. Should the owners of CPA firms in states with legalized marijuana laws worry about workers showing up to the workplace under the influence, either through recreational or medicinal use? Nancy Delogu, an expert on federal and state drug-free workplace and drug-testing issues at Littler Mendelson, thinks not so much. “The highest courts in California, Montana, Oregon, and Washington have ruled, in various contexts, that as long as federal law prohibits the use of marijuana for medical reasons, the states cannot actually legalize marijuana use and therefore cannot require employers to accommodate such use.” Additionally, in April 2010 in *Emerald Steel Fabricators v. Bureau of Labor and Industries*, the Oregon Supreme Court found “that an employer can fire a worker for using medical marijuana, even if he has a card from the state authorizing its use.”

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44 Marijuana Laws Liberalized in Colorado, Washington – But Effect on Workplace Policies Likely Small
45 Cheat Sheet: The in-house lawyer’s guide to marijuana legalization, Inside Counsel, February 12, 2013
However, in February 2013, Julie Beck and Mary Swanton wrote in *InsideCounsel* that “employers in Arizona, Connecticut, Rhode Island, and Maine should be careful. These states all have laws that require employers to accommodate medical marijuana, but, though federal law may preempt those measures, none has yet faced a court test. In Colorado, employers cannot terminate employees for lawful conduct they engage in outside of the workplace during non-working hours. It’s possible that employees could use that [law] to argue that employers can’t ban workers from using now-legal recreational marijuana on their own time. Washington doesn’t have an off-duty conduct law.”

So what should CPAs do? Delogu recommends reviewing existing policies to ensure that they clearly express the firm’s policy on marijuana use and communicate to employees and applicants what effect, if any, the new laws will have on existing policies. Delogu says, “Employees may understandably be confused as to whether their use of marijuana in accordance with these state initiatives is acceptable to their employer, and employers should be prepared to answer questions from employees, applicants, and employee representatives.”

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46 Ibid.
47 Marijuana Laws Liberalized in Colorado, Washington – But Effect on Workplace Policies Likely Small
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Resources
• AICPA/NASBA Uniform Accountancy Act, Sixth Edition
• NCSL List of States Medical Marijuana Laws
• Title 21 United States Code (USC) Controlled Substances Act
• White House Federal Laws Pertaining to Marijuana