

LEGAL UPDATES

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## U.S. Attorney General Reverses Policy on Legal Marijuana

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On January 4, 2018, U.S. Attorney General Jeff Sessions rescinded, effective immediately, previous enforcement priorities of the Department of Justice (DOJ) on marijuana, including the Cole Memo. The move creates uncertainty about potential federal prosecution of state-legal marijuana businesses, as well as the availability of financial services for such businesses.

### Hands-Off Approach Is Abandoned

The new Sessions Memo dictates that federal prosecutors should follow the “Principles of Federal Prosecution” originally set forth in 1980 and subsequently refined in chapter 9-27.000 of the U.S. Attorneys’ Manual. The memo states: “These principles require federal prosecutors deciding which cases to prosecute to weigh all relevant considerations, including *federal law enforcement priorities set by the Attorney General*, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community.”

It is important to note that Sessions has not previously set enforcement priorities for marijuana, nor does his memo create new enforcement priorities for the DOJ. Rather, Sessions has removed the foundational guidance that states have relied on to regulate the production and distribution of marijuana pursuant to state law and the will of each states’ citizens.

The Cole Memo that Sessions unilaterally rescinded did not legalize marijuana at the federal level but reserved the DOJ’s authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Specifically, the Cole Memo provided that “neither the guidance herein nor any state or local law provided a legal defense to a violation of federal law...” The Cole Memo set marijuana enforcement priorities for the DOJ, including

preventing the distribution of marijuana to minors and preventing marijuana revenue from going to criminal enterprises.

The Sessions Memo creates broad discretion for federal prosecutors to potentially prosecute state-legal marijuana businesses even if they are not engaged in conduct enumerated by the Cole Memo as an enforcement priority. At this time, the DOJ has given no indication that enforcement priorities will target state-legal marijuana businesses.

## **Financial Questions**

The Sessions Memo also creates uncertainty about banking. The Financial Crimes Enforcement Network (FinCEN) has relied on the Cole Memo to formulate its policy on financial services to marijuana-related businesses, which many banks use as a guide in serving the marijuana industry. It is unclear if FinCEN will revise its current policy to align with the Sessions Memo. A change in FinCEN guidance could result in state-legal marijuana businesses losing access to the banking system.

It should be noted that Congress has already cut off federal enforcement dollars to the DOJ aimed at prosecuting state-legal medical and industrial hemp businesses per the “Rohrabacher–Blumenauer” amendment to the fiscal budget. This was affirmed by the Ninth Circuit when it concluded that §542 of the Consolidated Appropriations Act prohibits DOJ from spending money on actions that prevent medical marijuana states giving practical effect to state laws that authorize the use, distribution, possession or cultivation of medical marijuana. Congress is attempting to finalize this budget before January 19, 2018, and it is unclear if the amendment protecting state-legal medical and industrial hemp businesses will stay. However, because 30 states allow legalized marijuana law in some form, and numerous congressional leaders (including Republicans) have already condemned the Sessions Memo, there is a strong possibility that Congress will clear up confusion over DOJ enforcement priorities by keeping the amendment to the final budget.

## **What This Means to You**

Now is not the time for the cannabis industry to be complacent. Industry participants should contact their congressional representatives in an effort to ensure the DOJ’s enforcement priorities respect state’s rights. Cannabis businesses also need to ensure full compliance with state law and develop robust compliance programs.

## **Contact Us**

For more information on how the Sessions Memo may affect your business, please contact Steve N. Levine or another member of Husch Blackwell’s Cannabis team.