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THE LITTLE-KNOWN - AND CRITICAL - EXCEPTION TO FEDERAL PARAPHERNALIA LAWS



In June of 2017, the *Boulder Daily Camera* reported¹ on the case of Stashlogix, a manufacturer of lockable storage containers, whose shipment of products was seized by U.S. Customs and Border Protection (CBP). That seizure followed an earlier warning letter from CBP, which advised the company that the containers could not be imported.

The Washington Post provided² excerpts from the correspondence between CBP and Stashlogix after the seizure:

“This is to officially notify you that Customs and Border Protection seized the property described below at Los Angeles International Airport on April 28, 2017,” the letter read. The agency had seized 1,000 of Stone’s storage bags, valued at \$12,000. CBP said the bags were subject to forfeiture because “it is unlawful for any person to import drug paraphernalia.”

In a separate letter explaining the ruling, CBP acknowledged that “standing alone, the Stashlogix storage case can be viewed as a multi-purpose storage case with no association with or to controlled substances.” However, it noted that the storage cases come with an odor-absorbing carbon insert that could be used to conceal the smell of marijuana.

A representative of CBP provided further insight into the thinking within the agency³:

Jaime Ruiz, a public affairs agent with the CBP, said that because it remains illegal under federal law, importing any drug or associated products into the country is prohibited, even if it comes through a port in a state where pot is allowed.

When it comes to drugs and related products, he said, “we’re enforcing (Drug Enforcement Administration) guidance. So if it looks like drug paraphernalia, they’ll stop and inspect it and make the best determination.”

In asserting that this activity is unlawful, the CBP is basing that assertion on the federal paraphernalia statute (21 U.S.C. 863), which provides⁴:

It is unlawful for any person

- (1) to sell or offer for sale drug paraphernalia;
- (2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or
- (3) to import or export drug paraphernalia.
(21 U.S.C. 863(a))

Drug paraphernalia is defined as

“any equipment, product, or material of any kind which is 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, possession of which is unlawful under this subchapter.” (21 U.S.C. 863(d))

So it seems that in this case, CBP seized these lockable storage containers because they believe they were intended to “conceal” cannabis. This is quite a position for CBP to take, since the containers – whether they were for cannabis, tobacco, or prescription drugs – seem to have a primary purpose of keeping substances out of the hands of kids. If these products were not “concealed,” they might be accidentally ingested by small children.

But there is a more significant issue here that both CBP and the media did not address. What they ignored is a significant exception to the federal paraphernalia laws. At the end of the paraphernalia statute is this provision (21 U.S.C. § 863(f)):

(f) Exemptions. This section shall not apply to—

(1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items

As with any aspect of the law, there can be differences of opinion over how a statute should be interpreted. And the federal government may have its own interpretation of the exemption to the paraphernalia statute. The plain language, however, is pretty straightforward. If you are authorized under state law to manufacture, possess, or distribute certain items, then you are exempt from the prohibitions in that section.

Note that the exemption states, “*This section shall not apply...*” It does not say, “Prohibitions on manufacturing, possession, or distributions shall not apply...” It says, “This section...” And what is included in the section? The prohibition on importing paraphernalia. The plain language of the statute, therefore, suggests that the prohibition on importing paraphernalia does not apply to an individual who is authorized to manufacture, possess, or distribute paraphernalia under state law.

The federal paraphernalia exemption is so significant that it was used as a model for a bill introduced by Rep. Dana Rohrabacher (R-CA), which has 24 co-sponsors (12 GOP and 12 Dems) as of this writing.⁵ The Respect State Marijuana Laws Act of 2017 adds one sentence at the end of the Controlled Substance Act:

Part G of the Controlled Substances Act (21 U.S.C. 801 et seq.) is amended by adding at the end the following:

“SEC. 710. RULE REGARDING APPLICATION TO MARIHUANA.

“Notwithstanding any other provision of law, the provisions of this subchapter related to marihuana shall not apply to any person acting in compliance with State laws relating to the production, possession, distribution, dispensation, administration, or delivery of marihuana.”

The drafters of cannabis-related ballot initiatives have been aware of the paraphernalia exemption for quite some time and have intentionally addressed paraphernalia – often called “marijuana accessories” – in the measures so that the federal exemption would apply.

In 2012, Colorado’s Amendment 64 provided that the following acts would no longer be an offense under Colorado law for persons twenty-one years of age or older: “manufacture, possession, or purchase of marijuana accessories or the sale of marijuana accessories to a person who is twenty-one years of age or older.”

California’s Proposition 64 in 2016 took the additional step of expressly connecting state law and the federal paraphernalia exemption, by providing⁶:

11362.1.

(a) Subject to Sections 11362.2, 11362.3, 11362.4, and 11362.45, but notwithstanding any other provision of law, it shall be lawful under state and local law, and shall not be a violation of state or local law, for persons 21 years of age or older to:

[...]

(5) Possess, transport, purchase, obtain, use, manufacture, or give away marijuana accessories to persons 21 years of age or older without any compensation whatsoever.

(b) Paragraph (5) of subdivision (a) is intended to meet the requirements of subdivision (f) of Section 863 of Title 21 of the United States Code (21 U.S.C. § 863(f)) by authorizing, under state law, any person in compliance with this section to manufacture, possess, or distribute marijuana accessories.

The cannabis industry faces a host of difficulties stemming from the disparity between state and federal laws. The challenges and risks associated with these differences have become an accepted cost of doing business. But where federal law provides a clear exemption for certain state-legal activity, the federal government should ensure that its activities are consistent with the law. In this case, it seems far from clear that they are.

FOOTNOTES

1. “Boulder’s Stashlogix, maker of pot carrying cases, under fire as feds confiscate product,” *Boulder Daily Camera*, June 8, 2017.
2. “The feds are blocking a product aimed at keeping drugs out of kids’ hands,” *The Washington Post* Wonkblog, June 12, 2017.
3. *Ibid.* 1.
4. <https://www.law.cornell.edu/uscode/text/21/863>
5. <https://www.congress.gov/bill/115th-congress/house-bill/975/cosponsors>
6. [https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20\(Marijuana\)_1.pdf](https://www.oag.ca.gov/system/files/initiatives/pdfs/15-0103%20(Marijuana)_1.pdf)

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