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Cannabis Business Blog

What Would "Greater Enforcement" Mean for Washington's Cannabis Businesses?

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Justice Department has options to crack down, but may galvanize the push for even wider legalization

In statements that were perhaps inevitable but nonetheless surprising to the cannabis industry, White House Press Secretary Sean Spicer on February 23, 2017, provided the first official comments on how the Trump administration may address recreational marijuana.

Responding to a question from an Arkansas reporter regarding medical marijuana, Spicer indicated that the Trump administration sees "a big difference" between medical and recreational marijuana, stating that federal law needs to be followed "when it comes to recreational marijuana and other drugs of that nature."

Spicer also indicated that enforcement decisions will primarily be a Department of Justice ("DOJ") matter, stating that enforcement is "a question for the Department of Justice," but that he believed there would be "greater enforcement of [federal law], because again, there's a big difference between medical use, which Congress has, through an appropriations rider in 2014, made very clear what their intent was on how the Department of Justice would handle that issue," which, Spicer stated, is "very different from the recreational use, which is something the Department of Justice will be further looking into."

Although Spicer's statements should probably not be considered as the Trump administration's definitive policy statement on recreational marijuana use, they do raise a variety of concerns for cannabis businesses.

A New Direction for the Department of Justice

The August 29, 2013 DOJ Memorandum (the "Cole Memo") is the closest thing the cannabis industry has to an official federal policy statement on DOJ's enforcement of the Controlled Substances Act ("CSA") in states that have legalized the possession, production, processing and sale of marijuana.

The Cole Memo is well-known throughout the cannabis industry, but to recap, it is essentially soft guidance to federal prosecutors regarding DOJ's view on the appropriate allocation of federal resources regarding enforcement of the CSA.

The Cole Memo outlines eight general federal enforcement priorities related to marijuana in states in which it has been legalized, and notes that these enforcement priorities are less likely to be threatened in states with "strong and effective regulatory and enforcement systems to control the medical and commercial cultivation, distribution, sale, and possession of marijuana . . . ." In these situations, the Cole Memo provides guidance to federal prosecutors that "enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity."

The Cole Memo is, however, non-binding, and expressly states that it is "intended solely as a guide to the exercise of investigative and prosecutorial discretion" and does not provide "a legal defense to a violation of federal law, including any civil or criminal violation of the CSA." This means that DOJ is free to reverse course and begin enforcement actions related to CSA violations in states that have legalized marijuana. The appointment and subsequent confirmation of Attorney General Jeff Sessions, who has been an outspoken critic of marijuana use, raised the possibility of a change within DOJ.

Spicer's recent statements indicate that Attorney General Sessions would be free to pursue a policy change without interference from the White House.

Exactly what that change would look like remains uncertain, but keep in mind that despite state-level legalization, marijuana remains a Schedule I controlled substance under the CSA, and the federal government can seize, and seek the civil forfeiture of, real or personal property used to facilitate the sale of marijuana, as well as money or other proceeds derived from such sales. In addition, there is potential risk of criminal investigation or prosecution for aiding and abetting violation of the CSA or for conspiring to violate the CSA.

DOJ's best, and perhaps most likely to be used, enforcement actions are criminal prosecutions and civil forfeiture cases brought against individuals and businesses directly participating in the cannabis industry (producers, processors and retailers). Those actions are simple to implement, as DOJ simply needs to allow Drug Enforcement Agency agents to conduct investigations of and/or raids on producers, processors and retailers, then tell federal prosecutors that they are free to seek the indictment of these individuals and businesses for violating federal law.

The Distinction Between Medical and Recreational Marijuana is Critical – For Now

Spicer's statements also highlight the "big difference" between how the Trump administration views medical and recreational marijuana. This view is reflected in federal law, which currently grants limited protection to medical marijuana users and, by implication producers, processors and retailers. The "Rohrabacher-Farr Amendment", which is a rider to the federal spending bill currently in effect, prohibits DOJ from spending funds to prevent states' implementation of their medical marijuana laws. In *United States v. McIntosh*, a 2016 case, the Ninth Circuit Court of Appeals held that this rider "prohibits DOJ from spending money on actions that prevent the [states listed in the rider from] giving practical effect to their state laws that authorize the use, distribution, possession or cultivation of medical marijuana."

The Ninth Circuit rejected a broader argument that the rider prohibits DOJ from bringing federal charges against anyone licensed or authorized under a state medical marijuana law for activities occurring in that state, including situations where those activities do not fully comply with state law. The court determined the rider "prohibits the federal government only from preventing the implementation of those specific rules of state law that authorize the use, distribution, possession, or cultivation of medical marijuana," and that DOJ does not "prevent the implementation" of rules authorizing conduct when it prosecutes individuals who engage in conduct unauthorized under state medical marijuana laws.

Accordingly, prosecuting individuals who do not strictly comply with all state-law requirements applicable to medical marijuana remains permissible. For cannabis businesses engaged in the production, processing or sale of medical marijuana, having robust policies and procedures in place to ensure compliance with state law is critically important.

Also notable is that the current federal spending bill expires on April 28, 2017. If the current bill is not extended, or if this rider is not included in the next spending bill, this protection will be lost and all marijuana industry participants will be again exposed to the risk of federal criminal prosecution and civil forfeiture actions, in addition to other enforcement actions.

There is also ambiguity in states, such as Washington, with overlap between the medical and recreational laws. In July 2016, Washington's previously unregulated medical marijuana market was integrated into the regulated recreational marijuana market, with new laws taking effect that focused on creating a patient authorization database, a consultant certification program and a certification for "compliant products" for medical use.

Under Washington state law, participation in these medical marijuana programs is essentially voluntary. Medical marijuana patients in Washington are not required to participate in the patient database, and producers and processors are not required to obtain "compliant product" certifications from the Washington State Department of Health. Many producers and processors have not sought this certification due to the increased product testing and compliance costs, and many medical marijuana patients have refused to register for the patient authorization database due to privacy concerns. Given the current landscape, however,

cannabis businesses may want to reconsider their participation in state medical marijuana programs.

The Need for a Congressional Solution

Spicer's comments should also serve as a reminder that the status quo – that is, DOJ's discretionary decision to not enforce federal law against state-sanctioned marijuana activities – is not viable as a long-term solution for the industry. Spicer's statements are at odds with polling data on legalization of marijuana, with an October 2016 Gallup poll indicating that 60 percent of Americans support legalization, and a February 23, 2017 Quinnipiac University poll indicating that 71 percent of Americans (including majorities of both Democrats and Republican voters and in every age group) believe that the federal government should not enforce federal laws against marijuana in states that have legalized recreational or medical marijuana.

A renewed focus on federal enforcement is also certain to trigger resistance from states such as Washington, Colorado and Oregon that have seen positive economic benefits from marijuana regulation. Since regulated sales began in Washington in 2014, the state has collected approximately $430M in additional tax revenue. Fiscal year 2017 tax revenue in Washington alone is projected at $272M. It is difficult to envision states willingly giving up this tax revenue while disregarding the will of their voters.

Indeed, earlier this month, amid uncertainty over the Trump administration's approach to cannabis laws, Washington Attorney General Bob Ferguson and Governor Jay Inslee wrote to Attorney General Sessions asking that the guidance in the Cole Memo be maintained, and that any changes to the policy be coordinated closely with states that have established cannabis markets. Ferguson has already responded to Spicer's statements, stating in an interview that he intends to resist any efforts by the Trump administration to interfere with Washington's regulated marijuana market.

Taking a "glass half-full" approach, Spicer's statements could be what it takes to galvanize public support around re-scheduling or de-scheduling marijuana and to finding a viable long-term solution to the industry. Industry participants and other stakeholders have an opportunity to use this potential shake-up to the status quo as an effective lobbying strategy in order to convince Congress that a well-regulated industry operating in the light with substantial state oversight is a better outcome, both economically and socially, than pushing it back toward an unregulated black market.

Warning Regarding Federal Law: The possession, distribution, and manufacturing of marijuana is illegal under federal law, regardless of state law which may, in some jurisdictions, decriminalize such activity under certain circumstances. Penalties for violating federal drug laws are very serious. For example, a conviction on a charge of conspiracy to sell drugs carries a mandatory minimum prison term of five years for a first offense and, depending on the quantity of marijuana involved, the fine for such a conviction could be as high as $10 million. In addition, the federal government may seize, and seek the civil forfeiture of, the real or personal property used to facilitate the sale of marijuana as well as the

money or other proceeds from the sale. Although the U.S. Department of Justice (DOJ) recently rescinded its guidance regarding prioritization of criminal prosecutions of individuals and entities operating in compliance with effective state regulatory systems, DOJ left in place long standing guidance to federal prosecutors regarding how to exercise this discretion. Individuals and companies are cautioned to consult with experienced attorneys regarding their exposure to potential criminal prosecution before establishing business operations in reliance upon the passage of state laws which may decriminalize such activity. Federal authority to prosecute violations of federal law as crimes or through seizures and forfeiture actions is not diminished by state law. Indeed, due to the federal government's jurisdiction over interstate commerce, when businesses provide services to marijuana producers, processors or distributors located in multiple states, they potentially face a higher level of scrutiny from federal authorities than do their customers with local operations.

Tags: appropriations rider, Attorney General Jeff Sessions, cannabis businesses, cannabis industry, cannabis processors, cannabis producers, cannabis retailers, certification for "compliant products", civil forfeiture cases, Cole Memo, Congressional Appropriations Rider, Consolidated Appropriations Act, consultant certification program, Controlled Substances Act, criminal investigation, criminal prosecution, CSA, cultivation of medical marijuana, DEA, Department of Justice, distribution of medical marijuana, DOJ, DOJ policy guidance, Drug Enforcement Agency agents, federal legalization of marijuana, Governor Jay Inslee, marijuana businesses, marijuana processors, marijuana producers, marijuana production, marijuana regulation, medical marijuana, patient authorization database, positive economic benefits from marijuana regulation, possession of medical marijuana, recreational marijuana, regulated marijuana sales, sale of medical marijuana, Schedule I Controlled Substance, Sean Spicer, state cannabis laws, state medical marijuana laws, state-level legalization of marijuana, Trump Administration, Trump Administration marijuana policy, Washington Attorney General Bob Ferguson, Washington state medical and recreational marijuana law, Washington state's medical marijuana programs, Washington state's regulated recreational market, Washington state's unregulated medical marijuana market