

Canada-U.S. Trade in Marijuana-Related Products is Fraught with Peril

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Now that Canada allows using and producing marijuana and marijuana-related products, and bordering U.S. states like Washington, Maine, and Michigan have similarly relaxed marijuana-related laws, it seems natural that industries on both sides of the border will look for cross-border business opportunities. But cross-border transactions between the Canadian and U.S. marijuana industries face a potentially insurmountable obstacle: items primarily intended for the marijuana industry are considered prohibited drug paraphernalia and are illegal to import into or export from the United States. We refer to this statute as the Paraphernalia Statute.

The Paraphernalia Statute prohibits paraphernalia from being imported into, exported from, or transported across U.S. state lines. The statute also prohibits the use of the mail to transport drug paraphernalia. Even merely offering paraphernalia for sale in the United States is a federal criminal offense. U.S. Customs and Border Protection (“CBP”) takes custody of each import prior to release the goods to the importer or consignee, giving CBP a powerful means to enforce the Paraphernalia Statute. CBP has the authority to seize and forfeit any merchandise that is considered to be contraband under federal law. Likewise, CBP can halt an outward bound shipment of an item prohibited for exportation from the United States and seize and forfeit drug paraphernalia. Besides the loss of the merchandise itself, importers and exporters also could become subject to criminal penalties.

Most people would not be surprised to learn that CBP may seize items intended to inhale or ingest drugs, but the breadth of what is considered “paraphernalia” under U.S. law may not be widely understood, and goes far beyond items merely designed for marijuana consumption.

The Paraphernalia Statute defines paraphernalia as equipment, products, or materials *primarily intended or designed for* use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance. The Supreme Court has

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interpreted the phrase *designed for* to mean that items principally used with illegal drugs by virtue of features designed by the manufacturer are prohibited items under the Paraphernalia Statute. In addition, the phrase *primarily intended*, according to the Supreme Court, focuses not only on the objective features of the item, but also what the “likely use” of the item is by users.

By way of example, production and harvesting equipment likely would be considered drug paraphernalia if it had particular attributes unique to the marijuana plant. CBP has found, for example, that cannabis grinders are prohibited by the Paraphernalia Statute from being imported because they were marketed for marijuana grinding, and the importer did not submit evidence of non-drug uses for the grinders. The statute could potentially cover health- or production-related equipment primarily used with drugs or drug plants.

Companies should not take comfort in the legally ambiguous test about what constitutes prohibited paraphernalia because the penalties for being wrong are severe, and CBP and third parties can raise the issue. CBP can independently assess whether an import or export is prohibited under the Paraphernalia Statute, even if no party raises the issue. In addition, carriers and importers can ask CBP to interpret the Paraphernalia Statute to determine whether the import ban applies. This happened most recently in April 2017 when a carrier received confirmation from CBP that items shipped by the not-so-cleverly-named Stashlogix were in fact prohibited from import. The penalties for violating the Paraphernalia Statute, moreover, are severe and include potential prison time, CBP seizures, and hefty fines as a result of an offense.

CBP has rejected arguments that statutory exceptions permit state laws to provide a safe harbor for importing or exporting drug paraphernalia. The Paraphernalia Statute exempts persons “authorized by...state...law to manufacture, possess or distribute such items.” An importer argued to CBP that, even assuming its marijuana accessories are paraphernalia, the Paraphernalia Statute authorized its activities because they were legal under Colorado law. CBP rejected the argument holding, among other things, that the statute could not be read as proposed by the importer and, in any event, the U.S. Constitution prohibited the result, because, under the “Supremacy Clause,” federal legislation supersedes and displaces inconsistent state law. Until a federal court overrules CBP on this interpretation of the law, importers and exporters must assume that state law is not a viable defense under the Paraphernalia Statute. CBP’s interpretation also raises the question: what is the status of state-licensed or authorized distributors of marijuana-related equipment under the Paraphernalia Statute?

As with federal law generally, it remains to be seen how vigorously enforcement authorities will penalize violators of the Paraphernalia Statute. CBP’s actions to date, however, suggest that it will take action against offending imports or exports. For example, CBP has indicated that it could cite a non-citizen’s investment in cannabis business as grounds to bar admission into the United States under immigration law.

Entities that are focused on the marijuana industry should take action to prevent cross-border transactions unless they are certain the items involved are not considered

paraphernalia. Finally, application of the Paraphernalia Statute to trade between Canada and the United States could become a flashpoint in the larger debate about the extent to which federal prohibitions related to marijuana should be enforced. At the least, companies should avoid testing the boundaries of what are prohibited items under the Paraphernalia Statute and CBP's willingness to enforce the statute.