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International Tax Watch

Getting into the Weed(s): Representing Marijuana Businesses in Tax Matters

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I. Introduction

Congress has enacted an expansive set of laws to prevent money laundering, or the process of washing "illegally obtained moneys … so as to give the appearance of legitimately obtained income."[1] Some of those laws civilly or criminally punish failures to correctly report certain currency transactions,[2] while others punish people who transact in property (including money) that bears a connection with illegal activity.[3] Most tax practitioners are familiar with the currency transaction reporting rules—much ink has been rightfully spilled over Treasury's Financial Crimes Enforcement Network (commonly known as FinCEN)—but many tax practitioners are entirely unfamiliar with the rules that punish people who transact in funds that are somehow connected with illicit activity. However, as marijuana becomes legal in more and more states, and companies that produce and distribute marijuana increasingly seek tax representation, tax practitioners need to become familiar with laws that prohibit transacting in property connected to activity that is illegal under federal law, and fast, so that they can provide the competent representation that taxpayers need without inadvertently committing a federal crime.[4]

As we wrote previously, Code Sec. 280E's deduction and credit disallowance is one of the biggest federal tax issues that businesses that produce and/or distribute marijuana face.[5] Code Sec. 280E prohibits taxpayers from claiming federal tax deductions or tax credits for expenditures made "in carrying on any trade or business" that "consists of trafficking in controlled substances (within the meaning of Schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted." Businesses that produce or distribute marijuana, *i.e.*, products containing more than 0.3% delta-9-tetrahydrocannabinol (THC), in the United States are effectively prevented from claiming any deductions or credits that non-marijuana businesses could otherwise enjoy.[6] As a result, marijuana businesses can be taxed on their gross income—a punitive regime that can push otherwise profitable enterprises into a loss or even bankruptcy.

Despite the apparent blanket prohibition that Code Sec. 280E imposes, recent cases, such as *Northern California Small Business Assistants Inc.*, show that, with effective representation, marijuana companies may be able to proactively plan to mitigate Code Sec. 280E or challenge its constitutionality if the Internal Revenue Service (IRS) comes calling.[7] Unfortunately, many marijuana businesses never receive the sophisticated representation that is required to engage in the necessary planning or mount a well-counseled and vigorous defense because, under the Money Laundering Control Act of 1986, it could be a crime for a tax practitioner to receive payment from a marijuana business for the practitioner's services.[8]

The obvious takeaway from this column is that federal law needs to change—it should not be a federal crime to operate a marijuana enterprise legally under state law, and tax practitioners who wish to represent those businesses should not be subject to "draconian" money laundering laws.

Unwilling to accept the potential risk of being convicted of a federal crime that carries steep financial penalties and imprisonment of up to 20 years, many tax practitioners have understandably declined to represent businesses that produce or distribute marijuana in the United States, even when those businesses do so legally under state law. The Money Laundering Control Act of 1986 therefore chills representation, which is bad for state legal marijuana businesses that want the same choice of tax counsel as every other legitimate enterprise, bad for diligent tax practitioners who wish to represent those businesses, bad for courts that hear those businesses' cases without the benefit of the businesses' desired counsel, and, of course, bad for the administration and development of the law.

It doesn't have to be that way. A marijuana business that operates under state law should be able to be represented like any other taxpayer, and that business should be able to pay its chosen counsel for the counsel's services. Although we think that aligning federal law with the laws of the majority of the states and legalizing marijuana at the federal level is the most practical solution to this problem (as well as many others), we believe that there is at least one path forward for tax practitioners to represent marijuana businesses and receive payment for their services without running afoul of the Money Laundering Control Act of 1986. Unfortunately, as we will discuss below, that path requires a specific set of facts, and therefore is not a generally applicable solution. For that reason, absurd as it may seem to sophisticated professionals who advise all manner of clients on a wide range of tax issues, receiving fees from a marijuana business for advice or representation on issues as mundane as the computation of cost of goods sold (COGS) may well put a *bona fide* tax practitioner squarely within the crosshairs of the Money Laundering Control Act of 1986—a chilling result, as we note above.

In this column, we first walk through the fundamentals of the Money Laundering Control Act of 1986. We then address how the Money Laundering Control Act of 1986 may or may not apply to tax practitioners who represent marijuana businesses operating in the United States. While the federal civil asset forfeiture rules and their state law counterpart are also a serious concern for practitioners,[9] we do not address either of those areas here and limit our focus to what we view as the more critical issue—namely, the risk that a practitioner could be subject to prosecution, conviction, and imprisonment for providing tax services. We also do not address the implications for marijuana businesses operating outside the United States, as we addressed the Code Sec. 280E and criminal law implications for those business in our prior column, *Who's Afraid of Code Sec. 280E*? This column nevertheless is still relevant for these businesses as well to the extent they contemplate expanding into the United States. In short, our primary objective is to raise awareness among the tax community that, for a discrete group of legitimate businesses, the Money Laundering Control Act of 1986 is preventing all of us from doing what we do every day—that is, offer competent assistance to people trying to navigate the uncertainty and complexity of federal tax laws. That should be something that troubles all of us, and for which we should all be focused on a solution.

II. Federal Money Laundering Laws

The Money Laundering Control Act of 1986 was a component of the Anti-Drug Abuse Act of 1986.[10] Congress

passed the Anti-Drug Abuse Act of 1986 as part of the so-called "War on Drugs."

The Money Laundering Control Act of 1986 appears in two sections of the U.S. Code—18 USC sec. 1957 ("Section 1957") and 18 USC sec. 1956 ("Section 1956"). Both carry prison sentences, criminal penalties, and civil fines.[11] Because both sections punish people who conduct a transaction that uses the proceeds of criminal activity, tax practitioners will never come within the ambit of the money laundering laws if they do not transact in (*e.g.*, receive) "criminally derived property," for purposes of Section 1957, or the "proceeds of specified unlawful activity," for purposes of Section 1956. Section 1956 requires some sort of intent to conceal or promote illegal activity, whereas Section 1957 does not. Both sections, however, require a person to transact in property (including money) derived from illegal activity as a threshold matter. Accordingly, if tax practitioners never transact in criminally derived property, then neither section should ever apply them. While 1957 follows 1956 numerically, we nevertheless first consider Section 1957, which addresses the basic mechanics of the money laundering rules, and then examine Section 1956, which adds a layer of complexity with its intent requirement.

A. Section 1957

Section 1957(a) makes it a crime to "knowingly engage[] or attempt[] to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity …."

As applied to a tax practitioner, case law tells us that the term "knowingly" in Section 1957(a) means that the practitioner was aware that the practitioner engaged in a monetary transaction and that the property involved was derived from specified unlawful activity.[12]

A "monetary transaction" is "the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title …."[13] However, a monetary transaction "does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution."[14] Therefore, Section 1957 provides a special exemption for payments made to exercise a defendant's right to an attorney under the Sixth Amendment (*i.e.*, a payments made for criminal defense).[15] Section 1957 does not have a similar carve-out for civil representation.[16]

Section 1957's specific exemption for "any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution" was not part of the Money Laundering Control Act of 1986 as originally passed. Congress introduced the exemption into the U.S. Code as part of the 1988 amendment to the Act, which Congress appears to have enacted in response to concerns about the constitutionality of prosecuting criminal defense attorneys.[17] Although there were efforts to expand the exemption to include payments for all legal representation (i.e., civil and criminal alike), these efforts proved unsuccessful.[18]

Financial institutions include banks and can also include other businesses as designated by the Secretary of the Treasury.[19]

Nonetheless, until these laws change, tax practitioners need to be aware of the risks that federal money laundering laws present. We believe that there are ways for tax practitioners to represent state legal marijuana enterprises, and receive payment for their work, without committing a felony in certain limited circumstances.

Under the statute, "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense.[20]

Section 1957 defines specified unlawful activity by reference to Section 1956. Section 1956(c)(7) references "any act or activity constituting an offense listed in section 1961(1) of this title …." Section 1961(1)(D) of Title 18 describes the "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United

States ….” Marijuana is a controlled substance under the Controlled Substances Act.[21] And the Controlled Substances Act makes it a crime “to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”[22] Thus, property derived from manufacturing, distributing, dispensing, or possessing with the intent to manufacture, distribute, or dispense, marijuana is criminally derived property.

Courts have often been invited to expand the language of Section 1957. One issue that is often teed up for statutory expansion is the co-mingling of funds—where criminally derived and non-criminally derived funds are in the same bank account. Different circuits have different rules with respect to co-mingled funds, and the Ninth Circuit’s rules are very defendant friendly for Section 1957 purposes. In Section 1957 cases “[w]here the transaction involves criminal proceeds that have been commingled with innocent funds, the Ninth Circuit imposes a tracing requirement; the government must trace each of the alleged monetary transactions to criminally-derived proceeds.”[23] The government must prove beyond a reasonable doubt that the transaction in question was of property worth at least $10,000 that was criminally derived.[24] Other circuits, including those that encompass states where marijuana is now legal, have adopted the presumption that once an account has both “dirty” and “clean” money in it, for the purposes of Section 1957, the clean money becomes tainted and constitutes criminally derived proceeds.[25]

Breaking it all down for our purposes, subject to the Sixth Amendment exemption noted above, if a tax practitioner receives fees that stem from the proceeds of a marijuana business *via* a bank or other financial institution, the practitioner violates Section 1957. It is irrelevant whether the practitioner did or did not intend to conceal the money/other property.[26] And the effects of co-mingling by the enterprise(s) from which the money/other property stems on the application of Section 1957 depend on the circuit involved.

B. Section 1956

Section 1956 is similar to Section 1957, except that unlike Section 1957, Section 1956 requires an intent to conceal the source of funds or to promote the carrying on of the specified unlawful activity.[27] For tax practitioners who represent marijuana businesses operating under state law, two paragraphs in Section 1956 potentially apply to create a criminal offense.

1. Section 1956(a)(1)

Like Section 1957, Section 1956(a)(1) punishes a person who “knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity ….”[28] However, the person must conduct or attempt to conduct the financial transaction with intent or knowledge in one of the four categories listed below:

(1) Intent to promote the carrying on of specified unlawful activity;
(2) Intent to engage in conduct constituting a violation of Code Sec. 7201 or 7206 (*i.e.*, avoiding currency reporting requirements);
(3) Knowledge that the transaction is designed in some part “to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity”; or
(4) Knowledge that the transaction is designed in some part “to avoid a transaction reporting requirement under State or Federal law ….”[29]

2. Section 1956(a)(3)

Section 1956(a)(3) punishes a person who “conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity” with the intent to:

(1) Promote the carrying on of specified unlawful activity;
(2) Conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or
(3) Avoid a transaction reporting requirement under state or federal law.

For purposes of both Sections 1956(a)(1) and 1956(a)(3), “proceeds” are “any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.”[30] And a financial transaction is “(A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree ….”[31] Financial institution is defined the same

as for Section 1957. At the same time, Section 1956 is broader than Section 1957 in terms of how a "financial transaction" is defined. As the above shows, Section 1956 does not require the use of a financial institution—if a transaction affects interstate commerce and involves the movement of funds, monetary instruments, or the transfer of certain types of property, then that transaction can be a "financial transaction."

Putting it all together, if a tax practitioner acts with the intent either to conceal the transaction (either explicitly or for reporting purposes) or to promote the carrying on of the specified unlawful activity (such as manufacturing, *etc.* marijuana) and (2) the transaction that has some effect on interstate commerce or uses a financial institution (*e.g.*, a bank), the practitioner commits a federal crime under Section 1956(a). Although Section 1956(a) does not expressly carve out payments to exercise Sixth Amendment rights like Section 1957, the carve out seems to be implicit in that defending a person accused of a crime should not constitute promoting "the carrying on of a specified unlawful activity."[32]

III. Getting in the Weed(s): Representing Marijuana Businesses Without Violating the Money Laundering Rules

On their face, Sections 1957 and 1956 appear to preclude a tax practitioner from representing a marijuana business that manufactures, distributes, dispenses, *etc.* marijuana in the United States if the practitioner knows that the funds the business uses to pay the practitioner's fees stem from manufacturing, *etc.* marijuana in violation of federal law. The two sections effectively backstop each other. Even if a marijuana business were to pay a practitioner's fees in cash, and thereby sidestep the financial institution element of Section 1957's monetary transaction component, the practitioner would still seem to fall within the scope of Section 1956. The practitioner would seem to be trying to conceal the source or nature of the funds by either never depositing the funds and instead putting them in safe or by depositing them with a financial institution and arguing that the funds were in fact the proceeds of lawful activity—*i.e.*, providing legal services. So what's the solution (other than, of course, for Congress to do the right thing and either make it clear that Sections 1956 and 1957 do not apply to legal services at all or simply legalize marijuana)?

Setting aside the example above, one possible position is that most tax practitioners who wish to represent a business that grows or distributes marijuana do not have the intent required for Section 1956 to apply. Tax practitioners receive funds with the intent to be paid for their tax/legal services. Tax practitioners do not promote a client's continued business so much as they advise the client about how the client's current or anticipated future operations interact with tax and other laws or represent the client in connection with a dispute that typically centers around the client's historic operations. Tax and other legal representation and/or advice may certainly help a marijuana business flourish, but that result is typically a byproduct of the representation/advice, not its intended objective.[33] That said, the word "promote" can be construed broadly, and we could see a prosecutor arguing, or a court concluding, that providing professional services that further the operation of a marijuana business is tantamount to promoting that business. There are no doubt some nuances here, as providing consulting advice on how to optimize the multistate tax profile of a marijuana business has more of a promotion flavor than providing representation in connection with a criminal prosecution. For that reason, even though Section 1956 does not incorporate Section 1957's express Sixth Amendment exemption, we think that some legal services would fail to rise to the level of promotion, and a *bona fide* attorney who provides such services would not meet Section 1956's intent requirement. The challenge, of course, is figuring out where the line is.

Section 1957 is clearer. Under Section 1957 on its face, a tax practitioner who merely accepts funds from a marijuana business that manufactures, *etc.* marijuana in the United States for the practitioner's tax/legal services likely commits a crime. Practically speaking, the practitioner likely receives fees of greater than $10,000 through a bank.[34] And given most firms' practices with respect to client due diligence and "know your customer" rules, the practitioner likely knows or should know that the fees come from activity that is illegal under federal law (manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense marijuana, a controlled substance, in the United States[35]).

One way to sidestep both Sections 1956 and 1957 is for the tax practitioner to avoid receiving or otherwise transacting in "dirty" money. Assume the following:

(1) There is a company in California that has two business units, each of which operates in a separate

LLC. We can refer to them as LLC A and LLC B.[36] LLC A grows and distributes marijuana entirely in California, and LLC B sells non-marijuana items, such as cannabidiol (commonly known as CBD), wellness products (*e.g.*, vitamins), and rolling papers.

(2) The two LLCs have different employees and different bank accounts.

(3) LLC A engages a tax practitioner for tax representation—LLC A is the client.

(4) LLC B pays LLC A's practitioner directly from its own bank account.

The practitioner should not fall under Section 1957 or 1956 to the extent the practitioner avoids receiving funds or property—*i.e.*, the proceeds of criminal activity—from LLC A.[37]

Alternatively, a company may operate a marijuana distribution and/or production business wholly outside the United States, in a jurisdiction where it is legal to do so (*e.g.*, Canada). If that company also establishes a marijuana distribution and/or production business in one or more of the United States, the company ought to be able to use the proceeds of the non-U.S. business to pay for tax services for the U.S. business without running afoul of Section 1957 or 1956 because the proceeds of the non-U.S. business's activity should not represent criminally derived property.[38]

Turning back to the initial fact pattern, there is of course the practical question of whether an enterprise that makes money by producing and/or selling marijuana will want to operate a successful standalone business that sells federally legal products and services. Even if the enterprise wants to operate two different businesses, it may also be difficult for the enterprise to keep the two businesses truly separate for purposes of maintaining the distinction between the two businesses' funds and avoid the co-mingling issues we discuss above—*e.g.*, separate bank accounts, employees, *etc.* In addition, in both fact patterns, if the tax practitioner is an attorney, the arrangement above raises some legal ethical questions. The Model Rules of Professional Conduct allow one person to pay the legal fees of another person, but they also provide guidelines that the attorney and the client have to follow. In the primary example above, LLC A would have to give its informed consent for LLC B to pay, and the attorney would have to ensure that the payment structure would not compromise the attorney's other obligations, including the attorney's judgment and client confidences.[39] Still, assuming the facts align and an enterprise does in fact have standalone businesses along the lines above, a tax practitioner ought to be able to represent the enterprise in respect of its U.S. marijuana business and receive fees from the enterprise that are sourced to its non-marijuana business, or to a legal non-U.S. marijuana business, without risking civil or criminal liability.

The answer appears to be less favorable for the tax practitioner who represents, or wants to represent, the state legal marijuana enterprise that only produces and/or sells marijuana (*i.e.*, that has only LLC A). The government's position, as articulated in the Department of Justice's U.S. Attorneys' Manual, is that the Section 1957(f)(1) exemption does not apply to fees paid for any civil representation.[40] However, the U.S. Attorneys' Manual also sets a high bar for prosecutors to proceed against attorneys under Section 1957. For example, prosecutors may not use privileged communications to prove that an attorney is violating Section 1957.[41] At the same time, while the government acknowledges that "[t]here is no legislative history to clarify this provision [Section 1957(f)(1)] and its scope is open to differing interpretations," the government effectively takes the position that any legal representation before "the time judicial proceedings have been initiated against" the client[42] do not come within the scope of the Section 1957(f)(1) exemption.[43] This narrow reading of Section 1957(f) is bad for everyone—the government should want people to be represented in any civil tax matter, especially a civil tax matter that deals with the complex issues that Code Sec. 280E presents.

A more generous construction of Section 1957(f)(1) would provide an exemption for the tax lawyer who represents, or wants to represent, the state legal marijuana enterprise that only produces and/or sells marijuana. Section 1957(f)(1) expressly states that "monetary transactions" do not "include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution." Until Congress amends the Controlled Substances Act to exclude marijuana, enterprises that manufacture, *etc.* marijuana in the United States violate federal criminal law. When a marijuana enterprise evaluates whether Code Sec. 280E applies to deny some or all of its deductions, prepares to contest the constitutionality of Code Sec. 280E, or challenges an IRS assessment, it analyzes elements that could be the subject of a federal criminal complaint. As the core of a marijuana enterprise's business is illicit from a federal standpoint, the enterprise ought to be able to engage an attorney to discuss any legal issue that touches its business to preserve the enterprise's right to uncompromised representation in a criminal proceeding that may or may not materialize.

Unfortunately, there is limited case law on courts' interpretation of the Section 1957(f)(1) exemption. At the same time, the courts appear to be reluctant to hold that attorneys who represent clients in good faith fall outside the scope of the exemption. In *United States v. Velez*, for example, the Eleventh Circuit held that the Section 1957(f)(1) exemption applied to an attorney who was working on behalf of another person's criminal defense attorney to trace the source of funds that could be used to pay the criminal defense attorneys and therefore was not actively representing the defendant.[44] In contrast, in *United States v. Blair*, the Fourth Circuit held that Section 1957(f)(1) did not apply to an attorney who paid the legal fees of others, but in that case, the defendant attorney encouraged his client to lie to the Federal Bureau of Investigation (FBI), concealed criminally derived money in real estate, and took a cut of the money for himself without telling the client.[45] To us, this limited case law, together with the government's stated policy of restraint in prosecuting attorneys under Section 1957, suggest that a court could be reluctant to limit the Section 1957(f)(1) exemption except where attorneys are really acting in furtherance of crime.[46]

We believe that there is a path for a court, or a prosecutor, to construe Section 1957(f), as well as the term "promote" in Section 1956, in a manner that allows for marijuana businesses to receive legal representation. To the extent that the practitioner can show that any money the marijuana business pays the practitioner for the business's civil representation was "necessary" to ultimately "preserve" its Sixth Amendment right to criminal representation, that money ought not to be subject to Section 1957's sanctions.[47] We believe that the Section 1957 exemption ought to apply where the civil and criminal matters are closely connected and the marijuana enterprise expresses its understanding that it could be subject to criminal liability.[48] For example, the attorney ought not to be subject to Section 1957 for fees the attorney receives from civil representation if the civil and criminal cases deal, or may ultimately deal, with identical or near identical facts, or the civil attorney collaborates with the criminal defense attorney in building the civil case (or the civil and criminal attorneys are one and the same). Unfortunately, in light of the unsettled legal landscape, the more conservative position is that Sections 1957 and 1956 potentially apply to criminalize legal services outside the context of active criminal defense representation. Absurd as it may sound, this position may mean that an attorney who represents a marijuana business that is legal in the state in which it operates in open court on a non-criminal tax issue potentially commits a federal crime.

IV. Closing Thoughts

The obvious takeaway from this column is that federal law needs to change—it should not be a federal crime to operate a marijuana enterprise legally under state law, and tax practitioners who wish to represent those businesses should not be subject to "draconian"[49] money laundering laws. Nonetheless, until these laws change, tax practitioners need to be aware of the risks that federal money laundering laws present. We believe that there are ways for tax practitioners to represent state legal marijuana enterprises and receive payment for their work without committing a felony in certain limited circumstances. One approach is to make sure the fees stem from a federally legal business, and from an account that does not contain illicit proceeds. As we indicate above, there may be other approaches as well—and given the potential viable arguments against and around Code Sec. 280E, sophisticated tax practitioners need to start being creative about minimizing the risks associated with representing marijuana enterprises. Clients need it, and so does the law.

ENDNOTES

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1 Peter J. Kacarab, *An Indepth Analysis of the New Money Laundering Statutes*, 8 AKRON TAX J. 1, 2 (1991).

2 31 USC sec. 5322(a).

3 Money Laundering Control Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. H, sec. 1352(a), 100 Stat. 3207-18, 3207-21 (codified as amended at 18 USC secs. 1956 and 1957).

4 We do not analyze the consequences of civil asset forfeiture laws or the implications of Model Rule of Professional Conduct 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.").

5 *See* Thomas Firestone, Scott Frewing, Ethan Kroll, Erika Van Horne, Stewart Lipeles & Julia Skubis Weber, *Who's Afraid of Code Sec. 280E?*, TAXES, at 7 (Nov. 2021).

6 *Alternative Health Care Advocates*, 151 TC —, No. 13, 151 TC 225, 236-40, Dec. 61,330 (2018).

7 *Northern California Small Business Assistants Inc.*, 153 TC —, No. 4, 153 TC 65, 77-90, Dec. 61,562 (2019) (Gustafson, J., dissenting); *id.* at 90

("I would hold that the Sixteenth Amendment does not give Congress the unrestricted power to impose, as a tax on 'incomes', the liability arising from the disallowances of Code Sec. 280E. I would hold that Code Sec. 280E imposes a 'fine' or penalty for purposes of the Eighth Amendment ....").

[8] *See* 18 USC secs. 1956 and 1957.

[9] *See Caplin & Drysdale*, SCt, 491 US 617, 626, 109 SCt 2646 (1989).

[10] Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207. In addition to the Money Laundering Control Act of 1986, the Anti-Drug Abuse Act of 1986 contained the following acts, among others: the Continuing Drug Enterprises Act of 1986, the Department of Justice Assets Forfeiture Fund Amendments of 1986, the Juvenile Drug Trafficking Act of 1986, the Drug Possession Penalty Act of 1986, the Narcotics Penalties and Enforcement Act of 1986.

[11] Sections 1957(b); 1956(a); 1956(b).

[12] *Pizano*, CA-8, 421 F3d 707, 722 (2005); *Van Brocklin*, CA-8, No. 96-2326, No. 96-2327, No. 96-2328, No. 96-2329, 1997 U.S. App. LEXIS 20745, at *29-30 (8th Cir. June 6, 1997); *accord Ness*, CA-2, 565 F3d 73, 78 (2009); *see also Bailey*, 444 US 394, 404 (1980).

[13] Section 1957(f)(1).

[14] *Id.*

[15] Though the U.S. Supreme Court has not decided the issue, some circuits have held that a corporation has a Sixth Amendment right to representation. *See, e.g., Unimex, Inc.*, CA-9, 991 F2d 546, 550 (1993) (holding corporation has right to counsel, but no right to be appointed counsel if it cannot afford its own); *accord Am. Airways Charters, Inc. v. Regan*, DC-DC, 746 F2d 865, 873 n. 14 (1984); *Rad-O-Lite of Philadelphia, Inc.*, CA-3, 612 F2d 740, 743 (1979).

[16] The Eleventh Circuit has held that Section 1957(f)(1) does not apply to Section 1956. *See Elso*, CA-11, 422 F3d 1305, 1309-10 (2005).

[17] Money Laundering Prosecution Improvements Act of 1988, Pub. L. No. 100-690, Tit. VI, Subtit. E, sec. 6182, 102 Stat. 4181, 4354; *see also* Eugene R. Gaetke & Sarah W. Welling, *Money Laundering and Lawyers*, 43 Syracuse L. Rev. 1165, 1170–71 (1992).

[18] *See* D. Randall Johnson, *The Criminally Derived Property Statute: Constitutional and Interpretive Issues Raised by 18 USC §1957*, 34 Wm. & Mary L. Rev. 1291, 1355–56 (1993).

[19] sec. 1956(c) (defining financial institutions by reference to 31 USC sec. 5312).

[20] sec. 1956(f)(2).

[21] *See* Controlled Substances Act, Pub. L. No. 91-513, Tit. II, sec. 202, 84 Stat. 1242, 1247-49 (1970) (codified as amended at 21 USC sec. 812(a)(sched. I)(c)(10), (c)(17)); *see also* Sched. I, 21 CFR sec. 1308.11(d)(23) ("Marihuana"); *id.* sec. 1308.11(d)(31) ("Tetrahydrocannabinols"). However, cannabis-derived products that contain 0.3% THC or less are considered "hemp" and are not controlled substances under the Controlled Substances Act. *See* Agriculture Improvement Act of 2018, Pub. L. No. 115-334, secs. 10113, 12619, 132 Stat. 4490, 4908, 5018.

[22] 21 USC sec. 841.

[23] *Yagman*, 502 FSupp2d 1084, 1087 (C.D. Cal. 2007) (quoting *Rutgard*, CA-9, 116 F3d 1270, 1292 (1997)).

[24] *See id.* at 1087 n. 1.

[25] *See, e.g., Sokolow*, CA-3, 91 F3d 396, 409 (1996). Note that New Jersey recently legalized marijuana, and it sits in the Third Circuit.

[26] *Rutgard*, CA-9, 116 F3d 1270, 1291 (1997) ("This draconian law, so powerful by its elimination of criminal intent, freezes the proceeds of specific crimes out of the banking system. As long as the underlying crime has been completed and the defendant 'possesses' the funds at the time of deposit, the proceeds cannot enter the banking system without a new crime being committed.").

[27] sec. 1956(a)(1), (3).

[28] sec. 1956(a)(1).

[29] *Id.*

[30] sec. 1956(c)(9).

[31] sec. 1956(c)(4).

[32] The Eleventh Circuit has held that Section 1957(f)(1) does not apply to Section 1956. *See Elso*, CA-11, 422 F3d 1305, 1309-10 (2005).

[33] Legal representation is important, so much so that the Department of Justice's Criminal Attorney's Manual prohibits the prosecution of criminal defense attorneys for receipt of "*bona fide* fees," unless a rigorous evidentiary showing can be made. *See* Dep't of Justice, *U.S. Attorneys' Manual*, sec. 9-105.600 (Dec. 7, 2018), *www.justice.gov/archives/usam/archives/usam-9-105000-money-laundering#9-105.750*.

[34] If a practitioner receives funds of less than $10,000, she may not run afoul of Section 1956 or 1957, but larger firms that hope to represent marijuana businesses may not engage a client that would pay less than $10,000 in fees.

[35] 21 USC sec. 841(a). It is also possible that a court might determine that a marijuana business client is engaged in a "continuing criminal enterprise" under 21 USC sec. 848(c), but whether a business (as opposed to an individual) could be a so-called "kingpin" is not within the scope of this column.

[36] We suggest the use of an LLC in this proposed solution because it's one type of an entity that is separate from its owner, not because of other attributes of an LLC.

[37] Even if LLC A had some revenue from non-marijuana items, there is a risk that all funds in its account would be treated as "dirty". *See Sokolow*, CA-3, 91 F3d 396, 409 (1996).

[38] *See* Firestone, Frewing, Kroll, Van Horne, Lipeles & Skubis Weber, *supra* note 5, at 9–10 (concluding that 18 USC secs. 841 and 846, which criminalize the distribution and production of controlled substances such as marijuana, do not apply to activities wholly outside the United States). We note, however, that the key challenge here would be "tracing" the proceeds—it would be important that the taxpayer ensure that the funds from the foreign legal marijuana company are fully separate from the funds of its U.S. operations. *See United States v. Yagman*, 502 FSupp. 2d 1084, 1087 (C.D. Cal. 2007) ("Where the transaction involves criminal proceeds that have been commingled with innocent funds, the Ninth Circuit imposes a tracing requirement; the government must trace each of the alleged monetary transactions to criminally-derived proceeds.").

[39] Model Rules of Professional Conduct 1.8 cmt. (f).

[40] *See* Dep't of Justice, *U.S. Attorneys' Manual*, sec. 9-105.600.

[41] *See id.*

[42] *Brewer v. Williams*, SCt, 430 US 387, 398, 97 SCt 1232 (1977). The Sixth Amendment right to counsel attaches "at or after the time that judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Id.* (quoting *Kirby v. Illinois*, 406, 689 (1972)).

[43] *See* Dep't of Justice, *U.S. Attorneys' Manual*, sec. 9-105.600.

[44] *Velez*, CA-11, 586 F3d 875 (2009).

[45] *Blair*, CA-4, 661 F3d 775 (2011).

[46] *See Elso*, CA-11, 422 F3d 1305, 1307 (2005) (holding sec. 1957(f)(1) does not apply to sec. 1956 where attorney "retrieved $266,800 in drug money" from client's home and "loaded it into a briefcase which he put into his car trunk, and attempted to drive back to his law office ... evad[ing] the police until he was blocked by traffic").

[47] *Cf. United States v. Yagman*, No. CR 06-227(A) SVW, 2007 U.S. Dist. LEXIS 63979, at *6 (C.D. Cal. Aug. 17, 2007).

[48] *Hoogenboom*, CA-7, 209 F3d 665, 669 (2000) ("Correctly read, the statute offers a defense where a defendant engages in a transaction underlying a money laundering charge with the present intent of exercising Sixth Amendment rights.").

[49] *Rutgard*, 116 F3d at 1291.