Congressional Research Service
Informing the legislative debate since 1914

The Application of Internal Revenue Code Section 280E to Marijuana Businesses: Selected Legal Issues

Updated February 6, 2026

Congressional Research Service
https://crsreports.congress.gov
R46709

CRS REPORT
Prepared for Members and
Committees of Congress

Congressional Research Service
Informing the legislative debate since 1914

The Application of Internal Revenue Code Section 280E to Marijuana Businesses: Selected Legal Issues

R46709

February 6, 2026

Milan N. Ball
Legislative Attorney

For a copy of the full report, please call 7-5700 or visit www.crs.gov.

SUMMARY

The marijuana industry has grown as an increasing number of states have relaxed state law prohibitions on the use of marijuana for medical and recreational purposes. Under federal law, marijuana remains classified as a Schedule I controlled substance under the Controlled Substances Act (CSA), meaning that the production, distribution, and possession of marijuana remains illegal, except in the narrow context of federally approved research studies. Regardless of marijuana's status under federal or state law, marijuana businesses are subject to the federal income tax.

The Schedule I status of marijuana means that marijuana businesses are treated differently from many other businesses for tax purposes. Internal Revenue Code (IRC) Section 280E (Section 280E) denies deductions and credits for amounts paid or incurred in carrying on the trade or business of trafficking in controlled substances (within the meaning of Schedules I and II of the CSA) in violation of federal *or* state law. Consistent with marijuana's classification as a Schedule I controlled substance, Section 280E disallows taxpayers from taking tax deductions and claiming tax credits attributable to marijuana businesses.

Nonetheless, for reasons related to constitutional concerns raised at the time of Section 280E's enactment regarding the scope of Congress's Sixteenth Amendment power to tax "income," businesses subject to Section 280E may offset gross receipts by the cost of goods sold when determining their gross income. Outside this general convention, there is little tax guidance concerning the application of Section 280E. Marijuana businesses have generally been unsuccessful in challenging the Internal Revenue Service's (IRS's) application of Section 280E and likewise have not succeeded in their attempts to challenge Section 280E on constitutional grounds.

Congress has broad authority to alter the tax treatment of marijuana businesses. The legislative history of Section 280E indicates that Congress enacted the provision to codify a sharply defined public policy against drug dealing. Recent legislative and administrative proposals aim to relax federal restrictions on marijuana or to mitigate the disparity between federal and state marijuana regulation. Many of these proposals would alter the tax treatment of marijuana businesses by rescheduling or descheduling marijuana under the CSA or by making marijuana-specific exceptions. Under these proposals, Section 280E would no longer prohibit marijuana businesses from taking deductions and credits.

Contents

Introduction 1
How are marijuana business taxpayers treated differently than business taxpayers engaged in activities that do not violate federal law? 2
How does Section 280E work? 3
What prompted the enactment of Section 280E? 7
Does Section 280E apply to marijuana businesses in states where marijuana is legal under state law? 9
Does Section 280E violate the Eighth Amendment's Excessive Fines Clause? 10
How would proposals alter taxes on marijuana businesses? 12

Contacts

Author Information 13

Introduction

Most states, as well as the District of Columbia, have enacted laws relaxing in some capacity criminal prohibitions on the use of marijuana,[1] from qualified medical use to recreational use.[2] A marijuana industry source reported $23.9 billion of "U.S. adult use cannabis" sales and $7.6 billion of "U.S. medical cannabis sales" in 2025; the source projected total U.S. cannabis sales will reach $39.1 billion by 2029.[3] While more and more states have allowed marijuana businesses to operate legally under state law, the federal Controlled Substances Act (CSA) continues to classify marijuana as a Schedule I controlled substance.[4] It is a federal crime to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense" Schedule I controlled substances outside the context of federally approved scientific studies.[5] As a result of this classification, Internal Revenue Code (IRC) Section 280E (Section 280E) prohibits marijuana businesses from taking tax deductions and claiming tax credits.[6]

There is limited Internal Revenue Service (IRS) guidance on the application of Section 280E.[7] A 2020 Treasury Inspector General for Tax Administration (TIGTA) report that looked at marijuana businesses in California, Oregon, and Washington concluded that marijuana businesses in those

[1] For the purposes of this report, the term "marijuana" is used as it is defined in Section 802(16) of the Controlled Substances Act (CSA), 21 U.S.C. Sections 801–904. Hemp and marijuana are both varieties of the single plant species, Cannabis sativa L. Hemp is defined as "the plant Cannabis sativa L. and any part of that plant . . . with a delta-9 tetrahydrocannabinol [(THC)] concentration of not more than 0.3 percent on a dry weight basis," and is not a controlled substance. 7 U.S.C. § 1639o. In 2025, Division B of the Continuing Appropriations, Agriculture, Legislative Branch, Military Construction and Veterans Affairs, and Extensions Act amended the definition of hemp to "the plant Cannabis sativa L. and any part of that plant . . . with a *total tetrahydrocannabinols [(THC)] concentration* (including tetrahydrocannabinolic acid) of not more than 0.3 percent on a dry weight basis." Pub. Law No. 119-37, § 781, 139 Stat. 495, 558 (emphasis added). The new definition will take effect on November 12, 2026. *Id.* Cannabidiol (CBD) products containing less than 0.3% THC are not treated as a controlled substance. *See* 21 U.S.C. § 802(16)(B)(i). For a discussion of the different strains of the single plant species Cannabis sativa L. and their classifications under federal law, see CRS Insight IN12620, *Change to Federal Definition of Hemp and Implications for Federal Enforcement*, by Lisa N. Sacco, Hassan Z. Sheikh, and Zachary T. Neuhofer (2025); CRS Legal Sidebar LSB11381, *Changes to the Federal Definition of Hemp: Legal Considerations Under the Controlled Substances Act*, by Joanna R. Lampe (2025); CRS Legal Sidebar LSB10482, *State Marijuana "Legalization" and Federal Drug Law: A Brief Overview for Congress*, by Joanna R. Lampe (2024); and CRS Report R44742, *Defining Hemp: A Fact Sheet*, by Renée Johnson (2019).

[2] U.S. DEP'T OF TREAS., TREAS. INSPECTOR GEN. FOR TAX ADMIN., 2020-30-017, THE GROWTH OF THE MARIJUANA INDUSTRY WARRANTS INCREASED TAX COMPLIANCE EFFORTS AND ADDITIONAL GUIDANCE 1–2 (2020) [hereinafter GROWTH OF THE MARIJUANA INDUSTRY], https://www.oversight.gov/sites/default/files/documents/reports/2020-04/202030017fr.pdf [https://perma.cc/HZC2-6GSJ]; *see* CRS Report R44782, *The Evolution of Marijuana as a Controlled Substance and the Federal-State Policy Gap*, coordinated by Lisa N. Sacco (2022).

[3] Sebastian Krawiec, *2025 State of the Cannabis Industry: Sales Trends and Forecasts*, CANNABIS SCI. & TECH. (Dec. 23, 2025), https://www.cannabisciencetech.com/view/2025-state-of-the-cannabis-industry-sales-trends-and-forecasts [https://perma.cc/Y35X-S75L]; *see* GROWTH OF THE MARIJUANA INDUSTRY 7; *see* U.S. CENSUS BUREAU, U.S. DEP'T OF COM., CANNABIS EXCISE SALES TAX COLLECTIONS (June 12, 2025), https://www.census.gov/data/experimental-data-products/cannabis-excise-sales-tax-collections.html [https://perma.cc/6DPJ-6RU6] (on file with the author) (reporting "experimental data" showing that 29 states and Washington, D.C., reported cannabis excise sales tax collections of approximately $2.5 billion in the first three quarters of 2025 and 28 states and Washington, D.C., reported cannabis excise sales tax collections of approximately $3.25 billion in 2024).

[4] 21 U.S.C. § 812(c).

[5] *Id.* § 841; *see id.* §§ 841–865; CRS Report R45948, *The Controlled Substances Act (CSA): A Legal Overview for the 119th Congress*, by Joanna R. Lampe (2025).

[6] 26 U.S.C. § 280E.

[7] GROWTH OF THE MARIJUANA INDUSTRY 3, 13. The IRS has issued unpublished subregulatory guidance directed at the marijuana industry, in the form of a short list of frequently asked questions. I.R.S., CANNABIS INDUSTRY FREQUENTLY ASKED QUESTIONS (Apr. 25, 2025), https://www.irs.gov/businesses/small-businesses-self-employed/cannabis-industry-frequently-asked-questions [https://perma.cc/P9K8-6383].

states have a high rate of noncompliance with Section 280E.[8] The TIGTA report also explained that, "[a]ccording to the IRS, there is no easy method to identify marijuana businesses based on tax return filing information."[9] TIGTA states, "Additional guidance in the [marijuana] industry is critical to improve the compliance rate with I.R.C. § 280E."[10]

This report addresses selected legal questions pertaining to the application of Section 280E to marijuana businesses.

How are marijuana business taxpayers treated differently than business taxpayers engaged in activities that do not violate federal law?

Like non-marijuana businesses, marijuana businesses are subject to tax on all of their income.[11] Under federal law, *all* income is taxable, including income from unlawful activities.[12] In contrast, not all expenses are deductible from a taxpayer's gross income.[13] The Supreme Court has explained that tax deductions and tax credits are matters of "legislative grace."[14] Taxpayers conducting lawful activities may deduct "ordinary and necessary" trade or business expenses

[8] GROWTH OF THE MARIJUANA INDUSTRY 10.

[9] *Id.*

[10] *Id.* at 13.

[11] *See* U.S. CONST. amend. XVI; 26 U.S.C. § 61(a); Alpenglow Botanicals, LLC v. United States, 894 F.3d 1187, 1199 (10th Cir. 2018), *cert. denied*, 588 U.S. 907 (2019).

[12] U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."); 26 U.S.C. § 61(a) ("Except as otherwise provided in this subtitle, gross income means all income from whatever source derived . . . ."); United States v. Sullivan, 274 U.S. 259, 263 (1927) (ruling that there was no "reason why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay."); Wood v. United States, 863 F.2d 417, 419 (5th Cir. 1989) (ruling proceeds from illegal activities are taxable even when they are forfeited to the government); *see* James v. United States, 366 U.S. 213, 218 (1961) ("It had been a well-established principle . . . that unlawful, as well as lawful, gains are comprehended within the term 'gross income.' Section II B of the Income Tax Act of 1913 provided that 'the net income of a taxable person shall include gains, profits, and income . . . from . . . the transaction of any *lawful* business carried on for gain or profit, or gains or profits and income derived from any source whatever . . . .' When the statute was amended in 1916, the one word 'lawful' was omitted. This revealed, we think, the obvious intent of that Congress to tax income derived from both legal and illegal sources, to remove the incongruity of having the gains of the honest laborer taxed and the gains of the dishonest immune." (citations omitted)); Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955) ("Here we have instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion. The mere fact that the payments were extracted from the wrongdoers as punishment for unlawful conduct cannot detract from their character as taxable income to the recipients."); *see generally* Boris I. Bittker, *Taxing Income from Unlawful Activities*, 25 CASE W. RES. L. REV. 130 (1974).

[13] 26 U.S.C. § 261 ("In computing taxable income no deduction shall in any case be allowed in respect of the items specified in this part," covering IRC Sections 261–280H.); Alternative Health Care Advocates v. Comm'r, 151 T.C. 225, 236 (2018) (" '[T]his part' includes section 280E, Expenditures in Connection With the Illegal Sale of Drugs." (alteration in original) (citing Californians Helping to Alleviate Med. Problems, Inc. v. Comm'r, 128 T.C. 173, 180 (2007)).

[14] INDOPCO, Inc. v. Comm'r, 503 U.S. 79, 84 (1992) ("[T]his Court has noted the 'familiar rule' that 'an income tax deduction is a matter of legislative grace and that the burden of clearly showing the right to the claimed deduction is on the taxpayer.' " (quoting Interstate Transit Lines v. Comm'r, 319 U.S. 590, 593 (1943)); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934) ("Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed."); Commodore Mining Co. v. Comm'r, 111 F.2d 131, 133 (10th Cir. 1940) ("The authority of Congress to discontinue the right to such deductions is not open to doubt. Congress has unquestioned power to condition, limit, or deny deductions from gross income in arriving at the net which is to be taxed." (citing *Helvering*, 292 U.S. 371)).

when computing their taxable income.[15] Taxpayers may claim tax credits to the extent permitted by statute.[16]

Section 280E denies tax deductions and tax credits attributable to the trade or business of trafficking in CSA Schedule I or II controlled substances where the trafficking is "prohibited by Federal law or the law of any State in which such trade or business is conducted."[17] As discussed *supra*, under the CSA, marijuana is a Schedule I controlled substance, and it is a federal crime to manufacture or dispense, or possess with the intent to manufacture or dispense, marijuana outside the context of federally approved scientific studies.[18] Accordingly, Section 280E prohibits marijuana businesses from deducting expenses and claiming tax credits.

How does Section 280E work?

Section 280E prohibits a marijuana business from taking deductions and claiming credits on any amounts paid or incurred in trafficking marijuana.[19] Section 280E does not define "trafficking." That said, courts have interpreted the term "trafficking," in the context of Section 280E, to mean "engaging in a commercial activity—that is, to buy and sell regularly."[20]

---

[15] 26 U.S.C. § 162(a) ("There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ."); Welch v. Helvering, 290 U.S. 111, 113–14 (1933) (explaining an expense is "necessary" if it is "appropriate and helpful" for the development of the taxpayer's trade or business and "ordinary" if it is "common and accepted" in the taxpayer's line of trade or business); *Alpenglow Botanicals*, 894 F.3d at 1200 ("The Supreme Court has defined 'ordinary and necessary expenses' as those expenses that are '"appropriate and helpful" to "the development of the (taxpayer's) business,"' Colo. Springs Nat'l Bank v. United States, 505 F.2d 1185, 1191 (10th Cir. 1974) (quoting Comm'r v. Tellier, 383 U.S. 687, 689 (1966)), and 'normal[ ] in the particular business,' *id.* at 1193 (quoting Deputy v. du Pont, 308 U.S. 488, 496 (1940))." (alteration in original)).

[16] Packard v. Comm'r, 746 F.3d 1219, 1222 (11th Cir. 2014) (per curiam); Feigh v. Comm'r, 152 T.C. 267, 276 (2019); *see* Schumacher v. United States, 931 F.2d 650, 652 (10th Cir. 1991).

[17] 26 U.S.C. § 280E ("No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted."). Businesses trafficking in Schedule II controlled substances in violation of federal *or* state law are also subject to Section 280E. *Id.* For further discussion of the different CSA schedules, the various controlled substances listed on those schedules, and their treatment under federal law, see CRS Report R45948, *The Controlled Substances Act (CSA): A Legal Overview for the 119th Congress*, by Joanna R. Lampe (2025).

[18] 21 U.S.C. § 812(c); *id.* §§ 841–865.

[19] 26 U.S.C. § 280E; S. REP. NO. 97-494, at 309 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 781, 1050; Californians Helping to Alleviate Med. Problems, Inc. v. Comm'r, 128 T.C. 173, 182 (2007) ("Section 280E and its legislative history express a congressional intent to disallow deductions attributable to a trade or business of trafficking in controlled substances."). In *Mission Organic Center, Inc. v. Commissioner*, the Tax Court held that the IRS did not abuse its discretion when it adopted a policy that did not take nondeductible business expenses under Section 280E into account when calculating a taxpayer's reasonable collection potential for an offer-in-compromise. Mission Organic Center, Inc. v. Comm'r, 165 T.C. No. 13 (2025), 2025 WL 3638261, *6–7; *see* 26 U.S.C. § 7122.

[20] Alternative Health Care Advocates v. Comm'r, 151 T.C. 225, 236–37 (2018) ("In [*Californians Helping to Alleviate Medical Problems*], 128 T.C. [173,] 182 [(2007)], we defined 'trafficking' as the act of engaging in a commercial activity—that is, to buy and sell regularly. In *Olive v. Commissioner*, 139 T.C. [19,] 38 [(2012)], we held that 'dispensing . . . medical marijuana pursuant to . . . [California law] was 'trafficking' within the meaning of section 280E.'" (sixth alteration in original)); *see also* Alpenglow Botanicals, LLC v. United States, No. 16-CV-00258, 2016 WL 7856477, at *3 (D. Colo. Dec. 1, 2016) (citing *Californians Helping to Alleviate Med. Problems*, 128 T.C. at 182), *aff'd*, 894 F.3d 1187 (10th Cir. 2018); High Desert Relief, Inc. v. United States, No. 16-CV-469, 2017 WL 1740467, at *5 (D.N.M. Mar. 31, 2017) (citing *Alpenglow Botanicals*, 2016 WL 7856477, at *3–4), *aff'd*, 917 F.3d 1170 (10th Cir. 2019).

The prohibition on deductions includes deductions for: "ordinary and necessary" business expenses under IRC Section 162(a), state and local taxes under IRC Section 164, losses under IRC Section 165, depreciation under IRC Section 167, and charitable contributions under IRC Section 170.[21] As a result, marijuana businesses, from farmers and processors to distributors and retailers, are prohibited from writing off many of their day-to-day expenses and overhead costs, such as rent, utilities, compensation, advertising, interest, depreciation, costs of administration, and charitable gifts to promote goodwill.[22]

When a taxpayer operates more than one trade or business, Section 280E only disallows deductions and credits related to the marijuana business.[23] Under the IRC, an activity qualifies as a separate trade or business when the taxpayer is "involved in the activity with continuity and regularity and . . . the taxpayer's primary purpose for engaging in the activity [is] for income or profit."[24] For example, the U.S. Tax Court found a taxpayer operating a community center for members with debilitating diseases was engaged in two separate trades or businesses for the purposes of Section 280E—one that provided a variety of caregiving services and another that dispensed medical marijuana.[25] Thus, the court ruled the taxpayer could deduct expenses

[21] 26 U.S.C. §§ 161, 162(a), 164, 165, 167, 170, 261, 280E; *see, e.g.*, San Jose Wellness v. Comm'r, 156 T.C. 62, 68–77 (2021) (applying Section 280E to deny depreciation deductions under IRC Section 167(a)(1) and deductions for charitable contributions under IRC Section 170); N. Cal. Small Bus. Assistants Inc. v. Comm'r, 153 T.C. 65, 72–73 (2019) (applying Section 280E to deny deductions for taxes under IRC Section 164 and depreciation deductions under IRC Section 167); Beck v. Comm'r, T.C. Memo. 2015-149, 110 T.C.M. (CCH) 141 (2015), 2015 WL 4720041, at *6 (applying Section 280E to deny an IRC Section 165 loss deduction for marijuana seized by the Department of Justice's Drug Enforcement Administration); *Californians Helping to Alleviate Med. Problems*, 128 T.C. at 173–74, 180–81 (applying Section 280 to deny deductions for ordinary and necessary business expenses under IRC Section 162(a)); *but see* I.R.S. Chief Couns. Adv. 201531016 (June 9, 2015), 2015 WL 4591378 (permitting a taxpayer to offset gross sales by the state excise tax because the state excise tax was a reduction in amount realized on the sale of property, not a deduction or credit under Section 280E (citing IRC Section 164(a) flush language)); *see also* Welch v. Helvering, 290 U.S. 111, 113–14 (1933) (explaining an expense is "necessary" if it is "appropriate and helpful" for the development of the taxpayer's trade or business and explaining an expense is "ordinary" if it is "common and accepted" in the taxpayer's line of trade or business); *Alpenglow Botanicals*, 894 F.3d at 1200 ("The Supreme Court has defined 'ordinary and necessary expenses' as those expenses that are '"appropriate and helpful" to "the development of the (taxpayer's) business,"' Colo. Springs Nat'l Bank v. United States, 505 F.2d 1185, 1191 (10th Cir. 1974) (quoting Comm'r v. Tellier, 383 U.S. 687, 689 (1966)), and 'normal[ ] in the particular business,' *id.* at 1193 (quoting Deputy v. du Pont, 308 U.S. 488, 496 (1940))." (alteration in original)). The Tax Cuts and Jobs Act introduced a new deduction codified at IRC Section 199A, which allows certain passthrough businesses to deduct "qualified business income." Pub. L. No. 115-97, § 11011, 131 Stat. 2054, 2063 (2017). Section 280E prohibits marijuana businesses from taking deductions for amounts "*paid or incurred* during the taxable year." 26 U.S.C. § 280E (emphasis added). The IRS has not issued guidance on whether marijuana businesses are eligible to take a deduction under IRC Section 199A. However, in *Savage v. Commissioner*, the IRS appears to have taken the position that a marijuana business could take a "qualified business income" deduction under IRC Section 199A. Savage v. Comm'r, 165 T.C. No. 5 (2025), 2025 WL 2623254, *9 (Jenkins, J., dissenting); *see* Lord v. Comm'r, T.C. Memo 2022-14, 2022 WL 601127, *1 n.1. In *Savage*, the Tax Court held that marijuana business taxpayers subject to the W-2 wage limitation could not use their nondeductible wages to increase their IRC Section 199A deductions, because wages disqualified under Section 280E were "not properly allocable to qualified business income" for purposes of IRC Section 199A. *Savage*, 2025 WL 2623254, at *5–6.

[22] *See, e.g.*, *San Jose Wellness*, 156 T.C. at 66–67; *Alternative Health Care Advocates*, 151 T.C. at 233–42; *Californians Helping to Alleviate Med. Problems*, 128 T.C. at 178–86; Loughman v. Comm'r, T.C. Memo 2018-85, 115 T.C.M. (CCH) 1472 (2018), 2018 WL 3039824, at *2–4, 12.

[23] *See, e.g.*, *Californians Helping to Alleviate Med. Problems*, 128 T.C. at 183–86; *see also Alternative Health Care Advocates*, 151 T.C. at 239.

[24] Comm'r v. Groetzinger, 480 U.S. 23, 35 (1987); *see Alternative Health Care Advocates*, 151 T.C. at 239; *see also* 26 C.F.R. § 1.183-1(d)(1).

[25] *Californians Helping to Alleviate Med. Problems*, 128 T.C. at 183–86.

attributable to its caregiving services, but could not deduct expenses attributable to its marijuana business.[26]

Still, multiple activities may constitute a single trade or business when they "share a close and inseparable organizational and economic relationship."[27] In another case, the Tax Court determined that a taxpayer dispensing medical marijuana and providing caregiving services was not operating more than one trade or business when the taxpayer's only source of revenue was from the sales of medical marijuana.[28] As a result, the court held Section 280E precluded the taxpayer from taking deductions.[29] Similarly, the Tax Court has ruled that Section 280E prohibits a taxpayer from taking deductions when the taxpayer's business activities that are unrelated to the sale or distribution of marijuana are ancillary to its marijuana business.[30]

Section 280E does not prevent marijuana businesses from reducing their gross receipts by the cost of goods sold (COGS) when calculating their federal income tax liability.[31] The term COGS refers to "expenditures necessary to acquire, construct or extract a physical product which is to be sold."[32] By and large, taxpayers compute COGS by taking the inventories at the beginning of the year, adding the year's purchases and production costs, and subtracting year-end inventories.[33] A

---

[26] *Id.* at 185. In *Californians Helping to Alleviate Medical Problems*, the taxpayer charged each member a membership fee that covered (i) caregiving services; and (ii) the cost of each member's set amount of medical marijuana. *Id.* at 176. In *Canna Care, Inc. v. Commissioner*, the Tax Court ruled a taxpayer was only engaged in the trade or business of selling marijuana where the taxpayer also sold books, T-shirts, and other items. T.C. Memo 2015-206, 110 T.C.M. (CCH) 408 (2015), 2015 WL 6389130, at *5, *aff'd*, 694 F. App'x 570 (9th Cir. 2017). The Tax Court could not determine what percentage of the taxpayer's income was from sale of items other than marijuana based on the evidence presented. *Id.*

[27] Olive v. Comm'r, 139 T.C. 19, 41 (2012), *aff'd*, 792 F.3d 1146 (9th Cir. 2015); *see Alternative Health Care Advocates*, 151 T.C. at 239 ("[T]he activities of separate entities can be treated as a single trade or business if they are part of a 'unified business enterprise' with a single profit motive."); Alterman v. Comm'r, T.C. Memo 2018-83, 115 T.C.M. (CCH) 1452 (2018), 2018 WL 2980049, at *9 ("Whether selling non-marijuana merchandise was a separate business from selling marijuana merchandise is an issue of fact that depends on, among other things, the degree of economic interrelationship between the two activities.").

[28] *Olive*, 139 T.C. at 41–42.

[29] *Id.* at 42.

[30] *Alternative Health Care Advocates*, 151 T.C. at 240; *see, e.g.*, Patients Mut. Assistance Collective Corp. v. Comm'r, 151 T.C. 176, 204 (2018) ("Harborside dedicated the lion's share of its resources to selling marijuana and marijuana products. Those sales accounted for over 99.5% of its revenue. Its other activities were neither economically separate nor substantially different. We therefore hold that Harborside had a single trade or business—the sale of marijuana."), *aff'd*, 995 F.3d 671 (9th Cir. 2021); Beck v. Comm'r, T.C. Memo. 2015-149, 110 T.C.M. (CCH) 141 (2015), 2015 WL 4720041, at *5 ("The sole purpose of the [taxpayer's] dispensaries was to provide customers with medical marijuana and instruct those customers on how to use it. Unlike the taxpayer in [*Californians Helping to Alleviate Medical Problems*], petitioner has provided no evidence that he had any business activity unrelated to the sale or distribution of marijuana."); *see also* Desert Organic Solutions v. Comm'r, T.C. Memo. 2021-22, T.C.M. (RIA) 2021-22, 2021 WL 673016, at *2.

[31] *See, e.g.*, *Alterman*, 2018 WL 2980049, at *11; *Beck*, 2015 WL 4720041, at *6 ("COGS is an offset to gross receipts in determining business income." (citing 26 C.F.R. § 1.61-3(a))); *see also* CANNABIS INDUSTRY FREQUENTLY ASKED QUESTIONS (Apr. 25, 2025), *supra* note 7.

[32] Reading v. Comm'r, 70 T.C. 730, 733 (1978), *aff'd*, 614 F.2d 159 (8th Cir. 1980); Lord v. Comm'r, T.C. Memo 2022-14, 2022 WL 601127, *4 ("COGS is the cost of acquiring inventory, through either production or purchase.").

[33] *Alterman*, 2018 WL 2980049, at *11 ("Properly computed, cost of goods sold equals[:] the cost of merchandise on hand at the beginning of the taxable year ('beginning inventory'), [26 C.F.R. §] 1.471-3(a)[;] plus the cost of merchandise purchased since the beginning of the taxable year ('purchase costs'), [26 C.F.R. § 1.471-3](b)[;] plus the direct and indirect cost of producing merchandise ('production costs'), [26 C.F.R. §§ 1.471-3](c), 1.471-11[;] minus the cost of inventory on hand at the end of the tax year ('ending inventory'), [26 C.F.R. §] 1.471-1. Inventories must be recorded in a legible manner, properly computed and summarized, and these inventory records must be preserved by the taxpayer. [26 C.F.R. §] 1.471-2(e)."); *see* 26 U.S.C. §§ 263A, 471; *Lord*, T.C. Memo 2022-14, 2022 WL 601127, (continued...)

marijuana business may make a downward adjustment for COGS because it is not considered a deduction from gross income—it is outside the scope of Section 280E.[34] COGS offsets gross receipts when determining gross income, whereas deductions reduce gross income to calculate taxable income.[35]

Since marijuana businesses are limited to reducing their gross receipts by COGS, how they calculate COGS is critical to determining their tax liability.[36] Taxpayers must be able to substantiate any amounts claimed as COGS.[37] For example, a marijuana business can reduce its gross receipts by the cost of the marijuana purchased if properly substantiated.[38]

Section 280E's legislative history suggests that taxing gross receipts without providing an adjustment for COGS to arrive at taxable income might be subject to constitutional challenge.[39]

---

*4 ("Section 471 and its accompanying regulations direct taxpayers to section 263A for additional rules. Section 263A instructs both producers and resellers to include 'indirect' inventory costs in the cost of their inventory. See § 263A(a)(2)(B), (b); Treas. Reg. § 1.263A-1(a)(3), (c)(1), (e). Indirect costs are defined broadly as all costs other than direct material costs and direct labor costs (for producers) and acquisition costs (for resellers). Treas. Reg. § 1.263A-1(e)(3). Depreciation of production assets is an indirect cost. See Treas. Reg. § 1.471-11(c)(2)."); CANNABIS INDUSTRY FREQUENTLY ASKED QUESTIONS, *supra* note 7 ("The Internal Revenue Service takes the position that section 280E-affected taxpayers must calculate their cost of goods sold pursuant to Internal Revenue Code section 471 and the associated Treasury Regulations. Generally, this means taxpayers who sell marijuana may reduce their gross receipts by the cost of acquiring or producing marijuana that they sell, and those costs will depend on the nature of the business." (citing I.R.S. Chief Couns. Adv. 201504011 (Jan. 23, 2015))); *see also Alterman*, 2018 WL 2980049, at *11 n.21 ("In certain situations, farmers may use the cash method of accounting as an alternative to the inventory method."); GROWTH OF THE MARIJUANA INDUSTRY 14–15 ("The Tax Cuts and Jobs Act contained a new provision, I.R.C. § 471(c), which is applicable to taxable years after December 31, 2017, and will have the effect of reducing the burden for tracking inventory for small businesses with less than $25 million in gross receipts. These qualified businesses would not be subject to the general rule for determining inventory. Instead, they may elect to use internal financial statements or accounting procedures to account for costs in lieu of keeping inventories in the manner otherwise required by I.R.C. § 471(a)."") (footnotes omitted); 26 C.F.R. § 1.471-1; *see generally* Chief Couns. Adv. 202114019 (Jan. 23, 2021) ("[B]ecause Taxpayer is not using a method of accounting described in section 471(c) of the Code, this Chief Counsel Advice neither expresses nor implies any opinion about what costs would be permitted or required to be capitalized to the goods had Taxpayer applied the rules under section 471(c).").

[34] 26 U.S.C. §§ 61 (defining gross income), 63 (defining taxable income); *see* Alpenglow Botanicals, LLC. v. United States, 894 F.3d 1187, 1200 (10th Cir. 2018) ("The cost of goods sold is a well-recognized *exclusion* from the calculation of gross income, while ordinary and necessary business expenses are *deductions*."); *see, e.g.*, *Alterman*, 2018 WL 2980049, at *11 ("Taxable income is equal to gross income minus deductions. Cost of goods sold is a reduction made in the course of computing gross income. It is not a deduction." (citations omitted)).

[35] 26 U.S.C. § 63(a) ("[T]he term 'taxable income' means *gross income minus the deductions* allowed by this chapter (other than the standard deduction)." (emphasis added)); 26 C.F.R. §§ 1.61-3(a) ("In a manufacturing, merchandising, or mining business, 'gross income' means the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources."), 1.162-1(a) ("The cost of goods purchased for resale, with proper adjustment for opening and closing inventories, is deducted from gross sales in computing gross income.").

[36] *See, e.g.*, Richmond Patients Grp. v. Comm'r, T.C. Memo. 2020-52, 119 T.C.M. (CCH) 1342 (2020), 2020 WL 2114334, at *5–6; *Alterman*, 2018 WL 2980049, at *11–13; *Beck*, 2015 WL 4720041, at *6.

[37] *Alterman*, 2018 WL 2980049, at *11; *Beck*, 2015 WL 4720041, at *6 (citing Wright v. Comm'r, T.C. Memo 1993-27, 65 T.C.M. (CCH) 1792 (1993), 1993 WL 17590); *see* 26 U.S.C. § 6001 ("Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe. Whenever in the judgment of the Secretary it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary deems sufficient to show whether or not such person is liable for tax under this title."); 26 C.F.R. § 1.6001-1.

[38] *See* Ryan v. Comm'r, T.C. Memo 1989-297, 57 T.C.M. (CCH) 747 (1989), 1989 WL 64617.

[39] S. REP. NO. 97-494, at 309 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 781, 1050 ("All deductions and credits for amounts paid or incurred in the illegal trafficking in drugs listed in the Controlled Substances Act are disallowed. To preclude possible challenges on constitutional grounds, the adjustment to gross receipts with respect to effective costs (continued...)

This is based on the principle that the power to levy an "income" tax granted by the Sixteenth Amendment to the U.S Constitution refers to "gross income," not gross receipts, and a tax on gross receipts might be interpreted as "something other" than an income tax.[40]

What prompted the enactment of Section 280E?

Congress enacted Section 280E to obviate the need for courts to apply the common law "frustration of public policy" doctrine in certain tax disputes related to drug trafficking and to codify a "sharply defined public policy against drug dealing."[41] Prior to the enactment of Section 280E, courts applied the frustration of public policy doctrine to deny taxpayers deductions attributable to unlawful drug trafficking activities.[42] Under the frustration of public policy doctrine, courts weigh the government's interest in accurately measuring taxable income against the government's interest in disallowing deductions that "frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof."[43]

Courts have a long history of applying the frustration of public policy doctrine to deny taxpayers deductions for expenses attributable to unlawful activities.[44] In 1969, Congress precluded courts

---

of goods sold is not affected by this provision of the bill."); *see Alpenglow Botanicals*, 894 F.3d at 1199 ("To ensure taxation of *income* rather than sales, the 'cost of goods sold' is a mandatory exclusion from the calculation of a taxpayer's gross income.").

[40] N. Cal. Small Bus. Assistants, Inc. v. Comm'r, 153 T.C. 65, 82–84 (2019) (Gustafson, J., concurring in part and dissenting in part); *see* Doyle v. Mitchell Bros. Co., 247 U.S. 179, 185–86 (1918); Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 ARIZ. ST. L.J. 1057, 1149–54 (2001); *but see Alpenglow Botanicals*, 894 F.3d at 1201–02 ("Alpenglow also argues that, by refusing to allow deductions for unavoidable business expenses, Congress is permitting the IRS to tax its gross receipts rather than its income. But, 'it is [not] a violation of due process to impose a tax on gross receipts regardless of the fact that expenditures exceed the receipts. . . . The mere fact of intake being less than outgo does not relieve the taxpayer of an otherwise lawfully imposed tax.' " (alterations in original) (quoting Penn Mut. Indem. Co. v. Comm'r, 277 F.2d 16, 20 (3d Cir. 1960))).

[41] S. REP. NO. 97-494, at 309; *see* Californians Helping to Alleviate Med. Problems, Inc. v. Comm'r, 128 T.C. 173, 181–82 (2007); *see also Alpenglow Botanicals*, 894 F.3d at 1201.

[42] *See, e.g.*, Wood v. United States, 863 F.2d 417, 421 (5th Cir. 1989); Holmes Enters., Inc. v. Comm'r, 69 T.C. 114, 116–17 (1977); Holt v. Comm'r, 69 T.C. 75, 80 (1977); Mack v. Comm'r, T.C. Memo 1989-490, 58 T.C.M. (CCH) 89 (1989), 1989 WL 101869.

[43] Tank Truck Rentals, Inc. v. Comm'r, 356 U.S. 30, 33–34 (1958) (citing Comm'r v. Heininger, 320 U.S. 467, 473 (1943)); *see* Comm'r v. Sullivan, 356 U.S. 27, 29 (1958).

[44] Comm'r v. Tellier, 383 U.S. 687, 693–94 (1966) ("Deduction of expenses falling within the general definition of § 162(a) may, to be sure, be disallowed by specific legislation, since deductions 'are a matter of grace and Congress can, of course, disallow them as it chooses.' . . . But where Congress has been *wholly silent*, it is only in extremely limited circumstances that the Court has countenanced exceptions to th[is] general principle . . . . Only where the allowance of a deduction would 'frustrate sharply defined national or state policies proscribing particular types of conduct' have we upheld its disallowance. Further, the 'policies frustrated must be national or state policies evidenced by some *governmental* declaration of them.' " (emphases added) (footnote omitted) (citations omitted)); *see Alpenglow Botanicals*, 894 F.3d at 1206; *see also* S. REP. NO. 91-552, at 273–74 (1969), *as reprinted in* 1969 U.S.C.C.A.N. 2027, 2310–11 ("At the present time there is no statutory provision setting forth a general 'public policy' basis for denying deductions which are 'ordinary and necessary' business deductions. Nevertheless, a number of business expenses have been disallowed on the ground that the allowance of these deductions would be contrary to Federal or State 'public policy.' This has been true, for example, in the case of fines. . . . From the standpoint of tax policy, there generally has been a reluctance to deny business expenses on the ground that this departs from the concept of a tax imposed on actual net business income. There still remains, however, the question as to what is an ordinary and necessary business expense. The Supreme Court in [*Tank Truck Rentals*], for example, in holding that the payment of fines could not be considered as ordinary and necessary, stated: 'A finding of "necessity" cannot be made however, if allowance of the deduction would frustrate sharply defined national or State policies proscribing the particular types of conduct evidenced by some governmental declaration thereof.' On the same grounds, it appears appropriate to deny deductions for bribes, illegal kickbacks, and the penalty portion of antitrust treble damage payments.").

from applying the frustration of public policy doctrine in certain tax disputes by enacting legislation to disallow deductions of business expenses attributable to specific types of unlawful conduct.[45] Prior to Section 280E's enactment, Congress had amended the IRC to make fines and penalties, illegal bribes, and kickbacks, and certain other illegal payments nondeductible expenses.[46]

Congress enacted Section 280E in 1982,[47] one year after the Tax Court decided *Edmondson v. Commissioner*.[48] In *Edmondson*, the court ruled that a taxpayer operating an illegal drug business could offset sales by COGS and "ordinary and necessary" business expenses, making no mention of the judicial frustration of public policy doctrine.[49] The court found that the taxpayer was self-employed in the trade or business of selling amphetamines, cocaine, and marijuana.[50] The court held that the taxpayer could deduct business expenses, including rent, telephone, and automobile expenses, because the expenses were "ordinary and necessary" expenses made in connection with the taxpayer's illegal drug business.[51]

The Senate Finance Committee's report accompanying the bill enacting Section 280E indicates Congress enacted the provision in direct response to *Edmondson* and designed the provision to disallow "[a]ll deductions and credits for amounts paid or incurred in the illegal trafficking in drugs."[52] The Senate Finance Committee's report explained:

> There is a sharply defined public policy against drug dealing. To allow drug dealers the benefit of business expense deductions at the same time that the U.S. and its citizens are losing billions of dollars per year to such persons is not compelled by the fact that such deductions are allowed to other, legal, enterprises. Such deductions must be disallowed on public policy grounds.[53]

[45] Tax Reform Act of 1969, Pub. L. No. 91-172, § 902, 83 Stat. 487, 710 (1969); S. REP. NO. 91-552, at 274–75.

[46] 26 U.S.C. § 162(c) ("Illegal bribes, kickbacks, and other payments"), (f) ("Fines, penalties, and other amounts"), (g) ("Treble damage payments under the antitrust laws"); *see also Tellier*, 383 U.S. at 693 n.10. Although Congress has enacted several laws to preempt the frustration of public policy doctrine, including Section 280E, the courts and IRS continue to apply the frustration of public policy doctrine when there is a gap in legislation. Hackworth v. Comm'r, 155 F. App'x 627, 630–32 (4th Cir. 2005) (per curiam); Hampton v. Comm'r, T.C. Memo. 2025-32, T.C.M. (RIA) 2025-032 (2025), 2025 WL 1078931, at *5–7; Sestak v. Comm'r, T.C. Memo. 2022-41, 123 T.C.M. (CCH) 1205 (2022), 2022 WL 1210524, at *6; Rev. Rul. 82-74, 1982-1 CB 110; Rev. Rul. 81-24, 1981-1 CB 79; Rev. Rul. 77-126, 1977-1 CB 47; I.R.S. Chief Couns. Adv. 201346009 (Aug. 1, 2013); *see also* Nacchio v. United States, 824 F.3d 1370, 1377 (Fed. Cir. 2016).

[47] Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 351, 96 Stat. 324, 640 (1982).

[48] Edmondson v. Comm'r, T.C. Memo 1981-623, 42 T.C.M. (CCH) 1533 (1981), 1981 WL 11040, *superseded by statute*, Tax Equity and Fiscal Responsibility Act of 1982 § 351.

[49] 1981 WL 11040.

[50] *Id.*

[51] *Id.*

[52] *See* S. REP. NO. 97-494, at 309 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 781, 1050; Californians Helping to Alleviate Med. Problems, Inc. v. Comm'r, 128 T.C. 173, 181–82 (2007); *see also* Alpenglow Botanicals, LLC v. United States, 894 F.3d 1187, 1201 (10th Cir. 2018).

[53] S. REP. NO. 97-494, at 309.

Does Section 280E apply to marijuana businesses in states where marijuana is legal under state law?

Section 280E applies when trafficking marijuana violates federal *or* state law.[54] Section 280E applies to marijuana businesses operating in compliance with state law because trafficking marijuana continues to violate federal law.[55] Section 280E also applies to marijuana businesses engaged in state-sanctioned medical marijuana sales because marijuana is a Schedule I controlled substance under the CSA, and thus cannot legally be used for medical purposes.[56]

The federal government has not consistently enforced the CSA against state-sanctioned marijuana businesses.[57] However, any lack of enforcement of the CSA does not render Section 280E

[54] 26 U.S.C. § 280E ("No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business . . . consists of trafficking in controlled substances . . . which is prohibited by Federal law *or* the law of any State in which such trade or business is conducted." (emphasis added)); Standing Akimbo, LLC v. United States, 955 F.3d 1146, 1158 (10th Cir. 2020) ("Congress's use of 'or' extends the statute to situations in which federal law prohibits the conduct *even if* state law allows it."), *cert. denied*, 141 S. Ct. 2236 (2021).

[55] *Standing Akimbo*, 955 F.3d at 1158 ("So, despite legally operating under [state] law, 'the Taxpayers are subject to greater federal tax liability' because of their federally unlawful activities, and any 'remedy [for this] must come from Congressional change to § 280E or 21 U.S.C. § 812(c) (Schedule I) rather than from the courts.'" (second alteration in original) (citing Feinberg v. Comm'r, 916 F.3d 1330, 1338 n.3 (10th Cir. 2019))); Alternative Health Care Advocates v. Comm'r, 151 T.C. 225, 238 (2018) ("In response to the taxpayer's arguments related to congressional intent and public policy, the court concluded that '[i]f Congress now thinks that the policy embodied in . . . [section] 280E is unwise as applied to medical marijuana sold in conformance with state law, it can change the statute. We may not.'" (alterations in original) (quoting Olive v. Comm'r, 792 F.3d 1146, 1150 (9th Cir. 2015))); Olive v. Comm'r, 139 T.C. 19, 39 (2012); *see* CRS Legal Sidebar LSB10482, *State Marijuana "Legalization" and Federal Drug Law: A Brief Overview for Congress*, by Joanna R. Lampe (2024).

[56] *Alternative Health Care Advocates*, 151 T.C. at 236 ("Marijuana is a schedule I controlled substance in the context of section 280E even when the marijuana is medical marijuana recommended by a physician."); *Californians Helping to Alleviate Med. Problems*, 128 T.C. at 181 ("In the context of section 280E, marijuana is a schedule I controlled substance. Such is so even when the marijuana is medical marijuana recommended by a physician as appropriate to benefit the health of the user." (citation omitted)); *see* United States v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483, 491 (2001) (concluding there is no implied medical necessity exception to the CSA).

[57] For example, the U.S. Department of Justice issued several memoranda during the Obama Administration indicating that it would not prioritize enforcement against individuals engaging in *medical marijuana* activities compliant with state law, and it would rely on United States Attorneys to exercise discretion in pursuing federal enforcement actions against businesses in their districts engaging in state-sanctioned *medical marijuana* activities. *See, e.g.*, Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana to selected United States Attorneys (Oct. 19, 2009) [hereinafter Ogden Memo], https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf [https://perma.cc/B9QU-QCNB]; Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, on Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use to United States Attorneys (June 29, 2011) [hereinafter First Cole Memo], https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf [https://perma.cc/6BZ2-5HKT]; Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, on Guidance Regarding Marijuana Enforcement to all United States Attorneys (Aug. 29, 2013) [hereinafter Second Cole Memo], https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf [https://perma.cc/85Z9-46NT]. The memoranda did not alter the Justice Department's authority to enforce federal laws, "including laws prohibiting the manufacture, production, distribution, possession, or use of marijuana on federal property." Ogden Memo, at 2; *see* First Cole Memo, at 2; Second Cole Memo, at 4. On January 4, 2018, following a change in presidential administrations, the Justice Department rescinded prior guidance and reaffirmed the authority of the federal government to exercise prosecutorial discretion to enforce federal marijuana offenses "in accordance with all applicable laws, regulations, and appropriations." Memorandum from Jefferson B. Sessions, Att'y Gen., U.S. Dep't of Justice, on Marijuana Enforcement to all United States Attorneys (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download. For further information about the Justice Department's marijuana policy guidance and appropriations riders limiting the Justice Department's ability to prosecute state-sanctioned *medical marijuana* (continued...)

inoperable.[58] Unlike other sections of the IRC, Section 280E does not contain an exception that makes its application contingent on the federal government's policy on enforcing the CSA.[59] The IRS is authorized to initiate an investigation into whether a taxpayer is violating the CSA for purposes of applying Section 280E—neither a criminal investigation nor a criminal conviction is a prerequisite to an IRS investigation.[60]

Does Section 280E violate the Eighth Amendment's Excessive Fines Clause?

In *Northern California Small Business Assistants, Inc. v. Commissioner*, the Tax Court provided an in-depth explanation of its reasoning in ruling that Section 280E does not violate the Eighth Amendment's Excessive Fines Clause.[61] The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[62] When applying the Eighth Amendment, the Supreme Court's concerns include "direct actions initiated by [the] government to inflict punishment."[63] The Court has reviewed the history of the Eighth Amendment and determined that the drafters of the Eighth Amendment understood the term "'fine' . . . to mean a payment to a sovereign as punishment for some offense."[64] The Court has ruled that a fine is excessive where it is "grossly disproportional

activities, see CRS Report R45948, *The Controlled Substances Act (CSA): A Legal Overview for the 119th Congress*, by Joanna R. Lampe (2025); and CRS Legal Sidebar LSB10482, *State Marijuana "Legalization" and Federal Drug Law: A Brief Overview for Congress*, by Joanna R. Lampe (2024).

[58] High Desert Relief, Inc. v. United States, 917 F.3d 1170, 1198 (10th Cir. 2019).

[59] *Id.* at 1196 n.13 ("26 U.S.C. § 162(c)(2) . . . prevents deductions for bribes that are made illegal by state law '*only* if such State law is *generally enforced*.' This unique statutory provision then does not support a more generalized 'dead letter rule' based on non-enforcement—particularly with respect to § 280E, which has no analogous language that makes its application turn on whether the federal Executive Branch generally enforces the CSA." (citations omitted)).

[60] *Id.* at 1186–89; Alpenglow Botanicals, LLC v. United States, 894 F.3d 1187, 1197 (10th Cir. 2018) ("In summary, it is within the IRS's statutory authority to determine, as a matter of civil tax law, whether taxpayers have trafficked in controlled substances. Thus, the IRS did not exceed its authority in denying Alpenglow's business deductions under § 280E."); Green Sol. Retail, Inc. v. United States, 855 F.3d 1111, 1121 (10th Cir. 2017) ("But § 280E has no requirement that the Department of Justice conduct a criminal investigation or obtain a conviction before § 280E applies.").

[61] 153 T.C. 65, 68–72 (2019). Marijuana businesses have not succeeded in challenging Section 280E on constitutional grounds. *See, e.g.*, Speidell v. United States, 978 F.3d 731, 743–44 (10th Cir. 2020) (holding the IRS's attempt to collect and audit information about marijuana-related business practices from third parties to enforce Section 280E did not violate any Fourth Amendment right to privacy (citing Standing Akimbo, LLC v United States, 955 F.3d 1146, 1164–65 (10th Cir. 2020), *cert. denied*, 141 S. Ct. 2236 (2021))); Feinberg v. Comm'r, 916 F.3d 1330, 1333 (10th Cir. 2019) ("[W]e reject the Taxpayers' argument that placing the burden of proof on them to disprove their business is engaged in the trafficking of a controlled substance violates their Fifth Amendment right against self-incrimination."), *cert. denied*, 589 U.S. 1010 (2019); *High Desert Relief*, 917 F.3d at 1188 (rejecting petitioner's Fifth Amendment challenge to Section 280E because the taxpayer was a corporation with "no Fifth Amendment privilege that it c[ould] properly invoke."); *Alpenglow Botanicals*, 894 F.3d at 1198–1203 (holding Section 280E does not violate the Eighth and Sixteenth Amendments); Patients Mut. Assistance Collective Corp. v. Comm'r, 151 T.C. 176, 208–10 (2018) (rejecting petitioner's argument that limiting COGS to "only the actual cost used to purchase inventory" violates the Sixteenth Amendment"), *aff'd*, 995 F.3d 671 (9th Cir. 2021); *see also* Patients Mut. Assistance Collective Corp. v. Comm'r, T.C. Memo 2024-98, 2024 WL 4534205, *2 (concluding that (1) Section 280E was not "(a) an unapportioned direct tax or (b) an excessive fine in violation of the Eighth Amendment of the Constitution, and (2) the Controlled Substances Act [was not] unconstitutional as applied to state-legal instrastate cultivation, manufacture, distribution, and possession of marijuana.").

[62] U.S. CONST. amend. VIII.

[63] Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 260 (1989).

[64] *Id.* at 265.

to the gravity of [the] offense[ ].”[65] Whether Section 280E’s disallowance of deductions is a denial of a tax benefit or a punishment for the purposes of the Eighth Amendment is a matter of debate.[66] In *Northern California Small Business Assistants*, a panel of Tax Court judges issued differing opinions on the Eighth Amendment’s application to Section 280E.[67]

The corporate taxpayer in *Northern California Small Business Assistants* operated a medical marijuana dispensary, which was legal under California state law.[68] Applying Section 280E, the IRS issued the taxpayer a notice of deficiency explaining that Section 280E disallowed the taxpayer’s deductions.[69] The taxpayer filed a claim disputing the notice, and moved for partial summary judgment challenging the application of Section 280E.[70] At the heart of the taxpayer’s arguments was that Section 280E imposed a penalty in violation of the Eighth Amendment’s Excessive Fines Clause.[71] The panel agreed to deny the taxpayer’s motion for summary judgment, but the judges varied in their approach to reaching that decision.[72]

The majority opinion, joined by ten Tax Court judges, held that Section 280E does not violate the Eighth Amendment because the disallowance of deductions does not constitute a “penalty” for the purposes of the Eighth Amendment.[73] The opinion emphasized Congress’s unquestionable authority to tax gross income and concluded that Congress was the proper body to address the taxpayer’s grievances.[74] Two Tax Court judges did not advance a view on whether Section 280E imposed a fine for the purposes of the Eighth Amendment, but concurred in the denial of the taxpayer’s motion for summary judgment because the taxpayer failed to show the fine was excessive.[75] Three Tax Court judges concluded that Section 280E does impose a fine, but did not reach a conclusion on whether the fine was excessive.[76]

---

[65] Cooper Indus. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 434 (2001) (quoting United States v. Bajakajian, 524 U.S. 321, 334 (1998)); *Bajakajian*, 524 U.S. 321 (considering the amount of the fine, the particular facts of the case, the character of the defendant, and the harm caused by the offense in determining whether an asset forfeiture imposed as part of a criminal sentence violated the Eighth Amendment’s Excessive Fines Clause).

[66] *See* Bryan Camp, *Lesson From The Tax Court: § 280E Does Not Violate The Eighth Amendment* (Oct. 28, 2019), https://taxprof.typepad.com/taxprof_blog/2019/10/lesson-from-the-tax-court-280e-does-not-violate-eighth-amendment.html (on file with the author).

[67] N. Cal. Small Bus. Assistants, Inc. v. Comm’r, 153 T.C. 65 (2019).

[68] *Id.* at 66.

[69] *Id.*

[70] *Id.* at 66–67.

[71] *Id.* at 66, 68–72.

[72] *Id.* at 67–72, 74.

[73] *Id.* at 69–72, 74–76 (Lauber, J., joined by Marvel, Ashford, and Goeke, JJ., concurring), 76 (Morrison, J., joined by Foley, C.J., concurring), 77–90 (Gustafson, J., joined by Copeland, J., concurring in part and dissenting in part, in which Gale, J., joined in parts II and III), 90–94 (Copeland, J., joined by Gale and Gustafson, JJ., concurring in part and dissenting in part).

[74] *Id.* at 70–72, 74; *see id.* at 75 (Lauber, J., concurring) (adding that a tax provision imposed to discourage activity does not make the provision “‘in the nature of a penalty,’ for Eighth Amendment purposes,” even where the disfavored activity is illegal).

[75] *Id.* at 76 (Morrison, J., joined by Foley, C.J., concurring).

[76] *Id.* at 90–94 (Copeland, J., joined by Gale and Gustafson, JJ., concurring in part and dissenting in part); *see id.* at 77–90 (Gustafson, J., concurring in part and dissenting in part). Judge Gustafson’s concurrence notes the court would also need to address “whether the protections of the Eighth Amendment extend to corporate taxpayers.” *Id.* at 90 (Gustafson, J., concurring in part and dissenting in part). Since the majority in *Northern California Small Business Assistants* held Section 280E was not a penalty, it did not address whether the Eighth Amendment protects corporations from excessive fines. *Id.* at 68 n.4 (citing Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276 n.22 (1989) (declining to address whether the Eighth Amendment applies to corporations)).

How would proposals alter taxes on marijuana businesses?

A number of legislative proposals would make Section 280E inapplicable to marijuana businesses by rescheduling marijuana as a Schedule III controlled substance or entirely descheduling marijuana under the CSA.[77] A couple of legislative proposals would carve out an exception in Section 280E for marijuana businesses operating in compliance with state and tribal laws.[78] In May 2024, the U.S. Department of Justice issued a notice of proposed rulemaking to transfer marijuana from Schedule I to Schedule III with the aim of rescheduling marijuana to Schedule III using the administrative rescheduling process.[79] Under each approach, Section 280E would no longer prohibit marijuana businesses from taking deductions and claiming credits.

Some legislative proposals would implement marijuana taxes *and* regulate marijuana.[80] For example, the Marijuana Opportunity Reinvestment and Expungement (MORE) Act would impose an excise tax on cannabis products produced in or imported into the United States and an "occupational tax" on producers and export warehouse proprietors.[81] The MORE Act would use the amounts raised from those taxes to fund a trust fund for specified programs.[82]

A couple of legislative proposals would maintain the prohibition on marijuana businesses taking deductions and claiming credits even if marijuana is rescheduled or descheduled.[83] These proposals would amend Section 280E to expressly prohibit businesses trafficking marijuana from taking deductions and credits.[84]

[77] *See, e.g.*, H.R. 5068, 119th Cong. § 3 (2025); H.R. 4963, 119th Cong. § 2 (2025); *see* S. 4226, 118th Cong. §101 (2024); *see also* CRS Legal Sidebar LSB10556, *The MORE Act: House Plans Historic Vote on Federal Marijuana Legalization*, by Joanna R. Lampe (2020).

[78] *See, e.g.*, H.R. 2934, 119th Cong. § 9 (2025); H.R. 2643, 118th Cong. § 2 (2023).

[79] Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 44597 (proposed May 21, 2024). On December 18, 2025, President Trump issued an executive order instructing the Attorney General to "take all necessary steps to complete the rulemaking process related to rescheduling marijuana to Schedule III of the CSA in the most expeditious manner in accordance with Federal law, including 21 U.S.C. 811." Exec. Order No. 14370, 90 Fed. Reg. 60541 (Dec. 18, 2025). The Executive Order and the Justice Department's issuance of a notice of a proposed rulemaking follow the Department of Health and Human Services' recommendation to reschedule marijuana to Schedule III in August 2023. Schedules of Controlled Substances: Rescheduling of Marijuana, 89 Fed. Reg. 44597 (proposed May 21, 2024). For further discussion on controlled substance scheduling procedures, see CRS Report R45948, *The Controlled Substances Act (CSA): A Legal Overview for the 119th Congress*, by Joanna R. Lampe (2025).

[80] *See, e.g.*, H.R. 5068, 119th Cong. § 5 (2025); S. 4226, 118th Cong. § 401 (2024); *see also* CRS Report R43785, *Federal Proposals to Tax Marijuana: An Economic Analysis*, by Jane G. Gravelle and Sean Lowry (2014).

[81] H.R. 5068, 119th Cong. § 5 (2025) (adding chapter 56 to the IRC) ("There is hereby imposed on any cannabis product produced in or imported into the United States a tax. . . . Any person engaged in business as a producer or an export warehouse proprietor shall pay a tax of $1,000 per year (referred to in this subchapter as an 'occupational tax') in respect of each premises at which such business is carried on."); *see also* S. 4226, 118th Cong. § 401 (2024).

[82] H.R. 5068, 119th Cong. § 4 (2025) ("There are hereby appropriated to the Trust Fund amounts equivalent to the net revenues received in the Treasury from the taxes imposed under chapter 56."); *see also* S. 4226, 118th Cong. § 401 (2024).

[83] S. 471, 119th Cong. § 2 (2025); H.R. 1447, 119th Cong. § 2 (2025) (identical to S. 471, 119th Cong. (2025)).

[84] S. 471, 119th Cong. § 2 (2025) ("No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in—(1) marijuana (as defined in section 102(16) of the Controlled Substances Act (21 U.S.C. 802(16))."); H.R. 1447, 119th Cong. § 2 (2025).

A few legislative proposals from past Congresses have been designed to increase marijuana businesses' access to banking and financial services.[85] Many financial institutions are unwilling to provide state-sanctioned marijuana businesses with common banking products and financial services due to potential legal exposure, such as under federal anti-money laundering laws that criminalize the handling of money tied to marijuana.[86] As a result, many marijuana businesses reportedly operate exclusively in cash.[87] A former Treasury Secretary expressed that marijuana businesses' lack of access to financial services "creates a very large concern."[88] The former Treasury Secretary also stated: "We have to build cash rooms to take in large amounts of cash . . . where people owe us taxes, because we want to collect the taxes. . . . [T]hose entities are not banked. . . . I would say that creates risk to our IRS employees and to the people in the community."[89]

Author Information

Milan N. Ball
Legislative Attorney

[85] *See, e.g.*, S. 2860, 118th Cong. §§ 3–5 (as reported to the Senate, September 28, 2023); S. 1323, 118th Cong. §§ 3–5 (2023); H.R. 2891, 118th Cong. (identical to S. 1323, 118th Cong. (2025)); *see* CRS Legal Sidebar LSB11076, *Marijuana Banking: Legal Issues and the SAFE(R) Banking Acts*, by David H. Carpenter (2023).

[86] GROWTH OF THE MARIJUANA INDUSTRY 4–6; *see* CRS Legal Sidebar LSB11218, *Effect of Rescheduling Marijuana on Access to Financial Services*, by David H. Carpenter (2024).

[87] GROWTH OF THE MARIJUANA INDUSTRY 5; *see also* Memorandum from Maria T. Vullo, N.Y. State Superintendent of Fin. Servs., to CEOs or Equivalents of N.Y. State-Chartered Banks & Credit Unions, re: Guidance on Provision of Financial Services to Medical Marijuana & Industrial Hemp-Related Businesses in New York State, N.Y. DEP'T OF FIN. SERVS. 2 (July 3, 2018), https://www.governor.ny.gov/sites/default/files/atoms/files/New_York_Online_Lending_Survey_Report.pdf [https://perma.cc/2QRC-26ZG] ("Because marijuana currently is still listed on Schedule I under the Federal Controlled Substances Act, medical marijuana and industrial hemp-related businesses operating in accordance with New York State laws and regulations continue to have difficulty establishing banking relationships at regulated financial institutions. The ability to establish a banking relationship is an urgent issue today for the legal cannabis industry. So long as it remains difficult to open and maintain bank accounts, the industry will largely rely on cash to conduct business and operate.").

[88] *Dep't of the Treas. Budget Request for FY 2021 Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't of H. Comm. on Appropriations*, 116th Cong. (2020); *see Oversight of the Treas. Dep't's and Federal Reserve's Pandemic Response Hearing Before the H. Comm. on Financial Services*, 117th Cong. (2021) (including a former Treasury Secretary's acknowledgment that the IRS would benefit if state-sanctioned cannabis businesses had access to banking); *Budget Hearing—Fiscal Year 2025 Request for the Internal Revenue Service Before the Subcomm. on Fin. Servs. & Gen. Gov't of H. Comm. on Appropriations*, 118th Cong. (2024) (including a former IRS Commissioner's statement on cannabis business banking access and how third-party information reporting "drives a lot of integrity and quality control into the system, it reduces the number of uncertainties and variables, and often is helpful for the taxpayer because they are aware of what the IRS has been informed of in terms of income.").

[89] *Dep't of the Treas. Budget Request for FY 2021 Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't of H. Comm. on Appropriations*, 116th Cong. (2020).

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.