



BLACK MARKET NEVADA TRIES A

BY TISHA BLACK, ESQ.

In 2013, Nevada’s legalization of cannabis for medical use was well underway, and the state’s legalization for recreational use was just getting started. At that time (as is the case today), cannabis was a Schedule 1 drug under the federal Controlled Substances Act (CSA). Schedule 1 substances are defined as having no accepted medical use. These substances are illegal to produce, control, possess, or dispense. Unauthorized activities involving Schedule 1 drugs are federal crimes that may result in large fines or jail time. Much of the war on drugs centers on preventing the use and sale of Schedule 1 substances.¹ However, on August 29, 2013, Deputy U.S. Attorney General James Cole released a memorandum that radically changed the practical impact of cannabis’ Schedule 1 classification.

The now-famous “Cole Memorandum” specifically articulated the Department of Justice’s enforcement stance in states that have legalized cannabis cultivation, production, sale, and use. In a somewhat prescient moment, the memo states:

... the federal government has traditionally relied upon states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms [such as distribution to minors, funding gangs or cartels, or trafficking cannabis interstate] identified above.

The Cole Memorandum implied that very few federal resources would be devoted to federal cannabis enforcement in states where a statutory cannabis licensing and regulatory scheme exists. This statement essentially gave a wink and a nudge, pushing states forward with their efforts to legalize the cannabis business without threat of enforcement.

What perhaps was not realized, is that the Cole Memorandum also gave “license” to the black market to continue, if not step-up, sales in reliance on the axiom that absence of the federal prosecution for legal sales would result in less prosecution for black market sales as well. As it turns out, they were correct.

As a recent legal memorandum² published by the Heritage Foundation observed, Congress has recently passed appropriations bill riders that limit the DOJ from enforcing the CSA against state-regulated cannabis programs. Though these riders do not altogether bar enforcement of the CSA in states where cannabis is legalized, they do forbid the use of federal funds to “prevent” states from “implementing” state medical marijuana programs. In legal states, such as Nevada, where medical licenses have been combined with recreational licenses, enforcement of the black market is at dearth. In addition to restrictive riders and the lack of DOJ



CANNABIS: NEW APPROACH

resources to investigate and prosecute every cannabis sale, the public's perception of cannabis use as an illegal activity has waned (in large part because it is legal in many states). Again, these points were not lost on the black market.

Despite assurances from state legalization advocates that legalizing cannabis sales would vanquish the black market through legal competition, it has not come to pass. The black market has grown at a rate that far surpasses the legal market's gains. In California, it is estimated that illegal grows outnumber legal grows by as much as 10:1 despite having legalized recreational use of cannabis five years ago.³ Though California is a standout for its rate of illegal cannabis activity, it is not an outlier. Whitney Economics (an industry tracker) estimates that nationwide a staggering 75 percent of all cannabis sales are rooted in the black market.⁴ Brightfield Group, an economic tracker, estimated the cannabis market reached more than \$31.8 billion in annual sales in 2023,⁵ resulting in a lot of "green" that is neither being tested (for consumer safety) nor taxed.

If the DOJ is not actively pursuing illegal cannabis activity, states must step up their enforcement efforts; however, this is not the case either. Many states have reduced enforcement, Nevada included. In 2019,

Nevada passed an omnibus crime bill with the aim of reducing the prison population resulting in less, if any, jail time for illegal cannabis offenders. According to Crime Grade, the rate of drug-related crime in Nevada is much higher than an average U.S. state, a D- at 7.714 per 1,000 residents.⁶

In a speech to the Las Vegas Medical Marijuana Association, Clark County Sheriff Kevin McMahill echoed these points. The sheriff indicated that the black market is thriving and is selling a product that undercuts the legal product in price and availability despite black market cannabis often being laced with fentanyl to boost its potency.

"[We] still make arrests for illegal cannabis activity but they never result in significant jail time," McMahill said.

The decline in enforcement resources, change in community attitude, and lack of consequences trifecta is a boon for the cannabis black market entrepreneurs. But that is not all. They sell an incredibly cheap (and unsafe product) because they escape the high costs associated with regulation and taxation.

The shrinking profit margins for licensed cannabis operations (and the related tax losses) resulting from black market competition have not gone unnoticed by Nevada's regulators. As reported in the *Nevada Independent* and

Reno Gazette Journal, Tyler Klimas, the former Cannabis Compliance Board (CCB) executive director, demanded additional resources to address growing black market sales by creating a CCB task force and increasing enforcement by putting "boots on the ground."⁷ Missing from his efforts was a spirit of cooperation with industry licensees or an effort to increase public awareness of the dangers associated with the black market.⁸ Industry input and community awareness are paramount to the promulgation of sound rules and regulations, especially when the goals of all three are perfectly aligned.

Nevertheless, the Nevada Legislature specifically charged the CCB with the authority to deal with the black market in Senate Bill 328. The bill states its Section 1 premise:

Cannabis and cannabis products obtained from illegal sources are not tested, may be associated with violent crime and are often targeted at minors ... A well-regulated cannabis industry provides significant tax revenues to the State and runs contrary to the criminal and corruptive elements that exist in an unregulated and illegal market.

Appropriately, Senate Bill 328 (which passed with several amendments and

CONTINUED ON PAGE 10

Black Market Cannabis

became law in 2023) required that members of the CCB be required to have and glean the skill set required to regulate the cannabis industry and to promote the safety and health of the legal cannabis market and community it serves. Among other changes, the bill requires that at least one member of the CCB have a background in “the area of illegal or unlicensed cannabis activities.” More to the point, the board was authorized to “commit resources and take action to address unlicensed cannabis activities” and was given the authority to “seize and destroy cannabis and cannabis products involved in unlicensed cannabis activities” in accordance with NRS 179.1156 and 179.121 (Nevada’s forfeiture statutes). In addition, the CCB was granted authority to impose penalties “against persons who engage in unlicensed cannabis activities in accordance with the regulations adopted by the Board pursuant to NRS 678A.450” as well as “to adopt regulations to issue cease and desist orders, issue and impose administrative fines and civil penalties,” per 378A.450(3). Thankfully, licensees are no longer dependent upon prosecutors for enforcement and can, hopefully, rely on the CCB to pursue their shared illegal competitors. And though the CCB may only seize and destroy illegal cannabis and impose fines against their traffickers (rather than criminal prosecution), it may be more effective and efficient than a typical criminal prosecution. After all, the Internal Revenue Service took the same route during the era of alcohol prohibition.

Equipped with these new regulatory powers and no longer constrained by the vagaries of the criminal justice prosecutorial system (unlike traditional law enforcement), it appears the CCB is fitted to pursue illegal cannabis offenders. Yet, the effect and

As the smoke clears one thing is certain, the CCB, Nevada’s citizens, and cannabis licensees need to work together to eradicate the black market.

efficacy of that effort remains to be determined, as it is unclear how the CCB will create and employ these policies and whether or not an administrative agency alone can break Nevada’s entrenched and exceedingly emboldened black market. However, as the smoke clears one thing is certain, the CCB, Nevada’s citizens, and cannabis licensees need to work together to eradicate the black market. Perhaps armed with 328’s new tools, a public awareness campaign and a new executive director, the CCB and Nevada’s cannabis licensees

(together) may be able to make an appreciable step toward the protecting the Nevada community and increasing its state coffers.

ENDNOTES:

1. <https://crsreports.congress.gov/product/pdf/LSB/LSB11105>
2. https://www.heritage.org/sites/default/files/2023-04/LM326_0.pdf
<https://www.politico.com/news/2023/12/23/marijuana-legalization-inner-cities-00121185>
3. <https://www.politico.com/news/2023/12/23/marijuana-legalization-inner-cities-00121185>
4. *Id.*
5. <https://blog.brightfieldgroup.com/brightfields-2023-us-cannabis-market-forecast>
6. <https://crimegrade.org/drug-crimes-nevada/>
7. <https://www.rgj.com/story/opinion/2023/03/27/marijuanas-black-market-is-smoking-the-competition/70053999007/>; <https://thenevadaindependent.com/article/lawmaker-wants-cannabis-regulators-to-target-black-market-equitable-event-bill-returns>
8. A later amendment to the bill was added requiring the CCB to educate the public on the dangers of the Black Market. <https://legiscan.com/NV/text/SB328/id/2824560>

Thinking about going on your own?

We can help!

Modern Exclusive Workspace
For Attorneys
With Litigation Support



Contact us today! • info@legalthq.law • LegalHQ.law



TISHA BLACK is a native of Las Vegas and has practiced law for more than 20 years, focusing primarily on real estate and business issues, including cannabis businesses, regulatory compliance, corporate structuring, finance, real estate, business licensing and entitlements, acquisitions, and complex commercial transactions. In 2020, she founded the law firm of Black & Wadhams, which focuses on the legal needs of business owners and developers. Black has been an active participant and counselor in the Nevada marijuana industry since 2014. She continues to be active in the Nevada State Medical and Recreational Cannabis Program and participate in the legislative process. Black has also earned an AV rating from Martindale-Hubbell, which is the highest peer-reviewed rating of professional excellence, legal expertise, communication skills, and ethical standards.