Interstate Cannabis Commerce May Be In Reach, With Caveats

By **Adam Horowitz and Harry Berezin** (April 20, 2023)

Adam Horowitz

Harry Berezin

On Jan. 27, California's Department of Cannabis Control, or DCC, laid the groundwork for the potential opening of interstate cannabis commerce when it requested that the California attorney general issue a written opinion that the state's authorization of interstate cannabis agreements would not pose a significant legal risk to the state.[1]

California became the second state to authorize such agreements when it passed S.B. 1326 last year.[2] Oregon passed a similar law in 2019.[3]

But unlike the Oregon law and similar proposed legislation in other states, which require federal approval to become effective, California's law authorizes interstate cannabis agreements upon the issuance of a state attorney general opinion, without the need for federal action.

Indeed, as part of its request to the attorney general, the DCC makes a compelling argument that the authorization of interstate cannabis agreements would not result in significant risk to the state.

If the attorney general agrees, this would clear the way for the attorney general to issue the authorization pursuant to Section 26308 of the California Business and Professions Code.[4]

This is an exciting possibility for the cannabis industry. But could interstate commerce actually be achieved without federal approval? Specifically, would an interstate cannabis agreement trigger the compacts clause of the U.S. Constitution, which requires congressional approval of compacts between states?

We think not. First, an interstate cannabis agreement is unlikely to be deemed a compact under the meaning of the Constitution.

While case law has not been entirely clear as to what constitutes a compact, generally the U.S. Supreme Court looks for certain classic indicia in determining if a compact exists.

The classic indicia of a compact are: (1) the creation of a joint organization or body; (2) a restriction on a state's power to modify or repeal its laws unilaterally; (3) the constraining of state participants from acting in the absence of approval from other state participants; and (4) the conditioning of one state's actions on the actions of another state.[5]

An interstate agreement lacking these classic indicia or characteristics is not a compact.

An interstate cannabis agreement need not have most of these characteristics. For example, there is no need for a joint regulatory body. Likewise, the agreement could be drafted to avoid language that prevents a state from unilaterally changing its laws, entering into separate agreements with other states, or terminating the agreement altogether.

The only aspect of an interstate cannabis agreement that would suggest a compact is the conditioning of a state's actions on those of another state, which has been interpreted as meaning that reciprocal treatment from another state is required for the agreement to have an effect.[6]

As an interstate cannabis agreement could not take effect unless at least two states allow for the import and export of cannabis, this characteristic would be present.

While one indicium of a compact would necessarily be present in an interstate cannabis agreement, no court examining this issue has found that the presence of a single characteristic is enough to conclude that an agreement is a compact.

But even if a court found that a compact existed, it would still have to conclude that it is the type of compact that requires congressional approval in order to validate it. And the Supreme Court has made clear that the only compacts that require congressional approval are those that interfere with federal supremacy.[7]

This is where things could get interesting. Some may argue that an interstate cannabis agreement would implicate Congress' exclusive regulation of interstate commerce. But such an agreement arguably would not interfere with that federal constitutional authority.

Indeed, the Supreme Court held in its 1978 U.S. Steel Corp. v. Multistate Tax Commission decision that a compact does not interfere with federal supremacy where the "pact does not purport to authorize the member States to exercise any powers they could not exercise in its absence."[8]

In considering a multistate tax compact in U.S. Steel, the Supreme Court determined that the mere presence of an agreement for reciprocal legislation alone did not necessitate congressional approval, as the compact did not grant the states any powers they normally would not possess.[9]

Similarly, an interstate cannabis agreement would not purport to authorize the states to exercise any powers they could not normally exercise; a state already has the power to legislate that, under state law, cannabis may be exported from the state.

Further, the Supreme Court has previously contemplated contracts for interstate transport of goods, and has routinely found that such agreements do not require congressional approval.[10]

In Virginia v. Tennessee, the Supreme Court noted in 1893:

> If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them as part of the distance over the Erie Canal, it would hardly be deemed essential for the state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that state in that way.[11]

What is an interstate cannabis agreement but an agreement between states to allow for the transfer of goods?

Cannabis, of course, is not like most other goods. It remains listed on Schedule I of the federal Controlled Substances Act. But in the context of the compacts clause, that fact alone does not compel the conclusion that an interstate cannabis agreement requires congressional approval.

An interstate cannabis agreement would impose no restrictions on interstate commerce, and it also would not prevent Congress from enforcing its own laws against the interstate transport of cannabis. Any agreement could be drafted to make clear that the states are not

attempting to block federal enforcement.

And while the CSA does not impose any obligations on the state of California to enforce cannabis prohibition, nothing would stop federal enforcement of the CSA against the individual cannabis operators engaging in interstate transport.

Thus, a state entering into such an agreement could have a strong case that congressional approval is not required.

But while interstate cannabis agreements are being proposed as a solution for the problems caused by the overabundance of cannabis in states with legal adult-use cannabis markets, such agreements may fail to provide the relief hoped for by state legislatures.

Even if an interstate cannabis agreement survived a court challenge based on the compacts clause, it is unclear whether or how interstate cannabis commerce would actually take shape given the risks to individual operators associated with shipping cannabis across state lines, and uncertainty regarding how the U.S. Department of Justice and Congress might respond to such activity.

While California and any other states entering into such agreements would not prosecute the individual operators, the DOJ could seek to criminally charge the operators under the CSA.

The DOJ has not enforced federal cannabis prohibition in legal states that have their own enforcement programs, except to the extent that a specific activity implicates one or more of the enforcement priorities outlined in the Cole Memo, a 2013 memo from then-Deputy Attorney General James Cole to all U.S. attorney offices.

Although it was officially rescinded in 2018, the Cole Memo continues to form the basis of the DOJ's cannabis policy. Interstate commerce only potentially implicates one of those priorities — the prevention of distribution from legal states to other states.

The DOJ has not elaborated on whether its concern is interstate cannabis commerce generally, or merely the transport of cannabis from a legal state to a nonlegal state.

If it is the former, operators transporting cannabis between states — including between two adjacent states with legalized adult-use cannabis markets, such as Oregon and California — under an interstate cannabis agreement could trigger DOJ enforcement activity.

The DOJ may need to clarify its stance on this issue to give comfort to operators considering engaging in transactions under an interstate cannabis agreement.

While the Rohrabacher-Farr Amendment — an appropriations rider that has been included in the federal budget bill every year since 2014 — currently prevents the DOJ from interfering with state medical cannabis laws, it does not apply to recreational cannabis.

Additionally, the amendment only prevents the interference with the implementation of "[s]tate laws that authorize the use, distribution, possession, or cultivation of medical marijuana," and does not address the interstate transport of any medical cannabis.

The DOJ could take the position the amendment does not apply to cannabis transported across state lines, whether medical or not, and therefore may seek to utilize federal funds for enforcement actions.

And even if the Biden administration DOJ decided not to interfere with interstate cannabis commerce, Congress could still act to prevent these agreements. Or, a change in administration could lead to a change in enforcement policies, leading to federal action and large criminal consequences for those who had previously engaged in such commerce.

Because of these factors, the cannabis industry still has several hurdles to clear before interstate cannabis commerce becomes a reality. But in the absence of meaningful progress in Washington, D.C., on legalization or decriminalization, state-level action may be the best hope for creating the national market the industry desires — and arguably needs.

Adam J. Horowitz and Harry Berezin are associates at Goodwin Procter LLP.

Goodwin partners Brett Schuman and Jennifer Fisher contributed to this article.

[1] Letter from the California Department of Cannabis Control to the California Attorney General (Jan. 27, 2023), available at https://subscriber.politicopro.com/f/?id=00000186-000e-d065-a59f-d39f20340000.

[2] An Act to amend Sections 26080 and 26190 of, and to add Chapter 25 (commencing with Section 26300) to Division 10 of, the Business and Professions Code, relating to cannabis, California SB-1326 (2022), available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB1326.

[3] An Act Relating to Cannabis, Oregon SB 585 (2019), available at https://olis.oregonlegislature.gov/liz/2019R1/Measures/Overview/SB582.

[4] CA Bus & Prof Code § 26038 (2017), available at https://law.justia.com/codes/california/2017/code-bpc/division-10/chapter-3/section-26038/.

[5] Northeast Bancorp, Inc. v. Governors, FRS, 472 U.S. 159 (1985), available at https://supreme.justia.com/cases/federal/us/472/159/.

[6] U.S. v California, 444 F.Supp.3d 1181 (E.D. Cal. 2020), available at https://casetext.com/case/united-states-v-california-36.

[7] US Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978), available at https://supreme.justia.com/cases/federal/us/472/159/.

[8] Id.

[9] Id.

[10] See, e.g., Virginia v. Tennessee, 148 U.S. 503 (1893), available at https://supreme.justia.com/cases/federal/us/148/503/; US Steel Corp., 434 U.S. 452.

[11] Virginia, 148 U.S. 503.