COZEN O'CONNOR

MEMORANDUM

TO:	Harmonious Code Council
FROM:	Cozen O'Connor
DATE:	January 25, 2017
RE:	Financial Contributions Supporting Lobbying Efforts to Harmonize Federal and State Medical Marijuana Laws

I. Executive Summary

Harmonious Code Council ("HCC") is committed to addressing the often uncertain and frequently deleterious effects of inconsistent state and federal criminal laws regarding the growth, sale, and distribution of medical marijuana. Despite twenty-eight (28) states, as well as the District of Columbia, having legalized marijuana for medical and some recreational uses, marijuana is still a Schedule I drug under federal law (*i.e.* the Controlled Substances Act or "CSA"). *See* 21 U.S.C. § 841(a) (stating it is unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" marijuana). Federal law, therefore, dilutes the efforts of the states, in part because the Supremacy Clause of the U.S. Constitution prevents states from permitting conduct that federal law prohibits.

In recent years, key federal government agencies have made pronouncements that seemingly relax the federal enforcement framework in this area. Nonetheless, because marijuana operations remain unlawful under federal law, all marijuana-related economic activity also remains technically illegal under federal law, thereby presenting issues with banking and transmitting funds, taxes, obtaining insurance, transporting state-legalized marijuana, and obtaining public services and financial lending. In short, the current state of federal law

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dramatically frustrates the ability of state-legalized marijuana operations and related business to participate in normal economic and business activities. In order to address this contradictory and problematic legal structure, HCC was formed as a 501(c)(6) organization with a mission to lobby and effectuate streamlined laws as to medical marijuana, including what conduct related to its manufacture, use, and proceeds is deemed criminal and subject to federal prosecution.

Issue Presented: As HCC positions itself as a leading vehicle for changing medical marijuana policy and law, you have inquired whether HCC can accept funds from individuals and businesses involved in lawful state marijuana operations and use those funds to finance the organization's activities.

Short Answer: We conclude that entities and individuals engaged in *lawful* state medical marijuana operations may contribute, and HCC may accept, funds deriving from those operations, for purposes of engaging in lobbying, legal, media relations and other activities connected with its mission. Although the right to lobby is a fundamental constitutional protection and research has revealed no cases involving enforcement against donors or recipients of marijuana operation-related funds to be used for funding lobbying and related activities, HCC should remain mindful that funding sourced from marijuana activities *outside* of state-authorized programs *could* open the door for possible prosecutorial interest.

II. Analysis

The First Amendment to the Constitution encompasses rights including the right "to petition the Government for a redress of grievances." As a result, the right to lobby is embedded within the federal Constitution and applies to efforts to influence and change marijuana laws *See Marijuana Policy Project v. United States*, 304 F.3d 82 (D.C. Cir. 2002) (noting "medical marijuana advocates remain free to lobby, petition, or engage in other First Amendment-protected activities to reduce marijuana penalties" despite act of Congress preventing use of initiative process in the District of Columbia to do so); *Conant v. McCaffrey*, 2000 WL 1281174, at *15 (N.D. Cal. Sept. 7, 2000) ("Petitioning Congress or federal agencies

for redress of a grievance or a change in policy is a time-honored tradition. In the marketplace of ideas, few questions are more deserving of free-speech protection than whether the regulations affecting health and welfare are sound public policy."). Pursuant to this right, Rule 1.19 of the Pennsylvania Rules of Professional Conduct recognizes that attorneys may act as lobbyists on behalf of clients.

Consistent with these principles, there are other marijuana policy organizations, such as National Organization for the Reform of Marijuana Laws ("NORML") and Marijuana Policy Project ("MPP"), that openly seek donations to support their mission via their websites. Nonetheless, it is important to understand the federal approach to economic activities involving marijuana.

Before 2008, the U.S. Department of Justice ("DOJ") prosecuted medical marijuana businesses even if they were acting in accordance with state law. The Obama administration, however, implemented a change in DOJ policy. Starting in 2013, DOJ announced that it would not prioritize federal criminal prosecution of activities that were legal under a given state's marijuana laws, where the activities were not otherwise illegal.[1] In additional guidance issued in 2014, DOJ noted that financial transactions involving proceeds generated by marijuana-related

[1] On August 23, 2013, the Deputy Attorney General ("DAG") issued a memorandum updating DOJ federal marijuana enforcement policy in light of recent state initiatives, noting that ". . . .marijuana remains an illegal drug under the Controlled Substances Act and [] federal prosecutors will continue to aggressively enforce this statute," but "the federal government has traditionally relied on state and local authorities to address marijuana activity through enforcement of their own narcotics laws."

In his memorandum, the DAG identified the following eight priorities in federally enforcing the CSA against marijuana-related conduct:

- 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 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.

Available at https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

conduct can form the basis for prosecution under the Bank Secrecy Act, money laundering statutes (18 U.S.C. §§ 1956 and 1957), and the unlicensed money transmitter statute (18 U.S.C. § 1960), but clarified that federal prosecutors should consider the same priorities for these types of offenses.[2]

Coinciding with the DOJ guidance, FinCEN, one of the leading federal financial crime enforcement offices, issued a press release noting that "[t]he [DOJ] guidance provides that financial institutions can provide services to marijuana-related businesses in a manner consistent with their obligations to know their customers and to report possible criminal activity."[3] FinCEN viewed the guidance as clarifying the availability of financial services for marijuana-related businesses, thereby promoting transparency and mitigating the dangers of these businesses operating as all-cash operations.

The case law is consistent with the guidance as well. Research has revealed no successful federal enforcement case involving growers and distributors or other marijuana operation-supporting businesses relating to their First Amendment activities. *See Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (Ninth Circuit upheld a permanent injunction to protect the First Amendment rights of physicians who recommended medical marijuana for their patients but cautioned that issuing a prescription could constitute aiding and abetting the violation of federal law). The flow of cases arising from the federal criminalization of marijuana – e.g., dispensaries for distribution of state-legalized marijuana, a landlord of property housing a dispensary in a state where medical marijuana was legal, and patients for receiving legal medical marijuana – has been largely stemmed since the DOJ guidance was issued.[4]

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[2] *See* DAG Memorandum, Feb. 14, 2014, available at https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20(2).pdf
[3] Available at https://www.fincen.gov/news/news-releases/fincen-issues-guidance-financial-institutions-marijuana-businesses.
[4] *Cf. United States v. Washington*, 887 F. Supp. 2d 1077 (D. Mont. 2012) (case predating guidance in which defendant growers and distributors of medical marijuana lost a motion to dismiss because the court found that the government was free to exercise its prosecutorial discretion even if the defendants were complying with state law).

In addition, in 2014, Congress passed appropriations legislation that prevented DOJ from expending any federal funds interfering with a state's enforcement or implementation of its own medical marijuana laws. Courts have interpreted the Appropriations Act language to mean that DOJ resources cannot be used to prosecute state-compliant medical marijuana programs or businesses. *See United States v. McIntosh*, 833 F.3d 1163, 1176-77 (9th Cir. 2016). Although this type of appropriations legislation must be continued after expiration of the applicable appropriations term, the current legislation is in place until March 31, 2017. Given that the composition of Congress has changed little since passage of the last provision, it is likely that Congress will pass legislation extending the provision.

In the past, President Trump has not been entirely consistent regarding his view of marijuana, but in November 2016, he publicly took the position that he is not opposed to the legalization of medical marijuana and believes that enforcement in this area should be handled by the states – a position that is consistent with current federal law and policy. On the other hand, President Trump's nominee for Attorney General, Senator Jeff Sessions, has been an outspoken critic of marijuana legalization and use. If his nomination is affirmed, it is possible that he could change federal enforcement priorities related to medical marijuana-related activities, although that position would stand apart from President Trump's stated position. However, any such change would be prospective in nature. In addition, given Congress's enactment of appropriations legislation preventing federal enforcement of state-legalized marijuana activities for each of the past three years, it is very possible that Congress would enact legislation countermanding any such policy shift.

III. Conclusion

HCC intends to pursue legislative and/or policy initiatives to provide growers and distributors of medical marijuana operating legally under applicable state laws, and other businesses that support these operations, comfort that they will not be prosecuted by the federal government in connection with their normal business activities involving state-legalized medical

marijuana. Under the First Amendment, providing and receiving funds to support these efforts enjoy status as activities within the core of fundamental constitutional protections. In light of the guidance by DOJ and FinCEN, it is clear that entities and individuals involved in lawful state medical marijuana operations may give funds to HCC and HCC may accept those funds. HCC, however, should remain mindful that funds from marijuana activities *outside* of state-authorized programs could open the door for prosecutorial interest in financial transactions related to those funds.