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## Response to “Reverse Al Capone-ism” and the Tax Treatment of Marijuana Businesses

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Mr. Silverberg’s comment stresses that the proponents of the legalization of marijuana have not been able to convince Congress to legalize it, and so it is appropriate for Congress to penalize trafficking in that drug. Apparently, he sees our contention that the penalty adopted in I.R.C. § 280E is irrational and contravenes established punitive jurisprudence as a backdoor attempt to accomplish indirectly, by weakening the penalties on the marijuana businesses, what has not been able to be accomplished by those seeking its federal legalization. That was not the motive for our proposal and is not a fair reading of our Prompt. We did discuss marijuana at length because the ambivalence over the question of whether it should be legal made the application of the harsh penalty imposed on those businesses by § 280E especially questionable, but our objection to the penalty in § 280E applies to its imposition on all illegal drugs – not just to marijuana businesses. A marijuana business likely is hurt more by the § 280E penalty than other illegal drug businesses because most of its expenses will be lawful, and that is less likely to be the case for other illegal businesses. However harmful marijuana may or may not be, it is surely far less harmful and objectionable than many other illegal drugs whose trafficking will be penalized far less. So, the marijuana business provides a vivid example of how arbitrary the section 280E penalty is. To take an example, X and Y both engage in the marketing of marijuana in states where it is not unlawful under state law. X has 10 employees and pays them wages totaling \$300,000 each year. Y also employs 10 workers to do exactly the same work as X’s employees do. Y is a more generous employer who operates in a more expensive state, and so Y pays his employees wages totaling \$400,000 each year. We cannot see any rationale for penalizing Y more than X, but § 280E does so.

The exclusion of marijuana from § 280E penalty, however, would not resolve our objection to the arbitrariness of the penalty’s basing its size on two factors that have nothing to do with the seriousness of the offense nor the present or past conduct of the offender. For example, the trafficking in some illegal drugs, such as heroin, surely is considered worse than the trafficking in others. Yet the identity of the drug has no bearing on the size of the penalty.

If Congress wishes to penalize illegal drugs, including marijuana, let it do so by applying a rational penalty rather than utilizing the tax law inappropriately.