CANNABIS

RESCISSION OF MEDICAL MARIJUANA MEMORANDA

Attorney General Jeff Sessions issued a one-page memorandum on January 4, 2018 (the "Sessions Memo") rescinding both the Cole and Ogden Memoranda which essentially established a Department of Justice ("DOJ") prosecutorial safe harbor for medical marijuana businesses that complied strictly with state laws governing marijuana. The most attention-grabbing sentence in the Sessions Memo provides "[g]iven the Department's well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately." Translated into non-lawyer speak, that means anything in the cannabis space touching federal criminal jurisdiction potentially is fair game for prosecution. The Sessions Memo thus thrust into a zone of uncertainty the federal prosecution landscape during this Administration.

The Sessions Memo defers expressly to individual United States Attorneys to determine whether to prosecute the cultivation, distribution and possession of marijuana as they see fit within the framework that existed prior to the widespread legalization of medical and recreational marijuana by state legislators. There have been no changes to federal law, as the Sessions Memo is guidance to the chief federal prosecutors in the 93 federal districts around the country. The Sessions Memo does not mandate any specific dedication of resources to prosecuting marijuana offenses, nor would such a guidance memo do so. Nor does it require U.S. Attorneys to prosecute specific marijuana offenses. Instead, each U.S. Attorney has district-specific independent discretion to decide which marijuana activities to prosecute, if any, and how much, if any, of that office's finite resources will be dedicated to prosecuting marijuana offenses. The result of the Sessions Memo is the marijuana industry, while now facing additional uncertainty, does not appear to be under direct attack; however, only time will tell.

Three recommendations follow logically from this DOJ change in perspective. First, regardless of industry segment, marijuana-related businesses ("MRBs") should review with counsel all elements of company and regulatory compliance programs. Not that compliance programs offer any guarantees, but such demonstrative efforts to work within the framework of existing laws can be persuasive. Second, review with counsel all contracts in use and planned for use to ensure that the agreements reflect the most up-to-date terms and best practices. It is easy for the conduct of business partners unwittingly to cause well-intended relationships and activities to be pulled into an investigative red zone. Third, individuals and MRBs should pay close attention to the US Attorney overseeing that person's or business' federal district to ascertain that US Attorney's philosophical perspective on state legal medical or recreational marijuana businesses. That US Attorney alone will be the decision maker, not a centralized Washington-driven policy.

Implications for Federal and State Criminal Law

The August 2013 Cole and October 2009 Ogden memos, although non-binding guidelines, served as a quasi-safe harbor for MRBsoperating in states where marijuana is legal, either medically or recreationally, as long as the MRBs complied fully with state law. MRBs no longer have the protections of the previous DOJ guidance memos; therefore, it is imperative that MRBs continue to abide by their respective state laws and regulations to minimize the risk of drawing additional attention from federal prosecutors. If a U.S. Attorney in a state intends to pursue marijuana offenses, then that federal prosecutor likely will focus attention first on the "bad actors"—the medical marijuana businesses that are non-compliant with state law. Practically, those "bad actors" would not have benefited from the "safe harbors" operational under prior guidance.

Not all of the marijuana industry's protections have been stripped away by the Sessions Memo. Even without the perceived protections available under prior guidance, the Rohrabacher-Blumenauer Amendment, which prohibits DOJ from using federal funds to prosecute state marijuana programs, remains in effect until at least January 19, 2018. The amendment, formerly known as the Rohrabacher-Farr Amendment, first passed in December 2014, must be renewed annually and was set to expire September 30, 2017. As Congress has continued to pass "continuing resolutions" to keep in place the current federal budget instead of implementing a new budget, Congress effectively has extended the life of the Amendment. The future of the Amendment is uncertain, especially in light of the fact that Sessions previously asked Congress to revoke it. If the Amendment is not renewed, then an era of open-game enforcement may be on the horizon.

Those involved with lawful state MRBs, if faced with a federal or state criminal investigation, must deal with the reality that conventional criminal defense litigation tools may be inadequate. The generally open nature of state legal marijuana businesses will simplify the proof elements for a prosecutor. Counsel will assert states' rights and other defenses, but the prosecutor's burden of proving guilt beyond a reasonable doubt may shift subtly, albeit not as a matter of law, to an expectation that the defendant proves absence of guilt, which is not the legal standard.

Dickinson Wright as a full-service law firm with considerable expertise in white collar criminal defense, in addition to our long-established cannabis practice, is well-positioned to provide guidance for and defense of any marijuana investigations and prosecutions and the preparation and review of compliance programs, including on behalf of MRBs. At the federal level, the marijuana industry always has been illegal, and while the Cole and Ogden memos provided some comfort, they expressly did not legalize the industry. And indeed, the Sessions Memo was no surprise to our experienced practitioners and many in the industry because such an announcement was anticipated with the change in Presidential administrations. Insiders are hopeful that the Sessions Memo will spur federal legislators to pass comprehensive law to eliminate the risk of prosecution and conflict with state laws.

Our experienced lawyers share the view that the Sessions Memo does not change in any significant way the ultimate risk of criminal

prosecution that has been looming over the marijuana industry since its inception, as long as the Rohrabacher Amendment remains in effect. Nevertheless, the likelihood of prosecutions increased on Inauguration Day 2017, with the true fate of prosecutions dependent now entirely on each U.S. Attorney's individual position on marijuana. With the status quo subject to change and rapidly evolving, the Firm will continue to monitor the legal landscape and advise our clients accordingly.

With the Sessions Memo bringing focus to what will happen in federal enforcement, industry participants should not lose sight of state law enforcement considerations. Many local law enforcement agencies were hostile towards marijuana legalization in their states. State and federal law enforcement, particularly in the drug enforcement area, have worked cooperatively and closely for decades. The absence of a perceived federal safe harbor may energize state law enforcement authorities either to pursue state cases around the fringes of state law or walk MRB conduct in to federal prosecutors and seek federal enforcement assistance.

Implications for Civil Law

One of the potential risks posed by the revocation of all prior DOJ guidance, including the respective Cole and Ogden memos, is the possible heightened risk of civil forfeiture. In July 2017, Attorney General Sessions implemented a policy strengthening DOJ's civil asset forfeiture program. While much of the discussion has focused upon criminal prosecution, DOJ, working in conjunction with other federal agencies such as the Drug Enforcement Administration, has considerable power to initiate civil forfeiture proceedings. With a much lower evidentiary standard, civil forfeiture proceedings are a tool that can strip monetary resources available to defend against the civil forfeiture proceeding because the forfeiture itself often occurs preemptively, that is, prior to the civil proceeding. In addition, DOJ's initiation of a civil forfeiture proceeding often is a precursor to criminal charges. A party challenged to defend a civil forfeiture proceeding, potentially with monetary resources already restrained and unavailable to defend the criminal investigation, may perceive a strong incentive for targeted parties to simply abandon their businesses.

State by State Implications

In addition to rescinding the Cole and Ogden memos, Sessions announced the interim appointment of several U.S. Attorneys to fill the role until President Trump nominates replacements for the dozens of Obama-era U.S. Attorneys that were asked to resign, or were fired, last year. The interim U.S. Attorneys could be nominated by President Trump to fill the role permanently, or they may be replaced, but ultimately they cannot serve as interim U.S. Attorneys for longer than 120 days. MRBs should pay attention to the views of their interim U.S. Attorneys but be cognizant of the fact that they may be replaced. The landscape is changing and will continue to be in flux until permanent U.S. Attorneys are nominated by the President, confirmed by the Senate, and make their individual views on the marijuana industry known.

Interim U.S. Attorneys have been appointed for the following districts: New Jersey, Rhode Island, Hawaii, The Southern District and Northern District of New York, The Eastern and Western Districts of Louisiana, Minnesota, the Western District of Missouri, the Central District of California, the Eastern District of Washington, the Middle District of Florida, and the Eastern District of Michigan.

The decision by Bob Troyer, the Acting U.S. Attorney in Colorado, signaling that he will not alter his approach to marijuana enforcement is significant. His announcement highlights that the decisions truly will be made on a district by district basis, for better or worse. Although Troyer's statement is encouraging to MRBs in Colorado, he is not a presidential appointee. His decision will have no effect on the U.S. Attorney nominee.

Conclusion

The immediate effect of the Sessions memo is a nuanced and unpredictable landscape, one in which the most knowledgeable lawyers and observers are making educated guesses. Certainly, the upcoming budget bill and extension of the Rohrbacher Amendment is important and may offer the best hope for the cannabis industry. The risk of prosecution has increased, although the likelihood of prosecution may not yet have changed. From the federal government's perspective, MRBs are illegal enterprises, and the likelihood of prosecution is greater than this time in 2017. That is why proactive review of compliance programs, contracts and thoughtful preparedness for possible criminal investigation is the most prudent strategy for industry participants.

This client alert is published by Dickinson Wright PLLC to inform our clients and friends of important developments in the field of cannabis law. The content is informational only and does not constitute legal or professional advice. We encourage you to consult a Dickinson Wright attorney if you have specific questions or concerns relating to any of the topics covered here.

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