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Health Law Alert: Justice Department Issues Memo on Marijuana Enforcement

INDUSTRY SECTOR

Health Care

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On January 4, 2018, the Department of Justice published a memorandum authored by Attorney General, Jeff Sessions, which rescinds previous guidance issued by the Department of Justice regarding marijuana prosecutions, and directs that “[i]n deciding which marijuana activities to prosecute under these laws with the Department’s finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions.” Notably, the memorandum expressly rescinds the August 29, 2013, Department of Justice Memorandum authored by former United States Attorney General, James M. Cole, commonly referred to as the “Cole Memorandum.” The Cole Memorandum directed federal prosecutors to generally refrain from prosecuting those in the marijuana field who were complying with state law.

When contemplating the potential impact of Sessions’ pronouncement, it is important to understand that the Cole Memorandum did not go so far as to confer immunity from federal prosecution, but rather instructed prosecutors to “continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system.” Even so, the Cole Memorandum served as a guidepost to marijuana business owners and operators who have the difficult task of navigating conflicting federal and state laws on marijuana. Under federal law, no matter its purpose or form, the cultivation, possession and sale of marijuana remains illegal. At the same time, states continue to “legalize” marijuana under their laws. As of January 7, 2018, 29 states and the District of Columbia have laws permitting marijuana in some

capacity, and seven states and the District of Columbia have laws permitting marijuana for recreational purposes.

In addition to the now rescinded Cole Memorandum, those in the marijuana industry have also taken some solace from the continued passage of the Rohrabacher–Blumenauer amendment (formerly known as the Rohrabacher-Farr amendment), which provides that the Department of Justice may not use funds made available through the omnibus spending bill to prevent states from implementing their own laws that “authorize the use, distribution, possession, or cultivation of medical marijuana.” Initially passed as part of the 2014 omnibus spending bill, the amendment has thus far remained in effect by receiving annual renewal. Most recently, the bill was set to expire in September 2017, but has been included in the two-month continuing resolution, followed by additional extensions through January 19, 2018, of the federal government’s comprehensive spending plan. The amendment is notable for its role in the case *United States v. McIntosh*, 833 F.3d 1163 (9th Cir. 2016), in which the Ninth Circuit interpreted the amendment’s language to mean that the Department of Justice could not utilize appropriated funds in an effort to shut down a state-law-abiding medical marijuana business. The amendment is expected to be included in the new omnibus spending bill. In the seemingly unlikely event that the Rohrabacher-Blumenauer amendment is not included in the new omnibus spending bill, its exclusion would rightly cause medical providers, individuals, and businesses participating in the marijuana industry to take pause.

The practical effect of Jeff Sessions’ decree rescinding the Cole Memorandum and instructing federal prosecutors to enforce the laws enacted by Congress when pursuing prosecutions for marijuana related activities remains to be seen. The move by Jeff Sessions does not necessarily signal an impending government crackdown on marijuana related activities that are permitted under state law – enforcement of federal law on the marijuana industry continues to be, as it has always been, a matter of prosecutorial discretion. Now, however, it would appear that the autonomy of United States Attorneys has increased to some degree when it comes to handling marijuana related prosecutions. Rescission of the Cole Memorandum has also led to an increase in confusion and uncertainty among those in the marijuana industry, and an initial decrease in some marijuana related stocks. Ultimately, just as before, it is of utmost importance for those in the industry to take necessary measures to ensure compliance with applicable state laws and regulations, and assess their appetite for the risk inherently associated with operating in this gray area of the law.

We hope that you find this useful and informative. Please contact us if you have any questions about this, or any other matter.

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