



March 7, 2019

Dear Colleagues:

The Commonwealth of Pennsylvania has joined other states in permitting the growing and distribution of medical marijuana. As the medical marijuana industry grows, it will present a range of questions for the commonwealth's nonprofit sector.

One of those issues is whether accepting donations from a licensed marijuana grower or dispensary would subject a nonprofit corporation to potential criminal liability. In an attempt to clarify this, our foundations engaged the law firm of Fox Rothschild to issue a memorandum.

We are releasing that memorandum to Pennsylvania's nonprofit organizations as a way to help them prepare policies regarding accepting contributions from the medical marijuana industry.

Each nonprofit should consult with its own attorneys regarding any policy to be adopted. The memorandum we are providing is meant merely to inform the conversations that nonprofits, their boards and their qualified attorneys should have.

Note that the memorandum is directed at "Berks County Community Foundation." This is a proxy for any Pennsylvania public charity. In addition, there is a reference to "flower touching businesses." This term refers to businesses that actually manufacture or distribute marijuana, as opposed to those that are ancillary to the industry (insurance companies and banks, for example).

We hope that you find this to be a useful resource for your organization.

Sincerely,

Pedro Ramos  
President  
The Philadelphia Foundation

Jennifer D. Wilson  
President  
First Community Foundation Partnership of Pennsylvania

Kevin K. Murphy  
President  
Berks County Community Foundation

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## MEMORANDUM

**TO:** Richard S. Caputo  
**FROM:** Joshua Horn; Jesse M. Harris  
**DATE:** January 29, 2019  
**RE:** **Berks County Community Foundation, Inc. (“BCCF”): Cannabis-related Contributions**

### I. Issue

Whether a nonprofit organization, like BCCF, is subject to criminal liability if it accepts contributions from cannabis-related businesses.

### II. Legal Analysis

No criminal laws expressly prohibit nonprofit organizations from accepting contributions from cannabis-related businesses. That said, other related statutes may be implicated, including the Controlled Substances Act (the “CSA”) and federal money laundering laws, though federal enforcement priorities appear to mitigate against the risk of prosecution. Our research has revealed no cases in which a nonprofit organization—or its officers—have been prosecuted under these related statutes.

#### A. The Controlled Substances Act

The CSA, codified at 21 U.S.C. § 801 *et seq.*, establishes a comprehensive federal scheme to regulate controlled substances. The CSA makes it unlawful to “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense” any controlled substance . . .” *Id.* § 841(a)(1). The CSA also makes it a crime to possess any controlled substance except as authorized by the Act. *Id.* The restrictions that the CSA places on the manufacture, distribution, and possession of a controlled substance depends on the “schedule” in which Congress has placed the drug. *See Id.* §§ 821-29.

Since Congress enacted the CSA in 1970, “marijuana” (or “marihuana”) and tetrahydrocannabinols (“THC”) have been classified as Schedule I controlled substances. *Id.* § 812(c) (Schedule I(c)(1),(17)). The CSA defines marijuana as “all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.” *Id.* § 802(16).

This means that, despite state law to the contrary, the manufacture, distribution, and possession of marijuana is illegal under federal law. And while BCCF’s mission in no way violates these provisions, contributing cannabis-related businesses likely do, which implicates other provisions of the CSA.

For example, section 846 of the CSA includes penalties for attempt and conspiracy:

“Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”

Moreover, section 854 of the CSA includes penalties for certain investments of illicit drug proceeds:

“It shall be unlawful for any person who has received any income derived, directly or indirectly, from a violation of this subchapter or subchapter II punishable by imprisonment for more than one year in which such person has participated as a principal within the meaning of section 2 of title 18,<sup>1</sup> to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce.”

We do not believe that these provisions would apply to a nonprofit that accepts cannabis-related contributions. Moreover, we located no cases where such provisions were invoked to prosecute a nonprofit organization. Nevertheless, there can be no guarantee that BCCF will not face such prosecution, albeit unlikely at this time. This is particularly true given that section 854 is to be “liberally construed to effectuate its remedial purposes.” Id.

## **B. Federal Money Laundering Laws**

Money laundering typically refers to any organized network of activities intended to “convert” money obtained from illicit activities so that it appears to be money gotten from lawful sources. Money laundering charges often involve conspiracy charges associated with the money laundering activity. The relevant provision provides:

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

(A) (i) with the intent to promote the carrying on of specified unlawful activity<sup>2</sup> . . .

Shall be sentenced to a fine of not more than \$500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or

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<sup>1</sup> Principal is defined as “[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”

<sup>2</sup> The definition of “specified unlawful activity” includes violations of the CSA. See 11 U.S.C. § 1961.

dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement. See 18 U.S.C. § 1956.

Considering that the manufacture and sale of cannabis is still unlawful on a federal level, a creative prosecutor could allege that funds received from such flower touching businesses, even those permitted by state law, represent money laundering on the federal level. The potential criminal penalties for individuals engaged in the money laundering activity is up to 20 years in prison. Id. While misdemeanor convictions typically allow for fines against individuals and companies up to no more than a few thousand dollars, a federal conviction for money laundering can result in fines of up to \$500,000 or double the amount of money that was laundered, whichever is greater. Id. The size of the potential criminal sanction is in proportion to the amount of money being unlawfully laundered.

Although handling money from a state-run cannabis business potentially presents federal anti-money laundering criminal issues, we believe, based on our experience, observations, and research that the risk of a criminal money laundering sanction is currently more of an existential risk as opposed to an actual risk. The only individuals/companies that we are aware of that have run into potential criminal issues, in general, are those cannabis businesses that are operating in violation of their state licenses or operating without a state license.

### **C. Conclusion**

At bottom, we must stress that there are no black and white answers when it comes to the United States cannabis regulatory scheme—only gray. For example, in 2013 U.S. Deputy Attorney General James M. Cole issued a memorandum to all U.S. Attorneys (the “Cole Memo”) that established a federal policy not to enforce federal marijuana drug laws (with respect to *medical* marijuana) in states that “legalize marijuana in some form and . . . implemented strong and effective regulations and enforcement systems . . .” Although former Attorney General Sessions rescinded the Cole Memo—which was not law—appropriations bills since 2014 have severely limited the resources available to federal prosecutors when enforcing federal marijuana laws regarding entities/individuals operating under a state-sanctioned medical marijuana program. These appropriations bills reflect the policies espoused by the Cole Memo. Should BCCF choose to accept contributions from cannabis-related businesses, BCCF must ensure that those business are, at the least, in compliance with applicable state law.

Additionally, BCCF should (1) consider updating its contribution policy to reflect contributions from cannabis-related businesses; (2) consider accepting donations only from state-sanctioned *medical* cannabis businesses; (3) ensure that donations are received from only Pennsylvania cannabis-related businesses and grants are made to only Pennsylvania charities or school districts (to avoid conducting business across state lines); (4) file the appropriate tax forms when receiving contributions of more than \$10,000.00; and (5) be aware that federal grant funds often require certification of compliance with federal law.

JMH