

An Issue Brief on State Marijuana Laws and the CPA Profession

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Overview

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.

State and Federal Legislative Background

Twenty-three states, Guam, and Washington, DC, have all passed laws allowing the use of marijuana as a medical treatment for certain conditions. A majority of those states provide guidance for physicians who prescribe, and for patients who grow/transport/consume, medical marijuana. For example, Hawaii law has permitted the use of marijuana for certain medical needs since 2000; however, dispensaries only became legal in July 2015.¹ By comparison, the Michigan Department of Licensing and Regulatory Affairs, an umbrella agency that also regulates the CPA profession, operates a state medical marijuana program that has almost 100,000 registered patients.²

Just 16 years after California became the first state to approve medical marijuana in 1996, voters in Colorado and Washington approved ballot initiatives in November 2012 that legalized marijuana for recreational use. Amendment 64 in Colorado amended 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.³ Initiative 502 in Washington licenses and regulates marijuana production, distribution, and possession for persons age 21 and older, and also imposes multiple taxes on the growth, production, and sale of marijuana in the state – all while authorizing the Washington State Liquor and Cannabis Board to regulate and tax marijuana sales.⁴

In November 2014, two more states approved measures to legalize and regulate the recreational use of marijuana. In Alaska, Measure 2 legalizes recreational marijuana for individuals over the

¹ Hawaii State Legislature. [HB321 HD1 SD2 CD1](#). 24 July 2015.

² Ramirez, Charles. [Michigan sees another dip in medical marijuana patients](#). *The Detroit News*. 18 January 2015.

³ Colorado State Government. [Gov. Hickenlooper signs Amendment 64 proclamation, creates task force to recommend needed legislative actions](#). 10 May 2012.

⁴ Washington Secretary of State. [Washington Secretary of State Certification of Initiative 502](#).

age of 21, allowing the state to create a control board to regulate and tax it.⁵ Similarly, voters in Oregon 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.⁶

In November 2014, voters in Washington, DC, also approved a ballot initiative to decriminalize the recreational use of marijuana. Initiative 71 would allow 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 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 federal or local funds to implement the referendum – effectively upending a key component of the November vote.⁷ Interestingly, though, 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.⁸

In many ways, the conflict between DC voters and Congress is representative of the problem between the federal government and those states that have legalized marijuana either for medical or recreational use. Despite the fact that nearly half of the country has legalized marijuana in some form, in August 2013, the Department of Justice announced an update to its federal marijuana enforcement policy that made clear that marijuana remains an illegal, Schedule 1 controlled substance under the Controlled Substances Act of 1970, and that federal prosecutors will continue to have the authority to enforce this statute. A “Schedule 1” designation means that the federal government has taken the position that marijuana has a high potential for abuse, has no currently-accepted use for medical treatment in the U.S., and lacks acceptable safety for use under medical supervision.

⁵ Marijuana Policy Project. [A Summary of Measure 2, an Act to Tax and Regulate the Production, Sale, and Use of Marijuana](#). *The Marijuana Policy Project*. 2015.

⁶ Crombie, Noelle. [Recreational marijuana passes in Oregon: Oregon election results 2014](#). *OregonLive.com*. 4 November 2014

⁷ Davis, Aaron C and Ed O'Keefe. [Congressional spending deal blocks pot legalization in D.C.](#) *The Washington Post*. 9 December 2014.

⁸ Ferner, Matt. [Congress Passes Historic Medical Marijuana Protections in Spending Bill](#). *The Huffington Post*. 14 December 2014.

At the same time, the U.S. Department of Justice has said that it will focus its efforts on drug trafficking and keeping marijuana out of the hands of minors, not on prosecuting individuals who are following state laws, and that the federal government will rely 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 Department of Justice expects those states to establish strict regulatory schemes that protect the federal interests identified above.⁹ Based on assurances that those states will impose an appropriately-strict regulatory system, the Department has decided to defer its right to challenge their legalization laws at this time.

Moreover, in February 2014, the U.S. Department of Justice and the U.S. Department of Treasury both issued guidance for banks that wish to do business with recreational and medical marijuana dispensaries in states where those businesses are legal.¹⁰ Previously, banks were required to file a Marijuana Priority Suspicious Activity Report (SAR) with federal authorities if they believed a business was operating illegally.¹¹ 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.¹² The guidance from the Department of Justice does note that banks could still face prosecution if they provide financial services to marijuana businesses that conduct activities in violation of state or federal law, so it has not had the widespread effect of giving legal comfort to financial institutions.

“For example, if a financial institution or individual provides banking services to a marijuana-related business knowing that the business is diverting marijuana from a state where marijuana sales are regulated to ones where such sales are illegal under state law, or is being used by a criminal organization to conduct financial transactions for its criminal goals, such as the concealment of funds derived from other illegal activity or the use of marijuana proceeds to support other illegal activity, prosecution for violations of

⁹ U.S. Department of Justice Office of Public Affairs. [Justice Department Announces Update to Marijuana Enforcement Policy](#). *U.S. Department of Justice*. 29 August 2013.

¹⁰ U.S. Department of Treasury Financial Crimes Enforcement Network. 2014. [BSA Expectations Regarding Marijuana-Related Businesses](#). *U.S. Department of Treasury*. 14 February 2014.

¹¹ *Ibid.*

¹² *Ibid.*

18 U.S.C. §§ 1956, 1957, 1960 or the BSA (Bank Secrecy Act) might be appropriate. Similarly, if the financial institution or individual is willfully blind to such activity by, for example, failing to conduct appropriate due diligence of the customers' activities, such prosecution might be appropriate.”¹³

The Department of Justice could feasibly apply similar standards to other industries working with marijuana businesses. As such, the AICPA recommends that all CPAs and CPA firms interested in providing services to marijuana businesses review the full guidance offered by the [U.S. Department of Justice](#).

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.¹⁴ The SEC stated it had temporarily suspended the trading of securities in five companies that operate in the marijuana industry.¹⁵

The dichotomy between federal and state laws and regulations will continue to be a growing problem as more states adopt policies supporting the medicinal and recreational use of marijuana. In 2015, 18 states considered legislation related to medical marijuana (Alabama, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Pennsylvania, South Carolina, Tennessee, Texas, Utah, and West Virginia), and 18 also introduced legislation to treat and regulate marijuana similar to alcohol (Arizona, Connecticut, Florida, Georgia, Hawaii, Louisiana, Maryland, Massachusetts, Missouri, Nevada, New Jersey, New Mexico, New York, Pennsylvania, Rhode Island, Texas, Vermont, and Washington DC).¹⁶ Additionally, five more states are expected to prepare initiatives

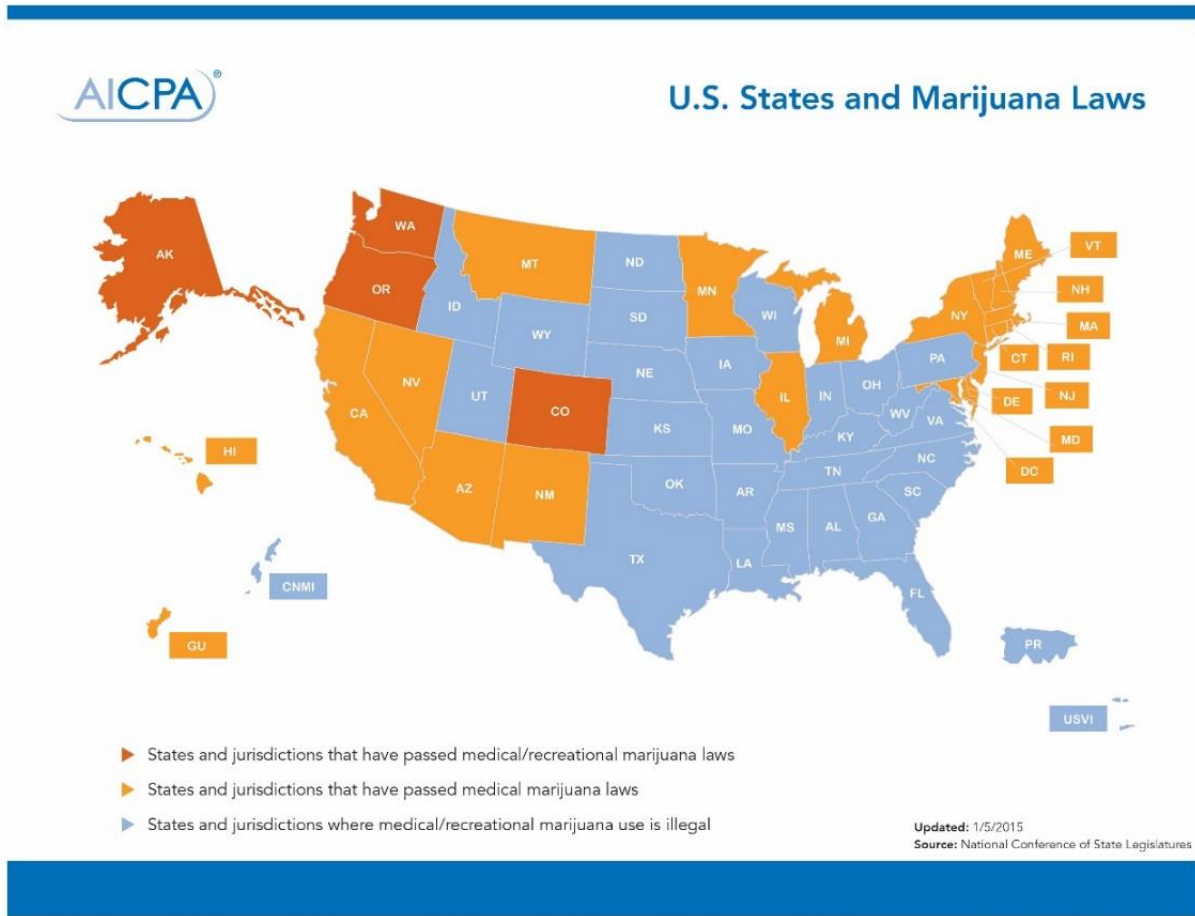
¹³ Cole, James M. [Guidance Related to Marijuana Related Financial Crimes](#). *U.S. Department of Justice Office of the Deputy Attorney General*. 14 February 2014.

¹⁴ U.S. Securities and Exchange Commission Office of Investor Education and Advocacy. [Investor Alert: Marijuana-Related Investments](#). *U.S. Securities and Exchange Commission*. 16 May 2014.

¹⁵ *Ibid.*

¹⁶ Marijuana Policy Project. [2015 Marijuana Policy Reform Legislation](#). *Marijuana Policy Project*. 11 May 2015.

legalizing the recreational use of marijuana in 2016: Arizona, California, Maine, Massachusetts, and Nevada.¹⁷



Guidance from State Boards of Accountancy

While almost half the country now allows marijuana to be sold for medical purposes, most state boards of accountancy have taken a “wait-and-see” approach when it comes to issuing guidance for CPAs offering services to marijuana businesses. As of January 8, 2016, only seven state boards of accountancy had issued specific guidance for CPAs who may wish to provide such services.

In 2014, the Washington State Board of Accountancy issued [guidance](#) stating, “Pending changes in federal marijuana enforcement policy, the Executive Director believes that offering or

¹⁷ Topaz, Jonathan. [The new clash over cannabis](#). *Politico*. 11 January 2015.

performing professional services to those commercial business enterprises licensed by the Washington State Liquor Control Board (WSLCB) to produce marijuana, process marijuana, and sell marijuana products for recreational use as defined in Initiative No. I-502 is not specifically prohibited by the Public Accountancy Act or Board Rules.”¹⁸ The Board also encouraged CPAs to consider potential issues arising due to the dichotomy between state and federal laws before taking on any such clients.

In March 2015, the Oregon Board of Accountancy released [guidance](#) stating that it will not take action against a CPA or CPA firm that elects to provide services to a state-legal marijuana business simply for providing services to that business.¹⁹ However, it also stated that CPAs should consider the “potential risks and uncertainties involved, including but not limited to the continued uncertainty surrounding enforcement of applicable federal drug laws and related provisions of the Internal Revenue Code.”²⁰

The Connecticut State Board of Accountancy has also [stated](#) that it, “will not pursue independent disciplinary action against Connecticut CPAs or CPA firms who are operating within the bounds of state law.”²¹

In November 2015, the Nevada State Board of Accountancy wrote that:

Nevada licensees and firms that elect to provide services to the marijuana industry legalized in any state in which the licensee practices will not face action by the Board based solely on the fact that the licensee or firm is providing such services. However, licensees are reminded that the federal government views such activity as a federal criminal offense. The Board's position does not negate the possibility that disciplinary

¹⁸ Washington State Board of Accountancy. [Position Statement of the Executive Director of the Washington State Board of Accountancy](#). 2015.

¹⁹ Oregon Board of Accountancy. [Guidance for Licensees Providing Services to the Marijuana Industry](#). 19 March 2015.

²⁰ Ibid.

²¹ Connecticut State Board of Accountancy. [Position Statement of the Connecticut State Board of Accountancy on Recent Developments Regarding State Marijuana Laws](#). 2015.

action may be taken by the Board should a licensee be found guilty of a federal criminal act.²²

The Maryland Board of Public Accountancy also issued guidance in 2015, stating, “Upon advice of counsel, in light of the current state of Maryland and Federal law, the Board will take no regulatory action against a CPA or firm solely on the basis that the CPA or firm provides services to a business involved in the sale or distribution of marijuana, provided that the business is operating legally under applicable state law.”²³

Similarly, the Colorado Board of Accountancy wrote in December 2015 that, “It is the Board’s position that offering to perform or performing professional services for clients in the marijuana industry who are in compliance with Colorado Medical Marijuana Code and the Colorado Retail Marijuana Code is not in itself specifically prohibited by the Accountancy Act codified in Section 2 of Title 12 of the Colorado Revised Statutes or the State Board of Accountancy Rules.”²⁴

Finally, in response to a petition from a practitioner, the Florida Board of Accountancy stated in 2015 that:

...the provision of public accounting services, as defined in Section 473.302(8), FS, to marijuana-related businesses in states where marijuana-related businesses have been legalized, in the absence of a criminal conviction of the certified public accountant for the provision of those services, in and of itself does not constitute a lack of good moral character.”²⁵

Outside of these seven states, state boards of accountancy have offered little specific guidance to CPAs regarding this issue. This is true even in states that have recreational marijuana laws (such as Colorado, where the board is discussing draft language similar to that issued by Oregon and

²² Nevada State Board of Accountancy. Guidance for Licensees Providing Services to the Marijuana Industry. 2015.

²³ Gring, Dennis L. Email from Maryland Board of Public Accountancy Executive Director. 2015.

²⁴ Colorado Board of Accountancy. [Colorado Board of Accountancy’s Position Statement Regarding Certified Public Accountant Certificate Holder’s Providing Services to the Marijuana Industry](#). December 2015.

²⁵ Florida Board of Accountancy. Response to Petition for Declaratory Statement by Howard, Howard and Hodges, Certified Public Accountancy and Consultants. 2015.

Washington), and those states that have attempted to mandate audits for marijuana-related businesses. For example, in 2010, the New Mexico Department of Health began mandating audits for nonprofit medical marijuana dispensaries. One such dispensary approached a CPA about providing this service, and the CPA sought direction from the New Mexico Department of Health. The Department of Health in turn sent a letter to the New Mexico Public Accountancy Board asking for the board to provide guidance on the issue. The board responded to the Department of Health by 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.”²⁶ The board recommended that CPAs considering this line of work seek independent legal advice, and 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.”²⁷ The audit requirement remained in effect as of February 2015, when the New Mexico Department of Health released its most updated version of rules.²⁸

Professional Concerns for CPAs Working with Marijuana Businesses

As mentioned above, while the state and federal landscape appears to be moving toward more lenient penalties for the activities of marijuana-related businesses and their consumers, marijuana itself remains a Schedule 1 drug according to the federal government, and most state boards have not issued official positions on the issue. As such, CPAs and CPA firms need to consider several factors before deciding to provide services to marijuana-related businesses.

CPAs should first determine how their state board of accountancy defines and applies the “good moral character” requirement, and what their board considers to be an act discreditable. Many state boards do not define what “good moral character” means – only that a CPA must have it in order to become licensed in that particular state. A state board of accountancy could consider providing services to marijuana-related businesses as grounds to refuse to grant or renew a

²⁶ 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.

²⁷ Ibid.

²⁸ New Mexico Commission of Public Records. [Licensing requirements for producers, couriers, manufacturers and laboratories; Section 7.34.4.23\(B\)\(2\)](#). *New Mexico Register*. 27 February 2015.

license based on the failure to satisfy the good moral character requirement, or as grounds for disciplinary action, although none have made such a determination so far. Additionally, it is theoretically possible that a CPA who has provided services to a marijuana business in a state where such business is legal could face licensing difficulties if he or she seeks a reciprocal license in a state where marijuana is illegal. Furthermore, CPAs who are contemplating providing services to marijuana-related businesses should consider whether a state board would consider it to be an act discreditable under that state's accountancy statute when a CPA provides services to businesses that violate federal drug laws, even in a state that allows those businesses to operate legally.

The contrast between state and federal laws, combined with the lack of direct guidance from most state boards of accountancy, puts CPAs in a legal gray area. In addition to consulting with his or her state board of accountancy for guidance on "good moral character" and "acts discreditable," a CPA interested in offering services to marijuana businesses should consider the following questions and discuss his or her concerns with legal counsel:

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?
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 other 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? (See [page 18](#) for more information on 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 in order to assess whether the prospective client understands the laws of his or her state concerning marijuana-related businesses and if the client is following those rules?

CPAs should also consider conducting background investigations on all key principals in the business to determine if any have prior convictions related to drug issues. While a CPA may decide to work with a marijuana business that has a principal with such a conviction, the CPA should nevertheless be aware of this information at the outset of any engagement.

As of May 2015, the AICPA is not aware of any state boards of accountancy that have taken action against a CPA for providing services to a marijuana business, nor has the AICPA Professional Ethics Team received any referrals from state boards for such action. However, CPAs who are AICPA members must consider the AICPA's bylaws and Code of Professional Conduct. While the AICPA Professional Ethics Executive Committee has not taken a formal position on this issue, [AICPA Bylaws](#) sections 7.3.2.1, 7.3.2.3 and 7.3.1.1 **REQUIRE** the Institute to sanction a member who is disciplined by a state board of accountancy or convicted of a crime punishable by more than a year.²⁹ 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.

While the law and ethical requirements remain uncertain, it is ultimately up to each individual CPA and his/her firm as to whether they are comfortable providing services to businesses in the marijuana industry.

Providing Attest Services to Clients in the Marijuana Industry

Businesses operating in the marijuana industry are seeking both assurance and non-assurance attest services, including audits, reviews, and agreed upon procedures engagements. Marijuana businesses in New Mexico and Minnesota are required to have an audit performed annually, for example. As such, the need for CPA services in these two states is great.

²⁹ American Institute of CPAs. [AICPA Bylaw Section 730](#). 18 October 2003.

CPAs wishing to provide services to these businesses must first address the issue of competency. Does the CPA have enough knowledge of the industry to plan an engagement properly? Competence can be attained from research, CPE, and consulting with individuals who have an advanced knowledge of the industry, but the availability of such resources for this industry are still limited.

A CPA should fully understand the entity, including the legal and regulatory environment of the industry, in order to assess the risk of material misstatement – a challenge when that environment is ever-changing and unclear. CPAs may find it difficult to get sufficient appropriate audit evidence about compliance with laws and regulations, for example, when it is unclear whether a recreational marijuana business is by its very nature out of compliance with laws and regulations.

In planning an audit and determining the risks of material misstatements, a CPA should consider the numerous risks associated with businesses in this industry. While any business has risks, there are several risks that are unique to marijuana businesses. For example, in addition to the legal and regulatory concerns discussed above, marijuana-related businesses often work on a cash-only basis due to the fact that banks have been hesitant to accept money from businesses engaging in activities considered illegal under federal laws.³⁰ High-cash businesses are more susceptible to theft and fraud, as owners can under-report cash or borrow from an outside source and over-report. Additionally, having a bank count a client's funds increases reliability. This factor is removed when a CPA is relying solely on the client's own count of his or her cash flows.

Inventory is another factor CPAs are required to consider when planning procedures to gain sufficient appropriate audit evidence. How can the CPA determine the quality and value of the product being produced? Will the CPA rely on an independent third party to verify such information, and – if so – how will they locate and verify the credentials of such an individual? The CPA should also consider and understand the internal control environment, as the inventory is highly susceptible to theft.

³⁰ U.S. Department of Treasury Financial Crimes Enforcement Network. 2014. [BSA Expectations Regarding Marijuana-Related Businesses](#). U.S. Department of Treasury. 14 February 2014.

In planning for an engagement, a CPA will also need to assess the likelihood of the business's ability to continue to operate. Given the uncertainty of federal laws, banking issues, and financing concerns, there may be conditions that lead a CPA to have substantial doubt about a marijuana business's ability to continue as a going concern. In such cases, the CPA should identify management's plans to address these issues, and should include any concerns in his or her report.

After deciding to engage in an audit, a CPA may find that the uncertainties are so material and pervasive to the financial statement that they are unable to obtain sufficient appropriate audit evidence. In these cases, entities sometimes request that the audit engagement be switched to a review engagement to avoid an adverse or qualified opinion. Such a request is not considered a reasonable justification by professional standards, and the CPA is not permitted to comply.³¹ Rather, in situations when there is not enough evidence to issue an opinion, the practitioner is required to either issue a disclaimer of opinion or withdraw from the engagement. Given the circumstances surrounding this industry, however, a disclaimer is not without value. The CPA can be clear in his or her report that the disclaimer of opinion is the result of the legal, regulatory, and financial circumstances surrounding the industry – not issues with management. Even when the CPA is able to perform an audit without issuing a disclaimer, the CPA may consider including an “emphasis of matter” paragraph in his or her report that highlights the unique circumstances surrounding this industry.

While many businesses may initially inquire about audit or other assurance services, a CPA may also wish to consider performing services such as an agreed upon procedures engagement. In this type of engagement, the practitioner does not try to obtain reasonable or even limited assurance. Rather, the CPA performs procedures that have been agreed upon with the client and then describes the findings in his or her report. Before engaging in an agreed upon procedures engagement, the CPA should come to a written agreement with the client that describes in clear and objective terms the services the CPA will provide.

³¹ American Institute of CPAs. [AU-C Section 210 Terms of Engagement](#). Paragraphs .14 and .A37. *AICPA Professional Standards*. 15 December 2012.

Providing Tax Services to Clients in the Marijuana Industry

In addition to attest services, clients operating in the marijuana industry may seek assistance with tax issues. While much of the guidance related to tax returns for clients in the marijuana industry is unclear, there are some rules that are not in question. For example, the IRS requires taxpayers to report all income, regardless of whether it is obtained legally or illegally. At the same time, Section 280E of the Internal Revenue Code states that taxpayers cannot deduct expenses related to income they obtain through an illegal enterprise. Thus, on federal returns, a marijuana client must report all income, but they cannot deduct expenses related to the cultivation, marketing, or distribution of his or her product. While these types of expenditures may not be deducted on a client's federal return, they may be allowed on a state return, depending on each state's specific laws. In cases where a deduction may be allowed on the state return but not on the federal return, the tax practitioner should treat the discrepancy exactly as they would any other federal/state or book/tax difference, such as tax-exempt interest or penalties.

Additionally, in January 2015, the IRS Chief Counsel released a memo concerning how a taxpayer trafficking in a Schedule I or Schedule II controlled substance should determine the cost of goods sold (COGS). According to the memo, "A taxpayer trafficking in a Schedule I or Schedule II controlled substance determines COGS using the applicable inventory-costing regulations under §471 as they existed when §280E was enacted."³² The memo also discusses issues related to "return of capital," helping tax preparers understand the difference between expenses related to return of capital and expenses related to the operation of one's business. As noted above, businesses in the marijuana industry may not deduct expenses incurred in the production of their product (e.g., rent for retail space, advertising, salaries, etc.). However, Congress does allow taxpayers in these industries to deduct expenses related to "return of capital" (e.g., the cost of seeds, seedlings, and growing lights). As such, it is important that tax preparers understand these terms in their proper context.

The key point for tax professionals working with clients in the marijuana industry is due diligence. Because of the lack of clear guidance, CPAs should be conscientious in reviewing all

³² McElroy, W. Thomas. [Taxpayers Trafficking in a Schedule I or Schedule II Controlled Substance -- Capitalization of Inventoriable Costs](#). *Internal Revenue Service Memorandum*. 10 December 2014.

available information related to standards for tax return reporting, confidentiality of client information, conflicts of interest, due diligence, knowledge of client's error, contingent fees, and written tax advice. Any CPA wishing to provide tax services to clients in the marijuana industry should build a foundation of information based upon the Internal Revenue Code, Treasury Department [Circular No. 230](#) (Rev. 6-2014): Regulations Governing Practice before the Internal Revenue Service, the [IRS memo](#) discussed above, the state laws and regulations for each state in which a CPA holds a license or practices, and professional standards such as the [AICPA Statements on Standards for Tax Services](#) and the [AICPA Code of Professional Conduct](#). Each of these resources will help guide tax professionals in making ethical tax decisions.

For example, Internal Revenue Code Section 6694 assesses a penalty against the tax preparer if there is an understatement of tax liability because the preparer did not apply the law properly and his or her conduct is deemed "a reckless or intentional disregard of rules or regulations." This is particularly troubling for marijuana clients because of the lack of clear rules and guidance from the IRS. Where a gray area exists that is open to interpretation, the IRS will look at both what tax preparers knew and what the IRS believes they should have known in preparing tax documents, resulting in an increased risk of a penalty under IRC 6694. Similarly, Circular 230 also provides some limited guidance on a tax practitioner's responsibility for positions taken on a client's tax return, as well as information on acts discreditable that could lead to a practitioner being sanctioned against practicing before the IRS. CPAs should carefully review Section 10.22, Diligence as to Accuracy; Section 10.34, Standards with Respect to Tax Returns and Documents, Affidavits and Other Papers; and Section 10.35, Competency. Finally, CPAs should also consider the guidance in the AICPA Statements on Standards for Tax Services No. 1, Tax Return Positions, and No. 3, Certain Procedural Aspects of Preparing Returns.

Mitigating Risk

CPAs who wish to provide services to clients in the marijuana industry will encounter many gray areas. However, in addition to the numerous considerations discussed thus far, there are a few more steps CPAs can take to mitigate the risks associated with taking on a client in this industry.

For example, a CPA should always have an engagement letter with his or her client that explains what services are to be provided, what services will not be provided, and how much those services will cost. Additionally, the CPA should require each of the principals in the business to sign a representation letter stating that they understand the requirements of state law related to cannabis businesses and that they intend to fully comply with those requirements to the best of their ability at all times. As a conservative precaution, a CPA may require that his or her clients sign an updated version of this letter each year.

CPAs should also consider the potential impact a client in the marijuana industry could have on the CPA's insurance policy. Every professional liability policy has an exclusion for criminal acts. If a CPA is deemed to have aided and abetted a client that is charged with illegally producing or selling marijuana, the CPA's insurance will most likely not cover those acts. It is important that a CPA know what is specifically included and excluded in his or her professional liability policy.

As with all clients, CPAs should also document all work and communication with a client, even if that communication takes place in an informal setting. Finally, a CPA should seek out advice from colleagues that have clients in the marijuana industry to determine how they are trying to best mitigate risk.

The growing medical and recreational marijuana industry provides numerous business opportunities for CPAs, but the potential for increased business also involves risk. By considering each of the issues discussed in this paper, a practitioner can begin to decide if taking on these risks is in the best interest of his or her practice.

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Resources

- AICPA Code of Professional Conduct
- AICPA/NASBA Uniform Accountancy Act, Seventh Edition
- AICPA Professional Standards, AU-C section 210, *Terms of Engagement*, paragraphs .14 and .A37
- AICPA Statement on Standards for Tax Services
- Colorado Board of Accountancy’s Position Statement Regarding Certified Public Accountant Certificate Holder’s Providing Services to the Marijuana Industry
- IRS Memo: Taxpayers Trafficking in a Schedule I or Schedule II Controlled Substance -- Capitalization of Inventoriable Costs
- NCSL List of States Medical Marijuana Laws
- Oregon Board of Accountancy: Guidance for Licensees Providing Services to the Marijuana Industry
- Position Statement of the Connecticut State Board of Accountancy on Recent Developments Regarding State Marijuana Laws
- Position Statement of the Executive Director of the Washington State Board of Accountancy
- Title 21 United States Code (USC) Controlled Substances Act
- U.S. Department of Treasury BSA Expectations Regarding Marijuana-Related Businesses
- U.S. Department of Justice Guidance Related to Marijuana Related Financial Crimes
- U.S. Department of Treasury Circular No. 230 (Rev. 6-2014): Regulations Governing Practice before the Internal Revenue Service
- White House Federal Laws Pertaining to Marijuana