UNIVERSITY OF CALIFORNIA

Research Policy Analysis & Coordination

Guidance Memo
19-02

March 19, 2019

To: Vice Chancellors for Research, Research Compliance Advisory Committee Members, Contracts and Grants Directors, and Development and Advancement Relations Officers

Subject: Pilot Approach when Considering Funding from the Marijuana Industry

Purpose: Many of the activities of the cannabis industry located in California and other states that have legalized recreational and medical marijuana use are still criminally prohibited under federal law. This presents concerns about accepting funding from the marijuana industry. This Guidance Memo provides information on the risks of accepting funding from the marijuana industry, and proposes a pilot program when considering accepting funding from the marijuana industry.

Background

As of November 2018, thirty-three states and the District of Columbia have legalized at least limited use of marijuana for the treatment of medical conditions. Ten of these states and the District of Columbia have also legalized marijuana for recreational use. In California, the Adult Use of Marijuana Act (Proposition 64) enacted on November 8, 2016 allows for the use, cultivation, and sale/distribution of marijuana for non-medical purposes among people over the age of 21 (medical use of marijuana has been legal in California since 1996). State marijuana legalization has led to a growth of entities in the marijuana industry, an increased interest in and need for marijuana-related research, and an interest in accepting funding from the marijuana industry (both to support marijuana-related research and to support other kinds of research and educational activities).

Despite legalization of certain uses of marijuana on the state level, including under California state law, the Drug Enforcement Agency (DEA) maintains a Schedule I classification for marijuana (or "marihuana" defined in the federal Controlled Substances Act, 21 U.S.C., Chapter 13, §801 et seq.), classifying it as a drug with "no currently accepted medical use" in the United States, along with heroin and ecstasy. As a Schedule I Controlled Substance, the use, possession, distribution, and cultivation of marijuana is illegal under the federal Controlled Substances Act, with limited exceptions (including exceptions that allow certain research that complies with strict federal controls). The Department of Justice (DOJ)/DEA has authority to enforce the Controlled Substances Act, including through civil and criminal penalties.

The plant material known as "industrial hemp" is a variety of the same Cannabis sativa L. plant as marijuana, but with a low concentration of delta-9 tetrahydrocannabinol (THC), the primary psychoactive component of cannabis. Hemp was historically included in the Controlled

Substances Act definition of "marihuana." However, in December 2018, the 2018 Farm Bill[1] was signed into law, which among other things, amended the Controlled Substances Act to exclude hemp (the plant Cannabis sativa L. with a THC concentration of not more than 0.3% on a dry weight basis) and hemp derivatives (extracts and cannabinoids) from the definition of "marihuana." Thus, hemp and hemp derivatives are no longer regulated as Schedule I Controlled Substances. Since hemp is no longer regulated under the Controlled Substances Act, and because negligent violations are no longer treated as criminal violations[2], accepting funding from the hemp industry is not subject to the same degree of risk as accepting funding from the marijuana industry. For that reason, this Guidance Memo focuses exclusively on accepting funding from the marijuana industry, and does not address cases that involve accepting funding from entities whose sole relationship with cannabis relates to cultivation, manufacture, or distribution of hemp or hemp derivatives.

However, it should be noted that under the 2018 Farm Bill, the cultivation of hemp is subject to a shared state-federal regulatory program. Under the 2018 Farm Bill, hemp (other than that grown exclusively for research purposes by a state department of agriculture pilot program or university in compliance with Section 7606 of the Farm Bill of 2014) may only be cultivated pursuant to a USDA-approved state plan that includes certain regulatory elements or, in the absence of such a state plan, by a grower that has applied for and obtained a license directly from the federal USDA. Such restrictions mean that not all entities are legally permitted to cultivate hemp, so some hemp that is available commercially may not have been produced in accordance with applicable rules. In order to ensure that campuses engage in transactions only with entities that are compliant with all applicable rules, campuses are advised to ask potential hemp suppliers or hemp industry funders to provide assurances that they are operating under a USDA-approved state plan or pursuant to a USDA-issued license.

In addition to the Controlled Substances Act, universities that receive federal funds, like UC, are also obligated to comply with the Safe and Drug-Free Schools and Communities Act and the Drug-Free Workplace Act. These federal laws require UC to implement policies that prohibit the unlawful manufacture, distribution, dispensing, possession, or use of any controlled substance at UC. Failure to comply could put federal funding at risk.

Defining the Marijuana Industry

The marijuana industry consists of entities or individuals that conduct marijuana-related activities that are illegal under federal law. They include, among others, cultivators, manufacturers, distributors, and retailers (e.g., dispensaries) of marijuana. The marijuana

[1] H.R. 2, enacting the Agriculture Improvement Act of 2018 (commonly referred to as the Farm Bill), was signed into law December 20, 2018, and became Public Law No. 115-334.

[2] Note that under the 2018 Farm Bill, "negligent violations" are not subject to a state or federal criminal enforcement action. If a hemp producer violates a USDA-approved state regulatory plan with a mental state greater than negligence – e.g., if the violation was willful or intentional – then the "safe harbor" protection from criminal enforcement would not apply. Thus, for example, if a hemp producer intended to comply with such a plan's requirement to grow Cannabis sativa L. with a THC concentration of not more than .3% on a dry weight basis, but accidentally or unintentionally grew Cannabis sativa L. exceeding that concentration in violation of the plan's requirement, the violation would likely fall within the safe harbor and not be criminally prosecuted. In addition, deliberate violations of state plan requirements could still be subject to criminal prosecution.

industry may also include trade association groups and those organizations that provide ancillary products and services to support federally illegal marijuana-related activities (e.g., lighting or hydroponic equipment companies whose main clientele is the marijuana industry).

Through its role in providing guidance to campuses, RPAC has received examples of entities or individuals conducting marijuana-related activities and has grouped the marijuana industry into three tiers:

1) Non-governmental entities or individuals that appear to directly derive all or most of their funding from illegal activities;
2) Non-governmental entities or individuals that appear to derive their funding from separately identifiable revenue streams, where one such funding stream is directly from conducting marijuana-related activities that are illegal under federal law; and
3) Non-governmental entities or individuals indirectly tied to the marijuana industry, such as a company that derives its profit from providing services to entities conducting illegal activities under federal law.

For the purposes of this Guidance Memo, the marijuana industry does not include government agencies that provide funding from tax dollars levied on cannabis industries, including the California Bureau of Cannabis Control, which is responsible for allocating funding under Proposition 64, nor does it include entities whose sole connection to cannabis relates to cultivation, manufacture, or distribution of hemp or hemp derivatives, as noted above. For information on the effect of Proposition 64 on marijuana research at UC, please refer to RPAC Guidance Memo 18-01.

Risks in Accepting Funding from the Marijuana Industry

Because the marijuana industry consists of entities or individuals that conduct marijuana-related activities that are illegal under federal law, there are concerns about accepting funding from/conducting transactions with members of this industry. Possible legal risks of accepting such funding from marijuana entities include charges of money laundering, charges of aiding and abetting violations of the Controlled Substances Act and the possibility of civil forfeiture. There are also reputational risks of working with an individual/entity engaged in illegal activities. Although the practical risk of enforcement may be low, accepting gifts, grants or funding under other mechanisms from members of the marijuana industry could:

- Open an institution of higher education to federal criminal charges of money laundering or aiding and abetting violations of the Controlled Substances Act,
- Entail a risk of federal forfeiture (i.e., funds that are determined to be the proceeds of criminal activities, which could apply if funds donated to a university were derived from the donor's sale or distribution of marijuana, and can be seized by the federal government); and
- Subject institutions to allegations that they have violated the Drug Free Schools Act and/or the Drug Free Workplace Act, which could put their federal funding at risk.

UC Pilot Approach when Considering Accepting Funding from the Marijuana Industry

UC is implementing a pilot program that would permit individual campuses to evaluate proposed funding from the marijuana industry without having to seek guidance from RPAC in

each instance (as currently required under RPAC Memo 18-01[3]). Under the pilot program, campuses are expected to engage in due diligence if they are aware of or reasonably suspect that potential funding may be related to the marijuana industry through a gift, grant, or other mechanism. Campuses also need to designate an office or officer(s) who will take responsibility for coordinating these reviews using the three-tiered approach outlined below:

Tier 1. Non-governmental entities or individuals that appear to directly derive all or most of their funding from conducting marijuana-related activities that are illegal under federal law (such as sale, distribution, or cultivation of marijuana, other than pursuant to federal authorization or industrial hemp cultivation by an entity whose activities are authorized under the federal Farm Bill):

> Accepting funding from an industry that engages in activities, such as the sale, distribution, or cultivation of marijuana, that are criminally prohibited under federal law raises serious concerns. Possible risks of accepting funding from such an industry include charges of money laundering, charges of aiding and abetting violations of the Controlled Substances Act, risk that the funding could be subject to Federal forfeiture under laws that give the government authority to seize assets derived from the illegal manufacture, import, sale or distribution of a controlled substance, and reputational risks of working with/for an illegal industry. To ensure consistency across UC, campuses may not accept donations, grants or other funding from entities or individuals known to directly derive most or all of their funding from conducting marijuana-related activities that are illegal under federal law.

Tier 2. Non-governmental entities or individuals that appear to derive their funding from separately identifiable revenue streams, where one such revenue stream is directly from conducting marijuana-related activities that are illegal under federal law (such as from the sale, distribution, or cultivation of marijuana):

> As described above, there are potential risks of accepting funding from an industry that directly derives its funding from conducting illegal activities. However, those risks can be mitigated if the campus obtains assurance that the funds flowing to the University are not derived from an illegal source. Prior to accepting funding from any entity or individual that that has access to funding that is from legal activities as well as from illegal marijuana-related activities, the campus must conduct due diligence and obtain written assurance that the funds provided to UC are not derived from activities that are illegal under federal law, including that the funds are not derived from the sale, distribution, or cultivation of marijuana or marijuana products. Campuses should also consider the potential optics of each funding opportunity.

Tier 3. Non-governmental entities or individuals indirectly tied to the marijuana industry, such as a company that derives its profit from providing services to entities conducting illegal activities under federal law:

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[3] Per RPAC Memo 18-01, issued on July 24, 2018, UC researchers are required to consult with their respective campus Contracts and Grants (C&G)/Sponsored Programs Office (SPO) or external relations/development office (who in turn must contact RPAC, which may seek advice from OGC as needed), before applying for and accepting non-governmental funding from individuals or entities whose funding is known to be directly derived from federally illegal marijuana activities (e.g. sale, distribution, and cultivation of cannabis).

In these situations an entity may be providing legally permissible products and services to the marijuana industry (e.g., manufacture and sale of grow lights or equipment used to measure the safety and toxicity of marijuana), but the funds they receive from their customers are likely to have been generated through the federally illegal activities of the marijuana industry. While there are potential concerns about accepting funding from an entity or individual that has only indirect ties to the cannabis industry, the legal risk of enforcement for charges of money laundering or charges of aiding and abetting violations of the Controlled Substances Act are lower than they are for accepting funds from a company that is directly engaged in illegal sales/cultivation/distribution. Campuses may make local decisions about whether to accept such funds. Campuses may consider conducting due diligence and obtaining written assurance that the funds provided to UC are not derived from activities that are illegal under federal law, including that the funds are not derived from the sale, distribution, or cultivation of marijuana or marijuana products. Campuses are also advised to evaluate the potential optics of each funding opportunity.

Contact

Contact Research Policy Analysis & Coordination if you have questions about the guidance provided above or about specific marijuana-related research at UC. Contact the Office of General Counsel if you need legal advice.

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