COLORADO BAR ASSOCIATION – LEGISLATIVE UPDATE
Tax, Business, Real Estate, and Trust and Estate Sections

JUNE 12, 2013

Herrick K. Lidstone, Jr., Burns, Figa & Will, P.C.
Greenwood Village, CO 80111

2013 BUSINESS LEGISLATION UPDATE

This legislative update is in three parts. Part I discusses 2012 and 2013 legislation amending Revised Article 9 of the Uniform Commercial Code as adopted in Colorado (§ 4-9-101 *et seq.*). Part II discusses the adoption of the Public Benefit Corporation Act of Colorado (§ 7-101-501 *et seq.*). Part III discusses Amendment 64 and marijuana legislation.

Part I

Adoption of the 2010 Amendments to Revised Article 9 (H.B. 12-1262 as amended by H.B. 13-1284), effective July 1, 2013

The 2012 Colorado General Assembly adopted the 2010 Amendments to Revised Article 9 of the Uniform Commercial Code by enacting House Bill 12-1262. But before the bill would become effective on July 1, 2013, the General Assembly discovered that the 2012 bill needed some minor changes. These 2013 changes will also become effective July 1, 2013 via House Bill 13-1284.

A significant focus of the 2012 amendments and the 2013 correction was the name of the debtor to be included on a UCC-1 financing statement to be filed in the public record.

For a debtor that is an entity, the most significant change is the addition of definitions for "public organic record" and "registered organization." In Colorado, a "registered organization" is an entity (such as a corporation, cooperative, LLC, or limited partnership) that must make a filing with the Colorado secretary of state (the keeper of the "public organic record" in Colorado). In this, the definition is similar to "reporting entity" set forth in § 7-90-102(58).

Since entities that are debtors are governed by the jurisdiction of their organization (§ 4-9-301), where a debtor is a non-Colorado entity, the creditor must look to the law of the organizational jurisdiction. Where (such as in the case of a general partnership) there are no filings required to form the entity, the definition is much less precise and care must be taken to ensure the correct names are listed as debtors on the financing statement. Section 4-9-503(a)(5)(B) [eff. 7/1/2013] does state that "if a debtor does not have a name," the financing statement should include the names of the individual partners, members, etc.

Regarding individual debtors, the original text of Revised Article 9 created significant uncertainty among lenders about the name to enter on a financing statement where an individual debtor used a number of different variants of his or her name on writings such as a birth certificate, tax returns, driver's license, etc. As originally promulgated, UCC § 9-503(a)(4) provided no guidance for what constituted a sufficient individual name for a financing statement. This created uncertainty in how to define the name of the individual debtor, as evidenced by a number of cases around the country:

> *In re Stewart*,[1] found that a financing statement that provided the debtor name as "Richard Stewart" was seriously misleading where the bankruptcy petition identified the debtor's legal name as "Richard Morgan Stewart, IV" and a search of the Kansas Secretary of State records under that name, using the standard search logic, failed to disclose this record.
>
> *In re Borden*,[2] found a financing statement to be seriously misleading as a matter of law where it provided the debtor's nickname of "Mike Borden" and the correct first name was "Michael."
>
> *In re Miller*,[3] found that the debtor's name "Bennie Miller" on driver's license and social security card was not sufficient where the birth certificate provided the name as "Ben Miller." This case was subsequently reversed,[4] perhaps reflecting the uncertainty even more clearly.

The 2010 Uniform Law Amendments approved by the Uniform Commercial Code's sponsoring organizations, the American Law Institute and the Uniform Law Commission, provided states with two options – Alternatives A & B – offering greater clarity with respect to the sufficiency of an individual debtor's name on a UCC-1 financing statement:

---

1 Bankruptcy No. 04–16838, 2006 WL 3193374 (Bankr. D. Kan., Nov. 1, 2006).

2 No. 4:07CV3048., 2007 WL 2407032 (D. Neb., Aug. 20, 2007).

3 Bankruptcy No. 10–92570., 2012 WL 32664 (Bankr. C.D. Illinois, Jan. 6, 2012).

4 No. 12-CV-02052, 2012 WL 3589426 (C.D.Ill. Aug. 17, 2012).

Alternative A specified that if the state whose law applies has issued to the debtor a driver's license that has not expired, then the *only* acceptable name for financing statement purposes is the name shown on the latest unexpired driver's license issued by that state. The banking community liked this approach because it provided them the greatest certainty.

Alternative B specified that any name that met any one of three formulations would be acceptable for financing statement purposes:

(i) the individual name of the debtor [this language is the same as existing law], or
(ii) the surname and first personal name of the debtor, or
(iii) if the state whose law applies has issued to the debtor a driver's license that has not expired, the name shown on the latest unexpired driver's license.

In 2012, Colorado adopted Alternative B, but did not also deal with identification cards which are common in Colorado for individual debtors without driver's licenses. The 2013 amendment expanded that safe harbor in § 4-9-503(a)(4)(C) to include an unexpired identification card issued by the Colorado DMV.

In § 4-9-518, Revised Article 9 granted debtors the right to file what was then called a "correction statement" if the debtor believed that the financing statement was inaccurate or wrongfully filed. Colorado, by non-uniform amendment, extended this right to a secured party. A correction statement was not an amendment and did not affect the effectiveness of the record. The 2010 UCC Amendments changed the name of this record to an "information statement" and granted to a secured party of record the right to file one, but only in the case in which the secured party believes the record to have been filed by someone not entitled to do so (e.g., a debtor wrongfully filed a termination statement). The bill enacted by the 2012 General Assembly included the Official Text version but failed to delete the pre-existing, slightly different, non-uniform Colorado version found in former sections 4-9-518(a)(2), 518(a)(3) and 518(f). The 2013 change conformed section 4-9-518 to the Official Text and deleted these now superfluous sections.

Because of the importance of the original filing jurisdiction, the 2012 amendments included new § 4-9-316(h) to address circumstances where a debtor (individual or entity) changed jurisdiction either by moving (an individual) or changing the state of organization (a registered organization). Basically, this gives the creditor a four-month period to file a financing statement in the new jurisdiction to maintain the creditor's original priority.

The final significant pieces of the 2012-2013 amendments to Revised Article 9 are the transition rules found in § 4-9-805 through -809 (added by H.B. 12-1262). These provisions state that security interests properly perfected by filing before July 1, 2013 continue in effect until perfection would otherwise lapse (generally five years as set forth in § 4-9-515). Continuation of financing statements filed after July 1, 2013 will not be effective unless the financing statement is amended to comply with the requirements of the

law then effective. Importantly, § 4-9-809 states clearly that H.B. 12-1262 determines the priority of conflicting claims to collateral, unless the relative priorities were established before July 1, 2013. Section 4-9-805(b) validates pre-July 1, 2013 financing statements even though they may be ineffective under post-July 1, 2013 law until they lapse.

Part II
The Public Benefit Corporation Act of Colorado[5]

In 2013, the Colorado General Assembly passed and Governor Hickenlooper signed H.B 13-1138, the "Public Benefit Corporation Act of Colorado" (the "PBCA") which will become effective on April 1, 2014. The PBCA adds Part 5 to Article 101 of the Colorado Business Corporation Act in Title 7, C.R.S., to allow Colorado corporations to elect the status of being a "public benefit corporation." A public benefit corporation (or "PBC") must identify a public benefit purpose in its articles of incorporation and the directors, in managing the business and affairs of the PBC, must balance the pecuniary interests of the shareholders, the interests of those materially affected by the corporation's conduct, and the public benefits identified in the articles of incorporation.

Colorado's public benefit corporation statute has little similarity either to the other "benefit corporation" statutes adopted or being considered in a number of other states or to the "model benefit corporation act" proposed by B Lab Company of Berwyn, Pennsylvania ("B Lab" and the "B Lab model act," available at www.bcorporation.net). The PBCA enacted in Colorado is a significant step forward in the national dialogue regarding benefit corporations and provides a mechanism by which a business corporation organized under the Colorado Business Corporation Act or a cooperative organized under Articles 55 or 56 of Title 7, C.R.S., can elect to become a PBC by a two thirds vote. The remaining one-third voting against the change to a PBC (or at least not voting for it) have the right to dissent under C.R.S. § 7-113-101 if they choose to exercise that right.[6] Furthermore, § 7-101-504(5) provides that a nonprofit corporation cannot be a constituent entity in a conversion to PBC status.

A PBC Defined. As set forth in § 7-101-503(1), a PBC is a corporation that "is intended to produce a public benefit or public benefits and to operate in a responsible and

---

5 For a much longer, more in depth version of this summary, see Herrick Lidstone, *The Long and Winding Road to Public Benefit Corporations in Colorado, http://ssrn.com/abstract=2266654*. The drafting group of Colorado attorneys involved in the three and one-half year process to adopt the PBCA included William Callison, John deBruyn, Robert Keatinge, Cathy Krendl, Herrick Lidstone, Avi Loewenstein, Mark Loewenstein, John Moye, Todd Olinger, Michael Sabian, Allen Sparkman, Sarah Steinbeck, Beat Steiner, Celia Taylor, and Anthony van Westrum. The assistance of the CBA lobbyists, Michael Valdez and Amy Redfern was invaluable during the entire process.

6 To make this right to dissent clear, amendments were adopted to § 7-113-102(1) by adding subsections (1)(e) (which incorporates the right to dissent found in C.R.S. § 7-101-504(3) and (1)(f) (creating a right to dissent if a PBC completes a plan by which it terminates its status as a PBC).

sustainable manner." The articles of incorporation will serve as the basis for disclosure by the PBC. Sections 7-101-503 and -505 require that the articles of a PBC must:

(a) Set forth one or more specific public benefits to be promoted by the PBC;
(b) State at the beginning of the articles of incorporation that it is a PBC;
(c) include in the entity's name the words "public benefit corporation" or the abbreviations "P.B.C." or "PBC"; and
(d) must clearly indicate that the entity is a PBC in share certificates or the statement required under C.R.S. § 7-106-207 issued by a PBC.

The term "Public Benefit" is defined in § 7-101-503(2) to mean: "One or more positive effects or reduction of negative effects on one or more categories of persons, entities, communities, or interests other than shareholders in their capacities as shareholders, including effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific, or technological nature."

The PBCA, in § 7-101-509, makes it clear that the PBC statute does not create a negative implication against other Colorado Business Corporation Act corporations. Just as they could before enactment of the PBCA, any Colorado corporation can still elect in its articles (or by resolution or otherwise) to follow a beneficial purpose outside a pure profit motive and protect the business judgment of its directors without electing to be treated as a PBC.

The Directors' Standard of Conduct. In § 7-101-506(1), the PBCA defines the "duties of directors" as follows:

> The Board of Directors shall manage or direct the business and affairs of a public benefit corporation in a manner that balances the pecuniary interests of the shareholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit identified in its articles of incorporation.

Under this provision, the board of directors must balance the pecuniary interests of the shareholders and the specific public benefit the shareholders defined with "the best interests of those materially affected by the corporation's conduct." Those materially affected could include employees, suppliers, and customers, but could also include neighbors and even competitors. While this does not prioritize the considerations to be balanced, it does suggest careful drafting of board of directors' minutes to reflect the "balancing" mandated by the statute. Furthermore, there is no prohibition in the PBCA against shareholders including prioritization goals in the articles of incorporation.

The PBCA provides that directors shall not have any duty to any person solely on account of any interest in the public benefit and that, where directors perform the balancing of interests described above, they will be deemed to have satisfied their fiduciary duties to shareholders and the corporation if (in the words of § 7-101-506(2)) their "decision is both informed and disinterested and not such that no person of ordinary, sound judgment would

approve." This is an effort to establish a very high standard for plaintiff shareholders who wish to challenge directorial actions. In addition, the PBC's articles of incorporation may provide that a failure by any disinterested director to satisfy the requirements of C.R.S. § 7-101-506 "does not, for the purposes of section 7-108-401 or article 109 [of the Colorado Business Corporation Act] constitute an act or omission not in good faith or a breach [of the director's] duty of loyalty."

This is similar, but in addition, to the exoneration provision found in C.R.S. § 7-108-402 that eliminates a director's liability for monetary damages for breach of his or her duty of care, but not for a breach of the duty of loyalty, such as may be found with respect to a conflicting interest transaction in § 7-108-501.

In the end, this balancing requirement is the price that a PBC must pay for the statutory protections afforded to directors of a PBC. If a corporation does not want to balance the interests of its shareholders against "the best interests of those materially affected by the corporation's conduct," choosing to be a PBC would be ill-advised.

Reporting Requirements. The Delaware draft legislation from which the PBCA was derived required that the PBC deliver a biennial report to shareholders that permitted, but did not require, assessment against a third-party standard. In negotiations that led to the finalization of the PBCA as adopted, the proponents of the B Lab asked that the reporting provisions included in the prior version of H.B. 13-1138 be carried forward in the new version. As a result, there is no mandatory annual or biennial reporting period, but merely a requirement that the PBC "prepare a report" that includes certain information. As described in § 7-101-507, the report (when prepared) must describe:

(a) The ways in which the PBC promoted the public benefit identified in the PBC's articles of incorporation and the best interests of those materially affected by the PBC's conduct;

(b) Any circumstances that have hindered the PBC's promotion of the public interest identified in its articles of incorporation or the best interests of those materially affected by the PBC's conduct;

(c) The process and rationale for selecting or changing any third party standard against which the PBC's performance is assessed; and

(d) An assessment of the overall social and environmental performance of the PBC against a third party standard, although the assessment can be a self-assessment and does not need to be audited or certified by any third party.

Each PBC must send a copy of the report (when prepared) to each shareholder and post it on the PBC's website, if any. The posted version of the report may omit financial or proprietary information included in the report sent to shareholders. If the PBC does not

maintain a website, it must provide the report (free of charge) to any person requesting a copy.

The Third Party Standard. There is no mandate in the PBCA that any PBC actually select a third party standard. The implication in the reporting section is clear that, when a report is prepared, the report should include an assessment against a third party standard. The term "third-party standard" is defined in § 7-101-507 as a "standard for defining, reporting, and assessing the overall corporate social and environmental performance" that has been "developed by an organization that is not controlled by the [PBC] or any of its affiliates." The definition also requires that the publisher of the standard makes publicly available:

(I) The criteria considered when measuring the social and environmental performance of a business, the relative weightings of those criteria, if any, and the process for development and revision of the standard; and

(II) The "material owners" of the organization, the members of its governing body (and their selection process), and the sources of financial support for the organization "in sufficient detail to disclose any relationships that could reasonably be considered to compromise its independence."

There is no penalty for failing to include an assessment, and in fact there is no temporal requirement for the benefit report, in contrast to the annual requirement of § 401(a) of the B Lab model act and biennial requirement in the draft Delaware legislation. Since § 7-107-101 of the Colorado Business Corporation Act requires an annual meeting of its shareholders, that would be an appropriate time to prepare the benefit report, although since there is no temporal requirement set forth in the PBCA, it is ultimately a decision to be made by the shareholders (who can define the requirements in the articles of incorporation) or the directors by resolution.

Enforcement Issues. Shareholders of a PBC may enforce the director's duties under C.R.S. § 7-101-506(1) through a derivative action if the shareholders (individually or collectively) own at least 2 percent of the PBC's outstanding shares or (if a public corporation listed on a national securities exchange) the lesser of 2 percent or shares with a value of at least $1,000,000. C.R.S. § 7-101-508.

This is the only right that the PBCA permits the shareholders to enforce by a derivative action. There is nothing in the PBCA that takes away the right of any other shareholder in any Colorado corporation (including a PBC) to maintain a derivative action outside of the PBCA except to the extent that a shareholder of a PBC is demanding that the directors focus only on the shareholders' pecuniary interests. The right to bring such an action is limited because that is the focus of the PBCA.

Like non-PBCs, persons other than shareholders of a PBC do not have the right to bring a derivative action (or any other enforcement action) under the PBCA.

It should also be noted that the derivative action provision found in § 7-101-508 has an antecedent existing in the CBCA at § 7-107-402 (entitled *Actions by Shareholders*). This applies to both PBCs and to corporations formed under the CBCA that are not PBCs and further defines the right of shareholders to bring derivative actions. Nothing in the PBCA changes the application of that provision except to the extent that § 7-101-508 changes the standing issue for a derivative action brought against a PBC.

In balancing the different factors as required by the PBCA, the directors are protected from frivolous litigation in a couple of ways. Section 7-101-506(2) provides that a director of a PBC does not have any duty to any beneficiary of the identified public benefit or other person because of an interest "materially affected by the [PBC's] conduct." The PBCA goes on to say that, with respect to any decision implicating the balancing requirement, the directors' will have satisfied their duties:

> to the shareholders and the corporation if the director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment, would approve.

This latter clause is interesting in two respects. First of all, for the protection to be available, the director raising the defense must be disinterested with respect to the decision. Second, the double negative in the last part of the clause raises the complaining shareholder's burden of proof significantly unless the complaining shareholder can show that the director was not "disinterested" with respect to the decision. Whether this disinterestedness requirement adversely impacts the willingness of directors to make decisions, or increases the disclosure of potential conflicts of interest, remains to be seen.

Are PBCs Necessary? There is a school of thought that a public benefit corporation is necessary because a regular corporation cannot protect its directors when making decisions that may intentionally reduce profit or positive cash flow, or otherwise have no direct correlation to the success of the corporation's business.

Of course, the business judgment rule serves to protect directors when they make a bad business judgment provided the directors did so in good faith and after a reasonable investigation. That is not the type of decision in question. The decision for which the public benefit corporation is useful to protect directors is the intentional decision by the directors to divert some of the corporation's profit or cash flow to purposes that may have a socially-beneficial purpose (at least in the opinion of the shareholders) which is not intended to have any demonstrable positive impact to the corporation itself. In effect, the directors are intentionally diverting cash resources which could be used for the benefit of the business or as a distribution to the shareholders to a non-business purpose. Such an action would likely not be protected by the customary interpretations of the business judgment rule.

It is, of course, possible that the articles of incorporation of a CBCA corporation can include, among its stated purposes, a non-business purpose. This is consistent with the

Delaware Supreme Court's *Unocal Corp. v. Mesa Petroleum Co.*[7] decision, where the Court said that in reaching its conclusion whether to support the takeover bid, the target board of directors may consider "the impact [of the bid] on 'constituencies' other than shareholders (*i.e.*, creditors, customers, employees, and perhaps even the community generally.)"

It has been argued that the articles can include an instruction to the directors that, in pursuing the purposes of the corporation they are to include in their decision-making this other non-business purpose even at the expense of business profit and business opportunities. On the other hand, the law supporting that approach outside of the limited *Unocal* context is uncertain and the PBCA clearly expands the right of the PBC management and directors to do so.

Issues Not Addressed In the PBCA. The PBCA does not address issues under the Colorado Securities Act (§ 11-51-101 *et seq.*) which regulates offers and sales of securities in Colorado. Generally, compliance will require disclosure to prospective investors of the public benefit purpose so that investors are not misled into believing that the PBC is a Colorado Business Corporation Act entity with a pure profit motive and the directors' duty of care obligations under C.R.S. § 7-108-401(1) "for the best interests of the corporation." Other normal compliance with the exemption/registration requirements of the Colorado Securities Act and the licensing of broker-dealers is also required. If a PBC (or a benefit corporation organized under the laws of another state) solicits funds from investors, it will need to consider the applicability of federal and state laws regulating the offer and sale of securities.

The PBCA also does not address issues that may arise for PBCs under the Colorado Charitable Solicitations Act (§ 6-16-101 *et seq.*). The Colorado Charitable Solicitations Act was enacted "to protect the public's interest in making informed choices as to which charitable causes should be supported" and "to help the secretary of state investigate allegations of wrongdoing in charities, without having a chilling effect on donors who wish to give anonymously or requiring public disclosure of confidential information about charities." § 6-16-102. The Charitable Solicitations Act requires that "charitable organizations" that solicit donations file certain reports with the Colorado Secretary of State. A PBC's public benefit purpose may fit within the broad definition of a "charitable purpose" and, as a result, the PBC may be considered to be a "charitable organization." If soliciting funds for its public benefit purpose, each PBC should consider whether compliance with the Colorado Charitable Solicitations Act is required and how to accomplish such compliance.

---

[7] 493 A.2d 946, 955 (Del. 1985). In a different context, which Professor Stephen Bainbridge refers to as "*Revlon*-land" after *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986), "directors may not consider any interest other than shareholder wealth maximization." Bainbridge, Stephen M., *The Geography of* Revlon-*Land*, 81 Fordham L. Rev. 3277, 3315 (2013), *available at* http://ssrn.com/abstract=2115769.

Note that the potential application of the Charitable Solicitations Act is not a problem that was caused by the PBCA. Limited liability companies can be formed in Colorado to conduct (as set forth in § 7-80-103) "any lawful business" whether or not for a profit. It can have a hybrid (public benefit or charitable) purpose even if it also is engaged in a business for a profit. As a result, there is a risk that the PBC (like a non-profit corporation or limited liability company formed for a public benefit purpose) might solicit funds and thereby be subject to the Charitable Solicitations Act.

The Colorado legislation, and legislation for benefit corporations generally, does not and cannot address the many issues that may arise under the Internal Revenue Code for a PBC pursuing its public benefit purpose. For example, § 162(a) of the Internal Revenue Code authorizes taxpayers to deduct from income their "ordinary and necessary business expenses." Marketing expenses generally fall within this section, such as the expenses incurred in advertising "organically grown ingredients," "sustainably grown coffee," or "contributions to local schools or charities." Will expenditures for a public benefit purpose that do not fit within the marketing rubric or which may be excessive when compared to normal marketing budgets be deductible? That is a question to be answered.

The PBC may be a wholly unsuitable investment for an employee stock ownership plan (an "ESOP") or other plan governed by the Employee Retirement Income Security Act of 1974 ("ERISA"). As set forth in ERISA § 404 and the regulations thereunder, the primary responsibility of fiduciaries of an ERISA plan is to run the plan solely in the interests of the participants and beneficiaries, and for the exclusive purpose of providing benefits and paying plan expenses. What fiduciary will be able to conclude that a PBC or benefit corporation which is not being operated solely for profit or the pecuniary benefit of its shareholders meets the mandated ERISA fiduciary standard of care? Any decision by an ERISA fiduciary to invest in or hold securities of a PBC or a benefit corporation (or any corporation claiming a purpose other than profit) is likely to be a personally risky decision to the fiduciary under current law.

What Will A PBC Accomplish? Properly used, it can be expected that PBCs and benefit corporations will have limited utility. Proponents of benefit corporations have predicted that "[f]or-profit social entrepreneurship, social investing and the sustainable business movement have reached a critical mass," and similar sentiments were expressed in the Senate floor debate on H.B. 13-1138. Whether this is fact or hyperbole remains to be seen.

On the other hand, reaction to the April 24, 2013 collapse of the garment factory building in Bangladesh where more than 1,100 people were killed shows that people care about social good. That came on the heels of a fire at another factory in November 2012 that killed 112 low-wage workers. Factories like these in Bangladesh pump out what Elizabeth Cline, author of *Overdressed: The Shockingly High Cost of Cheap Fashion*, calls "fast fashion" or clothes made for and sold inexpensively by big chain stores. Whether these stores suffer any long-term repercussions for these incidents and the working conditions in their Asian garment factories generally remains to be seen. Similarly, when

responding to a stockholder proposal for ExxonMobil to reduce greenhouse gas emissions, on June 2, 2013 Peter Lohnes reported in *The Green Mien blog* that CEO Tillerson replied: "What good is it to save the planet if humanity suffers?" Will the public care about how and where their clothes are made, or will price continue to be the driving factor? Do people care about saving the planet or is the price of a gallon of gas more important?

Clearly retailers, large and small, have focused on "doing good" and making that known publicly for marketing purposes. As discussed above, no company needs to be a PBC or a benefit corporation to do so. Furthermore, the certification organizations, such as B Lab Company, have certified a number of corporations and other entities that are not benefit corporations or PBCs. So, what corporation would want to be a PBC or a benefit corporation?

There are undoubtedly businessmen and women who truly want to see their organization do better for the world or their community while making a profit. They may want to see their vision ingrained in the fiber of the corporation so that the vision survives the individual (even though a future 2/3rds vote is all that is necessary to terminate PBC status). On the other hand, what business does not want to act in a "responsible and sustainable" manner and balance the interests of the shareholders and direction provided by shareholders in its articles of incorporation? Furthermore, "balancing" is what businessmen and women do frequently in making their business decisions.

Part III
Marijuana Legislation

In November 2012, the voters in Colorado passed an amendment to the Colorado Constitution, Amendment 64, legalizing the growing, sale, possession, and use of marijuana subject to some limitations. While legal under Colorado law, sale, possession and use of marijuana remains illegal under federal law.[8] Medical marijuana (approved by the voters in 2000) created a growth industry, at least for a period of time, and a number of Colorado attorneys counseled those involved in the industry. It can be expected that Amendment 64 will be an equal boon to businesses, even though many federally-regulated institutions (such as banks and credit card companies) will not deal with marijuana facilities for fear of repercussions under federal law.

The 2013 General Assembly scurried to implement regulations in order to legalize marijuana pursuant to Amendment 64. Six bills were signed regarding marijuana regulations, including:

---

[8] 21 U.S.C. § 812(c) lists "marihuana" as a controlled substance within the meaning of 21 U.S.C. § 841(a)(1).

- H.B. 13-1042, changes the treatment of business expenses incurred by marijuana facilities for Colorado tax purposes. Under § 380E of the federal Internal Revenue Code, these expenses (for a criminal activity) are not deductible.
- H.B. 13-1238 implements changes to existing medical marijuana provisions to facilitate licensing for recreational marijuana.
- H.B. 13-1317, which contains the primary provisions establishing the regulatory and licensing system for the implementation of Amendment 64's protection for recreational marijuana use.
- H.B. 13-1318, which addresses taxation of recreational marijuana and submits the issue to voters in November 2013 as required by the Taxpayer's Bill of Rights.
- H.B. 13-1325, which imposes a limit of 5 nanograms or more of THC per milliliter of whole blood to give rise to the inference that the person driving was under the influence of drugs (i.e., "driving while stoned").
- S.B. 13-283 to implement a number of provisions addressing issues such as indoor smoking of marijuana (banned under Colorado's Clean Indoor Air Act), and setting up a variety of commissions and requires several studies. This bill also makes it clear that contracts for activities that are lawful in Colorado (such as medical and recreational marijuana) are not void as against public policy even though they may violate other law (i.e., federal).

There remain significant questions whether Colorado attorneys run the risk of ethical or criminal violations should they counsel businesses involved in the marijuana industry.[9] Applicable rules are found in Colorado Rules of Professional Conduct and include:

- Rule 1.2(d) – a prohibition against assisting a client in conduct the lawyer knows to be criminal; and
- Rule 5.1(a) – requiring the management of the law firm to make reasonable efforts to ensure each lawyer's compliance with the Rules; and
- Rule 5.1(c) – imposing liability on lawyers associated in a law firm if they ratify any violations of the Rules.

While state prosecution will likely not occur as a result of Amendment 64, federal enforcement is still unresolved. Although it is likely that the marijuana industry will

---

[9] See, generally, Rothrock, Alec, *Is Assisting Medical Marijuana Dispensaries Hazardous to a Lawyer's Professional Health?*, 89 Denver University Law Review v. 4 at 1047 (2012)

become a fertile business field for Colorado practitioners, there remains much unknown about risks to attorneys and others involved in the industry. Although the risk may be small, it is extant. When counseling those engaged in the business of marijuana cultivation, sale, possession, and use, attorneys need to keep the risks in mind.