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CANNABIS INDUSTRY

Employees of Canadian cannabis businesses can't totally avoid scrutiny by U.S. Customs and Border Protection when traveling to the U.S.—spelling trouble for U.S. companies that may want to partner with Canadian cannabis companies. Perkins Coie attorneys offer 'do's and don't's' for minimizing risks to employees crossing the border.

INSIGHT: Cannabis Industry Employees Face Risks When Crossing the U.S.-Canadian Border



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The legal Canadian cannabis industry is booming, and U.S. companies can benefit from the prospering cross-border industry by partnering with Canadian companies. However, U.S. Customs and Border Protection cannabis law enforcement differentiates between citizens and non-citizens in an inconsistent manner and could spell trouble for U.S. companies that may want to partner.

This article highlights the treatment by U.S. CBP of cross-border movement of employees of Canadian cannabis companies—and offers practical guidance to in-house counsel regarding how to address this issue.

Legal Cannabis Industry Taking Off in Canada

In October 2018, Canada became the second country, after Uruguay, to legalize marijuana for recreational use. Canada's cannabis industry has consequently exploded. The top 12 Canadian marijuana companies are

collectively worth nearly \$42 billion, with stock selling quickly. Economists have estimated potential tax revenue alone from Canada's cannabis industry at up to \$1 billion U.S. dollars.

U.S. businesses and investors have naturally realized the significant potential upside of investing in the Canadian cannabis industry. For example, the Coca-Cola Co. is reported to be considering an investment in Aurora Cannabis, a Canadian marijuana company, to develop cannabis-infused beverages; Marlboro's parent company, Altria, is eyeing an investment in Aphria, another Canadian marijuana concern. Most notably, Constellation Brands, which owns scores of beer and wine brands, has committed to a \$4 billion investment in Canopy Growth, a major Canadian cannabis company.

CBP's Strict Border-Entry Policy

Unfortunately, recent CBP enforcement actions have raised concerns for U.S. companies.

For example, after questioning a Canadian investor in the cannabis industry who was traveling to Las Vegas to attend a marijuana industry conference and tour a new cannabis facility, the CBP banned the investor from entering the US for life.

CBP has confirmed that this was no isolated measure; CBP regularly asks Canadian citizens crossing into the U.S. from Canada what they do for a living, warning, "[i]f you work for the [marijuana] industry, that is grounds for inadmissibility." As explained below, this approach is at odds with the U.S. Department of Justice's general acceptance of the domestic cannabis industry.

CPB bases its cannabis policy on 8 U.S.C. § 1182(a)(2)(C)(i), which prohibits anyone from enter-

ing the U.S. who is or has illicitly trafficked any controlled substance or listed chemical as defined by the Controlled Substances Act, 21 U.S.C. § 802, or who is or has knowingly aided, abetted, assisted, conspired, or colluded with other in illicitly trafficking controlled or listed substances or chemicals or endeavored to do so.

CBP further clarified its policy on Oct. 9, 2018, in a revised Policy Statement on Canada's Legalization of Marijuana and Crossing the Border. In relevant part, the revised statement provides: "A Canadian citizen working in or facilitating the proliferation of the legal marijuana industry in Canada, coming to the U.S. for reasons unrelated to the marijuana industry will generally be admissible to the U.S. However, if a traveler is found to be coming to the U.S. for reason [sic] related to the marijuana industry, they may be deemed inadmissible."

Assets Seized

In addition to the possibility of incurring a lifetime ban, there is also a risk that CPB could seize a traveler's assets (cash or goods the traveler is carrying). 19 C.F.R. § 162.21 authorizes any customs officer to seize available property if he or she has reasonable cause to believe that any law or regulation enforced by Customs and Border Protection or Immigration and Customs Enforcement has been violated.

This harsh approach creates obvious risks to Canadian employees in the cannabis industry who are traveling to and from the U.S. The policy does allow such employees to enter the U.S. for reasons entirely unconnected to marijuana—such as, say, a sightseeing trip to Yellowstone National Park or Disneyland. Nevertheless, CBP's policy hampers Canadian employees and investors in the cannabis industry from entering the U.S. for purposes even tangentially related to their work.

Paradoxically, the policy presents no problem for U.S. citizens who work for cannabis companies from crossing and re-crossing the U.S.-Canadian border, for any reason whatsoever. Indeed, CBP's policy is oddly inconsistent with the general indifference of the DOJ to enforcing the Controlled Substances Act as to cannabis in states that have legalized marijuana.

As incoming Attorney General Barr has confirmed, "To the extent [marijuana companies] are complying with the state laws in distribution and production and so forth, we're not going to go after that." It is indeed strange that DOJ generally ignores significant cannabis business within the U.S. that involves citizens, while CBP may take action against aliens involved in the wholly legal Canadian cannabis industry who travel to the US in partnership with US businesses.

CBP's approach to cannabis enforcement and its hard line on cannabis-related border-entry when cannabis is an issue spells trouble for U.S. companies that may want to partner with Canadian cannabis companies.

For example, a U.S. beverage company seeking to do business with a legal cannabis company in Canada may want to bring Canadian executives into the U.S. to help with product development. Unfortunately, such travel would risk an enforcement action by the CBP. Moreover, CBP's policy would naturally discourage a potential Canadian business partner involved in the cannabis industry from traveling into the U.S. to conduct due diligence on a new investment opportunity.

Minimizing Employees Risks When Crossing the U.S.-Canada Border

What can businesses involved in US-Canadian cross-border ventures that involve cannabis do to minimize the risks posed by the CBP's policies? There is no absolute protection from scrutiny by CBP when the employees of Canadian businesses travel to the U.S., but we recommend the following "do's and don't's":

- **Compartmentalize cannabis-related operations.** Given the CPB's current strict approach to cannabis law, the safest approach for US companies that want to partner with Canadian cannabis companies is to compartmentalize operations geographically. Canadian investors and employees should refrain from crossing into the US for cannabis-related activity. Any cross-border business activity that would might entail Canadian business people traveling to the US should be conducted remotely, rather than in person.

- **Train Canadian employees how to respond to CBP inquiries.** The employees of Canadian business partners should be trained regarding CBP policies, and should know how to interact with CBP agents at US borders and ports-of-entry, and who to call if something goes awry. In-house counsel should have a response plan for how to react to problems in worst-case scenarios (e.g., having counsel engage with CBP immediately if problems arise). Do not let your company's employees or business partners be surprised by or unprepared to respond to CBP inquiries.

- **Be completely truthful with CBP officials.** It may be tempting for the Canadian employees of a cannabis-related business to lie to CPB officials about the purpose of a visit to the U.S. or the nature of one's employment, but deceiving federal law-enforcement agents is risky, and may create problems far more serious than a lifetime ban from visiting the US. A false material statement, verbal or written, to a CBP agent may result in prosecution and imprisonment under 18 U.S.C. § 1001. (Section 1001(a) provides for fines or imprisonment of up to 5 years for individuals who knowingly and willfully falsifies a material fact or makes a materially false statement) Instruct your employees to be completely truthful and forthright with CBP officials if they are questioned when crossing the U.S.-Canadian border.

- **Limiting involvement in the cannabis industry to indirect investment will not necessarily prevent problems.** CBP agents have a significant amount of discretion in the performance of their duties. Arms-length, indirect investment in a cannabis company may help reduce the risk to Canadian businesspeople who cross the US-Canada border; the distinction between mere investment in such a business and active involvement in the business activities may help reduce the risk that a CBP agent at the US-Canada border will exercise his or her discretion in enforcing CBP's policies. But keep in mind that even limited involvement in the cannabis industry does not address the fundamental risk posed by CPB to Canadians who enter the US for cannabis-related business. Ultimately, if a foreign traveler crosses a US border, has some involvement in the cannabis industry, and is travelling to or is travelling from the US to facilitate cannabis-related business, then CBP agents can exercise their considerable enforcement powers.

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