PASS THE REVENUE: HOW SECTION 280E IS HARMING THE MEDICAL MARIJUANA INDUSTRY

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I. INTRODUCTION

Remarking on the recently ratified United States Constitution in a letter to a friend living in France, Benjamin Franklin famously wrote "[o]ur new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except death and taxes."[1] The famous quote hits home especially hard to medical marijuana[2] businesses who are operating legally under the relevant state laws, yet are nonetheless treated as a business conducting an illegal trade for federal income tax purposes.

Although there are forty-six states with some form of legislation permitting the use of marijuana related products for medicinal purposes, it would be an overstatement to say the medical marijuana business is currently flourishing. Long gone are the days of a society which expresses disbelief that marijuana can be used as a medicine. Even as a recreational drug, marijuana no longer carries with it the same stigma that it did even a decade ago. Public perception is no longer the biggest enemy that medical marijuana companies must deal with; the supervillain role has been assumed by I.R.C. § 280E ("Section 280E") of the Internal Revenue Code ("IRC").

As federal law makes no distinction between medical and recreational marijuana, medical marijuana continues to be classified as a Schedule I drug under the Controlled Substances Act ("CSA"), in turn, subjecting it to the harsh conditions of Section 280E. The result of this treatment—the disallowance of ordinary business deductions or credits—has a ripple effect on medical marijuana businesses: it creates a higher tax bill, which in turn reduces profits, decreases research opportunities and disincentivizes new businesses from entering the market.

This writing proposes a resolution to the ongoing tax issues that medical marijuana companies are currently facing. While the simplest option would be a reclassification of "marijuana" under the CSA, to take it off the list of Schedule I or Schedule II banned drugs, this tactic has been advocated for repeatedly in the past and has been continuously rejected by the Drug Enforcement Agency ("DEA"). Instead, this writing explores the possibility of carving out an exception in Section 280E for medical marijuana companies which would allow them to take deductions for their ordinary business expenses, just like all other

1 Letter from Benjamin Franklin to Jean Baptiste Le Roy (Nov. 13, 1789), *in* 10 THE WRITINGS OF BENJAMIN FRANKLIN 69 (Albert Henry Smyth ed., 1907).

2 This writing chooses to refer to the drug which comes from the plant *Cannabis sativa* l as "marijuana." For clarity purposes, this term is used throughout the paper and can be referred to interchangeably with the term "cannabis."

businesses. While the obvious result of this would be higher net income for these companies, the totality of the effect would stretch much further regarding growth, research, and product availability. By detailing how the current application of Section 280E no longer falls in line with the initial purpose of its enactment and arguing why an exception is necessary due to current societal standards, tax theory, and health purposes; this writing aims to show why this exception is long overdue and a necessary step to continue to grow the medical marijuana industry.

II. History of Section 280E

A. Purpose and Effect of the Statute

To fully comprehend the purpose and effect of Section 280E, it is necessary to understand I.R.C. § 162 ("Section 162") as that is the section of the IRC with which Section 280E directly coincides with. Section 162 allows businesses to deduct for all ordinary and necessary expenses, paid or incurred in carrying on any trade or business.[3] This allows taxpaying companies to deduct expenses for costs associated with regular business practices such as marketing and advertising, equipment rentals, wages and bonuses, and supplies.[4] When examining the plain language of Section 280E, it becomes clear how the two Sections are directly intertwined. Section 280E creates an exception to Section 162, it states:

> No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted.[5]

Section 280E disallows a business from taking deductions on their federal income tax bill that would be otherwise be available were it not for the fact that their business or trade consists of trafficking of schedule I or II substances listed on the CSA.

Congress enacted Section 280E in 1982 to codify the tax implications of expenditures made in connection with the illegal sale of

3 I.R.C. § 162 (2018).
4 *See* Treas. Reg. § 1.162-1 (as amended in 1993).
5 I.R.C. § 280E.

drugs.[6] Section 280E was titled as "*Disallowing deductions for drug dealing*" and listed as a "*Miscellaneous Provision*" under the section titled "*Provisions Designed to Improve Taxpayer Compliance*" as a part of the Tax Equity and Fiscal Responsibility Act ("TEFRA") signed into law by President Ronald Reagan on September 3, 1982.[7] Section 280E was a direct response to a United States Tax Court ("Tax Court") ruling in the prior year which was met with a lot of social and political backlash, as it came at a time when President Reagan was determined to continue reinforcing and expanding President Nixon's policies related to the cleverly titled "War on Drugs" from the early 1970's.[8]

In 1981 the Tax Court issued a holding which allowed a self-employed taxpayer, who was in the business of illegally selling amphetamines, cocaine, and marijuana, to deduct, under Section 162, certain business expenditures related to this practice, such as his rent, packaging expenses and automobile expenses.[9] The court's holding did not mention any policy issues related to allowing the taxpayer to take the Section 162 deductions; they simply found that the expenses at hand qualified for the deduction as they "were made in connection with [the taxpayer]'s trade or business and were both ordinary and necessary."[10]

At the time, the lack of discussion on this issue was sensible, as the Supreme Court had previously held that it was not proper for the IRS Commissioner to deny business deductions to a taxpayer on "public policy" grounds when the requirements of Section 162 were met.[11] In *Commissioner v. Tellier*, the Court referenced the long standing principle that the Tax Code was enacted to tax net income and did not concern itself with the lawfulness of the income that it taxes.[12] As the language of the Tax Code did not provide any basis for exceptions based on public policy grounds, the Court re-affirmed their belief that it is up to Congress to make these types of decisions, and not a concern for the legislative branch.[13]

6 I.R.S. Chief Couns. Mem. 201504011 (Dec. 10, 2014).

7 Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.).

8 Chris Barber, *Public Enemy Number One: A pragmatic Approach to America's Drug Problem*, THE RICHARD NIXON FOUNDATION (June 29, 2016), https://www.nixonfoundation.org/2016/06/26404/.

9 *See* Edmondson v. Comm'r, 42 T.C.M. (CCH) 1533 (1981).

10 *See Id.* at 1536.

11 *See* Comm'r v. Tellier, 383 U.S. 687, 691 (1966).

12 *Id.*

13 *Id.* at 692.

Edmondson v. Commissioner was specifically cited in the Senate Report which accompanied TEFRA, when describing the present law that would be changed by the provision, "[a] recent U.S. Tax Court case allowed deductions for telephone, auto, and rental expenses incurred in the illegal drug trade."[14] Further, the public policy issues that were at the forefront of the Reagan administration's focus at the time were referenced in the Senate Report as well, as it was noted "[t]here is a sharply defined public policy against drug dealing," leading them to conclude that "[s]uch deductions must be disallowed on public policy grounds."[15] However, this was fourteen years before the passage of the first ever medical marijuana law in California,[16] and the idea that marijuana had any medical benefit or that it could even one day be sold recreationally was fully inconceivable at the time.

III. HISTORY OF MEDICAL MARIJUANA

A. Formation of Law in the United States

The United States Pharmacopeia—which serves as the leading compilation of drug information produced annually in the United States—first included marijuana in its publication in 1850.[17] At that time, marijuana was viewed as a drug which provided treatment for numerous ailments, including neuralgia, rabies, dysentery, tonsillitis, gout, alcoholism and opiate addiction.[18] The drug was subsequently removed from the Pharmacopeia in 1942, and has not been added back since.[19]

Fifty-four years later, California became the first state to enact a law allowing individuals to possess and grow marijuana for medical use, when state residents voted in favor of the ballot initiative Proposition 215 (Compassionate Use Act of 1996).[20] As of February 1, 2019, there are currently forty-six states which have some type of approved legislation

14 S. REP. NO. 97-494, at 309 (1982).

15 *Id.*

16 Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (Deering 2018).

17 *See* Mary Barna Bridgeman & Daniel T. Abazia, *Medicinal Cannabis: History, Pharmacology, and Implications for the Acute Care Setting*, 42 J. PHARMACY & THERAPEUTICS 180, 180 (2017).

18 George B. Wood & Franklin Bache, *The Dispensatory of the United States of America,* 332-334 (1851).

19 *See* Mary Barna Bridgeman & Daniel T. Abazia, *Medicinal Cannabis: History, Pharmacology, and Implications for the Acute Care Setting*, 42 J. PHARMACY & THERAPEUTICS 180, 180 (2017).

20 HEALTH & SAFETY § 11362.5.

related to the use of marijuana products for medical purposes.[21] Out of this group, there are thirty-three states which have approved a "comprehensive"[22] public medical marijuana program.[23] Thirteen other states have what is recognized as allowing the use of "low THC, high CBD" products for medical purposes.[24] This leaves Idaho, Kansas, Nebraska, and South Dakota as the only four states in the U.S. without some type of approved medical marijuana program.[25]

B. Science Behind Medical Marijuana

The scientific name for the plant used to create what is commonly known as medical marijuana is *Cannabis sativa* l.[26] "Medical marijuana" is a term which refers to using the "whole, unprocessed marijuana plant or its basic extracts to treat symptoms of illness and other conditions."[27] The plant is considered to be complex, as it is known to contain more than five hundred different components, including one hundred and four identified cannabinoids.[28] Cannabinoids, which are mainly present in the

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21 *See State Medical Marijuana Laws*, NAT'L CONF. OF STATE LEGIS., http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx (last updated Mar. 5, 2019).

22 *See id*. The NCSL requires five different criteria to be met for a state's program to be considered "comprehensive":

> 1. Protection from criminal penalties for using marijuana for a medical purpose;
>
> 2. Access to marijuana thorough home cultivation, dispensaries or some other system that is likely to be implemented;
>
> 3 It allows a variety of strains, including those more than "low THC;"
>
> 4. It allows either smoking or vaporization of some kind of marijuana products, plant material or extract; and
>
> 5. Is not a limited trial program.

Id.

23 *See id*. States with comprehensive medical marijuana programs include: Alaska,* Arizona, Arkansas, California,* Colorado,* Connecticut, Delaware, Florida, Hawaii, Illinois, Louisiana, Maine,* Maryland, Massachusetts,* Michigan*, Minnesota, Missouri, Montana, Nevada,* New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon,* Pennsylvania, Rhode Island, Utah, Vermont,* Washington,* West Virginia. *See id.* (* indicates that the State has also legalized the recreational adult-use of marijuana).

24 *See id*. States with "low THC, high CBD" programs (alphabetical): Alabama, Georgia, Iowa, Indiana, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia, Wisconsin, Wyoming.

25 *See id*.

26 *See Plants Profile for Cannabis sativa (marijuana)*, U.S. DEP'T OF AGRIC., https://plants.usda.gov/core/profile?symbol=casa3 (last visited Jan. 11, 2019).

27 *DrugFacts: Marijuana as Medicine*, NAT'L INST. ON DRUG ABUSE (June 2018), https://www.drugabuse.gov/publications/drugfacts/marijuana-medicine.

28 *See* Mahmoud ElSohly & Waseem Gul, *Constituents of* Cannabis Sativa, *in* HANDBOOK OF CANNABIS 3, 3 (Roger G. Pertwee ed., 2014).

flower of the plant—but also found in the leaves, stems and seeds—refer to the psychoactive and physiologically active constituents of the plant.[29] The two major compounds which give the plant its psychoactive and medicinal effects come from the specific cannabinoids delta-9-tetrahydrocannabinol ("THC") and cannabidiol ("CBD").[30]

The THC part of the plant contains the psychoactive component, which is responsible for the "high" feeling often associated with marijuana.[31] CBD is a non-psychoactive cannabinoid which is mainly associated with the medicinal properties of the plant.[32] Furthermore, CBD has been determined to actually reduce the psychoactive properties of THC, essentially working against the "high" affect.[33]

The reason the marijuana plant is able to affect the human body is due to the fact that the human body contains a biological pathway referred to as the endocannabinoid system.[34] The endocannabinoid system helps regulate a human's mood, appetite, memory and pain sensation.[35] When the marijuana plant is consumed (either through the inhalation of smoke or through digestion), both the THC and CBD will have an effect on this system.[36] The "high" feeling is a result of the THC cannabinoids attaching to the cannabinoid receptors in the human brain which are responsible for affecting our thoughts, memories, senses and perception of time.[37] While the chemical structure of THC and CBD are mostly identical,[38] there is one important structural difference. The point in the structure where THC contains a cyclic ring, the CBD structure contains a hydroxyl group; this difference in biochemistry is what controls whether or not the "high" effect is produced in the brain.[39]

29 *See id*. at 4.

30 Bridgeman & Abazia, *supra* note 17, at 181.

31 *See id*.

32 *See id.*

33 *See* Mitchell Moffit & Gregory Brown, *THC vs CBD: What's In Your Weed?*, YOUTUBE (Nov. 8, 2018), https://www.youtube.com/watch?v=1iIENII-lVo.

34 *See How Does Marijuana Produce its Effects?*, NAT'L INST. ON DRUG ABUSE, https://www.drugabuse.gov/publications/research-reports/marijuana/how-does-marijuana-produce-its-effects (last updated June 2018).

35 *See id*.

36 *See id*.

37 *See* New York Hall of Science, *The Science Behind Medical Marijuana,* YOUTUBE (June 14, 2017), https://www.youtube.com/watch?v=eGiQs0Ng2Y0.

38 *See* Mitchell Moffit & Gregory Brown, *THC vs CBD: What's In Your Weed?*, YOUTUBE (Nov. 8, 2018), https://www.youtube.com/watch?v=1iIENII-lVo.

39 *See* New York Hall of Science, *The Science Behind Medical Marijuana,* YOUTUBE (June 14, 2017), https://www.youtube.com/watch?v=eGiQs0Ng2Y0.

The cannabinoid receptors in our body, to which the THC and CBD attach, are known as Cannabinoid receptors type 1 ("CB1 Receptor").[40] In your normal, sober body, your CB1 Receptor is affected by a neurotransmitter called anandamide, which controls the generation of pleasure, motivation and feeding behavior.[41] The chemical structure of THC is so similar to the chemical structure of anandamide that it fits perfectly to the CB1 receptor, causing the "high" effect.[42] CBD's chemical structure, which is different in shape due to the presence of the hydroxyl group, does not fit in to the CB1 Receptor, therefore not making you feel "high."[43] However, CBD does bind to other receptors in the cannabinoid system and therefore affects the body in other ways.[44]

When CBD and THC are consumed at the same time, it has been found that due to the biochemical shape of CBD, it can attach to the CB1 Receptor in a certain way which causes the THC to not be able to bind as perfectly as usual, resulting in a decrease in how "high" one feels.[45] Researchers have found that medicinal marijuana offers a therapeutic value for a wide range of health conditions, including multiple sclerosis, epilepsy, arthritis (and inflammation in general), and anxiety, to name a few.[46] It has most notably been used to reduce the number of seizures for people who suffer from specific types of epilepsy.[47] In fact, last year, the Food and Drug Administration ("FDA") approved Epidolex® (cannabidiol), which is a CBD-based drug.[48] However, despite this FDA approved medical usage, medicinal marijuana is still classified under Schedule I of the CSA, which is where drugs with no proven medicinal value are scheduled.[49]

40 *See How Does Marijuana Produce its Effects?*, *supra* note 34.

41 *See id*.

42 *See id.* The term "runners high" refers to an anandamide being released in your body due to the exercise. *See* New York Hall of Science, *The Science Behind Medical Marijuana,* YOUTUBE (June 14, 2017), https://www.youtube.com/watch?v=eGiQs0Ng2Y0.

43 *See id*.

44 *See id*.

45 *See id*.

46 *See id.*

47 Press Release, U.S. Food & Drug Admin., FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana to Treat Rare, Severe Forms of Epilepsy (June 25, 2018), https://www.fda.gov/newsevents/newsroom/pressannouncements/ucm611046.htm.

48 *Id*.

49 *See* 21 U.S.C. § 812 (2012); *see also Drug Information: Drug Scheduling*, U.S. DRUG ENF'T ADMIN., https://www.dea.gov/drug-scheduling (last visited Jan. 11, 2019).

IV. Intersection of Section 280E and Medical Marijuana

A. Controlled Substances Act

Under Section 280E, since medical marijuana is classified as a Schedule I drug under the CSA, medical marijuana businesses are denied certain tax deductions and credits due to the fact that their business "consists of trafficking in controlled substances."[50] The Supreme Court held in *United States vs. Oakland Cannabis Buyers' Cooperative* that there was no exception for medical marijuana under the definition provided by the federal laws at the time.[51] As federal law still makes no distinction between recreational marijuana and medical marijuana,[52] for federal tax purposes they are treated as the same substance, even though they are often regulated differently at the state level.[53] Despite a shift in public perception, shown through (1) thirty-three states legalizing the use of medical marijuana;[54] (2) arguments from legal scholars;[55] and (3) numerous acts introduced by Government representatives,[56] the DEA and the FDA—the two federal agencies responsible for determining which substances are added or removed from each schedule—have refused to reclassify the drug under a different schedule or to create a distinction specifically for medical marijuana.[57]

To be classified under Schedule I, the drug in question must: (1) have "a high potential for abuse"; (2) have "no currently accepted medical use in treatment"; and (3) "lack of accepted safety for use of the drug . . . under medical supervision."[58] As recently as 2016, the DEA stated that "the science doesn't support [reclassification]" in their

50 26 U.S.C. § 280E (2012).

51 United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483 (2001).

52 21 U.S.C. § 802(16) (2012) defines "marijuana" as "all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin."

53 *See State Medical Marijuana Laws*, *supra* note 21.

54 *See 33 Legal Medical Marijuana States and DC*, PROCON.ORG, https://medicalmarijuana.procon.org/view.resource.php?resourceID=000881 (last updated Mar. 11, 2019).

55 *See, e.g.*, David R. Katner, *Up in Smoke: Removing Marijuana from Schedule I,* 27 B.U. PUB. INT. L.J 167 (2018).

56 *See, e.g.*, Ending Federal Marijuana Prohibition Act of 2011, H.R. 2306, 112th Cong. (2011); Respect States and Citizens Rights Act of 2012, H.R. 6606, 112th Cong. (2012); Regulate Marijuana Like Alcohol Act of 2015, H.R. 1012, 114th Cong. (2014); Legitimate Use of Medicinal Marijuana Act of 2017, 115th Cong. (2017).

57 *See* Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,688 (Aug. 12, 2016).

58 *See* 21 U.S.C. § 812.

conclusion that the therapeutic benefits of medical marijuana had not been adequately proven to support a move from schedule I.[59] However, the DEA did agree to expand the number of research centers allowed to grow marijuana for studies related to the value it may provide in chronic pain relief.[60] In a legal sense, as the analysis conducted by the FDA failed to produce medical and scientific data showing that "marijuana [was] safe and effective as a medicine," the DEA had no option but to prohibit reclassification.[61] It will be interesting to follow the next appeal for rescheduling now that the FDA and DEA have approved a drug which is comprised from the marijuana plant.

B. Costs of Goods Sold

In the Senate Report associated with the enactment of Section 280E, under the heading *Explanation of Provision*, it is stated that "[t]o preclude possible challenges on constitutional grounds, the adjustment to gross receipts with respect to effective costs of goods sold is not affected by this provision of the bill."[62] Essentially, this is an exception to disallowance of business expenses, as taxpayers who are subject to Section 280E are allowed to reduce their gross income in relation to their costs of goods sold. The Constitutional concerns on the mind of the Congress were related to the 1920 Supreme Court case *Eisner v. Macomber*.[63] The essential holding from this case was that Congress' power to tax under the Sixteenth Amendment was limited to the taxation of income and any such tax which stretched beyond this would be treated as unconstitutional.[64] As gross income is defined as "total sales, less the costs of goods sold, plus any income from investments and from incidental or outside operations of sources,"[65] it would follow that disallowing a medical marijuana company to reduce their sales by their costs of goods sold could lead to serious constitutional challenges.

The basic concept behind factoring in the costs of goods sold to the calculation of gross income is that the seller of the goods does not have a

59 Lenny Bernstein, *U.S. Affirms its Prohibition on Medical Marijuana*, WASH. POST (Aug. 11, 2016), https://www.washingtonpost.com/news/to-your-health/wp/2016/08/10/u-s-affirms-its-prohibition-on-medical-marijuana.

60 *See id.* There was only one federally valid research center in the United States, located at the University of Mississippi, allowed to grow marijuana for the purposes of studying the drug and its health benefits. *See id.*

61 *Id.*

62 S. REP. NO. 97-494, at 309 (1982).

63 252 U.S. 189 (1920).

64 *See id.* at 219.

65 *See* Treas. Reg. § 1.61-3(a) (as amended in 1992).

taxable gain until they recover the initial economic investment made directly in the goods being sold.[66] Therefore, the taxpayer may subtract the expenditures necessary to acquire, construct or extract the actual product being sold (the actual marijuana plant itself for the purposes of these medical marijuana companies).[67] For medical marijuana businesses, this is where their calculation stops—as taxable income is equal to gross income less allowable deductions[68]—yet since Section 280E disallows any deductions, there is no further steps to take in computing their taxable income. This helps illustrate the importance for medical marijuana business owners to try and be able to maximize their total amount of "costs of goods sold" for tax purposes.

However, the IRS has placed further restrictions on what can be classified as a "cost of goods sold" for medical marijuana companies in their calculation of gross income. A memorandum issued by the Office of Chief Counsel of the Internal Revenue Service in 2014, serves as the guide for how a medical marijuana business should determine their costs of goods sold for the purposes of Section 280E.[69] Essentially, the IRS determined that the only costs allowed to be included in this calculation were the specifically defined "inventoriable costs" in the code at the time Section 280E was enacted in 1982.[70] This means that the only costs that are includable were limited to costs that were capitalized to inventories under 26 U.S.C. § 471 ("Section 471").[71] Furthermore, this limits the only applicable regulations to §1.471-3(b) in the case of a reseller of property and §§ 1.471-3(c) and 1.471-11 in the case of a producer of property.[72]

If a company is a reseller, using the inventory method they would have to "[capitalize] the invoice price of the marijuana purchased, less trade or other discounts, plus transportation or other necessary charges incurred in acquiring possession of the marijuana."[73] While a medical marijuana business that is considered a producer would "[capitalize] direct material costs (marijuana seeds or plants), direct labor costs (e.g., planting; cultivating; harvesting; sorting), Category 1 indirect costs (§ 1.471-11(c)(2)(i)), and possibly Category 3 indirect costs (§ 1.471-11(c)(2)(iii))."[74]

66 *See* Reading v. Comm'r, 70 T.C. 730, 733 (1978).

67 *Id.*

68 26 U.S.C. § 63.

69 *See* I.R.S. Chief Couns. Mem. 201504011 (Dec. 10, 2014).

70 *Id*.

71 *See id*.

72 *See id*.

73 *Id*.

74 *Id*.

In the Tax Reform Act of 1986,[75] which passed four years after the enactment of Section 280E, uniform capitalization rules were added to the IRC under 26 U.S.C. § 263A ("Section 263A").[76] Section 263A effectively increased the different types of costs that were considered to be "inventoriable" compared to those under Section 471.[77] Yet, the IRS has been steadfast in making clear that medical marijuana companies are unable to include any type of costs that are now recognized as allowable under Section 263A.[78] The IRS based this decision upon the legislative history behind the enactment of Section 263A and how that fit in with the restrictions of Section 280E.[79] The basic thinking was that allowing taxpayers to capitalize on these additional Section 263A costs would in-turn make the provision one that transforms non-deductible costs under Section 280E into capitalizable costs.[80] As Section 263A is first and foremost a timing provision, which forces some re-sellers and producers to treat business expenses that would otherwise be deductible as inventoriable costs, it did not follow, in the eyes of the IRS, to allow medical marijuana companies to benefit from this through the transformation of non-deductible costs into deductible ones.[81]

C. Tax Court: IRS vs. Medical Marijuana Companies Regarding Section 280E

1. "CHAMP" v. Commissioner

The first instance in which the Tax Court was faced with interpreting Section 280E for the purposes of applying it to a state legal medical marijuana company was in 2007 in *Californians Helping to Alleviate Medical Problems ("CHAMP") v. Commissioner*.[82] In its decision, the court put significant weight into the legislative history behind Section 280E in holding that medical marijuana companies acting legally under state laws were within the purview of the provision.[83] In examining the legislative history behind Section 280E, the court found that the provision was intended to disallow deductions attributable to marijuana businesses,

75 Pub. L. No. 99-514, 100 Stat. 2085 (codified as amended in scattered sections of 26 U.S.C.).

76 *See* I.R.S. Chief Couns. Mem. 201504011 (Dec. 10, 2014).

77 *Id*.

78 *Id*.

79 *Id*.

80 *Id*.

81 *See id*.

82 128 T.C. 173 (2007).

83 *See id*. at 181-82.

but not to reject deductions for a taxpayer's business expenses in connection with their other, non-trafficking pursuits.[84]

The taxpaying company, CHAMP, operated as a caregiving facility that provided medical marijuana along with other therapeutic services to their patients.[85] After the IRS applied Section 280E to deductions CHAMP claimed on their 2002 Federal income tax return, resulting in a tax deficiency of $355,056 and assessment of a penalty in the amount of $71,011, CHAMP appealed the decision in Tax Court.[86] CHAMP argued that Section 280E did not apply to them as their business did not involve the "trafficking" of a controlled substance within the meaning of the statute.[87] The court rejected the argument, reading the word within the statute to take on its dictionary meaning, to plainly mean "to engage in commercial activity: buy and sell regularly."[88]

CHAMP argued in the alternative, if Section 280E did apply, their caregiving services were a separate business from their supplying of medical marijuana, and since they were two separate businesses that not all of their business expenses should be subject to the Section 280E restrictions.[89] The IRS argued that because the two services were under the same company, Section 280E applied to all business expenses within the company.[90] Ultimately, the court found that there was a distinction between the two businesses; the business expenses related to the caregiving services provided by the company were deductible, but any expense related to their medical marijuana business was still not allowed the ordinary deductions or credits.[91]

CHAMP provided a framework for a way to reduce the tax burdens associated with Section 280E, by separating out all expenses which are not directly related to the "trafficking" of medical marijuana. However, one should refrain from being under the impression that this is some form of loophole for medical marijuana companies.

84 *See id.* at 182. (Specifically, the court described a "congressional intent to disallow deductions attributable to a trade or business of trafficking in controlled substances.")

85 *See id*. at 174.

86 *See id*. at 173.

87 *See id*. at 180.

88 *Id*.

89 *See id*. at 182.

90 *See id.* at 183.

91 *Id*. at 183-84.

2. Olive v. Commissioner

Five years after the decision in *CHAMP*, there was another case in Tax Court dealing with a taxpayer—who owned a medical marijuana company—appealing an IRS determination of improper deductions in relation to their business expenses.[92] In 2012, in *Olive v. Commissioner*, the Tax Court's decision ultimately denied the taxpayer's attempt at classifying his medical marijuana dispensary as two fundamentally separate businesses acting under one name.[93] Martin Olive, owned and operated a The Vapor Room, a California medical marijuana business acting fully within the relevant state laws.[94] On his federal income tax return, he claimed deductions for business expenses in the amount of $236,502 and $417,569 for the two relevant years at issue.[95] The business owned by Olive operated as almost a community center; The Vapor Room provided customers with food and games along with vaporizers[96] which could be used in conjunction with medical marijuana purchased at the facility or brought in from the outside world.[97] In addition, they required that all of their staff members be eligible to receive medical marijuana in order for them to better provide health care services related to counseling their patients with their current issues.[98]

Relying on *CHAMP*, the taxpayer argued that certain business expenses, particularly those related to its health care services, were fully deductible as they did not fall under Section 280E.[99] While the court admitted that there is a standard of deference to the taxpayer's characterization of their several undertakings as either one trade or business, or several separate ones for taxpaying purposes, they were still unpersuaded.[100] Furthermore, they articulated that "[t]he Commissioner will reject the characterization, however, if it is artificial and cannot be reasonably supported under the facts and circumstances of the case."[101]

92 Olive v. Comm'r, 139 T.C. 19 (2012).

93 *See id.* at 41.

94 *See id.* at 19.

95 *See id.* at 37.

96 A vaporizer is a device which can convert a substance and generate it into the form of vapor for inhalation. It is common for particular medical liquids, and very prevalent in the marijuana industry as both the flower form and oil form of marijuana are both easily converted into their vapor forms. *See* Dale H. Gieinger, *Cannabis "Vaporization"*, 1 J. OF CANNABIS THERAPEUTICS 153 (2008).

97 *See Olive*, 139 T.C. at 21.

98 *See id*. at 22.

99 *See id*. at 39-40.

100 *See id.* at 41.

101 *Id*.

In order to determine whether the business activities of The Vapor Room constituted just one "trade or business," as argued by the IRS, or two separate businesses, as argued by Olive, the court looked to whether the primary purpose of engaging in the business activities was for the purpose of realizing a profit.[102] If the answer is "yes," then that activity constitutes a trade or business.[103] And as in this case, if the answer is "no" then the separately claimed trade or business which did not have the intent of realizing a profit, was simply just a part of the business.[104] After applying this test, the court found that they were the same business as "the Vapor Room's dispensing of medical marijuana and its providing of services and activities share[d] a close and inseperable organizational and economic relationship."[105] As all the other "caregiving" services were provided at no cost, the Vapor Room's only source of revenue came from their sale of medical marijuana and the vaporizers, thus they could not fall under the exception provided by *CHAMP*.[106]

3. Alterman v. Commissioner

In *Alterman v. Commissioner of Internal Revenue*, the Tax Court offered further proof of how important record keeping is for medical marijuana companies, especially as it relates to their inventory calculations for the purposes of computing their year-end costs of goods sold.[107] In *Alterman*, a taxpaying medical marijuana business owner was once again in Tax Court appealing an IRS audit that resulted in an amended return and reporting accuracy related penalties.[108] Alterman owned and operated a business facility in Colorado which grew and sold medical marijuana along with various merchandise items that were related to marijuana (i.e., pipes, rolling papers, hats, shirts).[109] The Tax Court disallowed Alterman from separating the two businesses in order to separate the revenue from those sales to get away from Section 280E restrictions.[110] This finding centered around the facts at issue, which showed strong evidence of a lack of economic interrelationship between the two activities. As the selling of marijuana accounted for almost all of

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102 *Id*.
103 *See id.*
104 *See id.*
105 *Id*.
106 *See id*.
107 Alterman v. Comm'r, 115 T.C.M. (CCH) 1452 (2018).
108 *See id.*
109 *See id.*
110 *See id.*

the revenue that the business had in the taxable year, and as the non-marijuana products complemented the businesses efforts of marijuana sales, the separate activity standard outlined in *Olive* was not met.[111]

Next, the Tax Court examined Alterman's categorization of their cost of goods sold for the taxable years at issue, as this accounted for the discrepancy in the alleged amount owed by each side.[112] As the taxpayer, the burden fell on Alterman to prove the amounts which should have been allowable as the businesses costs of goods sold.[113] To prove this, the taxpayer is required to "maintain sufficient permanent records to substantiate income, including costs of goods sold."[114] As Alterman was unable to provide adequate records, the Tax Court attempted to estimate what the costs of goods sold would have been:

> Properly computed, cost of goods sold equals
> - the cost of merchandise on hand at the beginning of the taxable year ("beginning inventory"),
> - *plus* the cost of merchandise purchased since the beginning of the taxable year ("purchase costs"),
> - *plus* the direct and indirect cost of producing merchandise ("production costs"),
> - *minus* the cost of inventory on hand at the end of the tax year ("ending inventory").[115]

As Alterman's record keeping lacked the requisite beginning inventory and ending inventory for each of the relevant taxable years, the court found that any method of calculation that they could have claimed would be improper.[116]

4. Learning from the Cases

As both the taxpaying companies in *CHAMP* and *Olive* held themselves out a hybrid medical marijuana/care-providing business, the Tax Court ensured that their holding in *Olive* was not meant to overrule

111 *See id.*

112 *See id.* Taxpayer claimed their total costs of goods sold was $600,213 in 2010 and $417,520 in 2011. *See id.* The IRS contended that the costs of goods sold was $452,292 in 2010 and $232,772 in 2011. *See id.*

113 *See* TAX. CT. R. 142(a).

114 *Alterman*, 115 T.C.M. (CCH) at 1452 (citing I.R.C. § 6001).

115 *Id*. at 1452 (emphasis added) (citations omitted).

116 *See id.*

CHAMP, as that case could be distinguished on its facts.[117] While there were specific factors, such as the charging of a membership fee (*CHAMP* charged one, *Olive* did not) or the specific nature of the caregiving services provided, the court put significant weight in the record keeping differences between the two businesses.[118] In Alterman, it was the lack of a cohesive record and bookkeeping that led the court to conclude they were acting as one business, as their books never attempted to reflect a split between their caregiving services and their providence of medical marijuana.[119]

Taking these three cases together, it reflects something that has become to be an obvious standard for a medical marijuana business: there is a high level of competency required in the keeping of your records, whether for the purposes of separating your business activities or in calculating your Costs of Goods Sold. While proper accounting practices should be applied in all business operations, Section 280E seems to bring about the need for even higher standards of maintenance related to the accounting practice. The detailed accounting practices are beyond a necessity for medical marijuana companies, which seem to be audited with high frequency by the IRS, as a complete record is necessary to satisfy the burden of proof for both the separate business exception and the substantiation of costs of goods sold. Inventory tracking needs to be completely detailed for medical marijuana companies in the event of an audit, something that is even harder since most businesses deal in all cash.

V. Example Application and Comparison of Section 280E

To fully understand how Section 280E affects a medical marijuana business operating legally under state laws, a hypothetical example might provide the best illustration.

Suppose there are two separate neighboring companies, one is a medical marijuana company which is operating fully legally under the laws of the state it resides in; the other company buys cheap counterfeit goods from overseas and then resells them in a retail store for a significant markup. At the end of the fiscal year, both companies have $1,000,000 in total revenue; both companies have $400,000 in Costs of Goods Sold (COGS) and $300,000 in ordinary and necessary business expenses. The current code would allow the counterfeiting company a total of $700,000 in deductions ($400,000 COGS, "plus" $300,0000, Business Expenses),

117 *See* Olive v. Comm'r, 139 T.C. 19, 37 (2012).

118 *See id.*

119 *See id.* at 40-42.

bringing their taxable income to $300,000. For the medical marijuana company, Section 280A would disallow them from deducting any of their ordinary and necessary business expenses, resulting in an allowance of deductions in the amount of $400,000 (the amount of their COGS), bringing their taxable income to $600,000. If both companies were taxed at the current business rate (21%), the difference of their tax bill would be $63,000 ($63,000 for the counterfeiting company compared to $126,000 for the medical marijuana company).

In this extreme example, the punitive nature of 280E is clearly shown. The medical marijuana company is at a significant disadvantage when it comes time to pay their tax bill, even though they were the company who was actually providing a benefit to the public, while the counterfeiting company was the one causing some type of public harm. In theory, a punitive tax on the sale of illegal drugs makes complete sense, as the government should want to disincentivize drug dealing. However, to call a medical marijuana company, acting in full compliance with their states laws and providing a legitimate benefit to those in need, a drug dealer in terms of the law is a stretch that reaches far beyond the initial purpose of the legislation.

VI. PROPOSAL

In considering this analysis, Congress should act to amend Section 280E of the Internal Revenue Code to create an exception which allows taxpaying businesses, operating legally under the relevant state laws, to deduct all their necessary and ordinary business expenses made in connection to the production and sale of medical marijuana. As states with comprehensive medical marijuana programs currently have differing legislation regarding the regulation of medical marijuana, it would then be up to the individual states to determine the classification requirements necessary for a product to be properly qualified as medical marijuana. This would also ensure that the states could serve the needs of their citizens to the best of their ability.

While this would certainly take away from the total federal tax revenue dollars collected from medical marijuana companies, which has been estimated to be $2.7 billion dollars in 2018,[120] there would also be opportunity for the federal government to get this money back in other ways. Assuming significant growth in the medical marijuana industry

120 *See* NEW FRONTIER DATA, STATE OF THE CANNABIS UNION: 2019, at 4 (2019), https://equio-api.newfrontierdata.com/storage/reports/full_pdf/State%20of%20the%20Cannabis%20Union%202019.pdf.

after being freed from the clamps of Section 280E, an assumed boost in employment would lead to more federal payroll withholdings. Also, there is the possibility that the government could implement some form of federal sales tax on the retail sale of medical marijuana, shifting the full burden off the businesses and on to the consumer. A decrease in collection amount from Section 280E payments would not necessarily lead to a complete loss, as the government would have several options to recapture some of that loss, even beyond those briefly described above.

Reliance on the IRS for any type of Section 280E amendment is unreasonable, as their position is that they are powerless to provide any type of guidance on the allowance of deductions for expenses which a medical marijuana business incurs.[121] Their official stance is that it is up to Congress to amend either the IRC or the CSA in order for them to act affirmatively.[122] I believe it is finally time for Congress to act, in an attempt to help further grow the medical marijuana industry. Due to the measured shift in public opinion, not only from the citizens of the United States, but also congressional leaders and major governmental organizations, the timing has never been more perfect for a medical marijuana exception to be carved into Section 280E.

VII. Shift in Perception

A. Public Opinion

The policy issues that were relevant during the enactment of Section 280E are certainly no longer present. According to a 2017 Quinnipiac poll, when respondents were asked, "Do you support or oppose allowing adults to legally use marijuana for medical purposes if their doctor prescribes it?" an overwhelming majority, 93%, responded that they supported this use.[123] Further, 73% of respondents indicated that they would oppose the government enforcing federal laws against marijuana in states that have already legalized medical or recreational marijuana.[124]

121 *See* Letter from Andrew J. Keyso, Deputy Assoc. Chief Couns., Dep't of the Treasury, to Pete Stark, U.S. Rep. (Dec. 16, 2010), https://www.irs.gov/pub/irs-wd/11-0005.pdf.

122 *See id*.

123 Press Release, Quinnipiac Univ. Poll, U.S. Voter Support for Marijuana Hits New High; Quinnipiac University National Poll Finds; 76 Percent Say Their Finances Are Excellent or Good (Apr. 20, 2017), https://poll.qu.edu/images/polling/us/us04202017_Ummk29xq.pdf.

124 *Id.*

A 2018 Gallup poll indicated that 66% of respondents believed that the use of marijuana should be made federally legal.[125] Compare this result with the outcome of a 1980 version of the poll asking the same question: "Do you think the use of marijuana should be made legal, or not?" where only a mere 25% of respondents answered in the affirmative.[126] That considerable jump in the opinion of the legalization of marijuana from 1980 (two years before the enactment of Section 280E) to present day, shows that society's view of the drug is extremely different than it was back then.[127] The public policy concerns that were echoed in the respective House and Senate Reports accompanying Section 280E are simply no longer relevant. Furthermore, because of the knowledge I have now related to the medicinal benefits of marijuana, I argue that it is in fact currently *against* public policy to have laws such as Section 280E which severely punish an industry that provides a public benefit. It seems that society has done a complete one-eighty on these public policy issues that were a concern upon the implementation of Section 280E.

While surveys can often be criticized for their accuracy, the sales related to the marijuana industry seem to back up the numbers recorded in the surveys. In 2010, the estimated sales total for medical marijuana was $1.5 billion; compare that to a $4.16 billion estimate in 2015, and a $5.83 billion dollar estimate in 2018.[128] It is important to keep in mind that this astounding growth came mostly during a time when there was a shocking lack of support for the medical marijuana industry at the federal level. One would have to assume that if the Section 280E restrictions were to be lifted, the growth trajectory would become even steeper in an upward sloping manner.

B. Government Opinion

1. 2018 Farm Bill

Congressional approval of the Agriculture Improvement Act of 2018 ("Farm Bill") in December 2018 has further opened the door for a

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125 *See* Justin McCarthy, *Two in Three Americans Now Support Legalizing Marijuana*, GALLUP (Oct. 22, 2018) https://news.gallup.com/poll/243908/two-three-americans-support-legalizing-marijuana.aspx.

126 *See id.*

127 *See id.*

128 NEW FRONTIER DATA, CANNABIS IN THE U.S. ECONOMY: JOBS, GROWTH & TAX REVENUE, 2018 EDITION 8 (2018), https://equio-api.newfrontierdata.com/storage/reports/full_pdf/NFD-CannabisInTheUSEconomy-2018.pdf.

plausible exception for medical marijuana as it relates to Section 280E.[129] In that sense, the biggest accomplishment of the Farm Bill was its removal of the word "hemp" from the definition of "marijuana" under the CSA.[130]

The Farm Bill gave a comprehensive definition for the term "hemp" defining it as "the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3% on a dry weight basis."[131] This is the first instance in which federal law has created a distinction amongst the different parts of the marijuana plant, as the Comprehensive Drug Abuse Prevention and Control Act of 1970 made the whole marijuana plant illegal.[132] The Farm Bill also created an exception for the term "hemp" to amend the definition of the word "tetrahydrocannabinols" to add the following: "except for tetrahydrocannabinols in hemp (as defined under section 297A of the Agricultural Marketing Act of 1946)."[133]

The main purpose of the Farm Bill, through the legalization of hemp, was viewed as a move to help a farming industry featuring plenty of struggling growers and declining industry profits.[134] Hemp has major benefits as it relates to soil, as it has been found to detoxify the soil which helps prevent erosion.[135] However, because of the language used in the bill which speaks to permitted ratios of Hemp-to-THC, it seems the door is now open for the construction of a bill centered around the legalization of marijuana-based CBD as long as it contained a specific, minor amount of THC.

While CBD derived from marijuana and CBD derived from hemp both come from the same plant, they are harvested from two different parts of the plant; marijuana is harvested from the buds that grow off the plant, while hemp is harvested from the stalk and the seeds of the same

129 Agriculture Improvement Act of 2018, Pub. L. No. 115-334, 132 Stat. 4490.

130 *See id.* § 12619.

131 *Id.* § 10113.

132 *See* John Hudak, *The Farm Bill, Hemp Legalization and the Status of CBD: An Explainer*, BROOKINGS (Dec. 14, 2018), https://www.brookings.edu/blog/fixgov/2018/12/14/the-farm-bill-hemp-and-cbd-explainer.

133 Agriculture Improvement Act § 12619.

134 Mitch McConnell (@senatemajldr), TWITTER (Dec. 11, 2018, 8:03 AM), https://twitter.com/senatemajldr/status/1072522201671307265 ("At a time when farm income is down and growers are struggling, industrial hemp is a bright spot of agriculture's future. My provision in the Farm Bill will not only legalize domestic hemp, but it will also allow state departments of agriculture to be responsible for its oversight.").

135 *See* Hudak, *supra* note 132.

plant.[136] The result of this difference is that hemp-based CBD lacks specific medicinal terpenes and secondary cannabinoids, which are found in marijuana-based CBD; these specific compounds interact with the other chemicals in the plant to enhance the medical benefits of the plant.[137] When harvested in this manner, hemp plants contain very small trace amounts of THC, and only around three to five percent of CBD.[138] Further, large amounts of the stalk or seeds are necessary in order to produce only a small amount of hemp-based CBD oil.[139]

Due to these differences, the production of a medicinal marijuana product solely derived from hemp, is far from being the optimal option for companies. Yet, judging by the willingness of Congress and the DEA to create an exception for hemp within the meaning of the word "marijuana," it is certainly possible that they would be willing to create an exception for medical marijuana. A similar exception, which would potentially define medical marijuana as any form of the plant which contains a certain ratio of CBD to THC does not seem that farfetched after the passing of the Farm Bill in 2018. As aforementioned, there are already several states which define and regulate their medical marijuana by limiting the dosage to only allow a specific amount of THC, dependent on the amount of CBD.[140] While the Farm Bill does not seem to expressly solve any of the current issues facing the medical marijuana industry, it shows a willingness from the federal government that had not previously been observed by creating an exception related to the definition of marijuana under the CSA.

2. Examining Proposed Legislation

The Strengthening the Tenth Amendment Through Entrusting States Act was a bill introduced by two Senators: Elizabeth Warren (Massachusetts) and Cory Gardner (Colorado).[141]

The bill's purpose was described as follows:

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136 *See Cannabis Oil vs. Hemp Oil*, PROJECT CBD, https://www.projectcbd.org/guidance/cannabis-oil-vs-hemp-oil [https://web.archive.org/web/20190130193848/https://www.projectcbd.org/guidance/cannabis-oil-vs-hemp-oil] (last visited Jan. 21, 2019).

137 *See id.*

138 *See How Are Cannabis CBD Oil and Hemp CBD Oil Different?*, GREEN RELIEF, https://www.greenrelief.ca/blog/cbd-oil-cannabis-vs-hemp-difference (last updated Sept. 20, 2018).

139 *See id.*

140 *See State Medical Marijuana Laws*, *supra* note 21.

141 STATES Act, S. 3032, 115th Cong. § 2 (2018).

> The STATES Act ensures that each State has the right to determine for itself the best approach to marijuana within its borders. The bill also extends these protections to Washington D.C, U.S. territories, and federally recognized tribes, and contains common-sense guardrails to ensure that states, territories, and tribes regulating marijuana do so in a manner that is safe and respectful of the impacts on their neighbors.[142]

Following this purpose, the specific objective the bill was to amend the CSA so that it would not continue to apply to businesses acting in compliance with state laws related to the production, possession, distribution, and administration of marijuana.[143]

On stage at the Marijuana BizCon last year in Las Vegas, Rep. David Joyce, a Republican congressman, expressed hope that the STATES Act would be passed through Congress in the upcoming year, even almost going as far as predicting as much: "I think we certainly have the opportunity to get it done in [2019]."[144] Additionally, Joyce said in reference to the STATES Act, "I'd certainly bet a fair amount of money on it."[145] Joyce, who is currently serving his fourth term in Congress, pointed to the newly shaped House and Senate after the 2018 midterms as his source of optimism.[146] In Congress, two hundred and ninety-six of the four hundred and thirty-five seats (68%) will be filled with members of the House of Representatives who represent the thirty-three states who have "comprehensive" medical marijuana programs.[147] In addition, sixty-six of the one hundred Senators will hail from these thirty-three states.[148]

In one of his impromptu press conferences on the lawn of the White House, President Trump—once a long-time critic of marijuana legalization—expressed support for the STATES Act when asked about it by a reporter, "I support Senator Gardner. I know exactly what he's doing, we're looking at it. But I probably will end up supporting that, yes."[149]

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142 *Id.*

143 *Id.*

144 John Schroyer, *Will 2019 Be the Year Congress Passes Marijuana Reform?*, MARIJUANA BUS. MAG., Jan. 2019, at 34, 34.

145 *Id.*

146 *See id.*

147 *See id.*

148 *See id.*

149 *See* Dennis Romero, *Trump Says He'll Probably Back Marijuana Protections Bill*, NBC NEWS (June 8, 2018, 8:15 PM) https://www.nbcnews.com/politics/white-house/trump-says-he-ll-probably-back-marijuana-protections-bill-n881561.

While the support garnered for the STATES Act is promising, the rescheduling of Schedule I drugs continues to be difficult, which is why the proposal in this writing stops short of a recommendation to do so. Despite this, the STATES Act would achieve the end goal as this proposal outlined, as Section 280E would no longer apply to medical marijuana companies acting in compliance with state laws. However, an amendment to the IRC would not seem to require heavy involvement from organizations such as the DEA, the FDA, and the World Health Organization, as the STATES Act would seem to require.

The Compassionate Access, Research Expansion, and Respect States Act of 2019 ("CARERS Act")[150] might be the most realistic piece of marijuana legislation currently on the House floor right now. It does not seek to remove the drug from Schedule I of the CSA, but instead looks to exclude cannabidiol from the definition of the term marijuana.[151] It also looks to expand the research licenses allowed for the continued growth and development of the plant component.[152] I argue that an attack like this, which creates an exception to the statutory language, is the best way to attack this issue. Using specific language, based off past Congressional findings in matters directly related, should provide an easier path to the proper legislation that medical marijuana companies need.

The Small Business Tax Equity Act of 2017 also seeks an exception like the one thought up in this writing.[153] It calls for the amendment of Section 280E to include the following at the end "unless such trade or business consists of marijuana sales conducted in compliance with State law."[154] However, I believe by limiting the exception just to medical marijuana and not including recreational marijuana, there is a more realistic case for an exception. As seen with the Farm Bill, there was a large group of the population who were positively affected by the legalization of hemp, surely helping ease any lingering concerns about the drug in general. Similarly, with medical marijuana, there is a large population of people that supporters can point to whom would be positively affected by the exception. By being able to claim in good faith that there is a legitimate public benefit associated with the proposed legislature, it helps substantiate it from the outset.

The fact that there are a substantial number of bills being introduced in Congress, speaks to the fact that the state representatives understand

150 H.R. 127, 116th Cong. (2019).

151 *See id.* § 1.

152 *See id.*

153 Small Business Tax Equity Act of 2017, H.R. 1810, 115th Cong. (2017).

154 *See id.* § 2.

that this is an important issue for the individuals whom elected them. On top of this, the bills also tend to receive significant media coverage when they are announced, further showing the public interest.

3. Governmental Organizations

In 2018, there were two major groups who provided recommendations in favor of CBD, specifically for looser regulation and the recognition of CBD as a medicine.

The World Health Organization ("WHO") Expert Committee on Drug Dependence ("ECDD")—an independent group of experts in the field of drugs and medicine, tasked to review the public health impact of psychoactive substantives and "to make recommendations to the international community"[155]—recommended that CBD no longer be scheduled on the list of drugs outlined in the United Nations International Drug Control Conventions.[156] Finding that CBD had a good safety profile, there were no public health problems associated with the use of CBD, that medicinal benefits associated with CBD had been proven, and that CBD was not liable to abuse, the ECDD recommended that any form of "pure"[157] CBD should not be under international control.[158]

The Department of Health Services ("DHS"), in a letter to the DEA, recommended that CBD be classified differently from marijuana under Schedule of the CSA and moved accordingly to Schedule V, the least restrictive CSA schedule.[159] Finding that (1) "CBD had negligible

155 *WHO Work on Controlled Substances*, WORLD HEALTH ORG. [WHO], https://www.who.int/medicines/access/controlled-substances/ecdd/work-on-ecdd/en (last visited Jan. 28, 2019).

156 WHO EXPERT COMM. ON DRUG DEPENDENCE, FORTIETH REPORT, at 17, WHO Technical Report Series No. 1009 (2018), https://apps.who.int/iris/bitstream/handle/10665/279948/9789241210225-eng.pdf.

157 While the term "pure" was not specifically defined in the report, its first use came about in an approved pharmaceutical drug which has a ratio of 1:1 CBD to THC. However, as it relates to Note 158, it was being used for any "preparations containing predominantly cannabidiol and not more than 0.2 percent of delta-9-tetrahydrocannabinol." *See* Letter from Tedros Adhanom Ghebreyesus, Director-General of the WHO Expert Comm. on Drug Dependence, to Antonio Guterres, U.N. Secretary-General (Jan. 24, 2019), https://www.who.int/medicines/access/controlled-substances/UNSG_letter_ECDD41_recommendations_cannabis_24Jan19.pdf.

158 Letter from Tedros Adhanom Ghebreyesus, Director-General of the WHO Expert Comm. on Drug Dependence, to Antonio Guterres, U.N. Secretary-General (Jan. 24, 2019), https://www.who.int/medicines/access/controlled-substances/UNSG_letter_ECDD41_recommendations_cannabis_24Jan19.pdf.

159 Letter from Brett P. Giroir, Assistant Secretary for Health, U.S. Public Health Service to Robert W. Patterson, Acting Administrator, DEA (May 16, 2018), https://www.votehemp.com/wp-

potential for abuse relative to other [Schedule V] substances"; (2) "CBD had a currently accepted medical use"; and (3) CBD produced "limited physical or psychological dependence relative . . . to other Schedule V substances," the DHS actually concluded that CBD with a "limited amount"[160] of THC should be removed from control under the CSA altogether.[161] However, due to prior DEA concerns about the United States' obligations to the United Nations International Drug Control Conventions,[162] the DHS formally recommended placement on Schedule V of the CSA.[163]

VIII. CONCLUSION

As society is constantly changing and moving forward, now faster than ever in 2019, a heavy burden falls on the legislature to ensure that the citizens they represent can have their voices properly heard. Quite simply, Section 280E does not fit with our current society's standards. While many bricks in the metaphorical wall of this antiquated tax provision fell in 2018, the momentum must continue forward. The medical marijuana industry, which has shown impressive growth, despite the constant hurdles it is forced to jump through, deserves a fair shot at proving their worth. It is up to Congress to push for an amendment to Section 280E that would allow medical marijuana companies to be taxed like the heroes they strive to be, and not as the villains of a different past.

content/uploads/2018/10/HHS-FDA-recommendation-DEA-CBD-2018-0014-0002.pdf [hereinafter Giroir Letter].

160 *Id*. (The public release of the letter from Brett Giroir to Robert Patterson was redacted. All references to the specified limit that the DHS had in mind were redacted).

161 *Id.* at 22–23.

162 *See id.* at 23 ("[I]n the April 6, 2018, DEA Letter, DEA asserted that given the controls mandated by the 1961 Convention, the United States would not be able to keep its obligations under the treaty if CBD were decontrolled under the CSA. The CSA contemplates that scheduling decisions will be made in accordance with treaty obligations.").

163 *See id.* at 22-23.