

ACCOUNTING PROFESSIONALS AND CALIFORNIA'S WAVE OF MARIJUANA REGULATION: A CERTIFIED PUBLIC ACCOUNTANT'S PLUNGE INTO SERVICING CLIENTS INVOLVED IN THE MARIJUANA INDUSTRY

I. INTRODUCTION

Twenty years after California passed a bill decriminalizing marijuana for *medical* purposes, Proposition 64 was passed legalizing marijuana for *recreational* purposes.¹ Regulations and business codes were created in what is described by three California state licensing authorities as “Emergency Legislation.”² New cannabis regulations were approved January 16, 2019 by the Office of Administrative Law replacing the emergency provisions with the goal to “establish a comprehensive system to control and regulate the cultivation, distribution, transport, storage, manufacturing, processing, and sale of nonmedical marijuana and marijuana products for adults twenty-one years of age and over.”³

California's Central Valley grows over 250 crops that feed people all over the world,⁴ and has the infrastructure to grow and process marijuana.⁵ By value, the Central Valley supplies eight percent of the United States

¹ Maureen Meehan, *California Rushing to Meet January 2018 Legalization Deadline*, HIGHTIMES, (Aug. 18, 2017) <http://hightimes.com/news/california-rushing-to-meet-january-2018-legalization-deadline>; see also 2016 CAL. LEGIS. SERV. PROP. 64 (Proposition 64) (West 2016).

² STATE CANNABIS LICENSING AUTHS., *New Cannabis Regulations Approved by the Office of Administrative Law*, (JAN. 16, 2019) <https://cannabis.ca.gov/2019/01/16/new-cannabis-regulations-approved-by-the-office-of-administrative-law/>.

³ CAL. BUS. & PROF. CODE § 26000.

⁴ U.S. DEP'T OF THE INTERIOR, U.S. GEOLOGICAL SURVEY, [https:// ca.water.usgs.gov/projects/ central-valley/about-central-valley.html](https://ca.water.usgs.gov/projects/central-valley/about-central-valley.html) (Last visited March 05, 2019).

⁵ See generally Central Valley Water Board Fact Sheet, waterboards.ca.gov, https://www.waterboards.ca.gov/centralvalley/board_info/exec_officer_reports/program_factsheets/fy1718/fy1718_cannabis_factsheet.pdf (Last visited March 05, 2019) (Although the Water Board does not expressly state that the Central Valley has the infrastructure to grow marijuana, it is implied from the fact that they are responsible for the passing of The Cannabis Cultivation Waste Discharge Act of 2014. This act ensures sufficient resources are allocated to both the Water Boards and Department of Fish & Wildlife to reduce the environmental impact of cannabis cultivation.)

agricultural output through use of fewer than one percent of farmland.⁶ It also produces one-fourth of the nation's food, including forty percent of the Nation's fruits, nuts, and other table food.⁷ The Central Valley is now home to a growing number of marijuana farmers.⁸ According to leaders in the commercialization of marijuana the California market for marijuana products will grow to \$6.5 billion by 2020.⁹

An industry's success within the financial infrastructure of California and the United States is determined on its ability to interact with financial institutions such as banks and its effectiveness in reporting to regulatory agencies such as the Internal Revenue Service (IRS).¹⁰ The ability of any business to positively affect society will depend heavily on Certified Public Accountants (CPAs) and their role in reporting an entity's finances to financial institutions and governmental agencies.¹¹ Many recreational marijuana businesses in the Central Valley are seeking the services of CPAs due to a high level of governmental regulation and accountability.¹² A CPA's willingness to take on recreational marijuana business owners as clients will result in a marijuana seller's mutually beneficial relationship with regulatory agencies and financial institutions that receive revenue from businesses involved in the supply chain marijuana sales.¹³

While many of the highly respected CPAs of the Central Valley will be reluctant to partake in the marijuana industry, others have already seized the opportunity to cater to a rapidly growing industry.¹⁴ California's publication

⁶ U.S. DEP'T OF THE INTERIOR, *Supra* note 4.

⁷ *Id.*

⁸ CAL. DEP'T. OF FOOD AND AG., CALCANNABIS CULTIVATION LICENSING, [calcannabis.cdfa.ca.gov](https://static.cdfa.ca.gov/MCCP/document/CalCannabis2018%20by%20the%20Numbers_12.31.18.pdf), available at https://static.cdfa.ca.gov/MCCP/document/CalCannabis2018%20by%20the%20Numbers_12.31.18.pdf (Last visited March 05, 2019) (Although not explicitly stated, a search of the licenses issued for cultivating cannabis reveals an increasing number of licensed cultivators in the central valley).

⁹ Patrick McGreevy, *Legal Marijuana Could be a \$5-Billion Boon to California's Economy*, LATIMES.COM (June 11, 2017), available at <http://www.latimes.com/politics/la-pol-ca-pot-economic-study-20170611-story.html>.

¹⁰ *Roles and Importance of Professional Accountants in Business*, INT'L FED'N OF ACCOUNTANTS, available at <https://www.ifac.org/news-events/2013-10/roles-and-importance-professional-accountants-business> (Last visited March 05, 2019) ("Like their counterparts in taxation or auditing, professional accountants in business play important roles that contribute to the overall stability and progress of society").

¹¹ *Id.*

¹² John Schroyer, *Industry Snapshot: Accounting Services for Marijuana Businesses*, MARIJUANA BUS. DAILY, (Jan. 2017) <https://mjbizmagazine.com/industry-snapshot-accounting-services-for-marijuana-businesses/> ("As the industry has grown, there's been a shortfall of qualified financial professionals willing to work with marijuana business, meaning there's a big opening for more CPAs to jump in.").

¹³ *Id.*

¹⁴ *Id.*

of regulations regarding the marijuana industry has made compliance with state law possible.¹⁵ However, it is impossible for someone involved in the marijuana industry to obey federal law because marijuana remains illegal under federal law.¹⁶ A CPA's interactions with businesses are often very intimate, a CPA will be under a microscope if a client is found to have violated federal laws in operating their business.¹⁷ Also, the heavily regulated market means that a CPA may be criminally or civilly liable for making a mistake, such as giving the wrong advice or classifying and reporting a revenue or expense incorrectly.¹⁸

The purpose of this Comment is to examine the legal issues a CPA faces when serving clients in the highly regulated marijuana industry and to examine whether there is adequate protection for CPAs when they service such clients.¹⁹ Accountants licensed as CPAs will continue to flourish in servicing California's businesses and will play an essential role in the rapid growth of the marijuana industry.²⁰ However, many CPAs are deterred from serving clients in the marijuana industry, because of marijuana's illegality at the federal level.²¹

To prove the need for statutory protections and an assuring advisory opinion from state agencies, Section II will provide the legal authority necessary to appreciate the risks to CPAs servicing marijuana businesses.²² Section III will examine legal risks such as license revocation for professional ethics violations, liability for mistakes in the highly regulated market, and criminal liability risks that cannot be eliminated by taking practical precautions.²³ Section IV will weigh the risk against the reward of servicing the industry with

¹⁵ STATE CANNABIS LICENSING AUTHS., *supra* note 2 (The Chief of State Cannabis Licensing Authorities, Lori Ajax, states "These approved regulations are the culmination of more than two years of hard work by California's cannabis licensing authorities. Public feedback was invaluable in helping us develop clear regulations for cannabis businesses and ensuring public safety.").

¹⁶ Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified at 21 U.S.C.A. Ch. 13 § 801 et seq., and 21 U.S.C.A. Ch. 13 § 812 et seq.).

¹⁷ CAL. BD. OF ACCOUNTANCY, DISCIPLINARY GUIDELINES AND MODEL ORDERS (9th Edition, 2013) [hereinafter "DISCIPLINARY GUIDELINES"], available at <http://www.cba.ca.gov/cba/licensees/dispman.pdf> (The CBA, through its Enforcement Division, assisted by its statutorily established Enforcement Advisory Committee, receives and investigates complaints; initiates and conducts investigations or hearings, with or without the filing of a complaint; and obtains information and evidence relating to any matter involving the conduct of Certified Public Accountants, Public Accountants and Accountancy Firms).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Schroyer, *supra* note 12.

²¹ *Id.*

²² See discussion *infra* Section II.

²³ See discussion *infra* Section III.

and without statutory protections.²⁴ These steps will be taken to conclude in Section IV that the California Legislature and the California Board of Accountancy must work together to protect CPAs inclined to help recreational marijuana clients.²⁵

II. LEGAL AUTHORITY AND FACTUAL BACKGROUND

A. *The California Board of Accountancy and a CPA's Right to be Certified in California*

The California Board of Accountancy (CBA) is a state agency overseen by California's Department of Consumer Affairs (DCA).²⁶ The DCA is responsible for protecting and serving California consumers while ensuring the market place is competent and fair.²⁷ This is accomplished by administering more than 250 different types of licenses through the licensing and regulatory entities under its jurisdiction.²⁸ These licensing entities set and enforce minimum qualifications for the professionals, establishments, and businesses they regulate.²⁹

The CBA's mission and vision statement generally explains the significance of being licensed by the CBA to practice public accountancy: "To protect consumers by ensuring only qualified licensees practice public accountancy in accordance with established professional standards. All consumers are well-informed and receive quality accounting services from licensees they can trust."³⁰

Being licensed by the CBA is a manifestation of an accountant's competence and trustworthiness.³¹ In *Sandarg v. Dental Board of California*, 184

²⁴ See discussion *infra* Section IV.

²⁵ CAL. BUS. & PROF. CODE § 5018.

(BUS. & PROF. § 5018 generally states that the CBA has the authority to regulate, prescribe, amend, or repeal rules of professional conduct. The recommendation made in section IV is that the CBA use this power to protect licensees from risk of professional conduct violations discussed in section III).

²⁶ CAL. BUS. & PROF. CODE § 5116.

²⁷ BUS. & PROF. CODE § 101.6.

²⁸ BUS. & PROF. CODE § 101.6.

²⁹ BUS. & PROF. CODE § 101.6.

³⁰ CAL. BD. OF ACCOUNTANCY, CONSUMER PROTECTION THROUGH LICENSURE, ENFORCEMENT, AND REGULATION [hereinafter "CONSUMER PROTECTION"], available at <https://www.dca.ca.gov/cba/index.shtml> (Last visited March 05, 2019) (CBA website has their mission & vision statement posted on the homepage of their website. This website is a portal where accountants and the general public can apply for licensure, view announcements and news, search disciplinary decisions, and more).

³¹ CAL. BD. OF ACCOUNTANCY, CONSUMER ASSISTANCE BOOKLET, available at <http://www.dca.ca.gov/cba/consumers/consumer-booklet.pdf> (Last Visited March 05,

Cal.App.4th 1434, 1438 (2010) the court determined, “The right to practice one’s profession is a fundamental vested right”³² and this right can only be stripped by an administrative judge citing “clear and convincing evidence” of an offense.³³ Sandarg was a practicing dentist when the Dental Board of California suspended his license.³⁴ The Department of Consumer Affairs oversees the Dental Board of California in the same way it oversees the CBA.³⁵ The California Court of Appeal for the Fourth District found that because Sandarg’s right to practice dentistry depended on this licensing any decision by the Board to suspend licensing had to be supported by clear and convincing evidence.³⁶ Since Sandarg was on probation the board’s burden of proof for suspending licensing was lowered to a preponderance of the evidence.³⁷ Also, the court found that a trial court’s review of the Board decision must reweigh the evidence independent of the board’s decision.³⁸ The Dentistry Board is very similar to the CBA and share the common goal of protecting consumers of their respective services.³⁹

The right to be certified in your respective state to practice public accounting is essential to a CPA’s livelihood, because without the certification their services are less appealing to consumers.⁴⁰ The revocation or suspension of the right to practice is only possible by a hearing before an administrative judge.⁴¹ The CBA licenses public accountants and has the powers and duties conferred to it by the California Accountancy Act to discipline behavior inconsistent with the board’s standards.⁴² This right of certification is akin to a lawyer’s right to practice law given to them by their respective State Bar, or Sandarg’s right to be licensed by the Dental Board of California to practice dentistry in California.⁴³ Good practitioners strive to practice within the

2019) (“To maintain the ability to practice public accountancy, CPAs are required to complete continuing professional education designed to maintain or enhance their knowledge and competence.”).

³² Sandarg v. Dental Bd. of California 184 Cal.App.4th 1434, 1440 (2010).

³³ *Id.* at 1438.

³⁴ *Id.* at 1436.

³⁵ BUS. & PROF. CODE § 101.6.

³⁶ Sandarg v. Dental Bd. of California 184 Cal.App.4th 1434, 1440 (2010).

³⁷ *Id.* at 1440

³⁸ *Id.* at 1440

³⁹ CONSUMER ASSISTANCE BOOKLET, *supra* at note 31 (Although the CBA does not explicitly state that non-licensed accountants are less marketable, it can be inferred that a consumer would feel more confident knowing their accountant is being held to the CBA’s professional standards.).

⁴⁰ *Id.*

⁴¹ BUS. & PROF. CODE § 5116.

⁴² BUS. & PROF. CODE § 5116.

⁴³ Compare BUS. & PROF. § 1601.1; BUS. & PROF. § 5000; and BUS. & PROF. § 6001.1 (A comparison of each regulation reveals that the main purpose of licensure is to protect consumers by requiring licensure for a person’s respective profession).

standard of care in their profession and in doing so, maintain a license in good standing.⁴⁴

B. The Professional Standards of a Certified Public Accountant

A CPA owes a fiduciary responsibility to act in their client's best interest.⁴⁵ A CPA is also liable to third parties, such as banks and investors, when a CPA is aware that these third parties will rely on information produced for the client.⁴⁶ For example, if a CPA produces an income statement for a client to present to a bank to secure a line of credit a CPA can be subject to disciplinary action by the CBA if the income statement is misleading.⁴⁷

A CPA is required to maintain high professional standards.⁴⁸ The CBA is tasked with assuring the public that CPAs have a reasonable currency of knowledge as a basis for a high standard of practice by licensees.⁴⁹ The board of accountancy is also tasked with assuring the public standards of professional conduct are being met.⁵⁰ These standards include maintaining continuing education requirements and reporting any reportable event that may constitute a violation of a professional standard to CBA.⁵¹

Business and Professions Code Section 5063 provides examples of events that must be reported to the board within thirty days of their occurrence.⁵² The following events, as well as the failure to report them, are all grounds for disciplinary action such as license revocation and suspension: conviction of a felony or any crime related to the qualifications, functions, or duties of an accountant; conviction of any crime involving theft, embezzlement,

⁴⁴ Compare BUS. & PROF. §1601.1; BUS. & PROF. § 5000; and BUS. & PROF. § 6001.1.

⁴⁵ CAL. BUS. & PROF. CODE §5018.

⁴⁶ See CONSUMER PROTECTION, *supra* note 30 (“The CBA performs its consumer protection mission for many stakeholders, including: Consumers who require audits, reviews, and compilations of financial statements, tax preparation, financial planning, business advice and management consultation; lenders, shareholders, investors, and small and large companies who rely on the integrity of audited financial information; governmental bodies, donors, and trustees of not-for-profit agencies, which require audited financial information or assistance with internal accounting controls; regulatory bodies such as the Securities and Exchange Commission, the Public Company Accounting Oversight Board, the Public Utilities Commission, Department of Insurance, Department of Labor, the Government Accountability Office, and federal and state banking regulators and local, state, and federal taxing authorities; and Retirement systems, pension plans, capital markets and stock exchanges.”).

⁴⁷ *Id.*

⁴⁸ BUS. & PROF. § 5026.

⁴⁹ BUS. & PROF. §5027.

⁵⁰ BUS. & PROF. §5063.

⁵¹ BUS. & PROF. §5026.

⁵² BUS. & PROF. § 5063.

misappropriation of funds or property; breach of a fiduciary responsibility; and the preparation, publication, or dissemination of false, fraudulent, or materially misleading financial information.⁵³ The CBA also reserves the right to discipline for any actionable conduct by the licensee in the practice of public accountancy.⁵⁴ The CBA can discipline a CPA for acts in violation of federal law even if the act is legal under state law.⁵⁵

C. Marijuana's Status as an Illegal Schedule I Controlled Substance

Although marijuana has been decriminalized in California it remains an illegal controlled substance under federal law.⁵⁶ In 2013, the Department of Justice announced an update to its federal marijuana enforcement policy that made clear that marijuana remains an illegal Schedule I controlled substance under the Controlled Substances Act of 1970.⁵⁷ In January of 2018, the Department of Justice rescinded nationwide guidance regarding marijuana enforcement⁵⁸ that instructed all United States attorneys to allocate resources to prosecute marijuana crimes based on eight priorities, none of which focus on prosecuting marijuana sellers in compliance with state law.⁵⁹ The memo now leaves prosecutors to decide whether to allocate resources to the prosecution of marijuana based on the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community. The memo does not preclude prosecutors from targeting marijuana growers in compliance with state law.⁶⁰ This leaves marijuana businesses with more uncertainty as to whether they will be prosecuted by the federal government.⁶¹

⁵³ BUS. & PROF. § 5063.

⁵⁴ BUS. & PROF. § 5063.

⁵⁵ See CONSUMER PROTECTION, *supra* note 30.

⁵⁶ 21 USCA § 811.

⁵⁷ *Justice Department Announces Update to Marijuana Enforcement Policy*, DEPARTMENT OF JUSTICE (August 29, 2013) available at <https://www.justice.gov/opa/pr/justice-department-announces-update-marijuana-enforcement-policy> (“In a new memorandum outlining the policy, the Department makes clear that marijuana remains an illegal drug under the Controlled Substances Act and that federal prosecutors will continue to aggressively enforce this statute.”).

⁵⁸ Memorandum from Former Deputy Attorney General James A. Cole, to All United States Attorneys, DEPARTMENT OF JUSTICE (Aug. 29, 2013) available at <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (commonly known as the “Cole Memo.”)

⁵⁹ Memorandum from Former Attorney General Jefferson B. Sessions, All United States Attorneys, DEPARTMENT OF JUSTICE (January 4, 2018) available at <https://www.justice.gov/opa/press-release/file/1022196/download>.

⁶⁰ *Id.*

⁶¹ Hilary V. Bricken, *Navigating the Hazy Status of Marijuana Banking*, American Bar Association (Sept. 19, 2018), available at

D. Prosecution for violation of Federal Money Laundering Statute

Although marijuana is decriminalized in California, growing, selling and consuming marijuana is still an unlawful federally.⁶² For CPAs to provide effective services for marijuana businesses, they should be well versed in the industry and regulatory scheme.⁶³ A CPA's services are procured for the purposes of continuing the business.⁶⁴ Therefore, a CPA is likely to be involved in financial transactions that promote the carrying on of the unlawful activity.⁶⁵

In order to convict a person of money laundering the Federal Government must prove (1) actual or attempted financial transaction; (2) involving proceeds of specified unlawful activity; (3) knowledge that transaction involves proceeds of some unlawful activity; and (4) either intent to promote carrying on of specified unlawful activity, or knowledge that transaction is designed to promote underlying specified unlawful activity or to conceal or disguise nature or source of proceeds of specified unlawful activity.⁶⁶ Any person found to be in violation of the four elements mentioned above can be sentenced to a fine of \$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.⁶⁷

E. The Internal Revenue Service's Take on Reporting Profit from Selling Illegal Substances

The IRS addresses marijuana sales indirectly as a Schedule I controlled substance.⁶⁸ A 2014 IRS report offers guidance to tax professionals concerning Schedule I controlled substance sellers.⁶⁹ Internal Revenue Code Section 280E states that:

https://www.americanbar.org/groups/business_law/publications/blt/2017/08/03_bricken/.

⁶² 21 USCA § 811.

⁶³ BUS. & PROF. CODE § 5027.

⁶⁴ Steven Bragg, *The Going Concern Principle*, Accounting Tools (Dec. 29, 2018), available at <https://www.accountingtools.com/articles/2017/5/14/the-going-concern-principle> (“An entity is assumed to be a going concern in the absence of significant information to the contrary.”).

⁶⁵ *See id.*; see 21 USCA § 811

⁶⁶ U.S. v. All Funds on Deposit in Dime Sav. Bank of Williamsburg Account No. 58-400738-1 in the Name of Ishar Abdi and Barbara Abdi, E.D.N.Y.2003, 255 F.Supp.2d 56, 70 and 18 U.S.C. § 1956.

⁶⁷ 18 U.S.C. § 1956.

⁶⁸ 26 U.S. CODE § 280E.

⁶⁹ 26 U.S. CODE § 280E.

no deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) 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.⁷⁰

Passed by Congress in 1982, Internal Revenue Code Section 280E specifically targets illegal businesses by severely limiting the kinds of business expenses and deductions these operations are legally allowed to make.⁷¹ The application of Section 280E is not simple.⁷² For example, Section 280E is intended to disallow the adjustment of gross receipts with respect to costs of goods sold.⁷³ Therefore, the cost of materials used directly in the production of marijuana products is not allowable as an expense.⁷⁴ Other expenses such as employee salaries, utility costs, advertising costs and rent fees are also not allowed to be deducted from gross receipts.⁷⁵

The IRS has the discretion to determine what is an allowable expense.⁷⁶ Filing taxes with a disallowed expense will result in under reporting income.⁷⁷ If audited this will create a tax liability that the taxpayer must pay.⁷⁸ A CPA must comply with what the IRS determines is an expense.⁷⁹ This will mean that a client that sells marijuana will pay more in taxes because their income will not be offset by expenses the IRS does not approve of.⁸⁰

F. The United States Securities and Exchange Commission

When the Sarbanese-Oakly Act of 2002 was passed the Securities and Exchange Commission (SEC) was given broad authority to regulate and penalize publicly traded companies and their officers.⁸¹ The Sarbanese-Oakly Act of 2002 eliminated an officer of a publicly traded company's excuse of

⁷⁰ 26 U.S. CODE § 280E.

⁷¹ Guillermo Jimenez, *Historic Ruling in Legal Marijuana vs IRS Could Be Just Around the Corner*, TAX REVOLUTION INSTITUTE (September 30, 2016), available at <https://taxrevolution.us/historic-ruling-legal-marijuana-vs-irs-just-around-corner/>.

⁷² *Id.*

⁷³ *Internal Revenue Code Section 280E: Creating an Impossible Situation for Legitimate Businesses*, NAT'L CANNABIS INDUS. ASS'N, available at <https://thecannabisindustry.org/uploads/2015-280E-White-Paper.pdf> (Last accessed Mar. 31, 2019)

⁷⁴ 26 U.S. CODE § 280E.

⁷⁵ 26 U.S. CODE § 263A.

⁷⁶ *The Green Solution Retail, Inc. v. United States*, 855 F.3d 1111, 1118 (10th Cir. 2017).

⁷⁷ 26 U.S. CODE § 280E.

⁷⁸ 26 U.S. CODE § 280E.

⁷⁹ 26 U.S. CODE § 280E.

⁸⁰ 26 U.S. CODE § 280E.

⁸¹ 26 U.S. CODE § 280E.

ignorance toward misleading financials.⁸² The SEC requires that any publicly traded company publish financial statements in accordance with General Accepted Accounting Principles (GAAP).⁸³ These principles include competency and objectivity standards as well as specific ways to report material facts.⁸⁴ When a publicly traded company is found to be in violation of principles they can be fined extensively or suspended from public trade.⁸⁵

As the marijuana industry grows, more marijuana companies are being publicly traded.⁸⁶ The SEC will often allocate resources to new industry because of the confusion that results when people begin investing in new emerging markets.⁸⁷ Publicly traded companies rely on CPAs to conduct financial disclosures to potential investors as well as ensure audit compliance by agencies such as the SEC.⁸⁸ This means that a CPA's services provided to publicly traded company will likely be subject to scrutiny by the SEC as the SEC seeks to protect investors from fraud and misleading financial statements.⁸⁹

III. LEGAL ANALYSIS

A. A Certified Public Accountant's Role in the Recreational Marijuana Industry and the Potential Risks that Follow

A CPA's services generally include the preparation of taxes and financial statements; bookkeeping; and assurance services used to offer assurance of a business' profitability or stability to owners, partners, banking institutions, and investors.⁹⁰ Many business professionals, including CPAs, already specialize in servicing marijuana clients.⁹¹ City ordinances often require an accounting

⁸² 15 USCA § 7241.

⁸³ FED. ACCOUNTING STANDARDS ADVISORY BD., STANDARDS AND GUIDANCE [hereinafter "FASAB HANDBOOK"], available at <https://fasab.gov/accounting-standards/> ("The FASAB Handbook of Accounting Standards and Other Pronouncements, as Amended (Current Handbook)—an approximate 2,500-page PDF—is the most up-to-date, authoritative source of generally accepted accounting principles (GAAP) developed for federal entities.").

⁸⁴ *Id.*

⁸⁵ 15 U.S.C.A. § 330d.

⁸⁶ AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, AN ISSUE BRIEF ON STATE MARIJUANA LAWS AND THE CPA PROFESSION (January 14, 2019) <https://www.aicpa.org/Advocacy/State/DownloadableDocuments/MarijuanaCPAsIssueBrief.pdf>.

⁸⁷ *Id.*

⁸⁸ See CONSUMER PROTECTION, *supra* note 30.

⁸⁹ AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, *supra* note 86.

⁹⁰ BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, available at <https://www.bls.gov/ooh/business-and-financial/accountants-and-auditors.htm#tab-2>.

⁹¹ BUS. & PROF. CODE § 5063.

software system in place to provide point of sale data as well as audit trails for both product and cash.⁹² Ordinances also require audits by independent CPAs.⁹³ Marijuana business owners that want quality point of sale systems and audit preparations will solicit the services of CPAs.⁹⁴

The entire supply chain of the marijuana industry, from research to packaging, is being highly regulated by the Bureau of Cannabis Control making it even more probable that the services offered by an accountant will have to navigate through the current regulations published on January 16, 2019.⁹⁵ Servicing the business owners in the marijuana industry presents legal challenges and risks that, if not handled properly, the CBA can deem a violation of professional standards.⁹⁶ When a professional standard is violated the CBA has the power to strip an accountant of their license.⁹⁷

1. Professional Ethics: The California Board of Accountancy's Authority to Revoke Licensing for Violation of Professional Standards Because of Involvement of Federal Crime

A significant risk of revocation of licensing exists when a CPA violates the CBA's professional standards.⁹⁸ The CBA has yet to publish a statement regarding the potential ethical violations serving a client involved in the business of selling recreational marijuana.⁹⁹ In fact, they have explicitly responded to requests for a position statement: "Position statements are legal opinions. Because the CBA cannot issue legal opinions, no position statement will be issued on this topic."¹⁰⁰ Other state boards of accountancy in Colorado and elsewhere, however, have stated they will not consider serving a recreational marijuana client an ethical violation solely because there is conflict between state and federal law.¹⁰¹

The CBA is a state agency empowered by lawmakers to ultimately protect consumers of accounting services.¹⁰² The CBA has the power to regulate the profession such that only those professionals that display the highest level of

⁹² Adult Use Commercial Cannabis Activity, Fresno County, CA, (Sep. 10, 2018) (Draft Ordinance), available at <https://www.fresno.gov/cityattorney/wp-content/uploads/sites/3/2018/09/9.10.18-MRD-Regulatory-Medicinal-Cannabis-Ord-CLEAN.pdf>.

⁹³ *Id.*

⁹⁴ See CONSUMER PROTECTION, *supra* note 30.

⁹⁵ BUREAU OF LABOR STATISTICS, *supra* note 90.

⁹⁶ See CONSUMER PROTECTION, *supra* note 30.

⁹⁷ BUS. & PROF. CODE § 5063.

⁹⁸ BUS. & PROF. CODE § 5063.

⁹⁹ See CONSUMER PROTECTION, *supra* note 30.

¹⁰⁰ *Id.*

¹⁰¹ BUS. & PROF. § 5063.

¹⁰² BUS. & PROF. § 5000.

ethics and competence can call themselves CPAs.¹⁰³ The CBA has power to enforce standard violations, to strip licensees of certifications, issue suspensions of the ability to practice, or deny accountants the right to perform specific tasks, such as audits or bookkeeping.¹⁰⁴ This power is likely to not be reviewed by a trial court if the decision is supported by the weight of the evidence and the administrative judge and CBA. did not abuse its discretion. Cassidy was a CPA whose license was revoked by the CBA for failing to file a tax return for a client and holding himself out as a CPA during a moment in time where his license had expired.¹⁰⁵ His appeal of the administrative judgment to a trial court was denied because the administrative judge and the CBA did not abuse their discretion.¹⁰⁶ The California Court of Appeal for the Fourth District reiterated the standard for rejecting the review of administrative law judgments: the trial court will not review an administrative decision if it is supported by substantial evidence and is not an abuse of discretion.¹⁰⁷

Many professions have professional standards that, when breached, constitute a “for cause” firing.¹⁰⁸ The CBA has revoked licensing of public accountants and even revoked the rights of accountants to use the word *accountant* when describing their services to consumers.¹⁰⁹ State boards of accountancy where recreational marijuana has been legalized, such as Washington and Colorado, have publicly stated that working with clients that violate the federal law that makes marijuana sales illegal is not an ethical violation.¹¹⁰ However, each of these states have qualified their statement by stating a licensee found to be involved with a federal crime is possibly in breach of their professional standards.¹¹¹ The CBA reserves a plethora of methods to ensure a licensee is disciplined in the most appropriate manner.¹¹²

Between 2012 and 2015 a CPA, and owner of New Era Certified Public Accountants, provided accounting, bookkeeping, and business consulting services to individuals who cultivated and sold marijuana in violation of Federal law.¹¹³ The owner, who is a CPA, was convicted of violating Title 34 of United States Code section 5324(a)(3) [Structuring Transactions to Evade Reporting Requirements], a felony.¹¹⁴ The owner was attempting to deposit cash revenues into a bank account in sums less than \$10,000 so the bank would

¹⁰³ BUS. & PROF. § 5000.

¹⁰⁴ BUS. & PROF. § 5027.

¹⁰⁵ Cassidy v. California Bd. of Accountancy 220 Cal.App.4th 620, 627 (2013).

¹⁰⁶ *Id.* at 620-627.

¹⁰⁷ *Id.*

¹⁰⁸ 18 U.S.C 1956 (A)(B)(I).

¹⁰⁹ Moore v. California State Bd. of Accountancy 2 Cal.4th 999, 1018 (1992).

¹¹⁰ AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, *supra* note 86.

¹¹¹ *Id.*

¹¹² CAL. BUS. & PROF. CODE § 5100.

¹¹³ See DISCIPLINARY GUIDELINES, *supra* note 17.

¹¹⁴ California Board of Accountancy v. Ceretto Case No. AC-2018-49 (2018).

not have to report the transaction to the federal government.¹¹⁵ Not only did the owner of the CPA firm receive prison time from the federal government, he was also subject to license suspension and numerous probationary requirements by the CBA.¹¹⁶ His discipline by the CBA took effect in September of 2018 and serves as an example of how the CBA may treat an ethics violation.¹¹⁷

2. Liability for Mistakes when Reporting to the Internal Revenue Service

Founder and CEO Lance Perryman of Next Harvest, a Colorado based marijuana retailer with \$10 million in annual revenue, expresses his frustrations by stating during an interview “[t]he lack of financial infrastructure makes it difficult for cannabis companies to establish exactly the kind of fiscal paper trail that federal and state regulators could use to help enforce regulatory compliance.”¹¹⁸ One reason for the lack of financial infrastructure is the federal government’s classification of marijuana as a Schedule I controlled substance.¹¹⁹

Section 280E was generally applied only to “traffickers.”¹²⁰ The IRS now considers virtually the entire vertical chain of marijuana distribution to be “traffickers” within the meaning of Section 280E.¹²¹ This means that a CPA will have to report a relatively high income to the IRS for not only those clients that sell marijuana but those clients that provide services directly related to the selling of marijuana such as transporting, packaging, and processing.¹²² This will lead to a higher tax expense for businesses directly involved with the recreational marijuana industry.¹²³ As a CPA navigates through the gauntlet of the many tax tools necessary to increase reportable expenses and lower taxable income for their clients, the risk of erroneous reporting is increased dramatically.¹²⁴ A false or misleading tax filing, however, can lead directly to an investigation by the IRS and/or CBA.¹²⁵ For example, in *Kwang-Ho Lee v. California Bd. of Accountancy*, the court revoked a Certified Public Accountancy Corporation’s licensing for gross negligence in conducting

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ Clay Dillow, *Millions in Marijuana Cash Roll Headed to IRS on Tax Day* (April 18, 2017) available at <https://www.cnn.com/2017/04/18/marijuana-companies-sending-a-huge-cash-roll-to-irs-on-tax-day.html>.

¹¹⁹ *Id.*

¹²⁰ 26 U.S. CODE § 280E.

¹²¹ 26 U.S. CODE § 280E.

¹²² 26 U.S. CODE § 280E.

¹²³ NAT’L CANNABIS INDUS. ASS’N, *supra* note 73.

¹²⁴ *Id.*

¹²⁵ CAL. BUS. & PROF. CODE § 5100.

audits and reporting to the IRS.¹²⁶ The court also found that the CBA could administer an abnormally harsh punishment that was not reviewable by the appellate court if it were rational and based on facts.¹²⁷

In a 2018 memo by The United States Tax Court, the case of *Alterman v. Commissioner* is used as an example of a business being disciplined for mistakenly classifying expenses.¹²⁸ Under Section 179 of the United States Tax Code a marijuana related business cannot offset revenues for non-marijuana sales with cost of goods sold unless those costs are for equipment or depreciation of equipment.¹²⁹ The business hired a tax firm to prepare their taxes and reported a high cost of goods sold that was a result of claiming expenses for labor and inventory related to sales of non-marijuana products.¹³⁰ Alterman, the business owner, would eventually be held liable for penalties resulting from inaccuracies regarding their overstated cost of goods sold.¹³¹

The misclassification of cost of goods sold resulted in an investigation of the tax firms work product.¹³² If recreational marijuana businesses utilizing the expertise of CPAs is targeted by an IRS investigation, the CPA must report it to the CBA within thirty days.¹³³ The Board will then scrutinize the CPA against their professional standards to see if there is a breach.¹³⁴ A CPA can lose not only their ability to file tax returns to the IRS but also their right to be licensed by the CBA if violations are found.¹³⁵

3. Risk of Investigation by the United States Securities and Exchange Commission

Many banks require special vetting procedures when considering servicing a marijuana seller because these accounts make banks highly susceptible to audits by the IRS.¹³⁶ A bank offers many desirable services such as checking accounts, lines of credit, and loans.¹³⁷ The discriminatory approach by banks towards recreational marijuana clients has led many such businesses to deal mostly in cash.¹³⁸ Not only does this make establishing control procedures at

¹²⁶ Kwang-Ho Lee v. California Bd. of Accountancy, No. B221561, 2011 WL 1662915, at *1, *1-*14 (Cal. App. 2nd May 4, 2011).

¹²⁷ *Id.* at *1

¹²⁸ *Alterman v. Commissioner of Internal Revenue*, No.13666-14, T.C.Memo. 2018-83, at *1, (2015).

¹²⁹ *Id.* at *8

¹³⁰ *Id.* at *6

¹³¹ *Id.* at *14

¹³² *Id.* at *8

¹³³ CAL. BUS. & PROF. CODE § 5063.

¹³⁴ *Alterman*, at *1-*14

¹³⁵ *Id.*

¹³⁶ See Dillow, *supra* note 118.

¹³⁷ *Id.*

¹³⁸ *Id.*

the operational level a nightmare for an accountant, it can hurt the business's overall, appeal to investors and governmental agencies that regulate publicly traded companies.¹³⁹

The SEC is devoted to protecting investors from misleading financial statements.¹⁴⁰ In 2014, the SEC issued an investor warning on their website after having to suspend several Colorado marijuana companies' trading of common stock.¹⁴¹ Suspensions are justified by the SEC because of questions regarding accuracy of public statements of financials that occurred just after marijuana was legalized for recreational purposes in Colorado.¹⁴²

On March 9, 2017, Medbox, a California based company that provides marijuana consulting services, reached an agreement to settle with the SEC for \$12 million dollars after they were found to have provided false financial statements of earnings to investors.¹⁴³ The SEC makes it a point to investigate publicly traded companies in emerging industries for false or misleading earning statements; the marijuana industry is no exception.¹⁴⁴ Investor's lack of familiarity with the industry often leads businesses to take advantage and to misstate earnings.¹⁴⁵ As more CPAs are called upon by companies to offer assurance services, there is a high likelihood their reports will be heavily scrutinized by the SEC.¹⁴⁶ A false or misleading report will likely lead to a complaint to the CBA and an investigation into a CPA's competency and ethics necessary to retain licensing.¹⁴⁷

B. Reducing Risk when Reporting to the Internal Revenue Service

The IRS mandates a person to report income regardless of whether the source of income is legal.¹⁴⁸ The IRS is treating marijuana businesses as they would any other business dealing in Schedule I controlled substances.¹⁴⁹ This treatment is manifested in the Section 280E requirement being upheld in a tax court that denies businesses the ability to offset revenue with costs of doing

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² INVESTOR ALERT: MARIJUANA-RELATED INVESTMENTS, U.S. SEC'YS AND EXCH. COMM'N (May 16, 2014), available at https://www.sec.gov/oiea/investor-alerts-bulletins/ia_marijuana.html.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, *supra* at note 86.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

business if that cost is involved in their business.¹⁵⁰ The decision to disallow tax benefits and credits allowed by most *legal* businesses were upheld by an appellate court in 2015.¹⁵¹

A CPA must strictly adhere to the Section 280E requirement when preparing taxes for marijuana related businesses.¹⁵² Claiming expenses that seem like they may pass scrutiny by the IRS as unrelated to marijuana is unwise.¹⁵³ In May of 2017, a marijuana dispensary brought action against the United States, seeking to enjoin the IRS from investigating a dispensary's business records during an audit.¹⁵⁴ The audit was conducted to determine whether the dispensary was disqualified from taking federal tax credits and deductions due to trafficking in controlled substances under Controlled Substances Act (CSA).¹⁵⁵ The claim was dismissed and the investigation by the IRS into the business' entire records was conducted because the IRS needed to determine whether or not the Section 280E credits were proper.¹⁵⁶ If this investigation had occurred in California, the CPA that was under investigation would have been required to report the information to the CBA within thirty days.¹⁵⁷

Section 280E allows for deductions and credits for a business owner's separate legal businesses, if they have any.¹⁵⁸ Claiming a tax credit while participating in a marijuana related business will give the IRS a reason to investigate whether or not the credits and deductions were proper and non-marijuana related.¹⁵⁹ The risk to a CPA would be greatly reduced if they only took on clients whose sole business venture is a marijuana related business.¹⁶⁰ This would mean that there would be no need to claim deductions and credits in relation to a business owner's other *legal* operations.¹⁶¹ Less convoluted means that IRS would have less reason to make the distinction between marijuana and non-marijuana related expenses because there would be less credits and deductions taken.¹⁶² Reducing the risk of investigation

¹⁵⁰ *Californians Helping to Alleviate Medical Problems v. Commissioner*, 128 T.C. 173, 181 (2007).

¹⁵¹ *Olive v. C.I.R.*, 792 F.3d 1146, 1147 (2015).

¹⁵² *Alterman v. Commissioner of Internal Revenue*, No.13666-14, T.C.Memo. 2018-83, at *1, *1-*14 (2015) (Alterman serves as an example of what can go wrong when a CPA makes mistakes classifying expenses under §280E).

¹⁵³ *Id.* at *1-*14

¹⁵⁴ *Id.* at *1-*14

¹⁵⁵ *Green Solution Retail, Inc. v. United States*, F.3d, No. 16-1281 1112, 1112-1120 (10th Cir. 2017).

¹⁵⁶ *Id.* at 1112-1120

¹⁵⁷ *Id.* at 1112-1120

¹⁵⁸ AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, *supra* note 86.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

significantly reduces the chances of having to report an investigation to the CBA, which can lead to disciplinary action.¹⁶³

C. Reducing Risk when Reporting to Financial Institutions and Investors to Avoid Revocation Because of Complaint or Investigation by the SEC

Besides reporting to the IRS, CPAs may be hired to prepare financial statements.¹⁶⁴ The need to reduce risk when reporting to banks and investors is not exclusive to the marijuana issue.¹⁶⁵ When an industry is booming, and relatively new products are involved, investors and banks are more susceptible to fraud coming in the form of assurance reporting, and revenue misstatements.¹⁶⁶ For a CPA to avoid the risk of erroneous reporting they must learn the industry.¹⁶⁷ Luckily there are continuing education credits available that are specific to the marijuana industry.¹⁶⁸ These classes are taught by lawyers and tax accountants to ensure a CPA is protected.¹⁶⁹ Having this educational background is essential to the relationship of trust necessary for a public accountant to serve clients.¹⁷⁰

The CBA's mission statement expressly states that the professional standards include quality of work.¹⁷¹ The IRS recognizes continuing education credits that specifically address marijuana industries and Section 280E requirements. If these classes are not taken and a CPA holds himself out as specializing in the area and mistakes in assurance services occur a CPA can be deemed negligent or incompetent in advising investors.¹⁷² The CBA can revoke or suspend licensing for violating professional standards of competency.¹⁷³

¹⁶³ CAL. BUS. & PROF. CODE §5100.

¹⁶⁴ See CONSUMER PROTECTION, *supra* note 30.

¹⁶⁵ AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, *supra* note 86.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Join us in Denver on July 27th and 28th for up to 18 hours of continuing education for enrolled agents, attorneys and CPAs working with clients in the legal cannabis industry, Tax Pros Inc. *available at* (<https://taxpracticeproinc.fanbridge.com/campaigns/show.php?id=1423208&sid=255929345>).

¹⁷¹ See CONSUMER PROTECTION, *supra* note 30.

¹⁷² AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, *supra* note 86.

¹⁷³ BUS. & PROF. CODE § 5100.

*D. Reducing Risk that the CBA will Revoke Licensing for
Violation of Professional Standard Because of Involvement
with a Federal Crime*

Tax evasion and federal drug trafficking are two major crimes that can occur while servicing clients in the marijuana industry. Tax evasion can occur if an illegal underpayment of tax occurs¹⁷⁴ and drug trafficking can occur if a recreational marijuana business engages in interstate commerce.¹⁷⁵

1. Reducing Risk of Illegal Tax Evasion.

Under Title 26 Section 7201 of the Internal Revenue Code, a person is guilty of evading taxes when they are required to pay any tax, to keep any records, or supply any information, and willfully fail to pay the tax, keep such records, or supply such information, at the time required by law.¹⁷⁶ Tax evasion is punishable as a misdemeanor or felony and can lead to large fines and imprisonment.¹⁷⁷

A CPA will encounter risk of being involved in tax evasion when preparing taxes for a business or individual who has income to report that is associated with marijuana.¹⁷⁸ A CPA's client may be inclined to fail to report revenue or overstate an expense resulting in an understated tax liability.¹⁷⁹ The idea of separation of duties can greatly reduce the risk that a CPA will be responsible for this misstatement.¹⁸⁰ If a CPA is merely hired to prepare a tax document the risk can be eliminated because they would have no part in the operational bookkeeping of the business.¹⁸¹ A CPA partaking in the operational aspects of a business, however, is more exposed as they may be responsible for the classifying of revenues and expenses.¹⁸² To reduce risk of being found to be willfully involved in tax evasion a CPA must document everything clearly and meticulously.¹⁸³ A CPA should always be prepared with enough documentation as to their participation in the business' operations.¹⁸⁴ This documentation begins with a letter of engagement that is specific, accurate and executed before any work is done by the CPA.¹⁸⁵ A proper engagement letter includes: the scope of the work to be performed (what the CPA will and won't

¹⁷⁴ 26 U.S.C.A. § 7201, I.R.C. § 7201.

¹⁷⁵ 26 U.S.C.A. § 7201, I.R.C. § 7201.

¹⁷⁶ 26 U.S.C.A. § 7201, I.R.C. § 7201.

¹⁷⁷ 26 U.S.C.A. § 7203, I.R.C. § 7203.

¹⁷⁸ AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, *supra* note 86.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

do); who will be performing the work, including whether the work is outsourced; client responsibilities; the cost of the services; when the work will be completed.¹⁸⁶ Any services offered to a client must be included in this letter.¹⁸⁷ These types of letters must be updated frequently to be accurate and thus reduce risk of being accused of wrong doing.¹⁸⁸

2. Reducing Risk of Involvement in Federal Drug Trafficking

Although marijuana is decriminalized in California, it is illegal on the federal level.¹⁸⁹ Any interstate commerce falls under the federal government's jurisdiction.¹⁹⁰ A CPA can be found to be involved with the crime of drug trafficking if they have knowledge of a marijuana seller's operation and fail to report it.¹⁹¹ Because a CPA's due diligence is likely to reveal the illegality of marijuana, a CPA will have knowledge of an illegal operation.¹⁹²

Even if they are not found to be criminally involved, the fact that they are not found to be criminally involved or are being criminally investigated must be reported to the CBA.¹⁹³ The CBA can find competency issues present if a CPA should have known there was illegal activity taking place and did not report the activity to the appropriate authorities.¹⁹⁴ This would be a violation of the CBA's professional standards and disciplinary action could range from restriction to practice in a particular industry to revocation of license completely.¹⁹⁵ Besides keeping a detailed record of services, a CPA should get to know the CBA personally.¹⁹⁶ All members of the board are CPAs and many are attorneys.¹⁹⁷ Knowing who will be investigating possible professional standard violations can mean the risk to having a recreational marijuana client is abnormally high.¹⁹⁸ Or, knowing who the members of the board deciding the fate of your right to practice public accountancy can lead you to believe there is very minimal risk.¹⁹⁹

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *5 Steps CPA Firms Can Take to Avoid Legal Claims*, ACCOUNTINGWEB.COM available at <https://www.accountingweb.com/practice/practice-excellence/5-steps-cpa-firms-can-take-to-avoid-legal-claims> (Last Accessed March 30, 2019).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ BUS. & PROF. § 5063.

¹⁹⁴ AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, *supra* note 86.

¹⁹⁵ *See* ACCOUNTINGWEB.COM, *supra* note 188.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

IV. RECOMMENDATION

A. The CBA Should Express their Support for CPAs by Expressly Stating a Violation of Federal Law will not be a Violation of Professional Ethics Standards as Long as they are in Full Compliance with State Law.

The CBA may regulate, prescribe, amend, or repeal rules of professional conduct appropriate to the establishment and maintenance of a high standard of integrity and dignity in the profession.²⁰⁰ In addition, a copy of the rules shall be mailed to every holder of a license at least thirty days prior to a date named for a public hearing held for the purpose of receiving and considering objections to any of the proposed provisions.²⁰¹ Every licensee of the CBA is governed and controlled by the rules and standards adopted by the board.²⁰² Although the CBA does not have the power to shield CPAs from being prosecuted by the federal government, they can promulgate assurances that CPAs in compliance with state law will not be deemed in violation of professional standards.²⁰³

Section III discussed how accountancy boards in Washington and Colorado have issued public statements that having a recreational marijuana client is not a professional standard violation.²⁰⁴ This comment also discussed how each state qualified their statement by stating involvement with a federal crime can still be considered a professional standard violation.²⁰⁵ As it stands, the use, possession and trafficking of marijuana is still illegal under federal law.²⁰⁶ Therefore, the previously mentioned accountancy boards are only offering protection to accountants up to the point the federal government begins prosecuting marijuana crimes.²⁰⁷ If their statements were intended to ease the minds of accountants considering representing recreational marijuana clients, they certainly failed.²⁰⁸ The CBA needs to be explicit in their protection of accountants if they want the profession to flourish under the new emerging industry.²⁰⁹

Many risks that impede a public accountant's ability to practice in the state of California have been discussed.²¹⁰ The major risk of having your license revoked by the CBA has been discussed considering practical precautions that

²⁰⁰ BUS. & PROF. §5063.

²⁰¹ BUS. & PROF. §5063.

²⁰² BUS. & PROF. §5063.

²⁰³ U.S. CONST. art. VI, para. 2

²⁰⁴ See discussion *supra* Section III.

²⁰⁵ See discussion *supra* Section III.

²⁰⁶ AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, *supra* note 86.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See discussion *supra* Section III.

²¹⁰ See discussion *supra* Section III.

should be taken to avoid such risks.²¹¹ A CPA will bridge the gap between the lucrative industry and a less enthusiastic financial audience.²¹² If an accountant serves a client with the standards set forth by the CBA they will rapidly structure a business to reduce risk of investigations and prosecutions by the various above mentioned administrative agencies.²¹³ While building this structure of accountability these businesses will be more suitable to financial institutions and banks.²¹⁴ In turn, the financial infrastructure necessary to support this booming industry will develop and support growth.²¹⁵ CPAs choosing to embark on the challenge early will be rewarded heavily by obtaining clients at the forefront of the lucrative recreational marijuana industry.²¹⁶

B. The CBA should Work with the State Legislature to Pass a Statute Protecting CPAs from Repercussions so long as the CPA take Reasonable Precautions when Representing Marijuana-Related Businesses.

California has not addressed the conflict between state and federal laws when it comes to public accounting.²¹⁷ However, other professions have addressed the issue regarding professionals such as attorneys.²¹⁸ For example, modifications to state bar's professional conduct standards allow a lawyer to counsel or assist a client in conduct that the lawyer reasonably believes is lawful under state law, so long as the lawyer also advises the client about the federal policy.²¹⁹

In a 2018 memo the Department of Justice nullified all previous prosecution guidelines regarding marijuana.²²⁰ The memo also gave prosecutors very general guidelines to follow when deciding whether or not to allocate resources to the prosecution of marijuana sellers and growers.²²¹ California can promulgate the professional standards for accountants dealing in the

²¹¹ See discussion *supra* Section III.

²¹² See discussion *supra* Section III

²¹³ See discussion *supra* Section III

²¹⁴ See FASAB HANDBOOK, *supra* note 83.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ Bruce Reinhart, *Dazed & Confused: Legal and Ethical Pitfalls in Marijuana Law*, AMERICANBAR.ORG (Winter 2017), available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/v31/CJ_v031n04_Reinhart.authcheckdam.pdf.

²¹⁹ *Id.*

²²⁰ Memorandum from former Attorney General Jefferson B. Sessions, *Supra* note 59.

²²¹ *Id.*

marijuana industry.²²² Clear guidelines to follow regarding servicing marijuana businesses will provide CPAs the ability to remain compliant with CBAs professional standards.²²³ These guidelines will not protect the CPA from federal prosecution but they will reduce the risk a CPA is stripped of the ability to practice if a federal prosecutor files charges for actions legal under California law.²²⁴

V. CONCLUSION

Any licensed professional takes on tremendous risk when servicing an illegal marijuana business.²²⁵ Accountants are particularly exposed, because their services often require in depth knowledge of operations.²²⁶ They expose themselves to criminal involvement and sanctions by the CBA.²²⁷ They are assuming this risk in an environment where they have limited protections either statutorily or in express bulletins or statements by the CBA.²²⁸ Until federal law is changed, and marijuana is made legal at the federal level, serving clients in the legal marijuana market may not be worth the risk.

If the steps recommended by this Comment are carried out accountants can help the marijuana industry thrive and contribute to the economy.²²⁹ This means that the Central Valley will maximize the benefits received by the new marijuana industry.²³⁰

JESUS PEREDA²³¹

²²² See CONSUMER PROTECTION, *supra* note 30.

²²³ See discussion *supra* Section III.

²²⁴ *Id.*

²²⁵ AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, *supra* note 86.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See discussion *supra* Section III.

²³⁰ See discussion *supra* Section III.

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