CROSS BORDER

CANADA, CANNABIS, AND CROSSING THE CONTINENT:
CONSIDERATIONS FOR CANADA-U.S. COMPANIES, BUSINESS TRAVELLERS, AND INVESTORS

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Managing your company's Canada-U.S. operations will become hazier following Canada's October 2018 legalization of recreational cannabis. While the Canadian Senate passed the Cannabis Act on June 21, 2018 to control and regulate the growth, distribution, and sale of recreational marijuana in Canada; cannabis remains firmly planted in and prohibited as a Schedule I controlled substance under the U.S. Controlled Substances Act (21 USC §802). Notwithstanding that 31 U.S. states, the District of Columbia, Guam, and Puerto Rico allow for some form of medical marijuana and, or, cannabis program[i] decriminalization, U.S. federal law controls "at the border" for customs, immigration and regulatory purposes as well as at U.S. consular posts regarding visa applications.[1]

U.S. federal law criminalizes the following: manufacture, distribution, dispensing, possession, importation, and exportation of any controlled substance, including marijuana.[2] It is also a federal crime to sell or import drug paraphernalia, including items for use in ingesting, inhaling, or otherwise introducing marijuana.[3]

These divergent approaches to cannabis create the potential for a new "thickening of the Canada-U.S. border" in terms of the movement of cargo, business professionals, and investments. Dickinson Wright's Canada-U.S. Platform, in collaboration with our immigration and cannabis practice groups, have been meeting with the respective governments, trade associations, individual companies, and investors regarding the potential changes.

As there have been media stories ranging from the well-sourced to "click-bait" regarding the October 2018 implementation, we are providing a summary of considerations based on our actual experience. Recently in meetings with U.S. Customs and Border Protection (CBP) officials from Washington, CBP management confirmed what was outlined in a recent statement reported in *Politico* by Todd Owen, the CBP Executive Assistant Commissioner for Field Office Operations. Assistant Commissioner Owen noted that CBP officials would not be, "asking everyone whether they have used marijuana," but CBP does not recognize the marijuana industry in the U.S. as a "legal business."[4] We emphasize that every company must examine its Canada-U.S. operations—particularly, scrutinizing areas such as human resources—to determine the potential implications at and behind the Canada-U.S. border.

I. The More Things Change the More They Stay the Same?

The U.S. government agencies charged with jurisdiction and authority over the Canada-U.S. border have been adamant that they will not change admissibility requirements and enforcement measures due to Canada's legalization of cannabis or for that matter of various states in the U.S. Officials repeatedly have advised that U.S. Department of Homeland Security (DHS) components, such as CBP and U.S. Citizenship and Immigration Services (USCIS), routinely address cannabis issues as a number of countries (e.g., Czech Republic, Israel, Jamaica, Mexico, South Africa) have decriminalized and, or, legalized aspects of cannabis possession and use. In addition, the Department of State (DOS) in its Foreign Affairs Manual (FAM) notes that, "whether or not a controlled substance is legal under state law is not relevant to its illegality under federal law.[5] As these policies and federal laws remain in full force and effect as to cannabis as a controlled substance, we initially provide a brief review of the current landscape.[6]

Existing Authorities

U.S. immigration law sets forth grounds to determine the inadmissibility (being barred from entering U.S.) or removability (deporting/removing a foreign national present in the U.S.) of non-US citizens [which term includes lawful permanent residents (LPR), who are also often referred to as "green card" holders]. Several inadmissibility grounds apply in particular to cannabis legalization/decriminalization:

1. Controlled Substances Ground of Inadmissibility: Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, as amended (INA), 8 USC §1182(a)(2)(A)(i)(II), provides that a foreign national who is in a violation of (or a conspiracy, or attempt to violate) any law or regulation of a state, the U.S., or a foreign country relating to a controlled substance is subject to being found ineligible to be admitted to the U.S. or ineligible to receive a visa.[7] There is no immigrant visa waiver, but there is a discretionary nonimmigrant visa waiver.[8]

2. Drug Trafficking Ground of Inadmissibility: Section 212(a)(2)(C) of the INA, 8 USC §1182(a)(2)(C) renders ineligible: (1) any alien who the consular officer or DHS knows or has reason to believe is or has been an illicit trafficker in any controlled substance or in any listed chemicals as defined in section 102 of the Controlled Substances Act (21 USC § 802), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others, in the illicit trafficking in any controlled or listed substance or chemicals, or endeavored to do so.[9] There is no immigrant visa waiver, but there is a discretionary nonimmigrant visa waiver.[10]

3. Security and Related Grounds Inadmissibility: Section 212(a)(3)(A)(ii) of the INA, USC §1182(a)(3)(A)(ii) provides, in pertinent part, that foreign nationals can be found inadmissible if the authorities know, or have a reasonable ground to believe, that they seek to enter the U.S. to engage in any unlawful activity.[11] This ground has been applied in the past to organized crime related activity.[12] Due to the severity of the consequences of this finding of ineligibility, it is applied in very limited circumstances.[13] Although there is rampant speculation as to the possible use of this provision, it would be an unlikely candidate as to the cannabis industry. Of

course, it would preferable to have a specific exemption stated. There is no immigrant or nonimmigrant visa waiver, but the ground only applies to current circumstances.[14]

4. Health Related Ground of Inadmissibility: Section 212(a)(1)(A)(iv), 8 USC §1182(a)(1)(A)(iv) provides that drug abusers and drug addicts, as defined, are deemed to have a Class A medical condition. Simple experimentation does not qualify as drug abuse, typically, but regular/routine use of even legalized marijuana/cannabis is likely to be found as a Class A condition.[15] There is no immigrant visa waiver for typically a 12-month period at least, but again a discretionary nonimmigrant visa waiver is available.[16]

5. Crimes of Moral Turpitude Ground of Inadmissibility: Section 212(a)(2)(A)(i)(I), 8 USC §1182(a)(1)(A)(iv) applies to convictions for statutory offenses which involve moral turpitude. Aggravated Driving Under the Influence (DUI) offenses and some reckless conduct offenses involved legalized marijuana use have been found to constitute crimes of moral turpitude.[17] A discretionary nonimmigrant waiver is available as well as a limited waiver under INA §212(h).[18]

Waivers

It is important to remember when reading about "permanent bars" to the U.S., that these bars can be subject to nonimmigrant and immigrant visa waivers depending on the ground of inadmissibility. As to nonimmigrant waivers, it is possible for Canadians to present the I-192 nonimmigrant waiver application at certain ports of entry or pre-clearance locations for the U.S.[19] Each location may have its own procedures and time frames for submission of the waiver. It is also possible for Canadians to submit the application when not seeking admission. The current processing time is around six to seven months and it is discretionary. CBP's Admissibility and Review Office (ARO) adjudicates the applications and they are specific to the particular visa category requested. The filing fee is $930.[20]

It is also important to stress that even though a nonimmigrant waiver is available, they are difficult to obtain. The officer has full discretion to grant waiver applications and there is no appeal of the decision. An applicant's only recourse is to re-apply for a waiver. The ARO considers a number of factors in making its determination including the seriousness, recentness, and type of offense as well as the number of offenses and any evidence of rehabilitation. Even though an applicant may appear to have strong facts to support a waiver, given the U.S. government's current position on marijuana/cannabis, it should be expected that it will be difficult to get a waiver granted. It will be interesting to see whether the U.S. government will support the grant of waiver applications to Canadians who are legally working in the cannabis industry in the future.

It is also important to remember the adjudicator. For example, if a visa is required for a Canadian (e.g. E visas), while a consular officer may make a determination of inadmissibility, it is not the only potential arbiter of the matter. USCIS can also review an E visa filing before a required visa application or a change of status may be applied for in certain circumstances from within the U.S. Competent immigration counsel is a must.

"Everyday" Examples

The most straight-forward cross-border scenario relating to cannabis and admission to the U.S. arises when the inspecting CBP officer has reason to believe through criminal history records that the person is inadmissible. As noted above though, the manufacture, cultivation, distribution, dispensing, possession, importation and exportation of any controlled substance, including marijuana, is a crime under U.S. law. It follows that should the CBP officer see/smell any indicia of cannabis use (e.g., residue, pipes, behavior) at the port of entry (POE), the non-U.S. citizen may be denied entry, along with being subject to other legal circumstances.

1. Prior Convictions As a reminder, any non-U.S. citizen who has a prior conviction for controlled substances—including marijuana¬—may be denied entry into the U.S. under more than one inadmissibility grounds (e.g., Controlled Substances and Drug Trafficking being common options). This point has not been "headline grabbing" news in the past as those individuals may apply for discretionary waivers of the most common grounds, as outlined above. The INA defines "convictions" broadly and even if a conviction is later expunged, for example, it must still be disclosed and may still affect the applicant.

2. "Have You Ever Smoked Cannabis" While most companies will certainly not condone or advise individuals to cross the Canada-U.S. border while under the influence of cannabis nor if they have prior relevant convictions, concerns have increased regarding the potential and common inquiry by CBP officers of "Have you ever smoked cannabis/marijuana?" DHS has advised that its officers will not be adding new routine questions of this nature upon arrival at the POE. Thus, while it may be unlikely that Canadian business travellers will be subject to this question absent other indicia of cannabis use or possible employment in the industry, applicants for admission should still be prepared to address such questions. In addition, random situations may arise in conjunction with border located festivals or concerts, when such questions may be more common. Travellers must remember that lying to a CBP officer can result in yet another permanent bar to admission to the U.S. without a grant of a discretionary waiver. Please refer to additional information on this point within this article as to material misrepresentations.

3. Legal Use in Canada But Not in U.S. While CBP has advised that it will not be adding new questions during the inspection process, it is important for a traveller to address CBP's questions truthfully and with awareness of the laws the CBP officer must enforce.

   Picture a scene where a traveller is at the POE and waiting his/her turn for inspection. After waiting in busy traffic and long lines, it is

finally the traveller's turn to present himself/herself for inspection. The officer asks the standard question, "What is the purpose of your travel? " The traveller begins to answer the question, but while speaking the officer notices his/her slurred speech and red eyes. The officer becomes suspicious. Trained in such matters, the officer knows that these attributes are possible side effects to marijuana, alcohol, or other drug use, and immediately sends the traveller to secondary inspection for further questioning.

During the secondary inspection process, the traveller admits to using medical marijuana and shows his marijuana card to the officer. Additionally, when asked, he/she tells the officer that he/she has never been charged or convicted of a drug offense and has never participated in growing or selling marijuana. He/she innocently thinks that since medical marijuana use is legal in Canada and most U.S. states, he/she is not doing anything wrong.

The U.S. federal laws control at the border and under these circumstances, the traveller could be inadmissible based on the controlled substance inadmissibility ground. His admission to the essential elements underlying the U.S. federal offense—even absent an actual conviction—may still result in a basis for inadmissibility for immigration purposes. [21]

The officer proceeds to take the traveller's sworn statement after a series of Q&As summarizing the details of the encounter, captures his biometrics. The sworn statement (record of intercept) then becomes a permanent, official government record and will likely prevent future entry to the U.S. absent a waiver.

Waiver

Stunned, our traveller finds himself/herself barred from entering the U.S. for simple use of medical marijuana that is legal in his/her home country. He/she contacts an immigration attorney in hope of finding a solution to returning to the U.S. The U.S. immigration attorney advises that a waiver of inadmissibility is available as relief, but it is discretionary.

Pursuant to INA §212(d)(3), 8 USC §1182(d)(3), a waiver of inadmissibility may be available for a single offense involving possession for one's own use of 30 grams or less of marijuana. Additionally, a waiver of inadmissibility may be available for a "conviction" for possession of paraphernalia, if the paraphernalia was intended for use with 30 grams or less of marijuana ("marijuana personal use waiver").

An application for a waiver is filed with CBP. The ARO will make a decision on the application, but it can take several months for adjudication (six to seven is common). As explained above, the ARO considers a number of factors in making its determination including the seriousness, recentness, and type of offense as well as the number of offenses and any evidence of rehabilitation. The "recentness" of the conduct in this example may prove to be an obstacle.

If a first time waiver is granted, it is typically valid for one year. However, depending upon the seriousness of the facts, it could be restricted for a shorter period of time and for a single entry. After reapplying for a waiver, it can be granted for a maximum of up to five years. A critical consideration for waivers relating to controlled substances is that the determination is not automatic. The decision rests with the discretion of the officer.

What are non-citizen travellers to do at the border or before a consular officer?

While CBP officers do not generally ask travellers about their drug use or seem to have plans to add cannabis-specific routine questions, there is a possibility that cannabis-related employment activity could arise during an inspection. Here are a few helpful tips for what to do at the border in these scenarios:

- *Tell the truth!* Lying to a federal officer about a material fact may be considered fraud and willful misrepresentation[22], and will result in a permanent ban to admission to the U.S., without a nonimmigrant or immigrant waiver, when applicable [INA §212(i)].

- *Silence[23] or refusal to answer questions*[24] If a traveller has certain ties to the cannabis industry (e.g. which is an evolving interpretation) and is directly questioned about his/her involvement during an inspection at the border, they can choose to refuse to answer questions. This silence will likely get them turned away at the border and/or flagged in a database, but answering a question connecting you to cannabis may lead to a finding of inadmissibility in certain circumstances. Once a record has been created related to a controlled substance, it will be extremely difficult to remove such a flag from the immigration databases. A past drug admission will likely come up every time at the border.

- *Inspect your vehicle prior to crossing the border*. Another possible scenario for travellers crossing the border is a situation where a high school or college student borrows a parent's car and returns the car after consuming the drug. The residue or smell of marijuana can linger in a car for weeks. Then, for example, the parent drives the car and attempts to cross the border, but CBP K-9s pick up the smell. If detected, a border official may conclude that the parent is inadmissible.

- R*emember that your person, vehicle, and electronics are subject to search*. CBP officers can take possession of your phone, computers, etc., and demand passwords for social media accounts. For that matter, they can and do conduct their own review of social media and internet sites. Refusing to provide a CBP officer with passwords could result in a determination of inadmissibility. It is always important to remember to consider withdrawing your application for admission and requesting this option from the CBP officer.

- *It may be legalized, but do not advertise*. Do not carry marijuana,

a medical marijuana card, place marijuana bumper stickers on vehicles used to cross the border, wear or bring t-shirts or other apparel with indicia of marijuana. CBP officers are trained to look for individuals who might be inadmissible. These items, your appearance, or manner of dress may trigger additional questioning.

- *Stay Trusted.* Privileges to Trusted Traveller Programs such as NEXUS, SENTRI, Global Entry, or Trusted Traveller/Trusted Shipper Programs such as FAST may be revoked for controlled substance violations at even lower thresholds than those provided in the immigration statutes. Those who cross the border where Trusted Traveller enrollment is a requirement must evaluate the cost-benefit of cannabis involvement. Similarly, participants in FAST must be certified under the Customs-Trade Partnership Against Terrorism (C-TPAT) program. CBP routinely conducts on-site visits to domestic and foreign C-TPAT member facilities. Members are at risk, if CBP finds involvement in the legal cannabis business as it relates to cross-border travel.

II. "Everyday" Cannabis Enforcement Applied to the "Intermestic" Canada-United States Economy

The adage that Canada and the U.S. share an "intermestic" (part international, part domestic) trading relationship creates significant challenges regarding the legalization/decriminalization of cannabis. Canada-U.S. shipments, workforces, services, and investments are inextricably intertwined creating a myriad of scenarios in which companies may run afoul of governing federal cannabis laws. The geographic proximity and volumes of Canada-U.S. trade and investment are unlike any other relationship that the U.S. has around the globe. A particular area of concern to Canada-U.S. businesses are the "drug trafficking" inadmissibility grounds. These provisions are broad in scope as described earlier in this article. We emphasize that DHS is not changing its enforcement position. Thus, it is up to companies to examine the possible scenarios and evaluate exposure. In order to assist in this analysis, we are providing several likely examples of the intersection of cannabis and inadmissibility in the Canada-U.S. business environment:

Scenario 1: Canadian engages in lawful activities in the marijuana/cannabis industry in Canada and seeks admission into the U.S. for marijuana/cannabis purposes.

A Canadian employee works at a multinational biopharmaceutical company in Canada with offices in the U.S. He participates in product development activities for his company, which manufactures and sells edibles containing cannabis. The Canadian employee will be assisting the company with the research and manufacture of this product. A cannabis food conference is being held in the U.S. and the Canadian employee would like to attend. In addition, he would like to visit the company's office located in a nearby city (where cannabis is legal under state law) to meet with other product developers and discuss research concerning the cannabis product.

Will the Canadian employee be deemed inadmissible to the U.S.?

The Canadian employee may be found inadmissible. By disclosing to the officer that he plans to attend a cannabis conference or business meeting to improve or commence production of cannabis products, the CBP officer could decide that the person would be seeking to enter the U.S. to violate federal laws as to assisting in the manufacture or production of cannabis. Please refer to the comment from CBP Assistant Commissioner Owen referenced earlier in this article.

Scenario 2: Canadian engages in lawful activities in the marijuana/cannabis industry in a Canada where it is legal and seeks admission to the U.S. for non-marijuana/cannabis purposes.

The same employee under Scenario 1 would like to travel to the U.S. for purposes of attending a business meeting at his company office located in the U.S., but the meeting is unrelated to marijuana/cannabis.

Will he be considered inadmissible based on the purpose of his travel into the U.S.?

The scope of activities in the U.S. are unrelated to controlled substances. The employee will not be seeking to enter the U.S. to engage in any unlawful activity and he will not violate any law or regulation of the U.S. relating to a controlled substance while in the U.S. Any conduct related to marijuana/cannabis would have taken place in a foreign country where the activities are legal and any legal conduct related to cannabis taking place in Canada would not give rise to a conviction. Furthermore, it would be a stretch for an officer to deny admission to the employee based on an admission of conduct related to a controlled substance, because there would be no violation of Canadian law. The employee likely will clear the first hurdle—"controlled substances inadmissibility".

The employee may be deemed inadmissible under this scenario, however, if questions about his occupation are brought up at the point of inspection. It is possible that the CBP officer would consider the employee's involvement in legal business activities in the marijuana/cannabis industry in Canada to be "trafficking," or aiding, abetting, assisting, conspiring or colluding with others, in the trafficking of a controlled substance, even if the conduct takes place outside of the U.S. The "drug trafficking inadmissibility" statute does not require the actual violation of any laws of any particular jurisdiction. It has the potential power to broadly apply to anyone who an officer has "reason to believe" is or has been a knowing aider, abettor, assister, conspirator, or colluder with others.

Scenario 3: The company is involved in legal cannabis business activities in Canada but the Canadian employee is not engaged in marijuana/cannabis industry activities.

A similarly situated employee to that presented in Scenario 1 works for the same biopharmaceutical company. The employee is not involved in the cannabis business line, and her customary activities

are unrelated to cannabis. She seeks to enter the U.S. for a business meeting related to the company's legal cannabis business in the U.S.

Will she be inadmissible due to her employment with the company?

The employee under this scenario could still be deemed inadmissible, if questions about her occupation are raised, whether or not she works in the production or manufacture of cannabis. The reason to believe standard applies to those "aiding and abetting" in the trafficking of any controlled substance, and a company profiting from the marijuana/cannabis business could be labeled as "trafficking" the drug.

While Canadian businesses and investors may separate their operations, business lines, and employees along the lines of cannabis and non-cannabis related activities, these firewalls must be crafted carefully and, most importantly, presented to employees prior to crossing the border. Even with a "cannabis wall" for protection, it cannot guarantee sufficient insulation from inadmissibility determinations. Another challenge is that by explaining why a company is "not in the cannabis business", one might actually provide the basis for a "reason to believe." Additionally, via marketing, social media, etc., a scenario may arise where it is public knowledge that a company is working in the cannabis industry and the employee's "guilt by association" may provide the "reason to believe."

Scenario 4: Canadian indirectly contracts to engage in lawful activities in the marijuana/cannabis industry in Canada where it is legal, and seeks admission to the U.S. for non-marijuana/cannabis purposes.

The same employee under Scenario 1 works for the same biopharmaceutical company, but his company does not directly research, manufacture, or sell cannabis products. The company instead collaborates with engineers, who manufacture equipment, and, in turn, his company sells the equipment to manufacturers who produce cannabis products using this equipment in Canada.

While there are further degrees of separation from the actual cannabis legal business activities, is this employee still inadmissible?

It remains possible that the employee could be found inadmissible, if questions about his occupation are raised, due to the reason to believe standard that applies to those "aiding and abetting" in the trafficking of any controlled substance. The same conclusion could be applied to contractors, service-providers (e.g., legal, accounting, financial, software, consulting, financial), and other non-citizens not directly involved in the legal cannabis industry.

On a practical level, it is less likely to find a non-citizen denied entry into the U.S. on this basis, because the presented facts should be more difficult to give rise to a basis for a reasonable belief.

Scenario 5: Canadian invests in a legal cannabis business in a State where it is legal or in Canada, and seeks admission into the U.S.

A Canadian investor finds a lucrative opportunity to invest in a state-approved cannabis operation in the State of California, where cannabis has been decriminalized. The opportunity is too good to pass up and she invests $1 million into the operation. She has a minority interest in the company. She decides to travel to the State of California for business-related reasons. During her inspection, the officer notices a folder on the passenger-side chair with a logo and name of a well-known cannabis operation she has invested in personally. The officer becomes suspicious and starts to ask the questions.

Will the investor be deemed inadmissible?

A Canadian investor, business owner, shareholder, or member of the Board of Directors, who directly or indirectly invests in a legal business or is otherwise involved in the management of the marijuana/cannabis related business, is at risk of a determination of inadmissibility by an officer if the purpose of the trip into the U.S. is in furtherance of, or related to, marijuana/cannabis activities. The investor would gain a percentage of profits from cannabis related business. This benefit could be considered the result of drug trafficking.

As explained above, separating operations or business lines may not be enough for investors, especially when the information about cannabis companies is public knowledge or broadcast on a company or investor website. Our present understanding is that DHS and other government agencies are not actively investigating otherwise legal cannabis operations for the purpose of making apprehensions at the border. Contrary to media reports, there is apparently no "list" being developed by U.S. agencies regarding U.S. and Canadian cannabis companies and investors. However, as this issue evolves, and circumstances such as the scenarios presented above occur at the border, those companies and individuals will be "in the system." While investments and investors potentially have the opportunity to fall outside of the relevant inadmissibility grounds, careful attention must be paid to structuring, taxation, distributions, marketing, and other "behind the border" issues in order to mitigate "at the border" risks.

Scenario 6: U.S. Work Visa Sponsorships

A multinational U.S. company with offices in several countries is engaged in the research, manufacture, and production of marijuana/cannabis and is interested in hiring a foreign worker to work in the U.S.

Can the US business sponsor a foreign national for a work visa? Specifically, could the same biopharmaceutical company under Scenario 1 sponsor the employee for an H-1B specialty occupation visa or L-1 Intracompany Transfer? Could a business in the agricultural sector that cultivates marijuana sponsor a worker for an H-2A agricultural work visa?

A company could file a work sponsorship petition on behalf of a foreign national with USCIS. USCIS will evaluate the petition on its merits, and might approve the petition. Of course, relevant facts should be disclosed in the petition. Even if USCIS approves a work sponsorship petition, CBP officers will ultimately determine the admissibility of

foreign nationals to the U.S. It is unlikely that the CBP officers will admit foreign nationals into the U.S. based upon the reasons stated. The foreign worker would be exposed to potential trafficking allegations as to aiding and abetting trafficking of a controlled substance.

Scenario 7: E-2 Visa Investors

A Canadian investor participating in the legal cannabis business in a state where it is legal or in Canada face risks as do the investor's employees. An immigration official may find that the Canadian investor is attempting to violate laws related to controlled substances and engaging in drug trafficking depending on the facts. The investor would be profiting from the "drug trade" in violation of U.S. federal laws.

Furthermore, a Canadian investor participating in the legal cannabis business, who has invested in setting up a U.S. enterprise, may be personally at risk, along with his/her Canadian employees hired to work at the U.S. company. The E-2 visa investor program was designed to allow foreign investors to invest substantial capital in setting up a U.S. business that will also create jobs for U.S. workers. As part of the E-2 visa investment, the source of funds must be examined to confirm that it derives from a legal source. If the Canadian investor is ineligible for a visa based on the source of funds for the investment (e.g. funds used to set-up the U.S. company were cannabis business derived), the investor would be potentially ineligible for the work visa, along with any of its employees.

Would it be possible to separate the cannabis vs. non-cannabis sourced funds for purposes of an E-2 visa? If a foreign national were to move funds from a non-cannabis source for U.S. investment purposes, the consular officer reviewing the application would possibly consider the sourced funds, and determine that the foreign national has been involved in "drug trafficking" and deny a visa application.

Conclusion

The foregoing analysis demonstrates that the inadmissibility grounds outlined under U.S. immigration law provide broad enforcement authority to U.S. border and consular officers regarding cannabis. Simply, inadmissibility determinations are not linked to a state's or foreign countries' laws, but to current federal law. Of course, the position is subject to varied legal challenges based on the particular facts.

For the foreseeable future, DOS, DHS, and its components will apply the current rules "on the books." It is imperative that companies and individuals know the changing contours of the legal and regulatory environment and not put enforcement officials in situations where a determination of inadmissibility is the only available option. While there are calls to address this issue as part of the North American Free Trade Agreement (NAFTA) renovation and, or, through well-established Canada-U.S. consultations such as Beyond the Border (BtB), those options are unlikely to occur in the foreseeable future, if ever. The burden thus falls on the companies engaging in cross-border trade and investment.

Dickinson Wright has developed several cross-border strategies that can be tailored to each company's needs. There is no omnibus solution to this issue. Companies involved in the Canada-U.S. cannabis industry must exercise extreme diligence in managing their cross-border operations and be engaged. "Winging it" is not an advisable option given the draconian penalties both at and behind the border.

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[1] *See* National Conference of State Legislatures summary of state medical marijuana and cannabis use laws and state chart. http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.
[2] *See* 21 USC §§ 841, 842, and 843.
[3] *See* 8 USC §863.
[4] See https://www.politico.com/story/2018/09/13/canada-weed-pot-border-783260.
[5] *See* 9 FAM 302.4-2(A).
[6] This article shall not constitute legal counsel as it provides only an analysis of legal issues and developments.
[7] There is a waiver from this ground of inadmissibility for immigrants (principal alien) as to a single offense of simple possession of 30 grams or less of marijuana under INA § 212(h) when the inadmissible activity occurred more than fifteen years from the application for admission or a visa, if the admission would not be contrary to the national welfare, safety, or security of the U.S. and the foreign national has been rehabilitated. There is also a limited waiver for the spouse, parent, son or daughter of a U.S. citizen or LPR under INA § 212(h) if the principal alien was found inadmissible for a single offense of simple possession of 30 grams or less of marijuana.
[8] *See* INA §212(d)(3)(A) and 9 FAM 305.3-4 (A). Consular officers are to consider the recency of the seriousness of the activity or condition causing the alien's inadmissibility, the reasons for travel to the U.S., the positive or negative effect, if any, of the planned travel to U.S. public interests, evidence of reformation or rehabilitation, and whether there is a single or isolated incident or pattern of misconduct.
[9] Note that this ground of inadmissibility also applies to the spouse, son, or daughter of a foreign national determined to be inadmissible under this category, if the family relation has within the previous five years obtained any benefit from the illicit activity of the inadmissible family member and who knew or reasonably should have known that the financial or other benefit obtained was the product of such illicit activity.
[10] *See* 9 FAM 305.3-4(B).
[11] A "reasonable suspicion" is met if the derogatory information available would warrant further detailed inquiry into the subject's background.
[12] *See* 9 FAM 302.5-4(B)(2).
[13] 9 FAM 302.5-4(B)(4) outlines a specific exception of the application of this ground to high level officials of Taiwan who enter the U.S. to engage in certain discussions at a state or federal level (e.g. trade, threats to U.S. national security, etc.)
[14] *See* 9 FAM 305.3-5(C).

[15] *See* 9 FAM 302.2-8(B)(6) and (7). Note that if the last visa refusal was less than one year ago, new medical examination is required. There is no waiver relief for immigrants in the interim.
[16] *See* 9 FAM 305.3-2(D).
[17] See *Marmolejo Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009).
[18] *See* 9 FAM 305.2-3(A) and 305.3-3(A).
[19] Canadians file an application with CBP in advance of the date of intended travel to the U.S. Filing of this application is generally done in person at a CBP designated port of entry or a CBP designated preclearance office. There are exceptions to in-person filing. Foreign nationals who require a visa must contact the appropriate U.S. Embassy or Consulate to apply for a waiver and to request the recommendation to the ARO for waiver of inadmissibility.
[20] *See* https://www.cbp.gov/travel/international-visitors/admission-forms/form-i-92-application-advance-permission-enter-nonimmigrant .
[21] See *Retuta v. Holder*, 591 F.3d 1181, 1186 (9th Cir. 2010).
[22] To find a person inadmissible for fraud or willful misrepresentation, there must be at least some evidence that would permit a reasonable person to find that the person used fraud or that he or she willfully misrepresented a material fact in an attempt to obtain a visa, other documentation, admission into the U.S., or any other immigration benefit. In addition, the evidence must show that the person made the misrepresentation to an authorized official of the U.S. government, whether in person, in writing, or through other means. Examples of evidence an officer may consider include oral or written testimony, or any other documentation containing false information. USCIS Policy Manual, Volume 8, Part J, Chapter 3.
[23] A person's silence or failure to volunteer information does not, in and of itself, constitute fraud or willful misrepresentation, because silence itself does not establish a conscious concealment. Silence or omission can, however, lead to a finding of fraud or willful misrepresentation if it is clear from the evidence that the person consciously concealed information. If the evidence shows that the person was reasonably aware of the nature of the information sought and knowingly, intentionally, and deliberately concealed information from the officer, then the officer should find that the applicant consciously concealed and willfully misrepresented a material fact. USCIS Policy Manual, Volume 8, Part J, Chapter 3. 9 FAM 302.9-4(B)(3) provides, however, that, "silence or the failure to volunteer information does not in itself constitute a misrepresentation for the purposes of INA §212(a)(6)(C)(i). In addition, a timely retraction serve to purge a misrepresentation in certain limited circumstances.
[24] A person's refusal to answer a question does not necessarily mean that he or she willfully made a false representation. However, refusal to answer a question during an admissibility determination could result in the officer finding that the applicant failed to establish admissibility. USCIS Policy Manual, Volume 8, Part J, Chapter 3.

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