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Dramatic Shift in Federal Enforcement Priorities Related to Legalized Marijuana Use

Thus, it appeared that the Obama Administration's hands-off approach to enforcement of federal laws related to medical marijuana would continue for the foreseeable future. [On January 1, 2018](#), California became the sixth state to begin its legalized recreational marijuana program amongst a total of 29 states that have legalized medical marijuana. Against this backdrop, there has been a flurry of proposals to adopt similar laws in many other states.

However, as if to stop the snowball from rolling downhill, on January 4, 2018, Attorney General Sessions emphatically stated that the DOJ would no longer take a hands-off approach to federal enforcement of marijuana laws by announcing the rescission of the [Cole Memorandum](#). The Cole Memorandum was authored by Deputy Attorney General James Cole, and adopted by Attorney General Eric Holder in 2013, and instructs U.S. Attorneys to only enforce the federal marijuana laws of the Controlled Substances Act in limited circumstances.

While [Attorney General Sessions' announcement](#) indicated that U.S. attorneys should use their prosecutorial discretion when deciding whether to enforce federal marijuana laws in states where marijuana has been legalized, the rescission of the Cole Memorandum leaves the door open to aggressive enforcement actions in states that fail to follow a strict regulatory scheme:

For states such as Colorado and Washington that have enacted laws to authorize the production, distribution and possession of marijuana, the Department expects these states to establish strict regulatory schemes that protect the eight federal interests identified in the Department's guidance. These schemes must be tough in practice, not just on paper, and include strong, state-based enforcement efforts, backed by adequate funding. Based on assurances that those states will

impose an appropriately strict regulatory system, the Department has informed the governors of both states that it is deferring its right to challenge their legalization laws at this time. But if any of the stated harms do materialize—either despite a strict regulatory scheme or because of the lack of one—federal prosecutors will act aggressively to bring individual prosecutions focused on federal enforcement priorities and the Department may challenge the regulatory scheme themselves in these states.

The rollback of the Cole Memorandum and the clarifications provided to federal enforcement priorities will likely create considerable havoc amongst legal marijuana states. As of this time, without the Cole Memorandum in place, the protections afforded by the Rohrabacher–Blumenauer Amendment continue, but these protections serve as cold comfort to many involved in legalized marijuana businesses (both recreational and medical) for several reasons.

First the Rohrabacher–Blumenauer Amendment applies only to specific states that have adopted medical marijuana laws, and does not apply to other states not listed or to recreational marijuana programs. Second, the Rohrabacher–Blumenauer Amendment is only currently in effect until January 19, 2018, and must be continually renewed in order to provide any assurance that federal monies will not be used for enforcement actions in the specific states listed in the amendment that have legalized medical marijuana usage. Third, local United States attorneys are not expected to replace the Cole Memorandum with local clarifications of their enforcement priorities and policies. Finally, when asked if the federal government was considering lawsuits against states that have legalized marijuana use, Attorney General Session responded that “[f]urther steps are still under consideration.”

Participants in both medical marijuana and recreational marijuana programs should carefully monitor local developments as well as the continuation of the Rohrabacher–Blumenauer Amendment at the federal level. In addition, medical marijuana related businesses should assure that they have robust compliance programs consistent with their states laws to minimize the chances of federal

enforcement actions.

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