

American Trade Association for Cannabis and Hemp



ATACH Policy Paper: The Time has Come for U.S. Cannabis Operators to Be Listed on Nasdaq and the New York Stock Exchange

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I. Introduction

Cannabis is among the fastest-growing industries in the United States. Revenues of U.S. cannabis sales are projected to exceed \$30 billion in 2022 and \$50 billion in 2026. The U.S. cannabis market has created more than 500,000 jobs, and is projected to create more than 800,000 jobs by 2026. The overall economic impact of the U.S. cannabis market is estimated at nearly \$100 billion, and could near \$160 billion by 2026.² In 2021, Gallup reported that 68% of Americans approve cannabis legalization.³

Nevertheless, Nasdaq and The New York Stock Exchange (NYSE) (herein the “Exchanges”) have not listed cannabis cultivators, processors, and dispensaries (herein “operators”) that grow, process, and/or sell marijuana, *i.e.*, “touch the flower,” pursuant to permits issued under state law because the Exchanges have decided against listing companies whose operations may be deemed to violate U.S. federal law.⁴ Given the growth of the U.S. cannabis industry, which now encompasses 37 states, the District of Columbia, and U.S. territories⁵ that have legalized marijuana for medical or adult recreational purposes, it is time for the Exchanges to list operators.⁶

The Exchanges’ practice with respect to federally unlawful, but state-legal cannabis activities appear to be driven by the concern that listing operators could result in federal prosecution of the Exchanges based on claims that (a) the Exchanges are aiding and abetting violations of the U.S. Controlled Substances Act (“CSA”) given that operators can be said to directly violate the CSA by manufacturing, possessing, and/or distributing marijuana; and (b) the

¹ The views expressed herein are exclusively those of the American Trade Association for Cannabis & Hemp (“ATACH”). ATACH is grateful to Seth Goldberg, Esq., Justin Santarosa, Esq., and Emily Meehan, Esq., attorneys with the law firm Duane Morris LLP, ATACH’s National Law Partner, for assisting in the development of this paper.

² See Section III(B), *infra*.

³ Megan Brenan, “Support for Legal Marijuana Inches Up to New High of 68%,” Gallup, November 9, 2020, <https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx>.

⁴ “Reference Library - Advanced Search (Identification No. 1474),” Nasdaq, Inc., December 8, 2017, https://listingcenter.nasdaq.com/Material_Search.aspx?materials=1474&mcd=LQ&criteria=2&cid=34 (stating “Nasdaq cannot initially list or continue the listing of a company whose current or planned activities are in violation of U.S. federal law or the law in a jurisdiction where the company operates.”).

⁵ “State Medical Cannabis Laws,” National Conference of State Legislatures, July 18, 2022, <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

⁶ “Following the Smart Money into Recreational Cannabis.” Highway 33 Capital Advisory, November 10, 2020. <https://highway33.com/following-the-smart-money-into-recreational-cannabis/>.

payment of listing fees by operators to the Exchanges and the raising of capital by operators through the Exchanges results in direct or indirect violations of anti-money laundering (“AML”) statutes.

However, since an Obama-era policy de-prioritizing the use of federal resources for the enforcement of the CSA against state-legal cannabis activities,⁷ which policy was recently reaffirmed in statements made by U.S. Attorney General Merrick Garland, the United States Department of Justice (“DOJ”) has taken a hands off approach to the state-legal cannabis activities of state-licensed operators and those transacting business with them, *i.e.*, “ancillaries.”⁸ It is due precisely to the federal government’s explicit laissez-faire policy when it comes to state-legal cannabis activities that the U.S. cannabis industry has grown.

On October 6, 2022, expressing his view that the criminalization of marijuana has been a “failed approach,” President Biden shifted the federal government’s cannabis policy toward decriminalizing or de-scheduling marijuana by: (1) pardoning federal offenses for simple possession of marijuana, (ii) urging governors to pardon state offenses for simple possession of marijuana, and (iii) “asking the Secretary of Health and Human Services and the Attorney General to initiate the administrative process to review expeditiously how marijuana is scheduled under federal law.”⁹

Where the federal government has stated clearly that federal resources will not be used to enforce the CSA against state legal cannabis activities, the DOJ has established a decade-long track record of such non-enforcement, and the President has now taken affirmative steps in the direction of decriminalizing, and possibly de-scheduling cannabis, the Exchanges’ practice of not listing operators is outdated and out of step with the reality that transacting business with state-legal cannabis operators is a not a priority for enforcement by the DOJ and thus the risk of such enforcement is low.

Notwithstanding their practice with respect to operators, Nasdaq and NYSE have themselves been listing more and more companies with cannabis-related interests as the industry has grown. Both exchanges have taken a less restrictive approach to listing ancillaries that do business with operators, and whose revenues are derived from payments by operators. In fact, the cannabis-related interests of some of those ancillaries are so material that Nasdaq and NYSE have crossed the rubicon and are effectively listing operators. Yet, as with virtually all operators and ancillaries over the past decade, the federal government has not taken action against Nasdaq or NYSE for listing companies with such material cannabis-related interests.

⁷ Deputy Attorney General James M. Cole to All United States Attorneys, Memorandum, “Guidance Regarding Marijuana Enforcement,” August 29, 2013, U.S. Department of Justice, <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

⁸ The growth of the cannabis industry has been supported by private investment firms, family offices, high net worth individuals, and ancillary businesses that provide a broad range of products and services to operators, such as industrial agriculture, construction, equipment, packaging, real estate, and software, to name a few.

⁹ “Statement from President Biden on Marijuana Reform, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/>

Importantly, the concerns of Nasdaq and NYSE regarding the listing of operators seem to ignore the compliance-heavy nature of their businesses, which results from operating in a highly-regulated industry. In order to maintain their state-issued cannabis permits, operators must implement SOPs, protocols, and other compliance measures intended to provide transparency and to ensure that state cannabis laws are not being violated. Such operators, many of whom are currently trading publicly on the OTC Markets, the Canadian Securities Exchange, and the NEO exchange are already satisfying those exchanges' listing requirements, are thus built for the reporting and disclosures required of publicly-traded companies.

In addition, at least with respect to Nasdaq, the listing of operators appears to be consistent with a number of Nasdaq's own public policy initiatives. For example, as with Nasdaq's "Purpose Initiative," which Nasdaq describes as "designed to support women and underrepresented minority communities with the resources needed to grow and sustain their businesses,"¹⁰ the cannabis industry has been explicit about ensuring the participation of women and minorities in operator businesses. Most states that have adopted adult-use and/or medical marijuana programs have included in their cannabis legislation provisions requiring operator license applicants to demonstrate such participation, and reward such participation with higher scores in evaluating operator permit applications. Similarly, as an emerging market driven by entrepreneurs, Nasdaq's listing of operators would be in line with its "Total Markets"¹¹ and "Entrepreneurial Center"¹² programs, which are intended to support innovative new markets and entrepreneurial interests.

As discussed below, whereas liquidity shortfalls and high costs of capital may impede the achievement of the cannabis industry's social equity objectives, the infusion of capital into the cannabis market that might result from operator trading on the Exchanges could increase the likelihood that such goals are met. And a stronger performing cannabis industry due to such capital would likely boost the overall U.S. economy.

For all of these reasons, as discussed further below, it is time for NYSE and Nasdaq to formally change their practice of not listing cannabis operators.

II. The Rationale for Listing State-Licensed Cannabis Operators on Nasdaq and NYSE.

As set forth below, a number of factors warrant the Exchanges formally changing their discretionary practice preventing the listing of operators, including: (a) the federal government's explicit de-prioritization of state-legal cannabis activities for federal prosecution; (b) the growth of the state-legal cannabis industry and the ubiquity of state-legal cannabis businesses and products; (c) Nasdaq and NYSE are already listing companies with material cannabis-related

¹⁰ "Nasdaq Launches Purpose Initiative to Advance Inclusive Growth and Prosperity," Nasdaq, Inc., September 21, 2020, <https://ir.nasdaq.com/news-releases/news-release-details/nasdaq-launches-purpose-initiative-advance-inclusive-growth-and>.

¹¹ "Total Markets," Nasdaq, Inc., accessed July 25, 2022, <https://www.nasdaq.com/TotalMarkets>.

¹² "Nasdaq Entrepreneurial Center," Nasdaq Entrepreneurial Center, accessed July 25, 2022, <https://thecenter.nasdaq.org/>.

interests and are already assuming the remote risk of prosecution by the DOJ; (d) operators function in an environment of compliance and transparency; (e) listing operators would support the Exchanges' purpose initiatives; and (f) listing operators is in the public's interest.

A. The Federal Government's Hands' Off Policy to State-Legal Cannabis.

Under federal law, except as specifically permitted under the CSA, it is unlawful to “knowingly and intentionally ... manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense” a controlled substance.¹³ Despite the federal government's legalization of hemp in 2018¹⁴ and widespread state legalization of marijuana for both medical and adult (or “recreational” use),¹⁵ marijuana remains a Schedule I controlled substance, the schedule reserved for the most dangerous drugs, under the CSA.¹⁶¹⁷ However, to the best of our knowledge, due to the policy reasons and legislation described below, the federal government has not enforced the CSA against businesses or individuals for cannabis activities in compliance with state cannabis laws.

1. The Cole Memo: Issuance, Rescission, and Current Status

In August 2013, then-Deputy Attorney General, James M. Cole, issued a memorandum for all U.S. Attorneys, entitled “Guidance Regarding Marijuana Enforcement” (the “Cole Memo”), which described the federal government's enforcement priorities with respect to state-sanctioned marijuana programs.¹⁸ The Cole Memo effectively deferred enforcement to those states “that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana.”¹⁹

The Cole Memo sought to make effective use of the federal government's prosecutorial resources, and delineated eight areas, known as the “Cole Priorities,” for U.S. Attorneys to focus on in states that have established cannabis programs with regulatory enforcement systems, as

¹³ 21 U.S.C. § 841(a).

¹⁴ Agriculture Improvement Act of 2018, Pub. L. 115-334 § 12619.

¹⁵ See Section III(B), *infra*.

¹⁶ 21 C.F.R. § 1308.11

¹⁷ A Schedule I drug is defined by federal law as follows: “(A) The drug or other substance has a high potential for abuse. (B) The drug or other substance has no currently accepted medical use in treatment in the United States. (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.” 21 U.S.C. § 812(b)(1).

¹⁸ Deputy Attorney General James M. Cole to All United States Attorneys, Memorandum, “Guidance Regarding Marijuana Enforcement,” U.S. Department of Justice, August 29, 2013, <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

¹⁹ *Id.*

follows: (a) preventing legal cannabis distribution to minors; (b) preventing legal cannabis revenue from going to criminal enterprises; (c) preventing legal cannabis diversion to states where not legal; (d) preventing legal cannabis as a pretext for trafficking illegal drugs or other illegal activity; (e) preventing violence/firearms in legal cannabis cultivation/distribution; (f) preventing drugged driving and adverse public health consequences from legal cannabis; (g) preventing the growing of legal cannabis on public lands; and (h) preventing possession/use of legal cannabis on federal property.

U.S. Attorneys adhered to the Cole Priorities from the Cole Memo's issuance in August 2013 until its rescission in January 2018, when Attorney General Jeff Sessions issued a one-page memorandum (the "Sessions Memo") rescinding all prior marijuana-related enforcement guidance issued by the Obama Administration's DOJ, including the Cole Memo and its list of prosecutorial priorities.²⁰ The Sessions Memo left to the discretion of local U.S. Attorneys whether to prosecute cannabis activities that are lawful under a state's cannabis legislation. In a press release announcing his rescission of the Cole Memo, (then) AG Sessions stated:

It is the mission of the Department of Justice to enforce the laws of the United States, and the previous issuance of guidance undermines the rule of law and the ability of our local, state, tribal, and federal law enforcement partners to carry out this mission . . . Therefore, today's memo on federal marijuana enforcement simply directs all U.S. Attorneys to use previously established prosecutorial principles that provide them all the necessary tools to disrupt criminal organizations, tackle the growing drug crisis, and thwart violent crime across our country.²¹

During William Barr's and Jeffrey Rosen's tenures as Attorney General and acting Attorney General respectively, the DOJ appeared to maintain an unofficial policy of deferring enforcement to the states with respect to state-legal marijuana businesses notwithstanding (former) A.G. Sessions' revocation of the Cole Memorandum.

Today, all indications are that the Biden Administration DOJ will continue to refrain from taking action against marijuana businesses complying with state law. During his confirmation hearings, Attorney General Merrick Garland suggested that he would oversee a reduction in DOJ resources being devoted to enforcement of federal marijuana laws, stating: "It does not seem to me a useful use of the limited resources that we have to be pursuing prosecutions in states that have legalized and that are regulating the use of marijuana, either medically or otherwise"²² Recently, on April 27, 2022, A.G. Garland again remarked: "I laid this out in my confirmation

²⁰ Attorney General Jefferson B. Sessions to All United States Attorneys, Memorandum, "Marijuana Enforcement," U.S. Department of Justice, January 4, 2018, <https://www.justice.gov/opa/press-release/file/1022196/download>.

²¹ "Justice Department Issues Memo on Marijuana Enforcement," Justice.gov, January 4, 2018, <https://www.justice.gov/opa/pr/justicedepartment-issues-memo-marijuana-enforcement>.

²² Diana Novak Jones, "AG Nominee Garland Supports Pot Prosecution Pullback." LAW360, Lexis Nexis, February 22, 2021, <https://www.law360.com/articles/1357743/ag-nominee-garland-supports-pot-prosecution-pullback>.

hearing, and my view hasn't really changed since then. The Justice Department has almost never prosecuted use of marijuana, and it's not going to be. . . . [Marijuana prosecutions are] not an efficient use of the resources given the opioid and methamphetamine epidemic that we have."²³

In his October 6, 2022, announcement of steps that should be taken in the direction of decriminalizing marijuana, President Biden reaffirmed the fact that marijuana is a low priority for the DOJ, and that its status as a Schedule I drug under the CSA, which is higher than fentanyl and methamphetamine, the addictive drugs fueling the opioid crisis, needs to be reassessed.²⁴ As President Biden explained:

As I often said during my campaign for President, no one should be in jail just for using or possessing marijuana. Sending people to prison for possessing marijuana has upended too many lives and incarcerated people for conduct that many states no longer prohibit... I am asking the Secretary of Health and Human Services and the Attorney General to initiate the administrative process to review expeditiously how marijuana is scheduled under federal law. Federal law currently classifies marijuana in Schedule I of the Controlled Substances Act, the classification meant for the most dangerous substances. This is the same schedule as for heroin and LSD, and even higher than the classification of fentanyl and methamphetamine – the drugs that are driving our overdose epidemic.

2. *The Joyce Amendment: Restriction on DOJ's Use of Funds*

Notwithstanding the changing enforcement directives at the DOJ, federal law currently prohibits federal prosecutors from using funds appropriated by Congress to prosecute individuals and businesses operating cannabis companies in compliance with state laws regulating medical use of marijuana.

The Joyce Amendment (previously known as Rohrabacher-Blumenauer Amendment and the Rohrabacher-Farr Amendment) is a provision in federal appropriations legislation that was first passed in December 2014, and has been renewed continuously each federal fiscal year since.²⁵ By its terms, the Amendment prohibits the Department of Justice from using federal funds to prevent

²³ "A Review of the President's Fiscal Year 2023 Funding Request for the U.S. Department of Justice," *United States Senate Committee on Appropriations* video, April 26, 2022, <https://www.appropriations.senate.gov/hearings/a-review-of-the-presidents-fiscal-year-2023-funding-request-for-the-us-department-of-justice>.

²⁴ "Statement from President Biden on Marijuana Reform, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/>

²⁵ "House Appropriations Committee Approves Amendment to Protect Legal State Marijuana Programs," NORML and the NORML Foundation, June 28, 2022, <https://norml.org/blog/2022/06/28/house-appropriations-committee-approves-amendment-to-protect-legal-state-marijuana-programs/>.

states “from implementing their own state laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”²⁶²⁷

The Rohrabacher-Blumenauer Amendment, as it was known at the time, was upheld in *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), where the Ninth Circuit held that the amendment was to be read as prohibiting the federal government from prosecuting individuals and businesses acting pursuant to state laws and regulations governing medical marijuana. The Ninth Circuit reasoned that such prosecution would effectively prevent the states from implementing their cannabis laws and regulations. As the court explained, “[b]y officially permitting certain conduct, state law provides for non-prosecution of individuals who engage in such conduct. If the federal government prosecutes such individuals, it has prevented the state from giving practical effect to its law.”²⁸ In two recent cases, the Ninth Circuit again addressed the issue of whether the provisions of the Joyce Amendment, recognized as a rider to a congressional appropriations bill, prohibits the prosecution of cannabis-related offenses in states that have legalized medicinal cannabis. The Court reiterated that the “rider covers only persons in total compliance with state law” and remanded the cases to the district courts for a factual determination as to whether the defendants’ activities were in strict compliance with applicable state laws regulating cannabis.²⁹

The Joyce Amendment was renewed on March 15, 2022, as part of the Consolidated Appropriations Act, Pub.L. 117–103.

B. The Growth of the State-Legal Cannabis Industry in the U.S.

The federal government’s hands’ off policy to state-legal cannabis activities has been the backdrop for state-legal cannabis becoming one of the fastest-growing, if not the fastest-growing, industries in the U.S.³⁰

In 1996, California became the first state to legalize marijuana for medical use when voters passed the Compassionate Use Act of 1996 (Proposition 215).³¹ Currently, thirty-seven states, the

²⁶ See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113235, § 538, 128 Stat 2130 (2014).

²⁷ The Joyce Amendment is explicitly limited to state medical cannabis activities and does not apply to adult use cannabis activities, regardless of whether those activities have been legalized under state law.

²⁸ *Id.* at 1176-77.

²⁹ See *United States v. Lynch*, 903 F.3d 1061, 1085 (9th Cir. Sept. 13, 2018); *United States v. Zucker*, No. 1530232, 2018 WL 3737036, at *2 (9th Cir. Aug. 7, 2018), *as amended on denial of reh’g* (Aug. 31, 2018) (non-precedential).

³⁰ Will Yakowicz, “Why Mainstream Businesses Are High On The Cannabis Industry,” *Forbes*, October 26, 2021, <https://www.forbes.com/sites/willyakowicz/2021/10/26/why-mainstream-businesses-are-high-on-the-cannabis-industry/?sh=7504bd30d2b0>.

³¹ The U.S. Supreme Court has ruled that, notwithstanding state law permitting the use of marijuana for medicinal purposes, the federal government has the authority to criminalize the production and use of homegrown marijuana pursuant to its inherent authority to regulate interstate commerce. See *Gonzales v. Raich*, 545 U.S. 1 (2005).

District of Columbia, and U.S. territories have legalized (or voted to legalize) marijuana for medical use, and, of those, nineteen states, the District of Columbia, and two territories have legalized (or voted to legalize) marijuana for adult use (or “recreational”) as well.³²

State legal cannabis is truly ubiquitous in the U.S. More than 70% of Americans live in states that have legalized cannabis for recreational or medical use.³³ Thousands of licenses to operate a cannabis business, including cultivation, processing, distribution, and dispensing licenses, have been issued at the state level, with the state of California issuing over 4,000 cannabis licenses in the last year alone.³⁴

The MJBiz Factbook, a study of the economic impact of the state-legal cannabis industry, projected that (a) sales from state-legal cannabis would exceed \$33 billion in 2022, and \$50 billion by 2026; (b) the state-legal cannabis industry has created approximately 520,000 jobs, which number is expected to grow to approximately 800,000 in 2026; and (c) the “American cannabis industry’s economic impact could near \$100 billion by end of 2022 and nearly \$158 billion by 2026.”³⁵

C. Nasdaq and NYSE Already List Companies with Material Cannabis-Related Interests.

A review of SEC filings since March, 2022 alone shows dozens of companies with cannabis-related operations, financial arrangements, or assets listed on Nasdaq and NYSE. While none of these companies is a cannabis operator in the Exchanges’ view, many of them are, or will be, transacting business with such cannabis operators. For example, Leafly (Nasdaq: LFLY), which views itself as “the world’s most trusted destination to discover cannabis products and order them from legal, licensed retailers,” facilitates the purchase and delivery of cannabis directly from its website by linking the orders of cannabis by consumers to the dispensaries that would deliver those products.³⁶ Through Leafly’s website consumers can shop for the very same cannabis products, *e.g.*, flower, edibles, vape cartridges, concentrates, and pre-rolled joints, that operators manufacture and sell.

³² “State Medical Cannabis Laws,” National Conference of State Legislatures, July 18, 2022, <https://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

³³ “Following the Smart Money into Recreational Cannabis,” Highway 33 Capital Advisory, November 10, 2020, <https://highway33.com/following-the-smart-money-into-recreational-cannabis/>.

³⁴ “California Department of Cannabis Control marks one year as state department,” Department of Cannabis Control, July 12, 2022, <https://cannabis.ca.gov/2022/07/california-department-of-cannabis-control-marks-one-year-as-state-department/>.

³⁵ “U.S. Cannabis Industry’s Total Economic Impact to Near \$158 Billion by 2026,” Business Wire, April 12, 2022, <https://www.businesswire.com/news/home/20220412006089/en/U.S.-Cannabis-Industry%E2%80%99s-Total-Economic-Impact-to-Near-158-Billion-by-2026>.

³⁶ “About,” Leafly, accessed July 26, 2022. <https://www.leafly.com/news/about>.

Akerna (Nasdaq: KERN) provides business software suites to cannabis operators, including seed-to-sale tracking, that become integral to their cannabis operations. As described on its website, “Akerna is an enterprise software company that has created a global technology ecosystem for cannabis.” It serves “the cannabis industry by providing compliance, data, payments, seed-to-sale, track-and-trace, and consulting to operators, governments, and brands.” According to it, “the cannabis economy runs on Akerna.”³⁷

WM Technology, Inc. (Nasdaq: MAPS) operates a listings marketplace with SaaS subscription offerings sold to retailers and brands in the U.S. state-legal and Canadian cannabis markets. Its “signature consumer-facing platform...provides consumers with information regarding cannabis products, including online ordering, local retailer and brand listings, product discovery, and consumer education on cannabis and its history, uses, and legal status.”³⁸

AFC Gamma (Nasdaq: AFCEG), Chicago Atlantic Real Estate Finance, Inc. (Nasdaq: REFI), and Suro Capital Corp. (Nasdaq: SSSS) are or own real estate investment trusts (“REITs”) that are the commercial real estate for cannabis operations. As its website notes, “Chicago Atlantic Real Estate Finance, Inc. is a commercial real estate finance company that manages a diversified portfolio of real estate credit investments primarily in the cannabis space and is actively investing across the value chain.”³⁹ It goes on to say:

Demand for financing in the cannabis market is expected to continue to rise due to recent and future state legalization of cannabis for recreational and medical use as well as increased consumer adoption, with both trends requiring significant capital expenditures by operators. At the same time, the federal prohibition on cannabis use and commercialization hampers certain commercial and financial activities, creating a limited competition environment for Chicago Atlantic. Combined with the Company and its sponsor’s leading cannabis lending platform, a growing portfolio with compelling risk-adjusted returns, a disciplined “credit-first” underwriting process, a track record of identifying market inefficiencies and the ability to redeploy capital quickly, this favorable demand environment positions Chicago Atlantic to become the lender of choice to leading cannabis industry operators.⁴⁰

In addition to these REITs, a number of special purpose acquisition companies (“SPACs”) whose focus is acquiring cannabis operators or cannabis ancillaries are listed on Nasdaq, including Tuatara Capital Acquisition Corp. (Nasdaq: TCAC), Clover Leaf Capital Corp. (Nasdaq: CLOE), Revelstone Capital Acquisition Corp. (Nasdaq: RCAC), Tuscan Holdings Corp. II (Nasdaq: THCA), Silver Spike Acquisition Corp II (Nasdaq: SPKB), and Relativity Acquisition Corp.

³⁷ “About Akerna,” Akerna, accessed July 26, 2019, <https://www.akerna.com>.

³⁸ “WM Technology,” WM Technology, accessed July 26, 2022, <https://weedmaps.com/corporate>.

³⁹ “Investor Relations, Corporate Profile,” Chicago Atlantic Real Estate Finance, accessed July 26, 2022, <https://investors.refi.reit/>.

⁴⁰ *Id.*

(RACY). The sponsors of at least two of these SPACs, Tuatara Capital Acquisition Corp. and Clover Leaf Capital Corp., own interests in U.S. cannabis operators. Similarly, a number of banks providing banking services to cannabis companies are listed on Nasdaq, including, Middlefield Banking Corp. (Nasdaq: MBCN),⁴¹ Parke Bancorp, Inc. (Nasdaq: PKBK),⁴² and Valley National Bancorp (Nasdaq: VLY).⁴³

On June 15, 2022, Tuatara Capital Acquisition Corporation, a Nasdaq-listed company, completed a business combination with Springbig, a formerly private company. Springbig is a leading provider of SaaS-based marketing solutions, consumer mobile app experiences, and omnichannel loyalty programs to the cannabis industry. Though Springbig is not physically plant-touching, it specifically markets itself as the leading cannabis marketing platform and directly provides its services to cannabis operators. In connection with the closing of the combination, Tuatara Capital Acquisition Corporation has re-listed under the Nasdaq ticker symbol “SBIG” and Springbig, now Springbig Holdings, Inc., has started to trade on Nasdaq.⁴⁴

A number of companies listed on Nasdaq cultivate, process, and distribute cannabis in Canada and other countries where adult-use and/or medical cannabis is legal, including: Aurora Cannabis Inc. (Nasdaq: ACB); IM Cannabis Corp. (Nasdaq: IMCC); Cronos Group Inc. (Nasdaq: CRON); HEXO (Nasdaq: HEXO); Intercure LTD (Nasdaq: INCR); Sundial Growers Inc. (Nasdaq: SNDL); and High Tide Inc. (Nasdaq: HITI).⁴⁵ And Global X’s Nasdaq listed Cannabis ETF (Nasdaq: POTV), which Global X describes⁴⁶ as follows, invests in a number of those cannabis operators and others that grow, process, and dispense cannabis in Canada:

The Global X Cannabis ETF (POTX) seeks to invest in companies across the cannabis industry. This includes companies *involved in the legal production, growth and distribution of cannabis* and industrial hemp, as well as those involved

⁴¹ “MB is Ohio Green,” The Middlefield Banking Company, accessed July 26, 2022. <https://www.middlefieldbank.bank/green>.

⁴² “Cannabis Banking,” ParkeBank, accessed July 26, 2021. <https://www.parkebank.com/business-banking/cannabis-banking/>.

⁴³ “Cannabis & Marijuana Banking,” Valley National Bank, accessed July 26, 2022. <https://www.valley.com/cannabis-banking>.

⁴⁴ “springbig Completes Business Combination with Tuatara Capital Acquisition Corporation, Becoming the Largest Publicly Traded Loyalty and Marketing Automation Platform in the Cannabis Industry,” springbig, June 15, 2022, <https://investors.springbig.com/news-releases/news-release-details/springbig-completes-business-combination-tuatara-capital>.

⁴⁵ Nasdaq’s listing of Canadian operators, where cannabis is legal demonstrates that the exchanges’ policies of not listing U.S. operators are driven purely by the concern of federal prosecution for aiding and abetting the CSA. However, given the explicit de-prioritization of state-legal cannabis activities for enforcement by the DOJ since 2013 and the concomitant growth and ubiquity of the cannabis industry in the U.S. demonstrate that the exchanges’ policies are out-of-step with the DOJ’s cannabis enforcement policies.

⁴⁶ “Reasons to Consider POTX,” Global X, accessed September 7, 2022, <https://www.globalxetfs.com/funds/potx/>.

in providing financial services to the cannabis industry, pharmaceutical applications of cannabis, cannabidiol (i.e., CBD), or other related uses including but not limited to extracts, derivatives or synthetic versions.

At least one Nasdaq-listed company, Canopy Growth Corp. (Nasdaq: CGC), that is producing and distributing cannabis products in Canada and other countries where cannabis is legal, and is producing and distributing hemp products in the U.S., acquired an option to buy the stock of a U.S. cannabis operator, Acreage Holdings, exercisable upon cannabis becoming federally legal in the U.S.⁴⁷ On October 24, 2022, Canopy announced the creation of a U.S. holding company, Canopy USA, to accelerate its entry into the U.S. cannabis market,⁴⁸ whereby Canopy USA will acquire Acreage, cannabis extract manufacturer Jetty, and cannabis edibles manufacturer Wana. Canopy Growth Corp. will not own direct interests in Acreage, Jetty, or Wana, but will own non-voting and non-participating shares in Canopy USA convertible to common shares. Nasdaq has apparently objected to this transaction based on its policy discussed herein.⁴⁹

Similarly, NYSE has listed a subsidiary of Scotts Miracle Gro (NYSE: SMG), The Hawthorne Collective, which, through RIV Capital, has invested more than \$150 million in a convertible debt transaction whereby Hawthorne acquired the option to own 100% of Etain, a New York licensed operator, upon federal legalization of cannabis in the U.S.⁵⁰ Thus, Scott's has effectively financed Etain's current cannabis operations for an ownership interest in Etain to be triggered in the future. Should federal legalization not occur by the maturity date of the loan, RIV Capital can ask for repayment of the loan instead of exercising the ownership option.⁵¹ Here, as with Nasdaq's listing of cannabis ETFs, NYSE does not appear concerned about cannabis qua cannabis, but rather the potential for a CSA or AML claim asserted against it by the DOJ arising out of transacting business with a cannabis entity. However, where Etain, RIV Capital, The Hawthorne Group, and Scotts, the entities with the actual cannabis interests, have not been the

⁴⁷ "Canopy Growth Announces Plan to Acquire Leading U.S. Multi-State Cannabis Operator, Acreage Holdings," Canopy Growth Corporation, April 18, 2019, <https://www.canopygrowth.com/investors/news-releases/canopy-growth-announces-plan-to-acquire-acreage-holdings/>.

⁴⁸ "Canopy Growth to Fast Track Entry into the U.S. Cannabis Market," accessed October 28, 2022, <https://www.newswire.ca/news-releases/canopy-growth-to-fast-track-entry-into-the-u-s-cannabis-market-847841024.html>

⁴⁹ "Nasdaq Objects to Canopy Plan to Consolidate US Revenue, accessed November 2, 2022, <https://mjbizdaily.com/nasdaq-objects-to-canopy-plan-to-consolidate-us-cannabis-revenue/>

⁵⁰ Jeff Smith, "Scotts-backed RIV Capital buys New York marijuana operator Etain for \$247M," MJBiz Daily, March 30, 2022, <https://mjbizdaily.com/scotts-backed-riv-capital-buys-new-york-cannabis-operator-etain-for-247-million/#:~:text=Finance-,Scotts%20backed%20RIV%20Capital%20buys%20New%20York,operator%20Etain%20for%20%2024247M&text=A%20Canadian%20investment%20firm%20bankrolled,Etain%20Health%20for%20%2024247%20million.>

⁵¹ Convertible Promissory Note Purchase Agreement by and between RIV Capital Inc. and the Hawthorne Collective, March 30, 2022, <https://www.sedar.com/GetFile.do?lang=EN&docClass=14&issuerNo=00044114&issuerType=03&projectNo=03366417&docId=5175735>.

targets of such a claim, the likelihood of such a claim being asserted against NYSE nonetheless seems exceedingly low.

Innovative Industrial Properties Inc. (NYSE: IIPR) is a REIT that invests in cannabis operations in the U.S. Constellation Brands, Inc. (NYSE: STZ) owns warrants in Canopy Growth Corp, which, as discussed above, has various cannabis-related operations and interests in the U.S. and other countries. Molson Coors Beverage Co. (NYSE: TAP) and Boston Beer Co. Inc. (NYSE: SAM) are or will be producing and distributing cannabis beverages in Canada through affiliated companies,⁵² and Turning Point Brands, Inc. (NYSE: TPB), a tobacco company, has made a significant investment in a popular cannabis brand, Old Pal, to fund that brand's expansion in states that have legalized adult-use cannabis.⁵³

Significantly, like Nasdaq, NYSE Arca has listed cannabis ETFs. For example, AdvisorShares "Pure US Cannabis ETF" (NYSE: MSOS),⁵⁴ touts itself as providing "the freedom to invest in U.S. Cannabis," and was the first ETF whereby investors could invest in U.S. cannabis operators. U.S. News & World Report recently described MSOS⁵⁵ as follows:

Investors looking to invest in U.S.-listed cannabis stocks can buy a portfolio of them via MSOS. MSOS is the most popular marijuana ETF listed on U.S. exchanges, boasting \$653 million in assets under management. Fifty percent of the ETF is held in mid-cap companies, with 40% in small caps and 9% in microcaps. MSOS doesn't hold stocks directly. Rather, the ETF opts for synthetic exposure via a total return swap. A swap is a derivative contract where a party exchanges cash collateral with another for the returns (positive or negative) of an asset, like a particular stock. MSOS uses swaps because federal and custodial banks restrict ETFs from investing in U.S. cannabis companies directly. The ETF has a net expense ratio of 0.73%.

By listing cannabis companies that facilitate investment in U.S. cannabis operators NYSE and Nasdaq are already effectively listing operators. Thus, their decision to not directly list U.S. operators is not only out of step with the DOJ's enforcement policy, but it is also inconsistent with their own listing practices.

⁵² Will Yakowicz, "Boston Beer Co. Launches TeaPot, Cannabis-Infused Iced Tea," May 23, 2022, <https://www.forbes.com/sites/willyakowicz/2022/05/23/boston-beer-co-launches-teapot-cannabis-infused-iced-tea/?sh=42a72aaa426b>.

⁵³ "Turning Point Brands Invests \$8 Million in Lifestyle Cannabis Brand Old Pal through Convertible Note," Turning Point Brands, July 22, 2021, <https://www.turningpointbrands.com/investor-relations/news/news-details/2021/Turning-Point-Brands-Invests-8-Million-in-Lifestyle-Cannabis-Brand-Old-Pal-Through-Convertible-Note/default.aspx>.

⁵⁴ AdvisorShares Pure US Cannabis ETF, accessed September 9, 2022, <https://advisorshares.com/etfs/msos/>.

⁵⁵ "7 Best Marijuana ETFs to Buy in 2022," last accessed September 9, 2022, <https://money.usnews.com/investing/slideshows/best-marijuana-etfs?slide=3>

D. Operators Function in Environments of Compliance and Transparency More so than Listed Companies in Other Industries.

The cannabis industry is heavily regulated and participants must acquire licenses from states and sometimes local jurisdictions. In order to obtain such licenses, operators must show that they have in place processes and procedures that ensure the safe and state-legal growing, processing, and distribution of cannabis. These include procedures related to the security of their facilities and the use of track and trace software in all transactions. Additionally officers, directors, managers and significant equity holders must undergo background checks (similar to those for officers and directors of financial institutions) and be approved by the relevant cannabis regulatory authority. Each of these operators must renew these licenses, typically on an annual basis. Further, many states have enacted statutes allowing a governmental authority to inspect the records and premises of a cannabis operator without notice. For example, Oregon's provides that "the [Oregon Liquor and Cannabis Commission] may at any time make an examination of a premises for which a license has been issued" for purposes of determining that the business is compliant with the statute.⁵⁶ Few other industries have such significant regulation and oversight.

As a result of these regulations and the federal illegality of cannabis, licensed operators in the cannabis industry are under a constant microscope to ensure compliance with the applicable state and local cannabis laws, and consequently, operators are well-positioned to manage the reporting requirements related to public trading.

E. Listing Operators Would Support The Exchanges' Purpose Initiatives.

Nasdaq has also developed policies and initiatives intended to promote diversity and inclusion amongst issuers.⁵⁷ These policies and initiatives align closely with the goals and purposes of many state level cannabis programs and would help create an important avenue for eventual listings. The aim of Nasdaq's Purpose Initiative is to "support Black, minority, and female entrepreneurs to strengthen, scale, and bring their ventures to market."⁵⁸ Its "Total Market" program seeks to "bolster liquidity for smaller publicly traded companies."⁵⁹ And Nasdaq's "Entrepreneur Center," is an educational program with a mission to "improve inclusion, access, and knowledge in entrepreneurship."⁶⁰ These policies indicate that Nasdaq views trading on its exchange as a way to support emerging markets, entrepreneurs and minority-owned businesses.

⁵⁶ OR Rev Stat § 475C.157 (2021).

⁵⁷ "Nasdaq, Listed Companies Take Action to Advance Equality," Nasdaq, Inc., June 19, 2020. <https://www.nasdaq.com/articles/nasdaq-listed-companies-take-action-to-advance-equality-2020-06-19>.

⁵⁸ "Nasdaq Launches Purpose Initiative to Advance Inclusive Growth and Prosperity," Nasdaq, Inc., September 21, 2020, <https://ir.nasdaq.com/news-releases/news-release-details/nasdaq-launches-purpose-initiative-advance-inclusive-growth-and>.

⁵⁹ "Total Markets," Nasdaq, Inc., accessed July 26, 2022, <https://www.nasdaq.com/TotalMarkets>.

⁶⁰ "About Us," Nasdaq Entrepreneurial Center, accessed July 26, 2022, <https://thecenter.nasdaq.org/>.

Nasdaq would be promoting its own such objectives in a growing industry by listing cannabis operators.

Social equity is a critical aspect of the emerging, fast-growing cannabis industry and an area in which business and laws need to do more. Many states that have legalized cannabis for adult-use and/or medical purposes have included in their cannabis legislation provisions intended to encourage the involvement of women and minorities in the ownership of operators and as operator employees. For example, in New York, the Office of Cannabis Management has the goal of issuing 50% of adult-use licenses to social and economic equity applicants. Social and economic equity applicants include individuals who have lived in communities disproportionately impacted by the War on Drugs and other underrepresented groups including minority and women owned businesses, distressed farmers, and service-disabled veteran-owned businesses.⁶¹ In Illinois, social equity applicants receive up to 25% of the total possible points for scoring retail license applications and up to 20% for scoring grower, processor, and transporter licenses.⁶² In Massachusetts, individuals who qualify for Massachusetts' social equity program and want to apply for a business license receive certain benefits, such as assistance in creating a business plan, management training and reduced licensing fees. Those who qualify for the state's program but don't want to own a business can instead get training for management or entry-level positions in the industry.⁶³

Given that the Exchanges and the cannabis industry have an interest in promoting and supporting minority and women owned businesses, from the standpoint of social equity, there is alignment in the listing of operators by the Exchanges.

F. Listing Operators is in the Public's Interest.

Due to the federal prohibition on marijuana, the cannabis industry has been largely foreclosed from traditional banking and financial services.⁶⁴ Most commercial and investment banks are unwilling to offer their services, including lending, to cannabis industry participants such as operators. Consequently, cannabis industry participants, including operators, have been forced to accept disproportionately high interest rates and other onerous terms to obtain the same

⁶¹ "What is in the Law Social and Economic Equity," New York State of Opportunity, Office of Cannabis Management, accessed July 26, 2022, https://cannabis.ny.gov/system/files/documents/2022/02/cannabis-management-fact-sheet-social-equity_0_0.pdf.

⁶² Jenel Stelton-Holtmeier, "Women & Minorities in the Cannabis Industry," MJBizDaily, October 4, 2021, <https://mjbizdaily.com/wp-content/uploads/2021/10/MJBizDaily-Women-and-Minorities-in-Cannabis-Report.pdf>.

⁶³ Eli McVey, "Women & Minorities in the Cannabis Industry," MJBizDaily, 2019, https://mjbizdaily.com/wp-content/uploads/2021/09/Women_and_Minorities_in_Cannabis_MJBizDaily.pdf?utm_medium=email&utm_source=&utm_campaign=MJD_202108_Women_and_Minorities_Confirmation.

⁶⁴ "American Bankers Association Letter to Congress in Support of the SAFE Banking Act 2021," March 17, 2021, <https://www.aba.com/advocacy/policy-analysis/support-safe-banking-act-2021>.

types of capital that businesses in virtually every other industry need and obtain to get off the ground, maintain operations, and grow.⁶⁵

Given the decision by Nasdaq and NYSE to forego listing operators and the limited access to traditional business financing, a number of the larger operators in the U.S., referred to in the industry as “multi-state operators” or “MSOs” because they have permits to operate in a number of different states, have sought (and been accepted for) listing on Canadian stock exchanges, such as the Canadian Securities Exchange, to raise capital from those public markets. As set forth in the attached chart, a comparison of the daily average trading volume of the five largest U.S. operators by market cap on the OTCQX and Canadian marketplaces versus the daily average trading volume of the five largest Canadian operators by market cap listed on Nasdaq demonstrates that the operators listed on Nasdaq enjoy greater daily trading volume than the operators listed solely on the Canadian exchanges.

Such higher daily trading volume for the operators listed on Nasdaq suggests the demand for trading of operators on Nasdaq and NYSE is strong,⁶⁶ and that U.S. operators listed on the Exchanges would facilitate their capital raising activities through the additional liquidity offered to investors as a result of the U.S. listing. While such capital would certainly benefit the listed operators, their stronger financial performance would potentially boost the U.S. cannabis market overall, and, correspondingly, as reflected herein, the U.S. economy would be expected to benefit from a stronger U.S. cannabis market. In addition, well-capitalized operators and a stronger cannabis market would make the likelihood of the U.S. cannabis industry achieving its social equity objectives greater than in the current environment, where operators and the industry are perpetually underfunded due to the dearth of banking and financing resulting from the federal prohibition on marijuana.

III. Conclusion

The time has come for Nasdaq and NYSE to list cannabis operators. Even though they involve material cannabis assets and financial entanglements with cannabis, none of the listing and trading described herein has resulted in Nasdaq or NYSE being the subject of action by the federal authorities for direct or indirect violations of the CSA or money-laundering statutes – nor, should they expect to be the subject of such enforcement in light of the DOJ’s decade-long policy of deferring to the states the enforcement of their own cannabis laws, which was recently affirmed by the U.S. Attorney General and President Biden’s affirmative steps toward decriminalizing marijuana. Having listed companies, such as cannabis ETFs, Leafly, Scott’s Hawthorne, and

⁶⁵ “Why weed companies can’t make any money,” Politico, September 4, 2022, <https://www.politico.com/news/2022/09/04/weed-companies-cant-make-money-00054541>.

⁶⁶ Such demand was apparent on October 6, 2022, as the volume of trading and prices of operator stock on Nasdaq, including through ETFs, rose sharply immediately upon the announcement by President Biden of the federal government’s policy shift toward decriminalization. See “Why this cannabis ETF surged 34% today,” October 6, 2022, <https://www.benzinga.com/markets/cannabis/22/10/29177393/why-this-cannabis-etf-surged-34-today>; “Pot stocks set to extend gains as Biden comments revive legalization hopes,” October 7, 2022, https://seekingalpha.com/news/3889575-pot-stocks-set-to-extend-gains-as-biden-calls-for-marijuana-review?utm_source=feed_news_all&utm_medium=referral

cannabis REIT's, whose cannabis-related assets and interests are so material, the Exchanges have already crossed the rubicon and are arguably effectively listing operators without reprisal from the DOJ.

Moreover, cannabis operators are particularly compliant and transparent due to the highly regulated nature of the cannabis industry, likely more so than companies already listed on the Exchanges. Furthermore, given the possibility that listing operators might support the promotion of minority and women owned businesses, such listing would support the Exchanges' purpose initiatives and the cannabis industry's social equity objectives. Lastly, boosting the growth of the cannabis industry with capital from the public markets would have an overall positive impact on the U.S. economy.

For all of the above reasons, Nasdaq and NYSE should list cannabis operators.

Comparison of Average Daily Trading Volume (“ADV”) of U.S. Operators Listed on Canadian Exchanges and Canadian Operators Listed on Nasdaq⁶⁷

Symbol	Name	MKT Cap in USD as of Oct 3, 2022	Jan to Sep 30, 2022 ADV_Canadian MKTS	Jan to Sep 30, 2022 ADV_US MKTS	US Symbol	US Market
CURA	Curaleaf Holdings, Inc.	\$3.59B	724,422	498,217	CURLF	OTCQX
CL	Cresco Labs Inc.	\$1.14B	492,383	498,956	CRLBF	OTCQX
TRUL	Trulieve Cannabis Corp.	\$1.61B	367,339	319,125	TCNNF	OTCQX
GTII	Green Thumb Industries Inc.	\$2.39B	443,455	408,633	GTBIF	OTCQX
VRNO	Verano Holdings Corp.	\$1.45B	579,791	397,679	VRNOF	OTCQX
Symbol	Name	MKT Cap in USD as of Oct 3, 2022	Jan to Sep 30, 2022 ADV_Canadian MKS	Jan to Sep 30, 2022 ADV_US MKS	US Symbol	US Market
WEED	Canopy Growth Corporation	\$1.40B	4,540,201	8,717,404	CGC	Nasdaq Global Select
TLRY	Tilray Brands Inc.	\$1.76B	3,194,775	27,614,805	TLRY	Nasdaq Global Select
ACB	Aurora Cannabis Inc.	\$0.37B	3,977,326	9,021,319	ACB	Nasdaq Global Select
CRON	Cronos Group Inc.	\$1.10B	655,772	2,096,519	CRON	Nasdaq Global Market
SNDL	SNDL Inc.	\$0.52B	-	64,568,080	SNDL	Nasdaq Capital Market

⁶⁷ Compiled from information pulled from the CSE, TMX Group, Nasdaq Canada, Tradelogiq, CBOE Canada, Nasdaq (US).