Complementary Educational Materials

Cannabis Legislation and Real Estate: Perspectives of Tenants, Landlords and Lenders

Association of Corporate Counsel
2022 Annual Meeting

Blake, Cassels & Graydon LLP

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Video Capsule: Blakes Cannabis Summit 2020

Leaders in the Canadian cannabis industry met in January of 2020 for an in-depth look at the legal and regulatory landscape of the cannabis sector. The Blakes Cannabis Summit featured thought leaders from across the sector, along with Blakes lawyers, who delved into the latest developments, potential challenges and opportunities that lied ahead for businesses.

Watch it here. Password: Lawyerz2022!

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Cannabis 2.0: Key Updates for 2020

December 11, 2019

Since the initial wave of legalization in 2018, cannabis continues to be a hot topic across Canada. The second wave of legalization, also known as Cannabis 2.0, came into effect on October 17, 2019, and with it comes the opportunity to manufacture and sell cannabis edibles, extracts and topicals, in addition to the other product forms.

Here are five key points on Cannabis 2.0 you should know about:

1. Notwithstanding that the 2.0 legislation came into force on October 17, 2019, 2.0 products must undergo a 60-day notice period before they can be sold in the market. As a result, these new product forms will start to become available in late December 2019.
2. Not all provinces permit the sale of all types of cannabis products. Quebec and certain other jurisdictions have, or indicated that they intend to, set limits on potency and product types that can be sold.
3. The federal government has tightened already strict requirements on cannabis advertising, including advertisements that may constitute or include health and cosmetic claims.
4. Despite the United States' permissive approach to hemp-derived cannabidiol (CBD), CBD in Canada remains subject to the same rules as other cannabis products, regardless of where it is sourced from.
5. A new category for cannabis health products may be introduced in 2020/21 that could allow for a less stringent market, potentially creating not only a new industry, but also opportunities for companies looking to get into the wellness space.

Have more than five minutes? Contact a member of our Cannabis group to learn more.

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Second Retail Lottery in Ontario: Tricks and Traps for Applicants

By Kevin Rusli and Chris Nyberg
July 26, 2019

The Alcohol and Gaming Commission of Ontario (AGCO) announced a subsequent allocation process for an additional 50 retail store authorizations (RSAs) in Ontario. Forty-two of these RSAs will be granted through a second allocation expression of interest lottery (Second Lottery) and the remaining eight RSAs have been allotted for First Nations reserves on a first-come, first-served basis.

The 42 RSAs to be allocated by lottery will be distributed to the following regions of Ontario as follows:

	Ontario Regions					**First Nations Reserves**
	East	**GTA**	**Toronto**	**West**	**North**	
Number of Stores	7	6	13	11	5	8

The **East Region** is comprised of Stormont, Dundas and Glengarry, Prescott and Russell, Ottawa, Leeds and Grenville, Lanark, Frontenac, Lennox and Addington, Hastings, Prince Edward, Northumberland, Peterborough, Kawartha Lakes, Simcoe, Muskoka, Haliburton, and Renfrew.

The **GTA or Greater Toronto Area** is comprised of Durham, York, Peel and Halton.

The **West Region** is comprised of Dufferin, Wellington, Hamilton, Niagara, Haldimand-Norfolk, Brant, Waterloo, Perth, Oxford, Elgin, Chatham-Kent, Essex, Lambton, Middlesex, Huron, Bruce, Grey, and Manitoulin.

The **North Region** is comprised of Kenora, North Bay, Sault Ste. Marie, Thunder Bay, and Timmins.

As the first expression of interest lottery (Initial Lottery) had very few requirements to apply (e.g., payment of a C$75 fee and a short application), it resulted in over 17,000 submissions. The requirements for inclusion in the Second Lottery have been significantly increased and are expected to substantially reduce the number of expected applicants. In addition to the standard acknowledgement and a C$75 application fee, the AGCO has added the following pre-qualification requirements in the Second Lottery:

- *Letter of Confirmation – Cash or Cash Equivalents Capacity*, from a bank found in Schedule I or Schedule II of the *Bank Act* (Canada), or a credit union or *caisses populaire* registered under the *Credit Unions and Caisses Populaires Act*, *1994* (each, a Qualified Financial Institution), which must confirm the applicant is in good standing and has the financial capacity necessary to obtain C$250,000 in cash or cash equivalents (Liquidity Requirement). Applicants who are applying for more than one region are permitted to use the same letter of confirmation for each regional application.

- *Commitment to Provide Letter of Credit*, from a Qualified Financial Institution, which must confirm the applicant has the financial capacity necessary to obtain a standby letter of credit in the amount of C$50,000 (LOC Requirement) and that such letter of credit will be provided by the Qualified Financial Institution within five business days of the applicant being notified of its selection. Applicants who are applying for more than one region are permitted to use the same letter of confirmation for each regional application.
- *Secured Location*, in the applicable region and provide the following information relating to such location: (a) the street address; (b) an attestation that the retail space will be available to operate a cannabis retail store as of October 2019; and (c) the name and contact information for a person with a legal interest in the retail space. The retail location may not be located less than 150 metres from a public or private school.

Application materials must be submitted between 12:01 a.m. EDT on August 7, 2019 and 8 p.m. EDT on August 9, 2019. The Second Lottery draw will be held on August 20, 2019.

Based on our experience working with winners in the Initial Lottery, the following points of interest may be important to applicants.

1. **Can I Change My Organizational Structure If I Win?**

The Second Lottery is open to applicants that are corporations, limited partnerships, partnerships, trusts, or sole proprietors. However, applicants are not permitted to change their type, ownership and/or corporate structure in a manner that would result in a change of control until at least July 2020 (Allocation Timeline).

This approach is consistent with the rules in the Initial Lottery and failure to comply can result in disqualification on the basis of making an unauthorized change. Although the AGCO did permit Initial Lottery winners to change their organizational type for tax reasons (due to the large number of successful sole proprietor applicants), it is unlikely to be permitted again in the Second Lottery. Accordingly, proper legal and tax planning is critical for serious applicants.

These rules do not necessarily prohibit corporate, partnership or trust entities from taking on additional shareholders, partners or beneficiaries, provided there is no “change of control” and the acquisition or addition is approved by the AGCO. Applicants should consult with their legal and tax advisors prior to engaging in any transaction involving the purchase or sale of equity or convertible debt to ensure that it complies with the requirements of the AGCO and will not jeopardize their eligibility to obtain the necessary licences and authorizations.

1. **If We Win, Are Branding Agreements Permitted?**

Although the AGCO’s FAQ indicates that, among other things, agreements that result in a change of control are prohibited; several successful applicants in the Initial Lottery partnered with established cannabis participants to operate their stores under a banner, including those owned either directly or indirectly by federal cannabis licensees. The content of these agreements varies but may include brand licensing, offering of financial assistance and/or the provision of operational resources. The Second Lottery rules have not prohibited similar arrangements from being entered into with the new round of lottery winners.

Counterparties to material agreements with winners of the Initial Lottery were subject to due diligence by the AGCO, and the agreements themselves were also subject to AGCO review and approval. This diligence and review can take extended periods of time for complex counterparties, which can put the lottery winner’s letter of credit at risk if it causes delays to the opening of the store.

1. **Do I Need A Binding Offer to Lease?**

The Second Lottery rules indicate that a lottery winner must be in possession of the retail space as set out in its application by October 1, 2019. This requirement can be satisfied by, among other things, a conditional lease in each of the regions in which an applicant is applying. For applicants, it is important to negotiate an exit

from each lease in case their application is unsuccessful. These are lessons learned from the Initial Lottery, as many applicants that did not win and had failed to negotiate appropriate termination rights assumed significant obligations for the balance of those lease terms.

As desirable retail locations are few, there is no rule that prohibits the same location from being listed in multiple applications. However, lottery winners must operate their store at the address provided on their application. Accordingly, if more than one lottery winner has identified the same retail space in their application, each winner will have five business days to submit a formally executed legal instrument that demonstrates the applicant's right to possession of the retail space identified in the application. A lottery winner that cannot demonstrate this right of possession will be disqualified, unless, within five business days, they can: (a) demonstrate the right of possession to a different retail space; and (b) secure the AGCO's approval of such address. The AGCO has indicated that its decision as to whether to permit a change of address will be made on a case-by-case basis.

As a result, it is important for both applicants and landlords to be clear on the terms of the lease conditions, especially if more than one conditional lease is being issued by a landlord for a single location. Failure to do so may inadvertently lead to disqualification for a lottery winner and litigation for a landlord.

1. **How Does Financing Work?**

One of the major hurdles faced by many lottery winners in the Initial Lottery was access to financing. Due to the recency of the legal retail cannabis industry in Ontario and the short timelines in the Initial Lottery, few traditional lenders were able to make credit facilities available to the first round of lottery winners.

The Second Lottery has introduced the Liquidity Requirement and mandated proof of the LOC Requirement prior to submission (rather than after the lottery selection, as was the case with the Initial Lottery). This must be evidenced by a letter of confirmation issued by a Qualified Financial Institution in the name of the applicant. The AGCO has also indicated that it may verify that each such applicant has actual access to the funds required to satisfy the Liquidity Requirement between the submission deadline and the draw date.

In addition to the letter of confirmation for the Liquidity Requirement and the LOC Requirement, it is important for an applicant to confirm with their financial institution whether they will be permitted to open a business account as a lottery winner (rather than an applicant) and/or have access to other credit products, such as an operating line.

1. **Can I Sell My Store If I Win?**

A lottery winner cannot currently sell their interest in the store or the regulated assets. Any change of control in a lottery winner is also prohibited during the Allocation Timeline; however, agreements with options to purchase an applicant's interest in a store when permitted were announced after the Initial Lottery.

If a lottery winner's plan is to eventually sell their interest in a store, it is especially important that they apply with an organizational structure that will allow them to facilitate the sale once permitted. It is recommended that applicants consult with their legal and tax advisors on how best to structure their submission.

For further information on the Second Lottery, please contact:

Kevin Rusli 416-863-4020

or any other member of our Cannabis group.

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Health Canada Introduces Cannabis Health Products, A Budding Category

By Laura Weinrib, Pei Li and Chris Nyberg
June 24, 2019

The federal government recently launched a consultation to seek feedback on the introduction of a new category of health products with cannabis, referred to as cannabis health products (CHPs). If implemented, this regime would have the potential to create a new market for cannabis products in Canada, especially given the recent interest in using cannabidiol (CBD)-based products for minor ailments.

Under the current regime, products that contain cannabis and make health claims are considered prescription drugs (subject to prescription drug pre-market authorization requirements) and can only be sold with a prescription from a health-care practitioner. Cannabis that is subject to the *Cannabis Act* and *Cannabis Regulations* is not currently permitted in over-the-counter drugs or natural health products (NHPs).

The introduction of CHPs would permit the sale of certain cannabis-based health products, with health claims, to be sold without a prescription. Health claims will likely be limited to minor ailments (relief of headaches, muscle pain, etc.)

Much like NHPs, the proposed CHPs would be governed by the *Food and Drug Act* (FDA), but CHPs would also remain subject to requirements under the *Cannabis Act*. While the precise details have not yet been determined, Health Canada did provide some key parameters of a proposed regulatory framework, including:

- **Health Claims.** Specific health claims would need to be supported by scientific evidence. General health claims (such as claims related to general health maintenance, support and promotion) would not be permitted.
- **Ingredients.** CHPs would still be subject to pre-market review, and the inclusion of any cannabis-based ingredients would need to be supported by scientific evidence for inclusion. Scientific evidence would need to be provided to demonstrate that the interaction of the different ingredients would be both safe and effective.
- **Retail.** Similar to cannabis, CHPs could be sold by a provincial, territorial or federally licensed retailer or seller. Federally licensed sellers would also be able to sell CHPs online or by phone, similar to the way they currently sell cannabis for medical purposes to registered clients. The federal government has also said that individual provinces and territories will have the flexibility to allow for CHPs to be sold at pharmacies, veterinary clinics, pet stores or other livestock medicine outlets, provided such locations meet the other requirements of the *Cannabis Act*.
- **Protecting Young Persons.** To restrict access to young persons and mitigate against their misuse, Health Canada is proposing to introduce the oversight of a “responsible adult intermediary” (such as a parent or guardian) for young persons to access CHPs. The intermediary could purchase CHPs from an authorized retailer and distribute CHPs to young persons for whom they are responsible. CHPs would also be subject to existing prohibitions regarding promotion, packaging and labelling appealing to young persons under the *Cannabis Act*.

- **Packaging and Labelling.** All pre-market review of labelling under the FDA would apply to CHPs, in addition to labelling requirements from the *Cannabis Act* (such as a standardized cannabis symbol and health warning messages, where appropriate).

It remains to be seen how Health Canada will determine what types of health claims will be permitted. Health Canada has indicated that it intends to gather external scientific advice regarding appropriate evidence standards for CHPs before drafting regulations for consultation. It also remains to be seen how Health Canada will review and pre-approve CHPs (and whether, for instance, certain CHPs may be authorized through the use of product monographs, similar to the existing NHP regime). Health Canada is accepting comments from industry, consumers and all interested parties until September 3, 2019.

For further information on how this may affect your business, please contact:

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Significant Changes to Canada's Cannabis Licensing Process

By Chris Nyberg and Joe Abdul-Massih
May 8, 2019

Health Canada has issued a press release stating that it is changing the application process for licences to cultivate cannabis, process cannabis or sell cannabis for medical purposes (Commercial Licences).

Effective immediately, Health Canada will require new applicants for Commercial Licences to have a completed site that meets all the requirements of the *Cannabis Act* (Act) and *Cannabis Regulations* (Regulations) at the time of their application.

These changes are being implemented following a review of the current application process, which found that significant department resources were being used to consider applications from applicants that were not ready to begin operations. This in turn significantly contributed to wait times for prepared applicants and resulted in an inefficient allocation of existing department capacity.

For existing applications for Commercial Licences, Health Canada has indicated that it will complete a high-level review of applications currently in its queue. If the application passes this review, Health Canada has stated that it will provide a status update letter to the applicant. Once the applicant has a completed site that meets the other regulatory requirements of the Act and Regulations, Health Canada will review the application in a priority determined by the original application date.

Additionally, in an effort to support prospective applicants, Health Canada will: (i) release additional guidance on the revised licence application process and the related regulatory requirements; (ii) establish service standards for the review of applications; (iii) provide enhanced support to Indigenous-affiliated applicants through its Indigenous Navigator Service; and (iv) implement additional support for applicants applying for micro-class licences.

While Health Canada has stated that these changes are intended to improve the administration of the cannabis licensing process, they may also be an attempt to slow the pace of applications, as Health Canada indicated that it expects current licensed capacity to be sufficient to meet independent demand estimates. While the changes may restrict established licensees' growth strategies, reduce access to capital and create more barriers to entry for start-ups, they may also inject more predictability into the process for mature applicants and well-capitalized companies.

For further information on how this may affect your business, please contact:

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TRENDS

CANNABIS

As part of our quarterly series on current trends across different industries, we first take a look at what's on the horizon for cannabis. As the Canadian *Cannabis Act* works its way through Parliament, the Canadian cannabis sector continues to experience an extremely dynamic, fast-changing environment. Here are a few legal trends to watch for as the industry becomes more sophisticated.

By Alexis Levine, Zvi Halpern-Shavim, Matthew Mundy and Stephanie Curcio

1

Financing and Capital

Cannabis issuers continue to be extremely active players in the Canadian capital markets. Demand for capital from businesses in the sector continues to be significant, as businesses continue ramping up capacity in hopes of capturing first mover advantage in this nascent industry.

Thus far, cannabis companies looking to raise financing have primarily relied on equity markets. However, with high demand for capital expected to continue throughout 2018, equity markets have become less reliable sources of capital, especially for new sector entrants. Increasingly, some cannabis companies have begun to slowly pivot away from dilutive equity financing in a search for debt financing to fund their growth.

Canada's major banks have largely taken a cautious approach to the industry, with some limited exposure to the sector, but no major Canadian bank lending extensively or routinely in the cannabis space. However, credit unions, debt funds, equipment financiers and private lenders have increasingly been looking at and lending to cannabis companies.

For licensed producers with a U.S. nexus, private debt has taken on increased importance. The recent rescission of the "Cole Memorandum" by the U.S. Attorney General has made traditional banks and investors even more wary than before of companies with cross-border activities. The Canadian Securities Administrators have confirmed that they will continue to permit Canadian reporting issuers with U.S. cannabis-related business activities to obtain financing in the Canadian public markets, with significant disclosure requirements, but these companies have limited access to major stock exchanges. For these producers, private debt may be of particular importance.

As the industry matures, revenues increase (to potentially encourage cash flow-based lending), and stigma diminishes, large financial institutions may revisit their willingness to lend into cannabis markets, although with a close eye on U.S. and international developments. The reduced regulatory and legal risks that legalization will bring, coupled with the revenue opportunities from the expanding recreational market, may make the opportunity a more appealing one for large institutions — with the proviso that the cross-border implications of any bank activity with industry participants with U.S. exposure will likely mean cross-border participants will not have access to Canadian banks until the U.S. federal legal regime is clarified.

2 Taxation

Discussions regarding taxation of legalized cannabis will likely intensify as the march toward legalization progresses. On November 10, 2017, the Department of Finance Canada announced a consultation on the proposed excise duty framework for cannabis products. The proposed framework included a requirement that all Health Canada licensed producers of cannabis products also obtain a Canada Revenue Agency (CRA) excise licence, similar to alcohol and tobacco producers, and prohibited the production of cannabis product by non-excise licensed producers once the *Cannabis Act* regime comes into force.

Effectively, this means that all licensed producers must obtain a second licence to carry on business. The licence applications have not yet been published, but if they are similar to the current alcohol and tobacco excise licences, they will require detailed information about the cannabis producers' facilities and business plans. Therefore, we are expecting cannabis producers to be working with the CRA and advisers to ensure that their excise licences are issued in time for the *Cannabis Act* regime.

Another area to watch relates to exemptions from the excise tax, and possibly even GST/HST (and provincial sales taxes). Particularly for cannabis products sold for medicinal purposes, the industry has argued that exemptions should apply, similar to prescription medication. It remains to be seen to what extent the government will be swayed by these arguments.

The 2018 federal budget referenced new excise tax exemptions in this regard. Namely, the excise duty framework will generally only apply to cannabis products that contain tetrahydrocannabinol (THC), the primary psychoactive compound of cannabis. Packaged products that contain concentrations of no more than 0.3 per cent THC will generally not be subject to the excise duty under the proposed framework. The budget stated that low THC products are used to treat medical conditions (though we note that this change will likely help spur further interest and investment into the segment of the cannabis market focused on

cannabidiol, a nonpsychoactive cannabis compound, a product area that many analysts and observers have already predicted to be an important component of the overall cannabis market going forward).

Pharmaceutical products approved by Health Canada with a drug identification number that are derived from cannabis and that can only be acquired through a prescription will also not be subject to the excise duty. These proposals, which are not yet drafted into law, are an indication that the industry representations have had some effect, and additional exemptions are possible.

3

Intellectual Property Rights and Branding

As the cannabis industry in Canada continues to grow, it will become increasingly important for emerging businesses to differentiate themselves. One strategy that should be considered is the development and maintenance of strong intellectual property rights.

At the very least, cannabis companies should be aware of the rights available for different aspects of their business (i.e., plants, products, processes, paraphernalia, etc.). As discussed in a previous article, a cannabis plant may be protected by either plant breeders' rights or one or more trade secrets, and a patent may be sought for other cannabis-related inventions (a cannabis plant is generally not patentable in Canada). However, the most effective way to differentiate one's business is to develop a strong brand through the strategic use of trade-mark rights, a trend we will certainly see as we get closer to legalization.

> "To date, CIPO has only issued approximately 200 cannabis-related trade-mark registrations . . ."

For nearly 10 years, the Canadian Intellectual Property Office (CIPO) has accepted applications to register trade-marks for a wide range of goods and services related to cannabis, including word marks, design marks, and packaging shape and design.

Since cannabis cannot yet be sold legally in Canada, and given the requirement that a trade-mark must be used in commerce in association with each good and/or service listed in its application prior to issuance, the number of registered trade-marks in the cannabis area is expected to rise significantly come legalization. To date, CIPO has only issued approximately 200 cannabis-related trade-mark registrations, despite receiving more than 2,000 applications. The demand is reflected at CIPO, as the terms "dried cannabis" and "dried marijuana" were added to its list of acceptable goods and services for trade-mark applications in early January 2018.

In developing a trade-mark strategy, businesses should be acutely aware of packaging, labelling and marketing legislation that will dictate whether a trade-mark may actually be used in commerce (and therefore registrable), even though it may meet other specific trade-mark requirements. The coming legislation will directly impact when, how and to whom cannabis goods and services may be advertised and sold.

Generally, Health Canada's proposed regulations are stricter than what is imposed on the alcohol industry, but not quite as strict as tobacco. Such a balance is aimed at engaging consumers enough to diminish the illicit market without impacting youth. The proposed laws specifically restrict the sale of cannabis and its accessories that may reasonably be construed as appealing to young people or include elements that encourage consumption. Cannabis brands depicting a person, character or animal are also restricted, and those that contain false, misleading or deceptive information about characteristics such as potency, health effects, composition, etc., are prohibited. Health Canada's consultation document on the regulatory framework was open for public comment until January 20, 2018; therefore, we expect further guidance on what the cannabis branding landscape will look like in the coming months.

> "[T]he terms 'dried cannabis' and 'dried marijuana' were added to [CIPO's] list of acceptable goods and services for trade-mark applications in early January 2018."

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Blakes Means Business

CSA, TSX Address Treatment of Canadian Reporting Issuers with U.S. Cannabis-Related Business Activities

By Norbert Knutel, Jacob Gofman, Kevin Rusli and Michael Hickey
October 16, 2017

On October 16, 2017, the Canadian Securities Administrators (CSA) and the Toronto Stock Exchange (TSX) released staff notices regarding their respective treatment of issuers with cannabis-related activities in the United States.

Canadian reporting issuers with U.S.-related cannabis activities have long been uncertain of their treatment by the CSA and the TSX given the conflict between U.S. federal and certain state laws regarding the regulation of cannabis and related business activities. While a number of U.S. states have legalized cannabis-related activities to various degrees, such activities remain illegal under U.S. federal law, where cannabis continues to be a Schedule I drug under the U.S. federal Controlled Substances Act. Confusing the matter further, the U.S. Department of Justice previously issued guidance indicating that it will generally not enforce federal prohibitions in any U.S. state that has authorized this conduct so long as such states have implemented a strong and effective regulatory program. This guidance is also contrary to the current U.S. administration's view and statements regarding cannabis. This confusing state of affairs is illustrated by the varied approaches taken by the CSA and TSX, as further described below.

CSA DISCLOSURE REQUIREMENTS

In CSA Staff Notice 51-352 – *Issuers with U.S. Marijuana-Related Activities*, the CSA endorsed a disclosure-based approach and set out their expectations regarding disclosure for issuers that currently have, or are in the process of developing, cannabis-related activities in U.S. states where such activities have been authorized within a state regulatory framework. This approach is premised on the assumption that issuers' cannabis-related activities are conducted in compliance with the current laws and regulations of a U.S. state and the understanding that the U.S. federal government's forbearance approach (despite not having the force of law) to the enforcement of federal laws remains in place. Again embedding a level of regulatory uncertainty, the CSA explicitly added that they reserve the right to re-examine their view if the U.S. federal government's forbearance approach were to change.

The CSA expect that the disclosure will be "clearly and prominently" disclosed in prospectus filings and continuous disclosure filings such as annual information forms and management's discussion and analysis. In addition, the CSA state that the same disclosure should be included in an issuer's listing statement or other documents related to a reverse takeover or spinoff transaction that allows such issuer to enter the capital markets. Issuers that do not provide the disclosure may be subject to regulatory action, including refusal of a receipt in the context of prospectus offerings, request for restatements of non-compliant filings, and referral for appropriate enforcement action.

All Issuers with U.S. Cannabis-Related Activities

All issuers with U.S. cannabis-related activities are expected to:

- Describe the nature of the issuer's involvement in the U.S. cannabis industry and, based on the nature of such involvement, provide the supplemental disclosure noted in the subheadings below
- Explain that cannabis remains illegal under U.S. federal law and that the approach to enforcement of U.S. federal laws against cannabis is subject to change
- Discuss the resultant risks of cannabis remaining illegal under U.S. federal law, including the risk of adverse enforcement action
- State whether and how the issuer's U.S. cannabis-related activities are conducted in a manner consistent with any U.S. federal enforcement priorities
- Discuss the issuer's ability to access both public and private capital and indicate what financing options are available and unavailable in order to support continuing operations given the illegality of cannabis under U.S. federal law.

Issuers with Direct Involvement in Cannabis Cultivation or Distribution in the U.S.

Issuers that directly engage in the cultivation or distribution of cannabis in accordance with a U.S. state licence will be required to:

- Outline the regulations for U.S. states in which the issuer operates and confirm how the issuer complies with applicable licensing requirements and the regulatory framework enacted by the applicable U.S. state
- Discuss the issuer's program for monitoring compliance with U.S. state law on an ongoing basis and outline internal compliance procedures
- Disclose any material non-compliance as well as material citations or notices of violation.

Issuers with Indirect Involvement in Cannabis Cultivation or Distribution in the U.S.

Indirect involvement may be considered to arise where an issuer has a non-controlling investment in an entity that is directly involved in the U.S. cannabis industry. Such issuers are required to:

- Outline the regulations for the U.S. states in which the issuer's investees operate
- Provide reasonable assurance, through either positive or negative statements, that the investees' business complies with applicable licensing requirements and the regulatory framework enacted by the applicable U.S. state.

Issuers with Material Ancillary Involvement in Cannabis Cultivation or Distribution in the U.S.

Issuers that provide goods or services, including financing, branding, recipes, leasing, consulting or administrative services, to third parties who are directly involved in the U.S. cannabis industry are required to provide reasonable assurance, through either positive or negative statements, that the applicable customers' or investees' business complies with applicable licensing requirements and the regulatory framework enacted by the applicable U.S. state.

Different Approaches

The CSA acknowledge that different exchanges, such as the Canadian Securities Exchange and the TSX, apply different listing requirements but note that investors should be aware that a successful listing does not have a cleansing effect on the legality of an issuer's U.S.-related cannabis activities under U.S. federal law.

TSX WARNS OF POSSIBLE DELISTING OF ISSUERS WITH U.S. CANNABIS- RELATED BUSINESS ACTIVITIES

In contrast to the CSA's central focus on disclosure, TSX Staff Notice 2017-0009 makes clear that TSX listing of issuers that are engaged in activities relating to the cultivation, distribution or possession of cannabis in the U.S. (U.S.-Related Cannabis Entities) raises serious policy concerns for the TSX over illegality and potential exposure under U.S. federal money laundering legislation. In short, the TSX has formally concluded that issuers operating in violation of U.S. federal law regarding cannabis are not acting in compliance with the TSX's listing requirements and such issuers should proactively address any gaps in compliance with the TSX requirements. The TSX notice also stresses that it has the discretion to initiate a delisting review of issuers engaged in activities that are contrary to the TSX requirements.

The TSX identified the following subject business activities as examples that may violate U.S. federal law, in order of concern:

1. Direct or indirect ownership or investment in U.S.-Related Cannabis Entities
2. Commercial interests or arrangements with U.S.-Related Cannabis Entities that amount in substance to ownership or investment
3. Providing services or products that are designed for, or targeted at, U.S.-Related Cannabis Entities
4. Commercial interests or arrangements with entities engaging in any of the foregoing businesses.

While the TSX recognized the U.S. federal government's forbearance approach to the enforcement of federal laws, it also emphasized that such guidance does not have the force of law and can be revoked or amended at any time.

The TSX intends to select issuers for in-depth reviews based on their continuous disclosure records. In the context of reviews of listed issuers in the cannabis sector, the TSX expects to group issuers into two categories: (i) U.S.-Related Cannabis Entities and (ii) issuers that engage in ancillary service activities for U.S.-Related Cannabis Entities. The TSX expects to contact any listed issuers identified for a more comprehensive review by the end of 2017, which provides affected issuers with a short grace period to correct any non-compliance (for example, through divestiture or spin-off of U.S. assets or commercial arrangements) in order to avoid a formal delisting review.

Issuers that may potentially become subject to delisting, or other regulatory action such as a halt or suspension, are strongly encouraged to assess the materiality and timing of becoming subject to a formal or informal review process by the TSX. Issuers should diligently evaluate each stage of discussion with the regulators to continuously assess the appropriate time to provide investors with disclosure of a material change, if any, as well as assess possible breaches or adverse triggers that any imposed regulatory action may cause under existing debt, streaming or other financing arrangements, material leases and contracts, supply and distribution agreements, joint ventures and acquisition agreements. Delisting may also lead to adverse consequences for existing investors, including loss of liquidity, potential disqualification of securities as investments qualified for registered plans, negative impacts on stock price and potential exclusion from institutional portfolios or investment fund and exchange-traded fund holdings. While the TSX strongly recommends that applicants and listed issuers considering engaging in cannabis-related activities in the United States consult with the TSX, we also advise that potentially affected issuers proactively contact the TSX to commence discussions in short order.

CONCLUSION

Given the changes adopted by the CSA and the TSX, issuers would be well advised to seek legal advice to understand the relevant rules and new disclosure requirements and to determine the relevant securities law considerations.

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or any other member of our Cannabis or Capital Markets groups.