# Carefully Navigate Shifting Sands of Federal Enforcement Priorities Related to Medical Marijuana

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**Authors:**

Charles M. Johnson

The DOJ has yet to formally change the priorities related to federal enforcement in states adopting medical marijuana laws, but Sessions has consistently made strong statements that indicate he is opposed to legalized marijuana on both a recreational and a medical basis. Accordingly, individuals and entities that seek to participate in new and existing medical marijuana programs must strictly comply with state statutes and regulations while treading carefully across the shifting sands of the federal medical marijuana enforcement priorities, which has had a chilling effect on the rollout of these programs.

Currently, 29 states and the District of Columbia have adopted various forms of medical marijuana laws, and nine states have adopted recreational marijuana laws. Participants in the state-sponsored medical marijuana programs, such as patients, growers or cultivators, processors, dispensaries, participating physicians and other related entities, make significant investments of time, money and other resources to comply with their respective state statutes and regulatory schemes, while marijuana remains a prohibited Schedule I controlled substance under the federal Controlled Substance Act (CSA). Under the CSA, it is illegal to possess, manufacture, distribute or dispense marijuana or conspire to do so. (21 U.S.C. §§ 841(a)(1), 846.) Navigating the interplay between state laws, which authorize medical marijuana programs under a strict statutory and regulatory scheme, while avoiding federal enforcement actions remains a considerable challenge requiring these participants to constantly monitor statements made by the attorney general to gauge whether the winds of enforcement are changing.

In 2013, under the Obama administration and Attorney General Eric Holder, the DOJ issued a "Guidance Regarding Marijuana Enforcement" known as the Cole Memorandum, addressing federal enforcement of the CSA in states with laws legalizing marijuana. In


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addition to the Cole Memorandum, named after then Deputy Attorney General James M. Cole, Congress passed a spending bill which prohibited the DOJ from using federally allocated funds for fiscal year 2015 in states that had legalized *medical* marijuana, effectively carving out federal enforcement actions in states specifically named under the statute that had adopted medical marijuana laws: The Rohrabacher-Farr Amendment (now known as the Rohrbacher-Blumenauer Amendment) posed restrictions on using federal funds in enforcement that remain in place today, but the protections are dependent on being reintroduced and adapted each year. The amendment, having been extended in May 2017 and again in September 2017, is now effective until December 8, 2017. Renewal of the amendment hinges on the work of the House-Senate conference committee that reconciles differences between bills of the two chambers.

Attorney General Jeff Sessions has consistently taken a firm approach that he is against the use of marijuana even in states where it has been legalized on a recreational or a medical basis. While the federal enforcement priorities announced by the DOJ in the Cole Memorandum and the prohibitions against the use of federal funds for such enforcement both remain in place, Sessions appears to be in favor of unwinding these protections. It should be noted that the Cole Memorandum merely states that the DOJ will not make federal enforcement a priority for those complying with state medical marijuana laws, but does not go so far as to prohibit federal enforcement actions. Actions taken by the current attorney general have suggested he is actively undermining these protections:

First, in May 2017, Sessions sent a letter to congressional leaders requesting that they do away with the Rohrabacher-Blumenauer Amendment, stating "I believe it would be unwise for Congress to restrict the discretion of the Department to fund prosecutions, particularly in the midst of an historic drug epidemic and potentially long-term uptick in violent crime." Currently, the budgetary bar for DOJ from using federal funds to conduct enforcement actions in specific states that have adopted the medical marijuana laws is in place, but participants in medical marijuana programs must remain diligent that these budgetary requirements must be renewed with


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each annual budget to assure that the limitation on enforcement actions remains.

Second, Sessions has taken a strict stance against the use of marijuana in his efforts as the chair of President Trump's task force on crime reduction and public safety. He has stated his position that illegal immigration and use of marijuana of any type have resulted in a significant increase in violent crime, and that controlling the usage of marijuana, including medical marijuana, is necessary to combat the increase in violent crime and gang activity. In addition, Sessions has reportedly re-established a controversial criminal asset seizure program prior to the issuance of the committee's final report. Even though the current task force has issued recommendations that appear to maintain the current compromise between state laws allowing for medical marijuana and federal laws that prohibit the use of any marijuana, most observers believe that Attorney General Sessions remains steadfast in his opposition to the legalization of marijuana on any basis.

Sessions has said that much of the Cole Memorandum remains valid, but until recently he had not publicly expressed whether he is in favor of maintaining the current enforcement priorities, or rescinding or amending the Cole Memorandum to adopt a more stringent enforcement approach. The latest update by the attorney general regarding the work of the task force does not contain any specific recommendation for a change in federal enforcement priorities regarding legalized marijuana. However, while testifying before the House Judiciary Committee recently, Sessions seemed to signal the continuation of the policies of the previous administration, stating "Our policy is the same really, fundamentally as the Holder-Lynch policy, which is that the federal law remains in effect and a state can legalize marijuana for its enforcement purposes, but it still remains illegal with regard to federal purposes…" When asked whether he would abide by the Rohrabacher-Blumenauer Amendment, Sessions stated "I believe we are bound by that." While not a ringing endorsement of the more *laissez-faire* policies of Holder-Lynch, this statement at least signaled to some what they hoped would effectively be a détente between the state programs and the federal government's enforcement actions.


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Nevertheless, despite the apparent thaw in positions, participants in medical marijuana programs are well advised to remain vigilant to assure that they are fully complying with the strict regulatory schemes adopted by states that have legalized medical marijuana, that they are being proactive in complying with the intent of the Cole Memorandum and that none of their activities otherwise invite federal enforcement actions.

If you require further information regarding the above, please contact Charles M. Johnson at cmjohnson@fbtlaw.com.

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