

# Government Affairs Extra

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## Craft Beer and Marijuana

It's hard to deny that marijuana has a cultural connection with craft beer, or at least with substantial segments of the craft brewing community. From Sweetwater's 420 Pale Ale to the markings on a can of Oskar Blues' Dale's Pale Ale, many craft brewers have signaled to their fans that they know a thing or two about the rituals and lingo of marijuana consumption. But with the legalization of recreational cannabis by several states since 2012, many brewers have been thinking more ambitiously about combining their brewing business with one or more aspects of the emerging marijuana business.

Marijuana currently operates in a very uncertain place in the U.S. legal system. According to the National Conference of State Legislatures, seven states and the District of Columbia have legalized the recreational use of cannabis, and California will begin accepting applications and issuing licenses for dispensaries for recreational use on January 1, 2018. Moreover, 29 states, the District of Columbia, Guam, and Puerto Rico currently permit the medical use of marijuana. Many of these states have developed complex and extensive excise tax, distribution, packaging, and marketing rules to regulate this socially sensitive business.

The federal government, however, has not yet significantly changed its position on the consumption of marijuana. In the waning days of the Obama administration, the Drug Enforcement Agency (DEA) denied a petition to begin a rulemaking that would remove marijuana from Schedule I of the Controlled Substances Act (CSA), a category reserved for drugs that have "no currently accepted medical use." The DEA relied on an evaluation from the Department of Health and Human Services (HHS), which concluded that marijuana has a high potential for abuse, no accepted medical use, and lacks an acceptable level of safety for use even under medical supervision. The Food & Drug Administration (FDA) has approved three drugs with synthetic versions of a substance that is present in or that acts similarly to substances present in the cannabis plant, but the FDA has not approved marijuana itself as a safe or effective drug to treat any disease.

Although the Obama administration did not substantially alter existing federal laws on marijuana, it did make halting steps toward marijuana legalization. Congress passed the Agricultural Act of 2014 (Farm Bill), which allowed limited production of industrial hemp for research purposes. Among other things, the Farm Bill permits the cultivation of cannabis with low concentrations of delta-9 tetrahydrocannabinol (THC)—the primary intoxicating substance in marijuana—by authorized higher education research institutions and state departments of agriculture.

More importantly, the Obama administration's Department of Justice issued a series of guidance memos to federal prosecutors on medical and recreational marijuana that modified existing policies. The most significant memo has become known as the Cole Memo. The 2013 memo sets

enforcement priorities for federal prosecutors evaluating marijuana operations operating in compliance with relevant state laws and indicates that the federal government will rely on state and local law enforcement and regulatory bodies to address marijuana activity under their own drug laws. Prosecutors are to exercise prosecutorial discretion and focus on persons whose conduct interferes with one or more of eight listed factors:

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 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.

The Obama administration issued additional guidance on marijuana-related financial crimes, such as money laundering, which also recites these eight priorities. Under that memo, prosecution may be appropriate if the financial institution or individual providing banking services knows the business is diverting marijuana from a state where marijuana sales are regulated to one where sales are illegal under state law.

## UNCERTAINTIES IN FEDERAL LAW

The inauguration of Donald Trump as the 45th president portended potentially major changes in federal policy. On the subject of medical marijuana, Trump voiced support for its legalization and use during his campaign. But he also said the legalization of recreational cannabis in Colorado was “bad” and “causing a lot of problems” on several occasions. Around the same time, Trump indicated that he views legalization as a states’ rights issue. More ominously, he appointed Jeff Sessions as attorney general of the United States. While in the Senate, Sessions was a strident critic of easing legal restrictions on marijuana use, and his posture upon appointment did not appear to change at all. To many new marijuana businesses, the future looked bleak indeed.

So far, however, no massive retrenchment has occurred. Most surprisingly, the Trump administration has yet to disavow the Cole Memo. This is particularly surprising, as the Cole Memo does not have the force of law and could be cast aside without any need for Congressional

action or administrative rulemaking. As of September, the Department of Justice had merely announced a task force to evaluate the Cole Memo and marijuana policies.

Moreover, the prospect of renewed federal enforcement against businesses operating in accordance with state law has helped galvanize a bipartisan group (the Congressional Cannabis Caucus) to protect the legalization decisions of their respective states. The number of federal legalization bills introduced has increased in the current Congress, and those bills appear to be attracting more co-sponsors than in prior sessions of Congress. That said, Trump issued a signed statement objecting to a provision in the Consolidated Appropriations Act of 2017, which funded the federal government through September 30, 2017. The law prohibits the Department of Justice from using funds to prevent certain states, territories, and the District of Columbia from implementing their own laws that permit the use, cultivation, distribution, and possession of medical marijuana. Trump declared that he would treat the provision consistent with his constitutional responsibility to ensure the laws are faithfully executed, which essentially means that he deemed the provision unconstitutional.

Thus, the current state of federal law remains quite uncertain. Even under the Obama administration, the Cole Memo provided little comfort, as it represented mere guidance to prosecutors and would not serve as a legal shield to anyone facing a criminal prosecution or other adverse action (e.g., asset forfeiture) under federal drug laws. And with the announced hostility to legalization by the current administration, the risks of entering into the marijuana trade—even when taking place in a state with a comprehensive regulatory structure—have only increased.

## THE RISKS INVOLVED

Brewers seeking to enter the marijuana business as investors or more face a host of questions and risks. The fact that marijuana remains a Schedule I drug under federal law carries the risk of significant criminal penalties. Trafficking in 100 to 999 kilos of marijuana carries a civil fine ranging between \$5 million and \$25 million, or a five- to 40- year prison sentence for a first offense. A host of additional civil fines and prison sentences arise from related conduct, including using the internet to deliver, distribute, or dispense controlled substances; advertising the sale of controlled substances; distribution near a truck stop or highway rest area; and distribution near schools, colleges, or “youth-centered recreational facilities.” In addition, federal laws subject all property used in an offense involving Schedule I substances, and all proceeds of the offense, to forfeiture to the U.S. government. In short, should the Trump administration decide to vigorously enforce current drug laws against marijuana businesses in accordance with state laws, the penalties would quickly ruin businesses and lives.

Even if the Cole Memo continues to keep federal prosecutors from bringing the full weight of the criminal justice system to bear on businesses operating in accordance with state marijuana laws, brewers face additional risks due to alcohol’s status as a heavily regulated commodity. Brewers must hold one or more Brewer’s Notices to operate, and many also hold federal Basic Permits to operate an importer, wholesaler, winery, and/or distillery. In addition, brewers hold a host of

state-issued licenses and permits, most critically in the state(s) in which they operate breweries, but also in states where they ship and store their beer.

Federal permits and state licenses and permits often are granted on the condition that the holder operates in compliance with the law. Many licensing schemes also inquire as to the fitness of the business and/or its ownership and management based on their moral fitness and character. Alcohol regulators, particularly ones in jurisdictions that are not friendly to the concept of legalizing marijuana sales, can certainly characterize any operation involving marijuana as unlawful under federal law. Moreover, amorphous criteria like moral character and fitness could be cited by a regulatory body as a reason an owner or manager's involvement in the marijuana trade (even if lawful in the jurisdiction in which it takes place) renders that person ineligible for a license to produce, distribute, and/or retail alcohol beverages. And although a full exploration of these issues falls beyond the scope of this article, the connection between an alcohol business and the marijuana trade can, depending on the jurisdiction and other circumstances, jeopardize the business' ability to obtain, renew, and/or hold an alcohol beverage license or permit.

Further obstacles arise where a brewer seeks to incorporate marijuana directly into its brewing business. The addition of hemp, marijuana, or any of their parts or byproducts to beer would trigger the formula approval requirement contained in the TTB's domestic brewery operations regulations. These regulations arise under the Internal Revenue Code, not the Federal Alcohol Administration Act (FAA Act) and, as such, do not require the beer to move in "interstate or foreign commerce" in order to trigger the formula requirement. In other words, contrary to popular belief, even if a brewery never sells a beer to a buyer in another state, the TTB's formula requirement still applies.

The formula requirement accordingly gives the TTB a "gatekeeping" mechanism to screen recipes of beers containing marijuana-derived ingredients. Since the 1990s, the TTB and its predecessor agency (ATF) have approved the use of non-THC hemp in the production of "malt beverages" (the FAA Act term for beer). In applying for formula approval, the applicant must satisfy the TTB that the hemp comes from a lawful source (imported or from an approved growing operation in the U.S.) and contains a minimum amount of THC, and that the finished product contains nothing (e.g., THC) that federal law considers a controlled substance.

In the past several years, a handful of brewers have attempted to add other marijuana-derived ingredients to beer. In 2015, Dad & Dudes Breweria announced plans to brew a pair of IPAs using cannabidiol, often known as CBD, for serving at the Great American Beer Festival. It soon faced pushback from the TTB, was reportedly asked to surrender its formula, and, at the time of this writing, is no longer brewing beers with CBD. The brewery has had to dial back plans while it seeks TTB approval for adding CBD or another marijuana extract to beer.

## MARIJUANA-DERIVED INGREDIENTS

The TTB has published no clarification on the use of marijuana-derived ingredients since its hemp beer policy in 2000. But unofficially, officials have indicated (for example at CLE International's Wine, Beer & Spirits Law Conference held in Portland, Ore. in September) that it will not approve a formula for a beer if the beer contains any ingredient meeting the definition of a Schedule I

product under the Controlled Substances Act. The CSA defines marijuana broadly to include “all parts of the plant *Cannabis sativa* L., whether growing or not” as well as the seeds, resin, and every compound, derivative, or preparation of the plant, seeds, or resin. The definition of marijuana does not include sterilized seeds incapable of germination, the mature stalks of such plant, fiber produced from mature stalks, certain derivatives of the mature stalks, or oil or cake made from the seeds of the plant.

If the TTB adheres to the informal position it has articulated, then, it would consider marijuana-derived ingredients a Schedule I drug and therefore prohibited unless the ingredients are found only within the mature stalks or other excepted parts of the plant listed in the definition of marijuana. In short, until federal law changes, it may be a long way before CBD-infused beer hits the market.

Even in states where marijuana is legal, state law may present additional challenges to a brewer seeking to directly integrate the weed into its brewing business. The statutes and regulations governing legal recreational marijuana use often prohibit such use on the premises of an alcohol licensee. While there are initiatives to change that status quo in some places (e.g., Colorado), brewers need to carefully scrutinize their home state’s laws—even in states that have legalized recreational marijuana—to avoid inadvertently putting their licenses in jeopardy.

## LABELING

Even if a brewer can navigate the TTB formula process and receive approval of a beer containing marijuana-derived ingredients, labeling presents yet another obstacle. As The New Brewer readers know, all “malt beverages” (with the exception of a small number of beer products, including gluten-free beers made without malted barley) must receive a “certificate of label approval” (COLA) if the product will enter into interstate commerce. Here, the TTB’s only published policy (articulated in the ATF’s 2000 hemp beer policy) is that the brewer is “prohibited from using depictions, graphics, designs, devices, puffery, statement, slang, representations, etc. implying or referencing the presence of hemp, marijuana, any other controlled substance; or any psychoactive effects.” Since then, the TTB has informally stated that it continues to adhere to that policy. More broadly, however, the TTB’s COLA approval decisions have indicated a slow loosening of its previously staunch stance on drug lingo and references in the labeling of alcohol beverages (not just those containing an ingredient like hemp). Perhaps the most notable example of this occurred in 2008, when Mt. Shasta Brewing Company came under TTB scrutiny for marketing its “Weed Ales” brewed in Weed, Calif. Tongue-in-cheek slogans like “Try Legal Weed” initially prompted the TTB to demand that Mt. Shasta change its marketing, which included the phrase on the beer’s bottle caps. After substantial press coverage largely critical of the TTB’s position, the brewery was allowed to continue marketing its beers with the slogans.

To sum up, the spread of recreational marijuana laws through the states does not yet create a clear or risk-free path for brewers to integrate the cannabis business, cannabis use, or cannabis-derived ingredients into their brewing operation. Given the considerable public sentiment in favor of greater liberalization of marijuana laws, some brewers may decide to take risks in order to become early participants in this exciting new business opportunity. The more cautious will likely

survey the layers of legal uncertainty and decide to wait for changes in conflicting federal laws before risking a situation where their brewery investment goes “up in smoke.”

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