Federal Enforcement Priorities and the Business of Marijuana: How Jeff Sessions Could Change the Landscape

As Senator Jeff Sessions' nomination for Attorney General advances to the full Senate, questions are being raised as to what impact he might have on the business of marijuana in the United States. Sessions has historically taken a hardline stance against marijuana, which is contrary to the position that has been taken by the Department of Justice under the Obama Administration.

Assuming Sessions becomes our next Attorney General, he will oversee federal prosecutors, the Drug Enforcement Administration and other agencies that could seek to enforce laws against marijuana businesses even if they are in compliance with their own states' laws.
Sessions has made numerous comments that concern marijuana advocates. He once stated that "[i]t is false that marijuana use doesn't lead people to more drug use. It is already causing a disturbance in the states that have made it legal." This past April, Sessions stated that "good people don't smoke marijuana" and that "[w]e need grownups in Washington to say marijuana is not the kind of drug that ought to be legalized… that it is in fact a very real danger."

U.S. Representative Dana Rohrabacher (R – CA), one of the authors of the Rohrabacher-Farr Amendment discussed below, and a leading conservative advocate for marijuana policy reform and states' rights on the issue, has expressed less concern about Sessions' appointment. He contends that President Trump is likely to let the states make their own decisions and that Sessions will follow Trump's lead. Rohrabacher has further stated that Sessions is a constitutionalist and will therefore likely leave local law enforcement to the states rather than use the Drug Enforcement Agency to target state-licensed marijuana businesses.

In light of increasing uncertainty regarding the position that will be taken by the Department of Justice under a Trump Administration likely to be led Sessions, is important that interested parties understand the issues when venturing into or expanding their businesses in this new industry.

The historical federal marijuana law enforcement framework under the Obama Administration was defined by the 2013 Cole Memorandum, named after its author, then Deputy Attorney General James Cole. The Memorandum, while making it clear that the federal government has not legalized marijuana, provides guidance that states and businesses have used in managing the risk of federal intervention. Specifically, the Memorandum details eight priorities that federal prosecutors should focus on in connection with enforcing the Controlled Substances Act. The Memorandum suggests that U.S. Attorneys and other federal agencies defer civil enforcement and criminal investigations and prosecutions of state-legal marijuana business activity in those states where there are "strong and effective regulatory and enforcement systems that control the cultivation, distribution, sale, and possession of marijuana."

The Memorandum encourages U.S. Attorneys and federal agencies to keep in mind the following federal priorities when allocating their resources:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences

associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

It is important to note that no part of the Memorandum is binding on any federal agency or U.S. Attorney, and it does not create a defense in the event of an enforcement action. In other words, the lesson of the Memorandum is: if your state has significant enforcement mechanisms, and you mind these eight priorities, you are not *likely* to be targeted by the federal government.

It is impossible to know whether a Department of Justice led by Sessions will withdraw the Memorandum, or add qualifications of its own. As already noted, the Memorandum is not binding, and it can be withdrawn, supplemented, or superseded by the next Attorney General at will.

Another law that currently applies in the medical marijuana arena is the Rohrabacher-Farr Amendment. The Amendment is a rider to the FY 2016 federal budget, last extended by continuing resolution through April 28, 2017. It states that "*None of the funds made available in this Act to the Department of Justice may be used . . . to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.*" The Amendment lists 32 states and the District of Columbia, including both Massachusetts and Rhode Island. The Department of Justice's interpretation of this Amendment is narrow — that the Department may not expend funds to interfere with state governments trying to create legal medical marijuana regimes, but that it is free to continue enforcement actions against private parties. The Ninth Circuit Court of Appeals has ruled that the Amendment is more restrictive of federal government enforcement, holding that it actually prevents the Department of Justice from expending any money to enforce federal drug laws in states which have implemented legal medical marijuana programs. The decision, *U.S. v. McIntosh, et al,* limited the Department's ability to enforce federal drug laws to cases involving violations of state law. Notwithstanding *McIntosh*, the Department has not withdrawn or modified its interpretation of the Amendment, and the decision's effect is currently limited to states covered by the Ninth Circuit — California, Oregon, Washington, Alaska, Hawaii, Arizona, Idaho, Montana, and Nevada. Although the Amendment currently imposes some additional hurdles against the enforcement of federal drug laws against medical marijuana businesses, it remains to be seen how long the Amendment will remain in effect. It will expire on April 28, 2017 if not expressly continued in force.

The approach to enforcement of federal drug laws under the Obama Administration could be discarded, dramatically altered or left unchanged under the Trump Administration. So long as uncertainty remains, state-legal marijuana businesses will continue to exist in the shadow of federal enforcement.

Regardless of the next Attorney General's position on the enforcement of federal marijuana laws, the ultimate decision on enforcement will rest with President Trump who has given some indications that he will respect states' rights on the legalization of medical marijuana. It is, however, still too early to tell what stance the Trump Administration will actually take.

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