

**UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION**

**In The Matter of:**

**The Application of TREEHOUSE REAL  
ESTATE INVESTMENT TRUST,**

**For Review of Action Taken by New York  
Stock Exchange**

Admin. Proc. File. No. \_\_\_\_\_

319192

**APPLICATION FOR REVIEW OF ACTION BY THE  
NEW YORK STOCK EXCHANGE**

**Carmen J. Lawrence  
Richard H. Walker  
King & Spalding LLP  
1185 Avenue of the Americas  
New York, New York 10036  
(212) 556-2100  
clawrence@kslaw.com  
rwalker@kslaw.com**

*Counsel for TREIT*

Treehouse Real Estate Investment Trust (“TREIT”) submits this application as an aggrieved person pursuant to Section 19(d) and 19(f) of the Securities Exchange Act of 1934 (the “Act”) for an order reversing the determination to deny TREIT the opportunity to list on the New York Stock Exchange (the “NYSE”) and the concomitant services of the NYSE. The NYSE’s determination unfairly limits access to the NYSE, imposes an inappropriate burden on competition to the detriment of TREIT and the investing public, and is inconsistent with the Act.

1. In January 2019, counsel for TREIT began discussions with the NYSE to pursue listing TREIT on the NYSE. On May 9, 2019, John Carey, Senior Director, Vice President of Legal at NYSE Regulation, advised counsel for TREIT that the NYSE would not permit TREIT to file an application to be listed on the NYSE because “NYSE is not intending to list any company that is directly or indirectly involved in the marijuana industry in the United States.” Specifically, the NYSE advised counsel for TREIT that it would not provide a clearance letter, which is required under NYSE rules for TREIT to make an application to list on the NYSE. The NYSE further advised counsel for TREIT that it would not issue, and has a practice of not issuing, a letter denying clearance for a listing application. Ex. A Walker Declaration. Accordingly, there is no written record of the NYSE’s determination. NYSE further advised that there was no opportunity to review this determination within the NYSE and that the determination was final. Ex. A Walker Declaration.

2. TREIT does not cultivate, process, distribute or sell cannabis. TREIT acquires real estate assets that are leased or may be leased to state-licensed cannabis operators. Despite the NYSE’s stated position on May 9, 2019 about not listing companies engaged in the cannabis industry in the United States, the NYSE lists several companies that are “directly or indirectly” involved in the cannabis industry in the United States, including Innovative Industrial Properties,

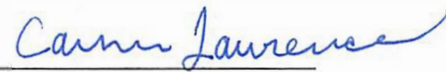
Inc. (“IIPR”), a real estate investment trust with the same business model as TREIT, and Scotts Miracle-Gro Company, a company that sells and specifically markets products to the cannabis industry and is building an R&D facility targeted at testing its products on cannabis plants in partnership with a Canadian cannabis cultivator. These companies, and others that are listed by the NYSE, are exposed to risks of potential federal law violations, just as TREIT. Yet, TREIT has been denied access to list on the NYSE on this basis alone, despite meeting the quantitative listing standards of the NYSE.

3. The NYSE’s Listed Company Manual, which contains the NYSE’s policies, practices and procedures for listed companies, contains no express prohibition regarding the listing of companies doing business, directly or indirectly, in the cannabis industry in the United States. The NYSE’s unwritten policy of not listing such companies has been applied in a selective and discriminatory manner in respect of TREIT’s request to be listed. While denying TREIT the opportunity to list, the NYSE has allowed other companies covered by this unwritten policy, such as IIPR and Scott’s Miracle-Gro, to list or remain listed. The selective application of the NYSE’s unwritten policy is discriminatory and does not “promote just and equitable principles of trade” or “protect investors and the public interest” as required by the Act. 15 U.S.C. § 78f(b)(5). The NYSE is not permitted to adopt any rule or policy that imposes a “burden on competition not necessary or appropriate.” 15 U.S.C. § 78f(b)(8).

4. Denying TREIT the opportunity to list exclusively on the basis of its cannabis-related business operations – a basis that applies equally to IIPR, a direct competitor of TREIT, and many other companies listed on the NYSE – is inequitable, anti-competitive, inappropriately deprives TREIT of access to capital, and denies investors access to a valuable investment opportunity. We respectfully request that the Commission reverse the NYSE’s determination.

Dated: June 3, 2019

Respectfully submitted,



Carmen J. Lawrence  
Richard H. Walker  
King & Spalding LLP  
1185 Avenue of the Americas  
New York, New York 10036  
(212) 556-2100  
clawrence@kslaw.com  
rwalker@kslaw.com

*Counsel for TREIT*

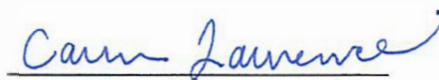
**Rule of Practice 420(c) Statement:** Service upon the applicant may be accomplished by serving their attorneys at the address listed above.

**CERTIFICATE OF SERVICE**

I, Carmen J. Lawrence, Esquire, hereby certify that on June 3, 2019, I served a true and correct copy of the foregoing Application for Review on the following via UPS:

Vanessa Countryman  
Acting Secretary  
United States Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Elizabeth King  
General Counsel  
New York Stock Exchange  
11 Wall Street  
New York, NY 10005



Carmen J. Lawrence

**UNITED STATES OF AMERICA**  
before the  
**SECURITIES AND EXCHANGE COMMISSION**

In The Matter of:

The Application of TREEHOUSE REAL  
ESTATE INVESTMENT TRUST,

For Review of Action Taken by New York  
Stock Exchange

Admin. Proc. File. No. \_\_\_\_\_

3-19192

**NOTICE OF APPEARANCE ON BEHALF OF TREEHOUSE REAL ESTATE  
INVESTMENT TRUST**

PLEASE TAKE NOTICE that Carmen J. Lawrence and Richard H. Walker, of the law firm King & Spalding LLP, hereby appear in the above-captioned proceeding on behalf of Applicant Treehouse Real Estate Investment Trust, who resides at 10115 Jefferson Boulevard, Culver City, California 90232.

Dated: June 3, 2019

Respectfully submitted,



Carmen J. Lawrence  
Richard H. Walker  
King & Spalding LLP  
1185 Avenue of the Americas  
New York, New York 10036  
(212) 556-2100  
clawrence@kslaw.com  
rwalker@kslaw.com

*Counsel for TREIT*

# **Exhibit A**

**UNITED STATES OF AMERICA**  
before the  
**SECURITIES AND EXCHANGE COMMISSION**

In The Matter of:

The Application of TREEHOUSE REAL  
ESTATE INVESTMENT TRUST,  
For Review of Action Taken by New York  
Stock Exchange

Admin. Proc. File. No. 3-19192

**DECLARATION OF RICHARD H. WALKER**

I, RICHARD H. WALKER, do hereby declare under penalty of perjury, pursuant to 28 U.S.C. § 1746:

1. I am an attorney at law admitted to practice before the Appellate Division, First Department, of the New York Supreme Court and a partner at King & Spalding LLP, counsel for Treehouse Real Estate Investment Trust ("TREIT"). I make this declaration in support of TREIT's application for review of action taken by the New York Stock Exchange (the "NYSE").
2. On March 25, 2019 I had an introductory telephone conversation with John Carey, Senior Director, Vice President of Legal at NYSE Regulation, to express TREIT's interest in listing its securities on the NYSE. I suggested during that call that it would make sense for TREIT to send NYSE a "White Paper" explaining the reasons why the NYSE should list TREIT, followed by a telephone call to discuss how best to advance TREIT's application for a listing.
3. On March 31, 2019, I emailed Mr. Carey TREIT's formal White Paper, a copy of which is attached as Exhibit 1, explaining the reasons why the NYSE should list TREIT.



4. On April 30, 2019, I had a telephone conversation with Mr. Carey and Carolyn Saacke, Chief Operating Officer, Capital Markets at the NYSE, to respond to any questions NYSE had about TREIT's White Paper and to discuss next steps in applying for a listing. During the call, Ms. Saacke told me that the NYSE was uncomfortable listing TREIT on its exchange due to its cannabis-related business operations.

5. Before being permitted to apply to list on the NYSE, a company must undergo a review of eligibility. NYSE Listed Company Manual, Section 104.00. If, after that review, the NYSE determines a company is eligible to list on its exchange, it will provide a written "clearance letter" permitting the company to file a formal listing application. *Id.*, Section 702.00.

6. On May 6, 2019, I emailed Mr. Carey and Ms. Saacke requesting a formal statement of denial of eligibility for TREIT to list on the NYSE to create a record of NYSE's decision.

7. On May 9, 2019, I received a phone call from Mr. Carey and Ms. Saacke in response to my May 6, 2019 email requesting a formal denial of eligibility. Mr. Carey told me that the NYSE does not issue letters denying clearance to list on the NYSE, and thus the NYSE would not issue a denial letter for TREIT. Ms. Saacke stated that the decision to deny TREIT the opportunity to list on the NYSE was based on a policy decision by the NYSE not to list companies engaged either directly or indirectly in the cannabis business.

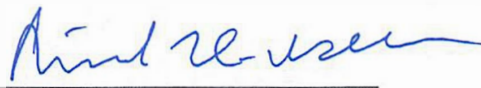
8. Mr. Carey also told me in our May 9 conversation that the NYSE would not provide TREIT an opportunity for a hearing or further review of this denial of listing opportunity, and that TREIT had exhausted all administrative remedies within the NYSE for this

determination because the NYSE has no appellate procedure or process for review within the NYSE for a determination of this nature.

9. Because there is no written record of NYSE's denial of TREIT's request to be listed and no appellate procedure or process within the NYSE to review this determination, I asked Mr. Carey what TREIT should tell the Securities and Exchange Commission (the "SEC") in any application for review. Mr. Carey told me that I could reference our May 9, 2019 conversation in any application for review. Mr. Carey said that I should inform the SEC that the "NYSE is not intending to list any company that is directly or indirectly involved in the marijuana industry in the United States."

I declare under penalty of perjury that the foregoing is true and correct.

New York, New York  
May 30, 2019

By:   
\_\_\_\_\_

Richard H. Walker

# **Exhibit 1**



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

## MEMORANDUM IN SUPPORT OF U.S. LISTING FOR SECOND REIT DOING BUSINESS WITH STATE-LICENSED CANNABIS OPERATORS

MARCH 29, 2019

### I. Issue

Treehouse Real Estate Investment Trust (“**TREIT**”), a REIT that primarily acquires real estate assets that are leased or may be leased to state-licensed cannabis operators, is seeking to be listed on the New York Stock Exchange (“**NYSE**”).

The NYSE currently lists Innovative Industrial Properties Inc. (NYSE:IIPR), a REIT with the same business model as TREIT, that also acquires real estate leased to state-licensed cannabis operators. In addition, several companies with sales to cannabis-related businesses that are exposed to the same risks of potential federal law violations as IIPR and TREIT are currently listed on the NYSE.

In preliminary discussions with representatives of TREIT, the NYSE staff expressed concern that the “climate” for listing a second cannabis REIT had deteriorated since the initial listing of IIPR in December 2016. We respectfully disagree with NYSE’s position and, as set forth in this memorandum, believe that the climate is more favorable now than it was in December 2016.

Accordingly, this memorandum evaluates whether the federal government is more or less likely today than it was in 2016 to enforce federal laws criminalizing cannabis and whether there is any reasonable basis for allowing IIPR, and other companies with cannabis-related businesses, to list while denying TREIT from listing. Specifically, this memorandum summarizes the positive momentum in favor of the federal government’s non-interference with companies that do business with state-licensed cannabis operations. It also explains the untenable inequities that would arise from denying TREIT’s listing application given the NYSE’s prior decision to list IIPR, a REIT with the same business model as TREIT, and to continue listing other companies with sales to cannabis-related businesses. Lastly, this memorandum details the implications of any NYSE “moratorium” on cannabis REITs, and the possible impact if the NYSE granted exclusive access to capital to a single market participant.

### II. Facts about TREIT

TREIT is not a cannabis company. TREIT acquires, owns, and operates real estate subject to long term leases with state-licensed cannabis operators. TREIT requires that the



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

operators are fully licensed, regulated and compliant with all applicable state and local laws and regulations.

TREIT has an institutional shareholder base, experienced board of directors, and expert advisors (including Greenberg Traurig and CohnReznick). TREIT's independent board of directors includes individuals with years of experience in the real estate and financial sectors. Those Board Members include:

- Brian Kabot, who has served as the Chief Investment Officer of Stable Road Capital since July 2017. Prior to Stable Road Capital, Mr. Kabot was Director of Research at Eschaton Opportunities Fund from May 2016 to July 2017. Prior to Eschaton Opportunities Fund, Mr. Kabot was a founding partner of Riverloft Capital, and served as a Deputy Portfolio Manager from January 2011 to April 2016.
- Charles R. Holzer, who has served as a director of his family-owned real estate companies for more than 25 years, where his responsibilities have included the acquisition, financing, development and management of approximately \$750 million in various real estate properties; the creation, operation and eventual sale of a nationwide commercial mortgage finance company; and the purchase of various non-performing loan packages from the Resolution Trust Company and other financial institutions.
- Kenneth T. Lombard, who has served as Executive Vice President and Chief Operating Officer of Seritage Growth Properties, a publicly-traded, self-administered and self-managed REIT with properties totaling approximately 39 million square feet of space across 49 states and Puerto Rico. Prior to Seritage, Mr. Lombard served as the President of two other investment firms, and also helped launch Johnson Development Corporation in 1992, where he spent 12 years as President and a Partner.
- Scott E. Peterson, who was most recently the co-founder and Chief Investment Officer of Digital Realty Trust Inc., from April 2014 to May 2018, where he was responsible for evaluating all capital allocation decisions.
- Ann Kono, who was most recently a Partner and Chief Information and Risk Officer of Ares Management LLC from 2007 to 2018, where she was instrumental in developing a platform in preparation for its dramatic growth from \$18 billion in assets to over \$100 billion in assets. At Ares, Ms. Kono oversaw the implementation all of its core systems, created and chaired the



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

Enterprise Risk Committee, and oversaw the implementation of Ares' first Cyber Security and Risk Analytics programs.

- Jonathan Trauben, who has been a Partner at Altitude Investment Management, LLC since 2017, and before that was a Senior Managing Director and Head of Capital Markets for Hunt Mortgage Group from 2015 to 2016. His prior experience includes senior level positions in the real estate groups at Barclays (from 2011 to 2015) and Credit Suisse (from 2002 to 2010).
- L. Spencer Wells, who has been a Partner at Drivetrain Advisors, an advisory firm providing fiduciary services to members of the alternative investment community, since co-founding Drivetrain Advisors in 2013. Mr. Wells' prior experience includes serving as a Partner at TPG Special Situations Partners (from 2010 to 2013) and Partner and Portfolio Manager at Silverpoint Capital, L.P. (from 2002 to 2009).

In January 2019, TREIT raised \$133.5 million through an offering of common stock through Ladenburg Thalmann & Co. Inc., Compass Point Research & Trading, LLC, and Northland Securities, Inc. These investment banks were the initial purchasers and placement agents for the offering. The offering was made to “qualified institutional buyers” as defined in Rule 144A under the Securities Act of 1933 (the “**Securities Act**”) and to persons outside the United States in offshore transactions in reliance on Regulation S under the Securities Act. The remainder of the shares were offered by TREIT pursuant to a private placement to “accredited investors” as defined in Rule 501 under the Securities Act, raising approximately \$45.5 million in a transaction that closed on March 18, 2019. We understand that some of the investors in this private round are also investors in IIPR. Also on March 18, TREIT announced that it had executed a term sheet with a federally-insured commercial bank for a debt facility.<sup>1</sup>

### III. Summary

The prior decision by the NYSE to permit the listing of a REIT that owns real property leased by companies operating state-legal cannabis operations provides compelling precedent to list TREIT as well.<sup>2</sup> There is strong evidence that – since the NYSE

---

<sup>1</sup> TREIT, Press Release, “Treehouse Real Estate Investment Trust, Inc. Announces Completion of Private Placement of Common Stock and Signs Debt Agreement with a Federally-Insured Commercial Bank,” (March 18, 2019), <https://www.apnews.com/d27b0c1a00274ffb87f5b70e9fab66ea>.

<sup>2</sup> The NYSE's listing of additional companies with sales to cannabis-related businesses that are exposed to the same risks of federal criminal law violations, as described herein in Part V, provides further support for our position.



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

permitted IIPR's listing in 2016 – the political and social environment has been rapidly driving legal and regulatory change toward expanding permission to operate cannabis-related businesses that are legal, licensed and regulated under state law. No fewer than five declared candidates for the U.S. Presidency (including all U.S. Senators in the race) have voiced their support for the legalization of marijuana. Newly confirmed Attorney General William Barr has said that he does not intend to initiate marijuana prosecutions that would upset legitimate investments in reliance on the lack of federal enforcement in the state-regulated cannabis marketplace. And finally, multiple bills are working their way through Congress that would lift existing federal restrictions on cannabis use and cannabis-related businesses.

#### **IV. The NYSE Permitted the Listing of a REIT With the Same Business Model**

This listing request is not a novel one. The NYSE has already permitted the listing of IIPR, a REIT that primarily acquires real estate assets that are leased or may be leased to state-licensed cannabis operators. There is no meaningful difference between the operations of IIPR and the operations of TREIT.

As IIPR stated in the November 25, 2016 Registration Statement it filed with the SEC in connection with its IPO (the "IIPR Registration Statement"), like TREIT, IIPR acquires properties and then leases them back to tenants, operating its business as a REIT for U.S. federal income tax purposes.<sup>3</sup> At the time of its IPO in 2016, IIPR stated that it intended to acquire industrial medical-use cannabis facilities, but it disclosed that its leases did not prohibit those facilities from cultivating cannabis for adult-use permitted under state law:

We intend to acquire industrial medical-use cannabis facilities and lease them to tenants who are the state-licensed operators of such facilities. While we target the acquisition of medical-use cannabis facilities, our leases do not prohibit cannabis cultivation for adult-use that is permissible under the state and local laws where our facilities are located. Consequently, certain of our tenants may subsequently cultivate adult-use cannabis in our medical-use cannabis facilities, if permitted by such state and local laws.<sup>4</sup>

Today, like TREIT, IIPR's acquisitions include properties licensed for both adult-use and medical-use cannabis. For example, on February 8, 2019, IIPR acquired a 43,000 square foot industrial space in Sacramento, California, operated by a tenant with a

---

<sup>3</sup> Innovative Industrial Properties, Inc., Registration Statement (Amend. No. 4 to Form S-11) (Nov. 25, 2016) at 1.

<sup>4</sup> *Id.* at 64.



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

“permanent adult-use and medical use cannabis retailer license.”<sup>5</sup> IIPR disclosed in its 2019 Annual Report that, “certain of our tenants are currently engaged in operations for the adult-use cannabis industry, which may subject our tenants, us and our properties to different and greater risks, including greater prosecution risk for aiding and abetting violation of the CSA and federal laws governing money laundering.”<sup>6</sup>

Significantly, TREIT and IIPR have essentially identical risk disclosures.<sup>7</sup> Both inform investors that if there is a change in “the federal government’s enforcement position, **we could be subject to criminal prosecution, which could lead to imprisonment and/or the imposition of penalties, fines, or forfeiture.**”<sup>8</sup> Both also emphasize that cannabis remains illegal under federal law. IIPR also states:<sup>9</sup>

- “Cannabis remains illegal under federal law, and therefore, strict enforcement of federal laws regarding cannabis would likely result in our inability and the inability of our tenants to execute our respective business plans.”
- “Federal prosecutors have significant discretion and no assurance can be given that the federal prosecutor in each judicial district where we purchase a property will not choose to strictly enforce the federal laws governing cannabis production or distribution. Any change in the federal government’s enforcement posture with respect to state-licensed cultivation of cannabis, including the enforcement postures of individual federal prosecutors in judicial districts where we purchase properties, would result in our inability to execute our business plan, and we would likely suffer significant losses with respect to our investment in cannabis facilities in the United States, which would adversely affect the trading price of our securities. Furthermore, following any such change in the federal government’s enforcement position, we could be subject to criminal prosecution, which

---

<sup>5</sup> “Innovative Industrial Properties Acquires California Property and Enters Into Long-Term Lease with Experienced Operator,” Business Wire, (Feb. 8, 2019), <https://www.businesswire.com/news/home/20190208005461/en/Innovative-Industrial-Properties-Acquires-California-Property-Enters>.

<sup>6</sup> Innovative Industrial Properties, Inc., Annual Report (Form 10-K) (March 14, 2019) at 28.

<sup>7</sup> As discussed in further detail below, there are other companies in the cannabis industry that are listed on the NYSE or Nasdaq, including India Globalization Capital Inc., Scotts Miracle-Gro, and Marrone Bio Innovations. Despite receiving proceeds from the federally illegal cannabis business, none of these companies have disclosures regarding potential criminal prosecution.

<sup>8</sup> *Compare* Innovative Industrial Properties, Inc., Annual Report (Form 10-K) (March 14, 2019) at 28 *with* TREIT Final Offering Memoranda (Jan. 3, 2019) at 41.

<sup>9</sup> Innovative Industrial Properties, Inc., Annual Report (Form 10-K) (March 14, 2019) at 27-28.





# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

could lead to imprisonment and/or the imposition of penalties, fines, or forfeiture.”

Thus, the overlap between TREIT and IIPR’s business models could not be more complete. Both entities operate as REITs that primarily acquire real estate assets that are leased or may be leased to state-licensed medical and adult-use cannabis operators. There is no justifiable reason for TREIT’s business operations alone to serve as the basis for it being denied a listing on the NYSE.

## V. **Twenty-Nine Companies Openly Engaged in The Cannabis Business Are Already Listed in the U.S.**

### A. NYSE

Besides IIPR, there are at least fifteen additional companies listed on the NYSE that openly engage in business, directly or indirectly, with the cannabis industry. Seven of the NYSE-listed companies are engaged in the cultivation and sale of cannabis for recreational or medicinal use in Canada,<sup>10</sup> three are hemp-related businesses in the United States impacted by the Farm Bill,<sup>11</sup> two have businesses in the cannabinoid pharmaceutical industry,<sup>12</sup> one sells gardening supplies to the cannabis industry,<sup>13</sup> one sells software to the cannabis industry,<sup>14</sup> one works in real estate in the cannabis industry,<sup>15</sup> and another is an ETF focused on cannabis stocks.<sup>16</sup>

**IGC.** One notable example of an NYSE-listed company with a cannabis-related business is India Globalization Capital Inc. (NYSE: IGC), a company that recently announced that it had successfully appealed a decision by the NYSE to delist based on alleged changes in its business operations.<sup>17</sup> IGC has two businesses: a legacy infrastructure business and a

---

<sup>10</sup> Compass Diversified Holdings, CannTrust Holdings, Canopy Growth Corporation, Aurora Cannabis, Aphria, HEXO Corporation, and Pyxus International Inc. In addition, Altria Group Inc., a U.S. company, acquired a 45% stake in Cronos Group (a Nasdaq-listed Canadian company that cultivates and sells medicinal marijuana). <http://investor.altria.com/file/Index?KeyFile=397052902>.

<sup>11</sup> Level Brands, Turning Point Brands Inc. and 22<sup>nd</sup> Century Group (subsidiary Botanical Genetics).

<sup>12</sup> India Globalization Capital Inc. and 22<sup>nd</sup> Century Group subsidiary Botanical Genetics.

<sup>13</sup> Scotts Miracle-Gro.

<sup>14</sup> Salesforce.com.

<sup>15</sup> CBRE Group Inc.

<sup>16</sup> ETFMG Alternative Harvest ETF.

<sup>17</sup> India Globalization Capital Inc., Press Release, “IGC Announces Successful Appeal of Delisting Proceedings and Imminent Relisting on NYSE American,” (Feb. 21, 2019), <https://static1.squarespace.com/static/55675f59e4b051f62f6f0b27/t/5c7002286e9a7f35d6d3f180/15508>



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

U.S.-based pharmaceutical company focused on phytocannabinoid-based products.<sup>18</sup> The U.S.-based cannabis company has marketed Hyalolex, a substance that contains cannabinoids that, according to the Hyalolex website, contains THC below the 0.3% limit permitted by the Farm Bill.<sup>19</sup> Before the passage of the Farm Bill in December 2018, however, IGC announced that it had begun production of Hyalolex in anticipation of commercializing the product that same year.<sup>20</sup> Based on this disclosure, it appears that for some period of 2018 IGC had business operations that complied with state law but may have conflicted with existing federal law. Moreover, TREIT – unlike IGC – is not directly involved in cannabis-based production or sales.

In its press release announcing the initial delisting decision, the NYSE explained that it delisted IGC because IGC had “substantially discontinued the business that it conducted at the time it was listed or admitted to trading, and has become engaged in ventures or promotions which have not developed to a commercial stage or the success of which is problematical” and that the “Company or its management have engaged in operations which, in the opinion of the Exchange, are contrary to the public interest.”<sup>21</sup> This delisting decision, however, was set aside by a NYSE review panel on February 20, 2019, which “unanimously found that the Company provided evidence sufficient to rebut the Exchange’s claim that the Company or its management had engaged in conduct contrary to the public interest.”<sup>22</sup>

**Scotts Miracle-Gro.** NYSE and Nasdaq both list U.S.-based companies that openly engage in sales within the United States to the cannabis industry. Scotts Miracle-Gro (NYSE: SMG) is a leading American lawn and garden company headquartered in Ohio that

---

44456944/IGC+Announces+Successful+Appeal+of+Delisting+Proceedings+%26+Imminent+Relisting+on+NYSE+American+Feb+20%2719.pdf.

<sup>18</sup> Phytocannabinoid is generally used to refer to any cannabinoid that is naturally occurring within the cannabis family of plants, including THC and CBD.

<sup>19</sup> See Hyalolex’s website at <https://hyalolex.com/> (last visited March 21, 2019).

<sup>20</sup> India Globalization Capital Inc., Annual Report (Form 10-K) (June 21, 2018) at 5.

<sup>21</sup> NYSE, Press Release, “NYSE American To Suspend Trading In India Globalization Capital Inc. (IGC) And Commerce Delisting Proceedings,” (Oct. 29, 2018), <https://ir.theice.com/press/press-releases/nyse-regulation/2018/suspensions/indiaglobalizationdelisting>; “Pileromazza Litigation Team Wins Long-Odds Appeal of New York Stock Exchange Delisting Decision,” Pileromazza PLLC, (Feb. 22, 2019), <https://www.pileromazza.com/pileromazza-litigation-team-wins-long-odds-appeal-of-new-york-stock-exchange-delisting-decision>; Daniel Liberto, “‘Poster Child of Cannabis Bubble’ Delisted From NYSE,” Investopedia, (Oct. 30, 2018), <https://www.investopedia.com/news/poster-child-cannabis-bubble-delisted-nyse/>; Francine McKenna, “Dubious pot stock IGC has trading suspended, shares to be delisted,” Marketwatch (Oct. 31, 2018), <https://www.marketwatch.com/story/dubious-pot-stock-igc-has-trading-suspended-shares-to-be-delisted-2018-10-29>.

<sup>22</sup> India Globalization Capital Inc., Press Release, (Feb. 21, 2019), *supra* note 17.



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

sells products to the cannabis industry in the United States. According to a position paper in support of cannabis legalization featured prominently on Scotts website: “As the leading provider of nutrients, plant supplements, growing media, air filtration and lighting used for hydroponic and indoor growing, our company is unique in its ability to help people who choose to produce cannabis authorized under state law.”<sup>23</sup> Scotts’ subsidiary, Hawthorne Gardening, is based in New York and is actively engaged in the cannabis industry. Bloomberg reported that Hawthorne generates about 90% of its sales from the cannabis industry (not including its AeroGrow indoor-gardening business).<sup>24</sup> It also acquired Sunlight Supply in 2018, a Canadian-based company with locations in the U.S. Sunlight Supply is a primary provider of hydroponic solutions to the cannabis industry.<sup>25</sup>

In a recent interview, Chris Hagedorn, general manager of Hawthorne and the son of Scotts Chief Executive Officer Jim Hagedorn, touted the prospects of the cannabis industry: “Pretty quickly we realized that cannabis and hydroponics were a big opportunity. It has become more acceptable to our investor base, to our board, to our management team and the motivation is obvious: it’s a high-growth category.”<sup>26</sup> Clearly, Scotts’ decision to knowingly market and sell its product to businesses in the cannabis industry for the purposes of increasing marijuana crop yields raises the same hypothetical risks of being charged with violations of federal anti-money laundering statutes as IIPR and TREIT.<sup>27</sup>

**Technology and Real Estate Companies.** In addition to Scotts, other U.S. companies are listed on the NYSE that operate in the cannabis industry, raising the same hypothetical legal risks. For example, Salesforce.com Inc. (NYSE: CRM) is a cloud-based software company headquartered in San Francisco, California that markets “Cultivate by CloudMJ,” an application built on the Salesforce App Cloud that is specifically designed for the cannabis industry.<sup>28</sup> CBRE Group Inc. (NYSE: CBRE), a commercial real estate services

---

<sup>23</sup> Scotts Miracle-Gro, “Our Viewpoint – cannabis legalization,” <https://scottsmiraclegro.com/who-we-are/where-we-stand/cannabis-legalization/> (last visited March 21, 2019) (arguing that “state-licensed cannabis businesses should have access to banking and other financial services, operate with the same tax structure as other businesses and not be threatened by federal prosecution if they comply with state laws”).

<sup>24</sup> Kristine Owram, “Scotts Miracle-Gro Tests Whether It Can Make Pot Grow Too,” Bloomberg, (Aug. 23, 2018), <https://www.bloomberg.com/news/articles/2018-08-23/scotts-miracle-gro-is-testing-whether-it-can-make-pot-grow-too>.

<sup>25</sup> Scotts Miracle-Gro, Press Release, “ScottsMiracle-Gro Reports Strong First Quarter Sales; U.S. Consumer Sales Increase 9%; Acquisitions Push Hawthorne Up 84%,” (Jan. 30, 2019), <http://phoenix.corporate-ir.net/phoenix.zhtml?c=98364&p=irol-newsArticle&ID=2385314>.

<sup>26</sup> Kristine Owram, *supra* note 24.

<sup>27</sup> See 18 U.S.C. § 1957(a).

<sup>28</sup> Salesforce.com, AppExchange, “Cultivate,” <https://appexchange.salesforce.com/listingDetail?listingId=a0N3000000DXzzhEAD> (last visited March 21, 2019).



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

and investment firm headquartered in Los Angeles, California, has “overseen a province-wide expansion of a leading private cannabis retailer” in Canada.<sup>29</sup>

## B. Nasdaq

There are currently at least thirteen companies listed on the Nasdaq that openly engage in business, directly or indirectly, with the cannabis industry. Two of the Nasdaq-listed companies are engaged in the cultivation and sale of cannabis for recreational or medicinal use in Canada,<sup>30</sup> eight have businesses in the cannabinoid pharmaceutical industry,<sup>31</sup> one sells pest control to the cannabis industry,<sup>32</sup> and two are technology companies that have sold hardware or software for use in the cannabis industry.<sup>33</sup>

**Marrone Bio Innovations.** Marrone Bio Innovations (Nasdaq: MBII), is an American company headquartered in California that is focused on the discovery, development and sale of innovative biological products for crop protection, plant health, and waterway systems treatment. Marrone Bio sells pest control to the cannabis industry within the United States. The company’s three main products (Grandevo CG, Venerate CG, Regalia CG) that account for over 87% of the company’s revenue stream for the past three years<sup>34</sup> are either currently being directly marketed and sold in the United States to the cannabis industry or are undergoing tests for the cannabis industry. For example, Marrone Bio announced at the end of February that one of its key products, Venerate CG, was approved by the California Department of Pesticide Regulation enforcement office to ensure the product’s use on cannabis is consistent with California Food and Agriculture Code 12973.<sup>35</sup> The Grandevo CG and Venerate CG products are already approved for use in the cannabis industry in Alaska, Colorado, Oregon, Nevada and Washington Departments of Agriculture.

Indeed, Marrone Bio – like Scotts Miracle-Gro – is knowingly marketing products for sale to customers in the cannabis industry, and both arguably face the same hypothetical

---

<sup>29</sup> CBRE Group, Inc., Sales Representative Profile, Paige Mersereau, <http://www.cbre.us/people-and-offices/paige-mersereau> (last visited March 21, 2019).

<sup>30</sup> Cronos Group and Tilray.

<sup>31</sup> Insys Therapeutics, GW Pharmaceuticals, Zynerba Pharmaceuticals, Corbus Pharmaceuticals Holdings Inc., Arena Pharmaceuticals Holdings Inc., Intec Pharma Ltd., Cara Therapeutics Inc., and Therapix Biosciences Ltd.

<sup>32</sup> Marrone Bio Innovations, Inc.

<sup>33</sup> Microsoft Corporation and HP Inc.

<sup>34</sup> Marrone Bio Innovations, Annual Report (Form 10-K) (April 5, 2018) at 23.

<sup>35</sup> Marrone Bio Innovations, Press Release, “Venerate CG label registered for use in California,” (Feb. 25, 2019), <https://marronebioinnovations.com/venerate-cg-label-registered-for-use-in-california/>.



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

criminal liability as TREIT under federal anti-money laundering statutes. It seems the only relevant difference is that TREIT, unlike these companies, has disclosed this risk to its investors so they can make informed investment decisions.

**Technology Companies.** Nasdaq also lists Microsoft Corporation (Nasdaq: MSFT) and HP Inc. (Nasdaq: HPE), both U.S. companies that have openly operated in the cannabis industry. Microsoft sold software to KIND Financial's "government solutions" division, offering software to state and local governments building compliance systems for the cannabis industry.<sup>36</sup> HP Inc. sold hardware to software firm FlowHub, which launched a product specifically designed for the cannabis industry.<sup>37</sup> Like Scotts Miracle-Gro, Salesforce.com, CBRE, and Marrone Bio, none of these companies have risk disclosures regarding their cannabis-related businesses.

**Nasdaq-Listed Canadian Cultivation Businesses.** Nasdaq also lists Canadian companies engaged in the cultivation and sale of medical cannabis. On February 27, 2018, Cronos Group (Nasdaq: CRON) became the "first marijuana company on a major U.S. exchange."<sup>38</sup> Cronos operates two wholly-owned Canadian cannabis license holders, is focused on building an international iconic brand portfolio and developing "disruptive intellectual property," and "is committed to building industry leading companies that transform the perception of cannabis and responsibly elevate the consumer experience."<sup>39</sup> On March 8, 2019, Cronos announced that it had received a \$1.8 billion equity investment from Altria Group, Inc. (NYSE: MO). Through this investment, Altria assumed a 45% ownership interest in Cronos.<sup>40</sup> On July 19, 2018, Nasdaq listed Tilray, Inc. (Nasdaq: TLRY) a "global pioneer in the research, cultivation, production and distribution of medical

---

<sup>36</sup> Nathaniel Popper, "The First Big Company to Say It's Serving the Legal Marijuana Trade? Microsoft," N.Y. Times, (June 16, 2016), <https://www.nytimes.com/2016/06/17/business/dealbook/microsoft-following-the-clouds-to-offer-marijuana-tracking-software.html>.

<sup>37</sup> Gene Marks, "HP finds an opportunity in the marijuana industry," Washington Post, (April 13, 2018), [https://www.washingtonpost.com/news/on-small-business/wp/2018/04/13/hp-is-jumping-into-the-pot-business/?utm\\_term=.87342b1543da](https://www.washingtonpost.com/news/on-small-business/wp/2018/04/13/hp-is-jumping-into-the-pot-business/?utm_term=.87342b1543da).

<sup>38</sup> Jennifer Kaplan and Erik Schatzker, "Nasdaq to Get First Pot Listing," Bloomberg (Feb. 26, 2018), <https://www.bloomberg.com/news/articles/2018-02-26/nasdaq-to-get-first-pot-listing-as-cronos-group-joins-exchange>.

<sup>39</sup> Cronos Group Inc., News Release, "Cronos Group Inc. to Hold Full Year and Fourth Quarter 2018 Earnings Conference Call," (March 1, 2019), <https://ir.thecronosgroup.com/news-releases/news-release-details/cronos-group-inc-hold-full-year-and-fourth-quarter-2018-earnings>.

<sup>40</sup> Cronos Group Inc., News Release, "Cronos Group Inc. Closes C\$2.4 billion Strategic Growth Investment From Altria Group, Inc.," (March 8, 2019), <https://ir.thecronosgroup.com/news-releases/news-release-details/cronos-group-inc-closes-c24-billion-strategic-growth-investment>; Altria Group, Inc., Press Release, "Altria Becomes Largest Shareholder in Cronos Group, a Leading Global Cannabinoid Company," (March 8, 2019), <http://investor.altria.com/file/Index?KeyFile=397052902>.



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

cannabis and cannabinoids.”<sup>41</sup> Tilray was the first licensed medical cannabis producer to successfully import medical cannabis products into the European Union, and recently announced that its Portuguese subsidiary had completed a successful harvest of medical cannabis on a €20 million research campus in the European Union.<sup>42</sup>

These multi-billion dollar capital-raise and “first-mover” market advantages that these Canadian companies have is no doubt a result of the decision by the NYSE and Nasdaq to list such companies on their respective exchanges.

## VI. Prosecutorial Discretion, Public Policy, and Continued Positive Momentum

Federal law remains clear in its treatment of cannabis as a controlled substance. Despite that fact, the current regulatory and legislative environments are steadily marching toward national legalization of cannabis. Even if that change takes longer than expected, the risk of federal prosecution is already quite remote, and we are confident it will continue to abate.

### A. Increasingly Remote Risk of Federal Prosecution

At present, thirty-three U.S. states and the District of Columbia have legalized adult-use and/or medical marijuana. To address this unusual conflict between federal and state law, in August 2013 the Department of Justice sought to provide guidance to its enforcement agencies by issuing a Memorandum drafted by former Deputy Attorney General James Michael Cole (the “Cole Memo”).<sup>43</sup> The Cole Memo offered guidance to federal prosecutors on how to prioritize civil enforcement, criminal investigations and prosecutions regarding marijuana in all states. It outlined eight prosecution priorities:

1. Preventing the distribution of marijuana to minors;
2. Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;

---

<sup>41</sup> Tilray, Inc., Corporate Profile, <https://ir.tilray.com/>.

<sup>42</sup> Tilray, Inc., Press Release, “Tilray Announces Successful Medical Cannabis Harvest in Portugal and Provides Update on Rapidly Expanding European Operations,” (March 6, 2019), <https://ir.tilray.com/news-releases/news-release-details/tilrayr-announces-successful-medical-cannabis-harvest-portugal>.

<sup>43</sup> James M. Cole, U.S. Dept. of Justice, Memorandum for all United States Attorneys: “Guidance Regarding Marijuana Enforcement,” (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

4. Preventing the state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
5. Preventing the violence and the use of firearms in the cultivation and distribution of marijuana;
6. Preventing the drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
8. Preventing marijuana possession or use on federal property.<sup>44</sup>

The Department of the Treasury Financial Crimes Enforcement Network (“**FinCEN**”) issued its own guidance in January 2014 in response to the Cole Memo, establishing a SAR reporting regime tailored to the cannabis industry. The FinCEN guidance requires financial institutions that provide services to marijuana-related businesses to complete certain diligence on account holders and file a SAR identifying any marijuana-related transactions.<sup>45</sup>

In January 2018, then-United States Attorney General Jeff Sessions rescinded the Cole Memo by issuing a new Department of Justice Memorandum concerning federal marijuana-related prosecutions (the “**Sessions Memo**”).<sup>46</sup> The Sessions Memo grants prosecutors complete discretion over which marijuana-related activities to prosecute. Initially, the uncertainty from this broad discretion caused banks difficulty in accurately assessing the potential legal exposure associated with doing business with marijuana-related business.<sup>47</sup> Ultimately, though, the Sessions Memo was merely symbolic in nature, as it did not result in *any* prosecutions of state-law compliant cannabis operators.<sup>48</sup> This

---

<sup>44</sup> *Id.*

<sup>45</sup> Department of the Treasury Financial Crimes Enforcement Network, Guidance (FIN-2014-G001), “BSA Expectations Regarding Marijuana-Related Businesses,” (Feb. 14, 2014), <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>.

<sup>46</sup> Jefferson B. Sessions, U.S. Department of Justice, Memorandum for all United States Attorneys: “Marijuana Enforcement,” (Jan. 4, 2018), <https://www.justice.gov/opa/press-release/file/1022196/download>.

<sup>47</sup> See Brad Scheick, “Do You Feel Lucky, Banker? The Shaky Prospects for Financial Transactions with Marijuana-Related Businesses,” Miller & Starr Real Estate News Alert, (May 2018), Vol. 28 Issue 5, [https://www.msrlgal.com/uploads/documents/MSR\\_Newsalert\\_BZS\\_2018.pdf](https://www.msrlgal.com/uploads/documents/MSR_Newsalert_BZS_2018.pdf).

<sup>48</sup> See Hilary Bricken, “ICYMI: New U.S. Attorney General (Probably) Won’t Harsh Your Mellow After All,” Above the Law, (March 4, 2019), <https://abovethelaw.com/2019/03/icymi-new-u-s-attorney-general-probably-wont-harsh-your-mellow-after-all/> (“To date, there haven’t been any reported incidents of the Feds going after state-law compliant cannabis operators in states that have legalized and regulated”).



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

provided a level of relief to financial institutions that had feared something far more punitive, and has since emboldened them to become more receptive to banking marijuana-related businesses.<sup>49</sup>

At the moment, despite Attorney General Sessions' resignation in November 2018, the Sessions Memo remains in effect. Critically, however, repeated statements from current Attorney General William Barr make clear that a return to the policies articulated in the Cole Memo is imminent. During his confirmation hearings with the Senate Judiciary Committee, Barr testified that his approach to federal enforcement within the state-law compliant marketplace would be in line with the Cole Memo, and not the Sessions Memo. Specifically, Barr's approach "would be not to upset settled expectations and the reliance interests that have arisen as a result of the Cole [Memo]."<sup>50</sup> Barr added, "Investments have been made [as a result of the Cole Memo], so I don't think it's appropriate to upset those interests."<sup>51</sup> Following his appearance before the Senate Judiciary Committee, Barr confirmed his approach in his written answers to the Committee: "As discussed at my hearing, I do not intend to go after parties who have complied with state law in reliance on the Cole Memorandum."<sup>52</sup> These sworn statements make clear that even if he does not formally reinstate the Cole Memo, Attorney General Barr is highly unlikely to endorse any action that is at odds with it. For these reasons, the risk of prosecution for entering into business arrangements with state-legal marijuana businesses is increasingly more remote than it was in 2016.

The United States Congress has also taken legislative action in recent years that not only further lessens prosecution risks for cannabis-related businesses, but, in fact, lays the ground work for future legislation in the area eliminating federal law restrictions. In 2014, Congress approved an amendment to the annual spending bill, introduced by California

---

Furthermore, in response to the Sessions Memo, FinCEN did not – and to this day has announced no intention to – rescind its January 2014 cannabis-related guidance for financial institutions. That said, because the FinCEN guidance was predicated on the Cole Memo, there is some uncertainty as to whether it is in full force and effect.

<sup>49</sup> John Vardaman, "A Year After Cole Memo Rescission and Marijuana Banking Goes On," HYPUR, (Dec. 16, 2018), <https://www.hypur.com/cole-memo-recscission-one-year-later/>. Indeed, FinCEN data shows a steady increase in the number of financial institutions serving marijuana-related businesses (based on Marijuana SAR filings), even after repeal of the Cole Memo. *Id.*

<sup>50</sup> U.S. Senate, Committee on the Judiciary, Hearing on the Nomination of the Honorable William Pelham Barr to be Attorney General of the United States, Congressional Transcripts, "Senate Judiciary Committee Holds Hearing on Nomination of William P. Barr to be U.S. Attorney General," (Jan. 15, 2019), <http://www.cq.com/doc/congressionaltranscripts-544471270>.

<sup>51</sup> *Id.*

<sup>52</sup> Tom Angell, "Trump Attorney General Pick Puts Marijuana Enforcement Pledge In Writing," Forbes, (Jan. 28, 2019), <https://www.forbes.com/sites/tomangell/2019/01/28/trump-attorney-general-pick-puts-marijuana-enforcement-pledge-in-writing/#5d9e3eb85435>.





# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

Reps. Sam Farr (D) and Dana Rohrabacher (R), blocking the Department of Justice from using federal funds to prosecute state-legal medical marijuana programs (the “Rohrabacher-Farr Amendment” or “Amendment”). In order to remain effective, the Rohrabacher-Farr Amendment must be renewed each year. Renewal has been approved with each subsequent spending bill. It was most recently renewed on February 15, 2019 and will be in effect through September 30, 2019.<sup>53</sup> Due in part to the Amendment’s continuous renewal, there have been no successful federal civil forfeiture actions involving real estate used in a state-compliant cannabis business.<sup>54</sup>

The trend is clear and continuing – Congress is chipping away at restrictions on cannabis-derived products and marching rapidly toward federal legalization. The Farm Bill, signed into law on December 20, 2018, removed hemp-derived products from the Schedule I drug category, federally legalizing hemp’s cultivation and production. Under the Farm Bill, cannabis-derived products that contain less than 0.3 percent THC can be shipped across state lines.<sup>55</sup> The fact that this legislation won bi-partisan support and was enacted into law in this contentious political climate leads to only one conclusion: future legislation that continues toward national legalization of marijuana is inevitable.

## **B. Pending Marijuana Legislation is Likely to Pass This Term**

There are an unprecedented number of pro-cannabis bills currently before Congress, some of which are quite sweeping in nature. Perhaps most notable for its reach is the Marijuana Justice Act, introduced by Senator Booker (D-NJ, another declared 2020 Presidential Candidate) on February 28, 2019. If passed in its current form, the Marijuana Justice Act would remove cannabis from the federal list of controlled substances, while also providing financial incentives to states to loosen their marijuana laws.<sup>56</sup> The bill is co-sponsored by seven of Senator Booker’s fellow Senate Democrats and Independents, including several 2020 rivals: Senator Gillibrand (D-NY), Senator Sanders (I-VT), Senator Harris (D-CA), and Senator Warren (D-MA). Other proposed legislation, arguably less

---

<sup>53</sup> See H.R.J. Res. 31, 116<sup>th</sup> Cong. (2019-2020), “Consolidated Appropriations Act”; see also Feb. 15, 2019 Presidential Signing Statement, <https://www.whitehouse.gov/briefings-statements/statement-by-the-president-28/>.

<sup>54</sup> While a small number of DOJ-initiated foreclosure proceedings were brought against properties in California used in legal dispensaries prior to 2014, the Department of Justice (the “DOJ”) dismissed all of these actions by 2016 and no new actions have been brought by the DOJ in the five years since.

<sup>55</sup> See *Agriculture Improvement Act of 2018*, Pub. L. No. 115-334, 132 Stat. 4490 (2018) (the 2018 Farm Bill), § 10113 Hemp Production at 4908-4909 Subtitle G “Hemp Production,” § 10113 (Sec. 297A Definitions); see also *id.* § 10114 at 4914 (“Interstate Commerce”).

<sup>56</sup> Tom Angell, “Marijuana Won The Midterm Elections,” *Forbes*, (Nov. 7, 2018), <https://www.forbes.com/sites/tomangell/2018/11/07/marijuana-won-the-midterm-elections/#1b7a6fd53a91>.



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

sweeping in nature, has received greater levels of bi-partisan support and as a result may be more likely to pass this term.

One such marijuana-related bill that was introduced quite recently is the Regulate Marijuana Like Alcohol Act, sponsored by Rep. Blumenauer (Chairman of the Congressional Cannabis Caucus).<sup>57</sup> The bill would remove marijuana from the government’s list of controlled substances and place it instead under the oversight of existing federal agencies—effectively decriminalizing marijuana at the federal level. Under the proposed law, the Drug Enforcement Agency would no longer have enforcement authority, and the plant would instead be regulated by the FDA and the ATF. The bill had been initially introduced by Rep. Polis (D-CO) in March 2017,<sup>58</sup> but Rep. Blumenauer re-introduced it on January 9, 2019. A related bill, the Marijuana Revenue and Regulation Act,<sup>59</sup> was reintroduced by Rep. Blumenauer on February 8, 2019. That bill would legalize, tax, and regulate marijuana at the federal level. Senator Ron Wyden (D-OR) introduced an identical version of the bill in the Senate on February 7, 2019.<sup>60</sup> These bills have not yet gained any co-sponsors, but have been referred to the relevant subcommittees.

The Strengthening the Tenth Amendment Through Entrusting States (STATES) Act would amend the Controlled Substances Act so that it applies only when state law applies as well.<sup>61</sup> The bill was introduced in June 2018 by a truly bipartisan group of ten senators (five Democrats and five Republicans) led by Senators Gardner (R-CO) and Warren. Congressmen David Joyce (R-OH) and Blumenauer introduced an identical companion bill in the House in June 2018.<sup>62</sup> Also referred to as the STATES Act, the House bill has 45 co-sponsors, 14 of whom are Republicans. Both bills have been referred to committees but have not yet been the subject of hearings.

Congressman Ed Perlmutter (D-Colo.) introduced legislation in April 2017 known as the Secure and Fair Enforcement (SAFE) Banking Act.<sup>63</sup> If passed, the bill would provide “safe harbor” for banks that provide financial products or services to state-legal marijuana businesses. The bill is noteworthy in that commentators have deemed it to have a

---

<sup>57</sup> H.R. 420, 116th Cong. (2019).

<sup>58</sup> H.R. 1841, 115th Cong. (2017).

<sup>59</sup> H.R. 1120, 116th Cong. (2019).

<sup>60</sup> S. 420, 116th Cong. (2019).

<sup>61</sup> S. 3032, 115th Cong. (2018).

<sup>62</sup> H.R. 6043, 115th Cong. (2018).

<sup>63</sup> H.R. 2215, 115th Cong. (2017).



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

particularly high chance of passing before the end of 2019.<sup>64</sup> The bill has already garnered widespread bipartisan support—at present it has 95 co-sponsors, 13 of whom are Republican. Even lawmakers who oppose the SAFE Banking Act have acknowledged that the all-cash business nature of legalized marijuana poses security risks and needs to be addressed.<sup>65</sup> The legislation was backed by 19 state attorneys general as of January 2018.<sup>66</sup> And, most importantly, it has the distinction of being the first and only marijuana-related bill to have a hearing—on February 12, 2019 the House Financial Services Committee held a hearing to discuss the bill.<sup>67</sup> At the hearing, Rep. Perlmutter expressed his intent to reintroduce the bill,<sup>68</sup> and the dramatic shift in favor of legalization means it has the potential to pass. On March 28, 2019, the House Committee on Financial Services passed the bill, paving the way for a vote among the full House of Representatives.<sup>69</sup> Senator Merkley introduced a companion bill in the Senate in May of 2017, but the bill is slightly broader in scope in that it deals with operations beyond just banks' depository capacities.<sup>70</sup> Commenters, including Compass Point analyst Isaac Boltansky, have recently increased the odds of the passage of meaningful reform. Boltansky puts the likelihood of banking-related cannabis legislation passing at 75 percent.<sup>71</sup>

When and if Congress passes any marijuana-related legislation, the legislation is likely to be supported and signed by President Trump, who has on multiple occasions said

---

<sup>64</sup> See Victoria Finkle, "The One Banking Bill Congress Might Actually Pass Next Term," *American Banker*, (Dec. 2, 2018), <https://www.americanbanker.com/opinion/the-one-banking-bill-congress-might-actually-pass-next-term>.

<sup>65</sup> Zachary Warmbrodt, "Bankers' pot push gets boost from blue wave, Sessions ouster," *Politico*, (Nov. 27, 2018), <https://www.politico.com/story/2018/11/27/bankers-pot-push-gets-boost-from-blue-wave-sessions-ouster-1017137>.

<sup>66</sup> Alex Pasquariello, "19 state attorneys general back Colo. Rep. Perlmutter's marijuana banking bill," *Denver Post*, (Jan. 16, 2018, updated Jan. 17, 2018), <https://www.thecannabist.co/2018/01/16/marijuana-banking-bill-perlmutter-state-attorney-general/96870/>.

<sup>67</sup> See Jeff Smith, "Congressional hearing on marijuana banking boosts industry hopes for reform, but passage far from assured," *Marijuana Business Daily*, (Feb. 13, 2019), <https://mjbizdaily.com/congressional-hearing-on-marijuana-banking-has-industry-hopeful-for-reform/>; Congressman Ed Perlmutter, Press Release, "SAFE Banking Act Introduced as Congress Looks to Address Cannabis Banking Issue," (March 7, 2019), <https://perlmutter.house.gov/news/documentsingle.aspx?DocumentID=2405>.

<sup>68</sup> *Id.*

<sup>69</sup> Cheryl Miller, "U.S. House Committee Passes First-Ever Marijuana Banking Bill," *National Law Journal*, (March 28, 2019), <https://www.law.com/nationallawjournal/2019/03/28/u-s-house-passes-first-ever-marijuana-banking-bill/?slreturn=20190228164032>.

<sup>70</sup> See Secure and Fair Enforcement Banking Act, S. 1152, 115<sup>th</sup> Cong. (2017).

<sup>71</sup> Zachary Warmbrodt, *supra* note 65.



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

he would most likely support the STATES Act.<sup>72</sup> This dynamic – legislation with broad bipartisan support and a receptive President – has led members of Congress to predict its inevitable passage into law. Congressman Earl Blumenauer (D-Ore) released a memo in 2018 containing a committee-by-committee breakdown and timeline outlining how to move ahead with cannabis reform legislation, stating: “There’s no question: cannabis prohibition will end. Democrats should lead the way. If we fail to act swiftly, I fear as the 2020 election approaches, Donald Trump will claim credit for our work in an effort to shore up support — especially from young voters.”<sup>73</sup>

## C. State Developments in Marijuana Legalization

State developments in marijuana legalization also support the notion that the risk of investing in marijuana-related businesses is at an all-time low– even as compared to December 2016 when the NYSE listed IIPR. At the time of that listing, adult recreational use was legal in only eight states.<sup>74</sup> In the two years since IIPR’s listing, Vermont and Michigan have also legalized recreational use. And the list of states legalizing adult recreational use will likely grow significantly by the end of 2019: Connecticut, Illinois, Minnesota, New Hampshire, New Jersey, New Mexico, New York, and Rhode Island all elected governors who made legalization a key campaign platform.<sup>75</sup>

## D. Public Opinion and Public Policy

Polling data indicates that the American public is in favor of new pro-cannabis legislation increasing the likelihood that some – if not all – of the proposed legislative initiatives pending in Congress will eventually become law, and that additional states will legalize the sale of cannabis. Most Americans are in favor of legalizing the use of marijuana and have been for years. Support is still on the rise and reaches across party lines. Indeed,

---

<sup>72</sup> In June 2018 President Trump stated that he “probably will end up supporting” bipartisan legislation to bar the federal government from interfering with marijuana legalization laws at the state level, specifically referencing legislation proposed by Senator Cory Gardner (R-Colo) and Elizabeth Warren (D-Mass). In responding to questions about the cannabis legislation, Trump said “I support Senator Gardner. I know exactly what he’s doing, we’re looking at it. But I probably will end up supporting that, yes.” See Cristiano Lima, “Trump voices support for bipartisan pot legislation,” Politico, (June 8, 2018), <https://www.politico.com/story/2018/06/08/trump-bipartisan-pot-legislation-633707>.

<sup>73</sup> Congressman Earl Blumenauer (D. Or), Memorandum to House Democratic Leadership: “Blueprint to Legalize Marijuana in the 116th Congress,” Politico, <https://www.politico.com/f/?id=00000166-83cb-d079-a367-b7fb96580001> (last visited March 22, 2019).

<sup>74</sup> Those states are Colorado, Washington, Alaska, Oregon, California, Nevada, Maine, and Massachusetts.

<sup>75</sup> Tom Angell, “These States Are Most Likely To Legalize Marijuana In 2019,” Forbes, (Dec. 26, 2018), <https://www.forbes.com/sites/tomangell/2018/12/26/these-states-are-most-likely-to-legalize-marijuana-in-2019/#47b0c3275add>.

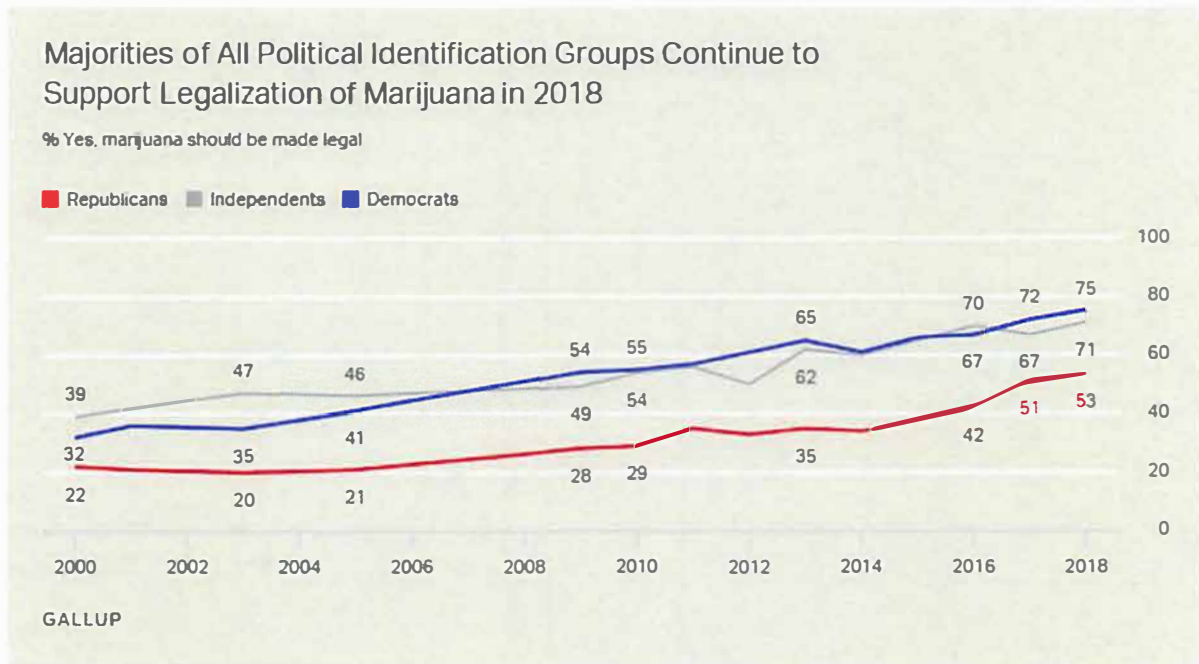


# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

the public is significantly more in favor of legalization now than in 2016, when the NYSE listed IIPR. This undeniable momentum increases the likelihood of marijuana’s widespread legalization.

The percentage of Americans who favor legalizing the use of marijuana increased consistently from 1990 through 2018. In October 2018, Gallup found that two out of three (66%) of Americans now support legalizing marijuana.<sup>76</sup> This was the third consecutive year in which Gallup found an increasing percentage of Americans favor ending marijuana prohibition. In fact, Gallup conducted the same poll in 2016 – the year IIPR listed on NYSE – and found a lower number, 60% of Americans, supported legalizing marijuana.<sup>77</sup> The following chart, from the 2018 Gallup report, illustrates the broad bipartisan support for legalization, including that, for the first time in 2018, a majority (53%) of Republicans support cannabis legalization (compared with 42% of Republicans who supported cannabis legalization in the 2016 Gallup survey).



Research from the Pew Research Center (“**Pew**”) echoes Gallup’s findings of growing support for legalization, particularly as between 2016 and today. Pew research

<sup>76</sup> Justin McCarthy, “Two in Three Americans Now Support Legalizing Marijuana,” Gallup, (Oct. 22, 2018), <https://news.gallup.com/poll/243908/two-three-americans-support-legalizing-marijuana.aspx>.

<sup>77</sup> Art Swift, “Support for Legal Marijuana Use Up to 60% in U.S.,” Gallup, (Oct. 19, 2016), <https://news.gallup.com/poll/196550/support-legal-marijuana.aspx>.



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

shows that by October 2016, around the time of the IIPR listing, 57% of U.S. adults said the use of marijuana should be legal.<sup>78</sup> The percentage rose materially between 2016 and today. In October 2018, Pew updated its findings: 62% of Americans say that the use of marijuana should be legalized, whereas only 34% say it should be illegal.<sup>79</sup> Pew, like Gallup, found a particularly significant increase in the share of Republicans in favor of legalizing marijuana – 45% in 2018, as compared to 39% in 2015. The following charts from Pew illustrate the consistent rate of increasing popular support for cannabis legalization from 1990 to the present, through both Democratic and Republican administrations.

---

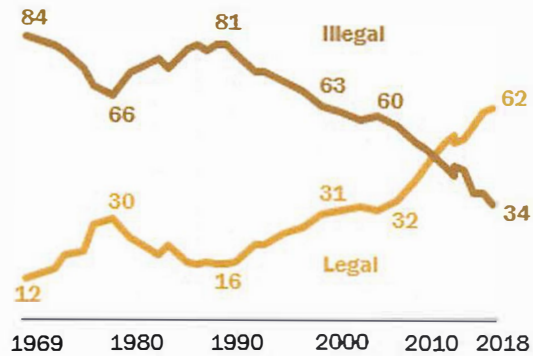
<sup>78</sup> Abigail Geiger, “Support for marijuana legalization continues to rise,” Pew Research Center, (Oct. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/10/12/support-for-marijuana-legalization-continues-to-rise/>.

<sup>79</sup> Hannah Hartig and Abigail Geiger, “About six-in-ten Americans support marijuana legalization,” Pew Research Center, (Oct. 8, 2018), <http://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/>.

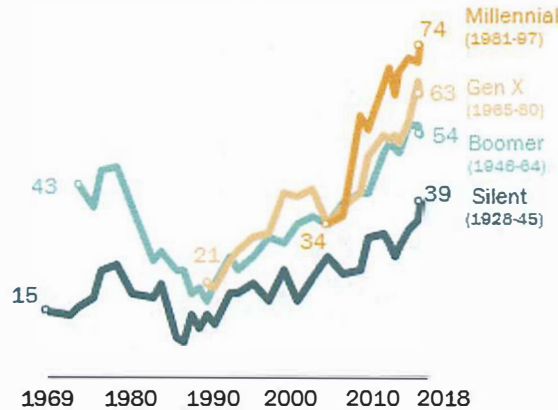


## U.S. public opinion on legalizing marijuana, 1969-2018

*Do you think the use of marijuana should be made legal, or not? (%)*



*% who say marijuana should be made legal*



Note: Don't know responses not shown.

Source: Survey of U.S. adults conducted Sept. 18-24, 2018.

PEW RESEARCH CENTER

Recent changes in the composition of the U.S. Congress, as well as the approaching 2020 presidential election, make it likely that federal laws will be adopted in the near-term reconciling state legalization of cannabis. Public opinion and money (tax dollars) are both squarely on the side of legalization, which is moving cannabis legalization forward, not backward. Democratic gains in the 2018 midterm elections boost the likelihood of pro-cannabis legislation being introduced and ultimately passed into law. In fact, election



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

observers have deemed marijuana a “clear winner” in the 2018 midterm elections. And, in a January 9, 2019 interview, Rep. Blumenauer, Chairman of the Congressional Cannabis Caucus, labeled the current Congress as “the most pro-Cannabis Congress in history.”<sup>80</sup> Rep. Blumenauer’s statement has already proved accurate—several weeks ago the House Financial Services Subcommittee held the first congressional hearing on proposed marijuana legislation.<sup>81</sup>

Even if Congress is slower than expected to pass revolutionary pro-cannabis legislation, staunch support by 2020 Presidential Candidates ensures that it will receive significant attention on the campaign trail. As detailed above, **all** of the Democratic Senators that have announced their intention to run for president have introduced or at least co-sponsored pro-cannabis legislation. In fact, Senator Warren (D-MA) has been a strong and consistent supporter of marijuana legalization over the years.<sup>82</sup> And Senator Klobuchar (D-MN) has already pledged to make marijuana legalization one of her campaign issues, stating: “I support the legalization of marijuana and believe that states should have the right to determine the best approach to marijuana within their borders.”<sup>83</sup> And it is not only Democratic presidential candidates who support legalization. Former Massachusetts Governor Bill Weld – who has announced his intention to challenge President Trump in the Republican primary – has long been viewed as a friend to the cannabis industry.

## VII. Equitable Considerations Favor TREIT’s NYSE Listing

### A. The SEC Approved IIPR’s Registration Statement And Has Announced No Contrary Policy

In connection with its 2016 IPO, IIPR submitted a registration statement for approval as required by the Securities Act. That registration statement made clear IIPR was a REIT that invested in properties leased to state-licensed medical marijuana

---

<sup>80</sup> See Kellan Howell, “This Congressman Says The New Congress Could Legalize Weed,” Newsy.com, (Jan 7, 2019), <https://www.news.com/stories/earl-blumenauer-legal-weed-could-pass-in-new-congress/> (video of interview); see also Andrew Blake, “Regulate Marijuana Like Alcohol Act reintroduced in ‘the most pro-cannabis Congress in history,’” AP, The Washington Times, (Jan. 10, 2019), <https://www.apnews.com/1a98592fd884d1ca40fb7099be7901d8>.

<sup>81</sup> See Congressman Denny Heck Press Release, “First Congressional Hearing Held On Cannabis Banking,” (Feb. 13, 2019), <https://dennyheck.house.gov/media-center/press-releases/first-congressional-hearing-held-on-cannabis-banking>.

<sup>82</sup> Mike Adams, “Where Does Presidential Candidate Elizabeth Warren Stand On Marijuana?” The Fresh Toast, (Jan. 8, 2019), <https://thefreshtoast.com/cannabis/where-does-presidential-candidate-elizabeth-warren-stand-on-marijuana/>.

<sup>83</sup> Dan Merica and Sophie Tatum, “Amy Klobuchar says she supports legalizing marijuana,” CNN, (Feb. 22, 2019), <https://www.cnn.com/2019/02/22/politics/amy-klobuchar-marijuana-legalize-2020/index.html>.





# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

companies. Specifically, IIPR identified itself as a corporation “focused on the acquisition, ownership and management of specialized industrial properties leased to experienced, state-licensed operators for their regulated medical-use cannabis facilities.”<sup>84</sup> The SEC permitted, and did not object to, IIPR’s registration – although it did provide comments on the registration statement to ensure that IIPR provided full and complete disclosure of the risks of federal enforcement related to cannabis.<sup>85</sup> This is entirely consistent with the SEC’s non-merit based approach to registration. In fact, the SEC has no policy, either express or, based on our conversations with the Staff, implied, prohibiting companies involved in cannabis-related businesses from registering and selling their shares.

TREIT will be submitting its registration statement for approval and has no reason to believe that the SEC will not declare it effective. TREIT’s registration statement likewise makes clear that it is a REIT that invests in properties leased to state-licensed marijuana companies. The NYSE has expressed its intent to deny TREIT’s listing application on the basis that TREIT, like IIPR, focuses on the acquisition, ownership and management of specialized industrial properties leased to experienced, state-licensed operators for their regulated state-legal cannabis facilities. If the NYSE were to deny this near identical listing application, the NYSE would be taking action that is difficult to reconcile with the SEC’s declaration of registration effectiveness with respect to IIPR and, we expect, TREIT.

Denying TREIT a listing here would also be contrary to the SEC’s current policies emphasizing the importance of bringing small companies to market and providing investors with expanded investment opportunities. A few short months ago, SEC Chairman Jay Clayton emphasized these policies in a speech at the Nashville Entrepreneurship Festival. Specifically, Chairman Clayton stated that “the SEC should be keenly focused on helping small businesses from coast to coast access capital to grow, create new jobs, and, in turn, provide investors, including our Main Street investors, expanded investment opportunities.”<sup>86</sup> Chairman Clayton advocated not just for more investment opportunities, but for greater diversity in the types of business registered with the SEC: “The SEC is committed to efforts to develop a regulatory framework that equally serves the neighborhood coffee shop that is looking to expand into a second location, the biotech startup looking to hire more scientists to cure cancer, the social media company looking to

---

<sup>84</sup> Innovative Industrial Properties, Inc., Registration Statement (Form S-11) (Oct. 17, 2016) at 3.

<sup>85</sup> Innovative Industrial Properties, Inc, Letter from Foley & Lardner to Jennifer Gowetski, Senior Counsel, Office of Real Estate and Commodities, Division of Corp. Finance (Correspondence) (Nov. 7, 2016) at 7, available at <https://www.sec.gov/Archives/edgar/data/1677576/000114420416131859/filename1.htm> (“We note your disclosure on the cover stating that ‘the federal government currently has a relaxed enforcement position’ relating to medical-use cannabis. Please revise your disclosure ... to remove this mitigating language and clarify that the sale and use of marijuana is a violation of federal law or advise.”).

<sup>86</sup> SEC Chairman Jay Clayton, “Remarks on Capital Formation at the Nashville 36/86 Entrepreneurship Festival,” (Aug. 29, 2018), <https://www.sec.gov/news/speech/speech-clayton-082918>.



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

conduct its IPO, and the Main Street investor saving for their future.”<sup>87</sup> The Director of SEC’s Corporate Finance Division, William Hinman, has echoed the need for a “regulatory approach that both fosters innovation and protects investors.”<sup>88</sup> Both Chairman Clayton and Director Hinman have explicitly stated their intent to welcome registration by another category of companies in a sector that is often deemed controversial: cryptocurrency.<sup>89</sup>

We also expect that numerous U.S. companies trading in Canada on the Canadian Securities Exchange (“CSE”) will, by December 31, 2019, no longer meet the requirements of being foreign private issuers under U.S. securities laws.<sup>90</sup> At that time, these companies must register with the SEC. The SEC’s decision to approve IIPR’s registration, as well as statements by SEC leaders about the need for diversity in investment opportunities, suggests that the SEC will welcome those companies with open arms.

## **B. Innovative U.S. Companies Should Be Listed in the U.S.**

Currently, there are six cannabis companies listed in Canada that are incorporated in the U.S.<sup>91</sup> There are also numerous Canadian companies with U.S. subsidiaries who operate in the cannabis industry.<sup>92</sup> The NYSE should not have a policy that results in U.S. companies having to list in Canada. The New York Times recently profiled one such

---

<sup>87</sup> *Id.*

<sup>88</sup> SEC Director of Div. of Corp. Finance William Hinman, “Testimony on ‘Oversight of the SEC’s Division of Corporation Finance,’” (April 26, 2018), <https://www.sec.gov/news/testimony/testimony-oversight-secs-division-corporation-finance>.

<sup>89</sup> See SEC Chairman Jay Clayton, *supra* note 86 (“No conversation about recent efforts at the SEC to foster innovation would be complete without mentioning our approach to distributed ledger technology, digital assets, and ICOs.”); SEC Director of Div. of Corp. Finance William Hinman, *supra* note 88 (identifying cryptocurrency and ICO markets as “additional areas where the Division has been focusing a significant amount of attention and resources”).

<sup>90</sup> Foreign private issuers must monitor their shareholder base and operations to make sure they continue to qualify for that status. Among other things, Companies with more than 50% of their outstanding voting securities owned by U.S. residents or that have more than 50% of their assets located within the United States will lose their status as foreign private issuers. See Securities Act Rule 405 (17 C.F.R. § 203.405 (2019)); Exchange Act Rule 3b-4 (17 C.F.R. 240.3b-4 (2019)). Given the enthusiastic and fast-growing U.S. investor and customer base in the cannabis sector, several Canadian-listed companies are likely to be forced to change their status in the coming year.

<sup>91</sup> Body and Mind, Inc., CLS Holdings USA, Inc., Dixie Brands Inc., Green Thumb Industries Inc., Lexaria Bioscience Corp., and Stem Holdings Inc.

<sup>92</sup> See, e.g. Charlotte’s Web (U.S. subsidiary of Charlotte’s Web Holdings Inc.), Nature’s Way Nursery of Miami, Inc. (U.S. subsidiary of Acreage Holdings, Inc.), and Just Healthy LLC (U.S. subsidiary of Green Growth Brands).



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

company, Charlotte's Web, that has significant U.S. operations.<sup>93</sup> The article described Charlotte's Web as "the Uber of CBD." It also noted the extent of its U.S. operations—not only corporate offices but also production facilities in Colorado. Charlotte's Web's profits have been enormous, the article noted, along with the fact that in September it raised \$100 million via an IPO in Canada. It cannot be in the public interest to push a successful and innovative U.S. company such as Charlotte's Web to Canada. U.S. exchanges and investors should be the ones to benefit from U.S. innovation and ingenuity.

Indeed, Congress made its intent clear that emerging growth companies should have a less restrictive path to funding and investment when it passed the Jumpstart Our Business Startups (JOBS) Act a few short years ago.<sup>94</sup> The JOBS Act eases securities regulations in an attempt to encourage funding of, and investment in, small businesses. It also aims to boost market access for these types of innovative companies. The cannabis sector is dominated by emerging growth companies. Through its stated intention of denying new listings to companies whose operations may conflict with existing federal law, the NYSE would be taking action contrary to the clear policy goals of the JOBS Act, forcing all emerging growth companies in an entire sector (except, apparently, IIPR) to list on foreign exchanges where comparable protections for investors may be less rigorous or even absent.

### **C. The SEC's Stated Concerns Regarding Fraudulent Cannabis Companies are Inapplicable to TREIT**

While the SEC has, at times, expressed concerns regarding fraudulent cannabis companies, those concerns are inapplicable to TREIT and do not support denial of its listing application. The concerns expressed by the SEC relate to either inadequate disclosure or to misconduct by individuals—i.e. issues that are in no way unique to the cannabis business. For example, the SEC issued an investor alert on September 5, 2018 noting an increased risk for investment fraud and market manipulation in the cannabis sector.<sup>95</sup> According to the SEC, the increased risk was due in part to fraudsters attempting to capitalize on excitement generated by media coverage about marijuana legalization. The alert also advised investors to be aware of the risk of federal prosecution that some cannabis companies face so that they can make informed investing decisions. TREIT, like IIPR, has appropriately disclosed this risk. An earlier SEC Investor Alert, published in May 2014,

---

<sup>93</sup> See Alyson Krueger, "Seven Buds for Seven Brothers," N.Y. Times, (Mar. 6, 2019), <https://www.nytimes.com/2019/03/06/style/cbd-charlottes-web-seven-brothers.html>.

<sup>94</sup> "Jumpstart Our Business Startups Act," 126 Stat. 306 (2012). TREIT intends to file as an Emerging Growth Company under the JOBS Act.

<sup>95</sup> See SEC Investor Alert: "Marijuana Investments and Fraud," Securities Exchange Commission, (Sep. 5, 2018), [https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia\\_marijuana](https://www.sec.gov/oiea/investor-alerts-and-bulletins/ia_marijuana).



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

announced the temporary suspension of trading in five marijuana companies.<sup>96</sup> In all five cases the reason provided by the SEC for the suspension was that the companies did not release accurate information about their operations. The misconduct at issue was completely unrelated to the cannabis-related nature of the company. Indeed, the SEC's press-release accompanying the Alert made clear that the risk for fraud stemmed not from the inherent nature of cannabis, but rather from the fact that "fraudsters follow the headlines" and for that reason were attracted to marijuana-related businesses.<sup>97</sup>

As is described above, TREIT's independent Board is made up of sophisticated and experienced professionals from the financial services and real estate sectors. Concerns about investment scams and fly-by-night fraudsters are inapplicable to TREIT's listing application.

#### **D. Denial of Listing is Inconsistent with NYSE's Stated Mission**

The NYSE has been called both a private club and a public institution.<sup>98</sup> It has broad listing discretion but is also obligated to act in the public interest. The Exchange Act created the SEC and empowered it to register national securities exchanges and to regulate and oversee their affairs.<sup>99</sup> The Exchange Act is unique in that it contemplates self-regulation by these exchanges through their own rules and regulations.<sup>100</sup> The exchanges rules and regulations must, among other requirements, "promote just and equitable principles of trade," and "protect investors and the public interest."<sup>101</sup> In addition, those rules and regulations must not "impose any burden on competition not necessary or appropriate."<sup>102</sup>

It is not in the public interest for one company to obtain a competitive advantage over others that are similarly situated without a compelling rationale. TREIT meets the

---

<sup>96</sup> See SEC Investor Alert: "Marijuana-Related Investments," Securities Exchange Commission, (May 16, 2014), <https://www.investor.gov/news-alerts/investor-alerts/investor-alert-marijuana-related-investments>.

<sup>97</sup> See SEC Press Release, "SEC Warns Investors About Marijuana-Related Investments Amid Recent Trading Suspensions," Securities Exchange Commission, (May 16, 2014), <https://www.investor.gov/additional-resources/news-alerts/press-releases/sec-warns-investors-about-marijuana-related>.

<sup>98</sup> Richard W. Jennings, "Self-Regulation in the Securities Industry: The Role of the Securities and Exchange Commission," 29 L. & Contemp. Probs. 663, 667-74 (1964); Anthony D. Schlesinger, "The Third Market - Challenge to the New York Stock Exchange," 20 Sw. L. J., Vol 20:640 at 647 (1966).

<sup>99</sup> The Securities Exchange Act of 1934 established the SEC and empowers it to scrutinize the exchange rules and regulations after they are registered. 15 U.S.C. § 78b; 15 U.S.C. § 78s.

<sup>100</sup> 15 U.S.C. § 78f(b)(1).

<sup>101</sup> 15 U.S.C. § 78f(b)(5).

<sup>102</sup> 15 U.S.C. § 78f(b)(8).



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

quantitative initial listing standards for the NYSE.<sup>103</sup> As explained above, IIPR already trades on the NYSE and has an identical business model to TREIT. There is significant overlap among target businesses between TREIT and IIPR, with both operating or targeting properties in California and New York.<sup>104</sup> Denying TREIT's listing application exclusively on the basis of its cannabis-related business operations – a basis that applies equally to IIPR – would be inequitable and would defy concepts of fairness and access to capital that have been hallmarks of the NYSE for 227 years. It is difficult to reconcile a practice that would allow the creation of a monopoly in a particular industry with the Exchange Act mandate that self-regulated exchanges “ensure fair dealing” and “protect investors.” Denying access to TREIT is contrary to the public policies of fair dealing and fair competition for market participants.

In addition, presenting investors with only one investment option, as a matter of policy, would not further their protection. In fact, the public policy behind the NYSE mission is well stated in NYSE General Counsel Elizabeth King's response to Danny Mulson of Aberdeen High School dated June 19, 2018.<sup>105</sup> In that letter, the General Counsel states that the NYSE's mission has, since its inception more than two centuries ago, been one of “maintaining fair, orderly, and efficient markets” and that the continuing mission of the exchange remains to ensure that “America's markets continue to be fair, orderly, and efficient... for centuries to come.” In the letter, Ms. King laments the risk of “selective access” presented by off-exchange trading venues.

The NYSE's decision to list IIPR but deny listing to other materially comparable companies such as TREIT, provides IIPR with an unfair competitive advantage. Not only does this violate stated NYSE policy, it is also inconsistent with its statutory mandate. Section 19 of the Securities Exchange Act of 1934 requires the SEC to set aside any exchange action that “imposes any burden on competition not necessary or appropriate in furtherance of [the Act].”<sup>106</sup> This rule was added to the Exchange Act in amendments to the Securities Act in 1975 that were focused on removing barriers to competition in the securities industry. At the time, the House of Representatives emphasized that competition

---

<sup>103</sup> NYSE, “Overview of NYSE Quantitative Initial Listing Standards,” [https://www.nyse.com/publicdocs/nyse/listing/NYSE\\_Initial\\_Listing\\_Standards\\_Summary.pdf](https://www.nyse.com/publicdocs/nyse/listing/NYSE_Initial_Listing_Standards_Summary.pdf).

<sup>104</sup> TREIT expects that the properties that it initially acquires will be geographically concentrated in California, Nevada, New York, and Florida. TREIT Final Offering Memoranda (Jan. 3, 2019) at 18. IIPR currently has properties in California, New York, Arizona, Colorado, Illinois, Maryland, Massachusetts, Michigan, Minnesota, and Pennsylvania. See Innovative Industrial Properties, “Our Portfolio,” <http://innovativeindustrialproperties.com/iip-our-portfolio/> (last visited March 21, 2019).

<sup>105</sup> Response Letter of General Counsel and Corp. Sec. of NYSE Elizabeth King to Danny Mulson, (June 19, 2018), NYSE, <https://www.sec.gov/comments/s7-05-18/s70518-3755194-162578.pdf> (responding to student comments on the SEC's proposed Transaction Fee Pilot for NMS Stocks).

<sup>106</sup> 15 U.S.C. § 78s(f).



# TREEHOUSE

REAL ESTATE INVESTMENT TRUST

is key, stating “in the securities industry undue emphasis has been placed on regulation instead of competition. We find that such emphasis has been unwarranted. ... in the economic areas affecting the securities industry, competition, rather than regulation, should be the guiding force.”<sup>107</sup> The statutory text makes clear that this standard applies to delisting decisions, as well as the denial of initial listing applications.<sup>108</sup> So, too, do federal court decisions.<sup>109</sup> If the NYSE has concerns about listing TREIT, and these concerns relate to the company’s business model, then those concerns should apply equally to continuing to list legacy issuers such as IIPR, as well as companies engaged in marketing and selling to cannabis-related businesses, such as Scotts. Denying TREIT a listing under these circumstances would impose a burden on competition by inequitably insulating IIPR from market forces, and, perhaps more importantly, would not be in the interest of investors or consistent with a NYSE policy of fair dealing.

## VIII. Conclusion

Numerous states – with more coming – have decided that the time has come to end the prohibition on cannabis. While this presents a conflict with existing federal law, we are confident that mounting pressure from public opinion will soon bring about an era where the federal prohibition on cannabis will end, or at the very least be left subject to state regulation. In apparent recognition of this evolving regulatory landscape, the NYSE had the foresight just over two years ago to permit IIPR to list its shares on the NYSE, despite its business operations creating the risk of conflict with federal law. To this day, the NYSE permits other companies involved in marketing and selling to cannabis-related business – again, activities that likewise risk conflict with federal law. We respectfully submit that the remedy for addressing this unusual conflict is full disclosure of those risks to investors, not denying TREIT the opportunity to list on the NYSE.

---

<sup>107</sup> H.R. Rep. No. 94-123, at 47 (1975).

<sup>108</sup> 15 U.S.C. § 78s(f) (stating that the standard applies “[i]n any proceeding to review . . . the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization”).

<sup>109</sup> See, e.g., *Fog Cutter Capital Grp., Inc. v. Securities Exchange Comm.*, 474 F.3d 822, 825 (D.C. Cir. 2007) (citing 15 U.S.C. § 78s(f) for the proposition that the SEC “must dismiss an application for review of an NASD delisting order if . . . (4) the decision imposes no unnecessary or inappropriate burden on competition under the Act.”).