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Sessions Issues Memorandum on Federal Marijuana Enforcement Policy

On Thursday, January 4, the United States Attorney General Jeffrey Sessions issued a memorandum on federal marijuana enforcement policy (Sessions Memo). The Sessions Memo immediately rescinds the set of memoranda (usually referred to collectively as the "Cole Memoranda") that articulated the Obama Administration's "hands-off" policy with respect to federal prosecutions in States that have legalized and regulated marijuana for medical purposes. Instead, the Sessions Memo instructs federal prosecutors to apply the principles of federal prosecution with respect to marijuana enforcement, which principles include weighing all relevant considerations including: (i) federal law enforcement priorities set by the Attorney General; (ii) the seriousness of the crime; (iii) the deterrent effect of criminal prosecution; and (iv) the cumulative impact of particular crimes on the community.[1]

As noted in the Sessions Memo, the Controlled Substances Act (CSA) prohibits the cultivation, distribution, and possession of marijuana.[2] With the Cole Memoranda rescinded, federal prosecutors are free to view marijuana like any other "Schedule I" controlled substance under the CSA, even when the related activity is allowed under state law, whether for medical or recreational use.

Regardless of the actions of Attorney General Sessions, however, the so-called "Rohrabacher-Blumenauer" Amendment remains in force.[3] Rohrabacher-Blumenauer prevents the Department of Justice from spending funds for the prosecution of individuals who engage in conduct permitted by State medical marijuana laws and who fully comply with such laws. The most recent stop-gap spending bill passed in December 2017, included the Amendment. However, that short-term spending bill expires on January 19, 2018, at which time Rohrabacher-Blumenauer will also expire. While the Rohrabacher-Blumenauer Amendment has been consistently included in congressional spending bills since 2014, its continued reauthorization is by no means guaranteed.

Notably, Rohrabacher-Blumenauer only prohibits the Department of Justice from expending funds to prosecute those engaged in state-authorized *medical* marijuana activity, but is silent on the expenditure of funds to prosecute state-authorized *recreational* activity. Regardless of the continued reauthorization of the Rohrabacher-Blumenauer Amendment, the Sessions Memo allows federal prosecutors to enforce the CSA against individuals involved in recreational marijuana.

Overall, this significant change in policy changes the assessment of the degree of risk of prosecution faced by both medical and recreational marijuana growers and distributers, as well as providers of services to those growers and distributers. At this time, it is difficult to predict how the Department will carry out its "new" policy. The Department has an array of tools at its disposal, including criminal prosecutions, civil forfeiture, and, in conjunction with banking regulators, the ability to cut off all access to non-cash financial mechanisms.

We strongly recommend that our clients who are conducting any activities related to marijuana, including state-regulated medical and/or recreational marijuana, proceed with caution as this uncertain legal landscape shifts. We invite our clients to reach to us immediately with questions or concerns regarding this information.

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[1] According to the U.S. Attorneys Manual: The principles provide convenient reference points for the process of making prosecutorial decisions; they facilitate the task of training new attorneys in the proper discharge of their duties; they contribute to more effective management of the government's limited prosecutorial resources . . .*See* US Attorneys Manual 9-27.001.

[2] 21 U.S.C. § 801 *et seq*.

[3] Formerly known by its previous co-sponsors as the Rohrabacher-Farr Amendment.

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