

Attorney General Jeff Sessions Rescinds Federal Enforcement Policy Concerning Marijuana

So what does this actually mean? Potentially not much.

Yesterday,¹ Attorney General Jeff Sessions rescinded previous federal prosecutorial guidance that had been issued during the Obama administration regarding marijuana activities in states that have legalized medical and recreational marijuana. This now-rescinded guidance was comprised of five memoranda, including what has commonly been referred to as “the Cole Memo,” which established eight federal marijuana enforcement priorities intended to prevent:

- the distribution of marijuana to minors;
- revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- the diversion of marijuana from states where it is legal under state law in some form to other states;
- state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- violence and the use of firearms in the cultivation and distribution of marijuana;
- drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- marijuana possession or use on federal property.

Due to the absence of any other federal guidance on the issue, these enforcement priorities as articulated in the Cole Memo have been the cornerstone upon which state governors, attorneys general and legislatures have crafted their state regulatory systems for the regulation of legal marijuana in a responsible and sophisticated manner. The Cole Memo was also perceived by many to be a de facto “non-prosecution” policy” that only permitted prosecutions of offenses within the ambit of the stated enforcement priorities. The Cole Memo, however, specifically indicated that it was “intended solely as a guide to the exercise of investigative and prosecutorial discretion . . . [and that it] does not alter in any way the department’s authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Seemingly, what this means is that any U.S. attorney could have prosecuted marijuana businesses under federal law even if they were in compliance with all state laws and even if the alleged offense fell outside of the eight enforcement priorities. It is also important to note that in recent years after the drafting of the Cole Memo, numerous state and federal joint task forces have gone after the black and gray markets by arresting hundreds of individuals in legal marijuana states for illegal trafficking, illegal grow operations, and selling quantities of marijuana beyond the amounts allowable under state law. The Cole Memo never intended to prevent—nor did it prevent—these kinds of law enforcement actions

So what does this mean for the coming days? To the extent it was not clear before, it is now clear that U.S. attorneys throughout the country now have the discretion to prosecute federal marijuana-related offenses in their respective districts, regardless of whether that activity falls outside of the previously noted eight federal enforcement priorities or whether the activity complies with state regulation. In that regard, yesterday’s

¹ Notably and perhaps coincidentally, California’s legalized recreational marijuana market came online just three days ago, which is estimated to have a value of approximately \$5 billion.

May 11, 2017

announcement may not have changed much from a prosecutorial standpoint, but it has been perceived by many as a sea change that could spur Congress to act.

Furthermore, it must be noted that in addition to the Cole Memo, the Department of Justice (“DOJ”) rescinded a Feb. 14, 2014, “Memorandum for All United States Attorneys” titled: “Guidance Regarding Marijuana Related Financial Crimes.” That same day, the Financial Crimes Enforcement Network (FinCEN) issued **Guidance** regarding the provision of financial services to marijuana-related businesses. That guidance clarified expectations for financial institutions seeking to provide services to marijuana-related businesses, in light of their federal suspicious-activity reporting (SAR) requirements, was not rescinded. Because the FinCEN guidance was premised, at least in part, on the Cole Memo and was a companion to DOJ’s financial crimes guidance, it would not be a surprise if FinCEN withdraws its guidance. If that happens, significant uncertainty would permeate the financial services industry, including banks, credit unions and investors who may be concerned about federal anti-money laundering laws.

It is important to note that the “Rohrabacher” amendment, which prevents DOJ from using appropriated funds to take enforcement action against state-compliant medical marijuana businesses, is still in effect. This language does not, however, apply to state-regulated *recreational* marijuana businesses. Efforts are currently underway through Brownstein’s ERI team to preserve Rohrabacher and expand its protections to the recreational marijuana industry as well.

While we don’t yet know how the U.S. attorney community will react to these events, it is unlikely that U.S. attorneys in states that have regulated marijuana regimes will change their priorities. For example, acting U.S. Attorney Bob Troyer (District of Colorado) issued a statement that his office would not change how it prosecutes marijuana-related offenses, despite changes to federal guidance. It remains to be seen how Attorney General Sessions will respond to this statement by acting U.S. Attorney Troyer, in light of the fact that the administration has yet to nominate and confirm a new U.S. attorney in the district.²

In response to yesterday’s developments, governors and state attorneys general across the country are joining together with their congressional delegations in support of the 10th Amendment and states’ rights and are weighing next steps on possible congressional action related to the federal budget and the classification of marijuana under the Controlled Substances Act. This action by Attorney General Sessions may finally be the catalyst for Congress to address the inconsistencies related to marijuana under state and federal laws.

Lastly, this issue reached the highest levels yesterday, including the floor of the U.S. Senate, where Sen. Cory Gardner (R-CO) vowed “to take all steps necessary, including holding all DOJ nominees, until the Attorney General lives up to the commitment he made” in assuring Sen. Gardner “that marijuana would not be a priority to the [Trump] administration.” You can view Sen. Gardner’s floor speech [here](#).

As it has for the last six years, Brownstein’s Emerging Regulated Industries team continues to work with policymakers on Capitol Hill and throughout the country to ensure that marijuana, where authorized under state law by voters or policymakers, is fairly and responsibly regulated.

Contact our team with any questions. We stand ready to help.

² Attorney General Sessions appointed Troyer to the role of acting U.S. Attorney. He has served as Colorado’s acting U.S. attorney for more than a year and also served the office under the Obama administration. If President Trump does not nominate a replacement for Troyer in the next 120 days, the U.S. District Court in Colorado is tasked with making the interim job a permanent one, or at least until Trump makes a nomination that is confirmed by the U.S. Senate, which could be Troyer or a new person entirely.

May 11, 2017

Public and private entities are facing significant legal and practical challenges related to the use of cannabis, powdered alcohol, self-driving cars and other new but quickly expanding industries that have high consumer demand and substantial government oversight. Brownstein Hyatt Farber Schreck's Emerging Regulated Industries (ERI) practice group is made up of seasoned attorneys and policy advisors with extensive knowledge in these unique areas. We assist these entities when they face legal uncertainty about how new laws apply to their operations, the rapid pace of changing laws and regulations at the state and federal level and implementing or complying with current regulations while still meeting strategic goals in an often contentious and time-sensitive environment.

Melissa Kuipers Blake

Shareholder
mkblake@bhfs.com
303.223.1164

William E. Moschella

Shareholder
wmoschella@bhfs.com
202.652.2346

Sarah M. Clark

Senior Policy Advisor and Counsel
sclark@bhfs.com
303.223.1139

This document is intended to provide you with general information regarding the Department of Justice's decision to rescind guidance on marijuana enforcement from the prior administration. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.