

Illicit Cannabis Is The Problem, Not State-Legal Markets

By **Tommy Tobin and Andrew Kline** (February 17, 2023)

In late December 2022, the White House Office of National Drug Control Policy, or ONDCP, released its annual drug enforcement report to Congress, focusing in part on high-intensity drug trafficking areas.[1]

Below, we call into question some of the hyperbole around state-regulated markets, refocus attention on the real danger to public safety — the illicit market — and highlight some of the takeaways for the nation's cannabis industry.

Background on the Report

In October 2022, the Biden administration made a major announcement regarding cannabis.[2] President Joe Biden reiterated that "no one should be in jail just for using or possessing marijuana." As such, he announced that his administration would pardon anyone with a federal conviction for cannabis possession. Biden encouraged governors to do the same at the state level.

Most notably, Biden directed the U.S. secretary of health and human services and the U.S. attorney general to initiate an administrative process to expeditiously review how marijuana is scheduled under federal law.

The ONDCP is a component of the Executive Office of the President and promotes a whole-of-government approach to drug policy.[3]

The ONDCP's director, Dr. Rahul Gupta, appropriately celebrated the Biden administration's "important and historic steps" regarding cannabis and noted these efforts will help ensure the administration's drug policies "help make all our communities healthier and safer." [4]

Gupta continued, "It is clear that our current marijuana laws have not worked, and that we need a new approach that balances science with criminal justice reform efforts." [5]

Within the context of the Biden administration's efforts to reform the nation's cannabis system, the ONDCP issued its report on high-intensity drug trafficking areas, or HIDTAs.

The HIDTA program is a coordination strategy across federal, state, local and tribal law enforcement agencies to address serious drug threats across 33 HIDTA regions.

Each HIDTA forms its own executive board, which in turn can develop its own strategies and initiatives.

The ONDCP facilitates coordination of the HIDTA program, and this annual report summarizes regional initiatives and priorities across HIDTA regions.



Tommy Tobin



Andrew Kline

Selected Findings

The ONDCP's 2022 HIDTA report rightly details the following problems associated with illicit cannabis:

- The Northern California HIDTA reported that illicit cannabis remains readily available in the region despite state legalization, with illegal grows on public land posing "a serious environmental threat, polluting and diverting water sources, and poisoning wildlife." [6]
- The Central Valley, California HIDTA noted that illegal cannabis poses a significant drug threat, and that law enforcement had removed 662 metric tons of unregulated marijuana from the community. [7]
- The Oregon-Idaho HIDTA reported that "[i]llicit manufacture and distribution of marijuana extracts, such as hash oil and marijuana wax, continue to increase in the region." [8]
- The Ohio HIDTA detailed that it had "consistently seized increasing quantities of illegal marijuana products annually" since 2018, removing 11,755 kilograms in 2020 alone. [9]

Some HIDTAs noted that cannabis was shipped into jurisdictions where it was not state-legal:

- In the South Florida HIDTA — notwithstanding Florida having one of the most robust state-legal medical marijuana programs in the country — cannabis is seen as "a significant threat to the region," and "the parcel shipment of commercially packaged marijuana from states where it is legal to Florida, where these activities are prohibited, are vast." [10]
- The Central Florida HIDTA similarly found that "THC concentrates from western states, particularly California, being transported to Central Florida primarily via parcel" resulted in high rates of cannabis availability and use. [11]
- The Texoma HIDTA, covering parts of Oklahoma and Texas, expressed concern regarding drug trafficking groups that "specialize in distribution of high-grade marijuana obtained from states with legalized forms of marijuana," and argued, without further evidence, that "[t]hese controlled substances are every bit as destructive as other 'hard-core' drugs and negatively impact the quality of life and safety of communities throughout Texas and Oklahoma." [12]
- The Appalachia HIDTA reported that "marijuana and marijuana derivatives" were "commonly transported" into the region from Western states. [13]

In several areas, the report casts aspersions on cannabis legalization, without citing any evidence.

For instance, the Northern California HIDTA stated, "Legalization of recreational cannabis in

California has likely invited more criminality connected to the production and transportation of the drug, especially by [drug trafficking organizations] and organized criminal groups."

But as an article in Marijuana Moment suggests, "The primary reason large-scale illicit cannabis cultivation persists is prohibition, not legalization. ... We don't see illegal production of tobacco and alcohol because both are legal in every state and under federal law." [14]

It's also worth noting that the ONDCP's annual HIDTA reports have received widespread pushback in recent years given the potential bias stemming from, according to the Marijuana Moment article, the "ONDCP's statutory mandate to oppose efforts to legalize Schedule I drugs like marijuana." [15]

Key Takeaways

The ONDCP's HIDTA report is not a peer-reviewed study, but instead is a series of regional reports by law enforcement operating in each HIDTA and incorporating each individual HIDTA's impressions and priorities. As such, the report does not reflect a central ONDCP-wide national policy approach.

Nonetheless, the report's findings indicate some takeaways for the cannabis industry.

Specifically, the report focuses on the perils of the illicit market, even if some law enforcement agencies misdirect blame for these perils without evidence. State-legal, licensed cannabis businesses have stringent state-level rules they must follow, including laboratory testing, labeling requirements, age verification and prohibitions on interstate commerce.

Compliant state-legal cannabis businesses are subject to seed-to-sale tracking systems that register whether state-legal products have been diverted to the illicit market.

Those state-legal programs also face strict limitations on the types of products sold, where they can be sold and to whom.

There are limits on the quantities that any individual can purchase on any given day, making it unlikely that large quantities of legal product are being diverted to other states. The more likely culprit is the illicit market.

The report illustrates the public health risks the illicit market presents to communities around the country.

These concerns are shared by a coalition of more than 20 state attorneys general, who issued a public letter to congressional leaders in June 2022.

In their letter, these state attorneys general — the top law enforcement officials in their jurisdictions — wrote that "counterfeit, unlicensed, unregulated, and untested THC edibles" mimicking the packaging and names of popular products pose "a grave risk to the health, safety, and welfare of our children." [16]

State attorneys general in Arkansas, California, Connecticut, Illinois and New York have previously issued consumer advisories and warnings regarding copycat THC edible products in those jurisdictions. [17]

And last summer, the U.S. Food and Drug Administration issued a consumer alert regarding copycat THC products, expressing particular concern because many products were specifically designed to mimic popular, well-recognized foods that appeal to children via similar brand names, logos or pictures.[18]

These copycat products, according to the alert, "can be easily mistaken for commonly consumed foods such as breakfast cereal, candy, and cookies, and accidentally ingested."

The ONDCP's HIDTA report provides further fodder for the fight against the illicit cannabis market.

Understandably, law enforcement is concerned with the problems posed by unregulated cannabis, including unlawful transportation of cannabis across state lines.

Any comments contained in this report that somehow inculcate the regulated cannabis market should be taken with a grain of salt for the simple reason that regulated, legal cannabis marketplaces operate with regulatory oversight that does not generally involve law enforcement authorities.

The truth is that the regulated market provides requirements for tested, properly labeled, age-verified, and quantity- and quality-controlled products.

The illicit market does not, which is why law enforcement should focus their limited resources there.

Tommy Tobin is an associate at Perkins Coie LLP.

Andrew Kline is senior counsel and co-chair of the cannabis industry group at the firm.

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[1] ONDCP, High Intensity Drug Trafficking Areas Program: 2022 Report to Congress (Dec. 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/12/HIDTA-Annual-Report-to-Congress-2022.pdf> (hereinafter "Report").

[2] White House, Statement from President Biden on Marijuana Reform (Oct. 6, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/>.

[3] ONDCP, <https://www.whitehouse.gov/ondcp/>.

[4] White House, Dr. Gupta Statement on President Biden's Marijuana Reform Announcement (Oct.6, 2022) <https://www.whitehouse.gov/ondcp/briefing-room/2022/10/06/dr-gupta-statement-on-president-bidens-pardon-announcement/>.

[5] Id.

[6] Report at 135.

[7] Report at 51.

[8] Report at 153.

[9] Report at 145.

[10] Report at 171.

[11] Report at 47.

[12] Report at 179.

[13] Report at 30.

[14] Kyle Jaeger, White House Highlights Police Concerns About Marijuana Legalization In New Report To Congress Marijuana Moment (Jan. 3, 2023), <https://www.marijuanamoment.net/white-house-highlights-police-concerns-about-marijuana-legalization-in-new-report-to-congress/>.

[15] Id.

[16] [https://www.oag.state.va.us/files/MIYARES2022/THCCannabisLetterFinal\(2\).pdf?source=email](https://www.oag.state.va.us/files/MIYARES2022/THCCannabisLetterFinal(2).pdf?source=email).

[17] AG Alert: Rutledge Warns Against Unregulated and Illegal Cannabis Products Sold in Look-alike Packaging, (Oct. 6, 2021), <https://content.govdelivery.com/accounts/ARAG/bulletins/2f647a5>; Attorney General Bonta: Cannabis-Infused Edibles Packaged as Popular Food and Candy Products Are Unsafe and Illegal (Oct. 28, 2021), <https://oag.ca.gov/news/press-releases/attorney-general-bonta-cannabis-infused-edibles-packaged-popular-food-and-candy>; Attorney General Tong Warns Against Unregulated and Illegal Cannabis Products Sold in Look-Alike Packaging (Oct. 26, 2021), <https://portal.ct.gov/AG/Press-Releases/2021-Press-Releases/AG-Tong-Warns-Against-Unregulated-and-Illegal-Cannabis-Products-Sold-in-Look-Alike-Packaging>; Robert Channick, Illinois warns parents against cannabis look-alike treats ahead of Halloween Chicago Tribune, (Oct. 26, 2021), <https://www.chicagotribune.com/business/ct-biz-cannabis-halloween-treats-warning-illinois-20211026-5vmkmwbi7zhvhvdekqdv7w73u-story.html>; Attorney General James Issues Alert to Protect Children From Deceptive Cannabis Products Sold in Snack Packaging (Oct. 26, 2021), <https://ag.ny.gov/press-release/2021/consumer-alert-attorney-general-james-issues-alert-protect-children-deceptive>.

[18] FDA, FDA Warns Consumers About the Accidental Ingestion by Children of Food Products Containing THC (June 16, 2022), <https://www.fda.gov/food/alerts-advisories-safety-information/fda-warns-consumers-about-accidental-ingestion-children-food-products-containing-thc>.