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FOUR CONGRESSIONAL ACTIONS TO PROTECT THE STATE-LEGAL CANNABIS INDUSTRY IN THE POST-COLE ERA

In November 2012, the states of Colorado and Washington passed the first laws making the possession, cultivation, and distribution of cannabis legal for all adults. Within weeks, any individual 21 years of age or older in those states could possess up to an ounce of cannabis. What was uncertain, however, was whether they would be able to purchase cannabis from state-regulated stores. It was going to take until 2014 before establishments would be licensed to cultivate and sell cannabis for non-patients. As the states worked toward that end, federal officials debated how to respond to the state-federal conflict posed by the fact that cannabis remained illegal at the federal level.

Finally, in August 2013, the Department of Justice, through a memorandum issued by Deputy Attorney General James Cole, conveyed to the public how it would approach this conflict between state and federal cannabis laws. The policy outlined in what became known as the ***"Cole Memo"***[1] was a sensible and balanced means of addressing the interests of federal law enforcement authorities and the desire of states to regulate the production and sale of cannabis. In short, the Department explained that it would not target individuals acting in compliance with state law, as long as their conduct did not interfere with eight specific federal law enforcement priorities, such as preventing revenues from going to criminal enterprises and preventing the diversion of cannabis to other states.

Less than six months later, in February 2014, the Department of Justice and the Treasury Department, through the Financial Crimes Enforcement Network (FinCEN), released additional guidance for financial institutions serving cannabis industry clients. The release of this guidance was an acknowledgement by the federal government of the dangers posed by a lack of access to banking services in the industry. The Department of Justice memo, again issued by Deputy AG Cole and often referred to as ***"Cole II,"***[2] reiterated the Cole Memo enforcement priorities and added, ***"if a financial institution or individual offers services to a marijuana-related business whose activities do not implicate any of the eight priority factors, prosecution for these offenses may not be appropriate."*** The FinCEN guidance informed financial institutions of their obligations when working with cannabis industry clients, including the filings of marijuana-related Suspicious Activity Reports (SARs).

For more than four years following the release of the Cole Memo, states were allowed to proceed with voter-approved laws to regulate the production and sale of cannabis to adults. This did not prevent federal law enforcement authorities from pursuing cases against individuals in these states who were acting outside of the parameters of state law. But it did result in a massive share of the cannabis market shifting from underground sales to taxed and regulated sales. And it made the lives of consumers safer, since they were able to purchase their intoxicant of choice at secure, professional establishments.

In addition to the comfort and stability provided by the Cole Memo, since December 2014, individuals engaged in the production and distribution of medical marijuana in accordance with state law have enjoyed the protections of the Rohrabacher-Farr Amendment. This amendment, named for the congressional sponsors of the measure, Rep. Dana Rohrabacher (R-CA) and Rep. Sam Farr (D-CA), and attached annually to federal spending bills, prohibits the Department of Justice from spending funds to interfere with state medical marijuana laws. The Ninth Circuit has interpreted this amendment to mean that the Department could not spend funds to prosecute individuals who were acting in compliance with state medical cannabis laws.[3]

Following the election of Donald Trump as the 45th president of the United States in November 2016, there was uncertainty about how the new administration would approach state cannabis laws. During the campaign, candidate Trump expressed support for states that

had carved their own path on cannabis, saying in response to a reporter's question about whether Colorado should be able to have adult-use cannabis sales, ***"I think it's up to the states, yeah. I'm a states person. I think it should be up to the states, absolutely."***[4] On the other hand, he nominated Alabama Senator Jeff Sessions, who had embraced very anti-cannabis positions during his time in the Senate, to be his attorney general. Throughout all of 2017, the Trump Administration was virtually silent on the issue of cannabis and the Department of Justice did not announce any change in policy, nor did it interfere with state cannabis laws.

Then, with the change of the calendar came a change in policy. On January 4, 2018, Attorney General Sessions declared in a one-page memo that he had rescinded the Cole Memo, Cole II, a similar memo related to cannabis activity on tribal land, and two older memos.[5] He directed U.S. Attorneys to instead ***"follow the well-established principles that govern all federal prosecutions,"*** which require federal prosecutors to ***"weigh all relevant considerations, including federal law enforcement priorities set by the Attorney General, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community."*** Whether this action by the Attorney General was based on a general desire to eliminate any existing Obama-era guidance or a specific desire to see more aggressive enforcement actions against state-legal cannabis industry players is unknown. What is known is that it created more uncertainty for individuals who are working with state and local officials to displace the underground, criminal cannabis market.

In the face of this executive branch action, it is critical for members of Congress to defend states' rights and stand up for individuals who are acting in compliance with state cannabis laws. Ironically, one of the problems for supportive members of Congress is that so many different legislative solutions have been introduced. This makes it hard to know which ones to support – or at least which ones to prioritize. So we are providing here a prioritized list of Four Congressional Actions to Protect the State-Legal Cannabis Industry in the Post-Cole Era.

✓ **Retain the Rohrabacher-Farr Amendment.** During consideration of the FY18 appropriations bills, this amendment was referred to as the Leahy Amendment, as it was Senator Patrick Leahy (D-VT) who introduced it in the Senate Appropriations Committee in July 2017, where it was adopted by voice vote. The House version of the FY18 amendment, now sponsored by Rep. Rohrabacher and Rep. Earl Blumenauer (D-OR), following the retirement of Rep. Farr, was blocked in the House Rules Committee and not permitted a vote on the House floor, where it had passed easily the last time it was voted upon in 2015, with 242 votes in favor.[6] Ultimately, after negotiations between the House and the Senate, Congress included the Leahy Amendment in the FY18 omnibus appropriations bill, maintaining protections for state-legal medical marijuana operators. Until there is permanent legislation protecting state-legal operators, all future appropriations bills must include this amendment.

✓ **Expand the Rohrabacher-Farr Amendment to cover all state cannabis laws.** As noted above, the Rohrabacher-Farr Amendment has prevented the Department of Justice from spending funds to interfere with state medical cannabis laws. A logical – and needed – expansion of this amendment would prohibit DOJ from interfering with any state cannabis law. An amendment to accomplish this goal has been introduced in the past by Rep. Tom McClintock (R-CA) and Rep. Jared Polis (D-CO) and has garnered significant support. In fact, in 2015, prior to passage of ballot measures to regulate the cultivation and sale of cannabis in California, Maine, Massachusetts, and Nevada in 2016, the McClintock-Polis Amendment received 206 votes on the House floor.[7] Given trends in support for cannabis policy reform in Congress, it seems very likely that this amendment would receive majority support if the sponsors were granted the opportunity to introduce it on the House floor again. Members of both the House and Senate should seek any opportunity to insert this amendment into a future appropriations bill.

✓ **Enact a permanent solution to the cannabis banking problem.** The elimination of the Cole II guidance to financial institutions has added one more layer of complication and uncertainty to an already unreliable system. Although the FinCEN guidance is still in place (as of this writing) and numerous financial institutions are still serving cannabis industry clients, too many other banks and credit unions are reluctant to serve the industry. And even those companies with accounts at financial institutions generally do not have access to merchant services, forcing many of them to rely on cash transactions. This is a public safety threat that will not be eliminated until there is a permanent legislative fix to the banking problem. Congress needs to pass the The Secure and Fair Enforcement (SAFE) Banking Act of 2017 (S. 1152, H.R. 2215), introduced by Sen. Jeff Merkley (D-OR) in the Senate and Rep. Ed Perlmutter (D-CO) in the House. Under the provisions of this bill, a financial institution may not be held liable pursuant to any Federal law nor may it be penalized by federal regulators for providing services to state-legal cannabis business.[8]

✓ **Exempt individuals acting in compliance with state cannabis laws from the provisions of the Controlled Substances Act.** While the Leahy and McClintock-Polis amendments would provide individuals in the cannabis industry a critical level of protection against prosecution by federal officials, there is significant uncertainty associated with provisions that must be renewed every year. Individuals acting in compliance with state cannabis laws in order to take production and sale out of the underground market deserve more certain legal standing. We believe the simplest legislative solution, prior to eventual legalization at the federal level, is to exempt individuals acting in compliance with state cannabis laws from the provisions of the Controlled Substances Act (CSA). A bill to accomplish this goal, the Respect State Marijuana Laws Act of 2017 (H.R. 975), has been introduced by Rep. Rohrabacher and enjoys strong bipartisan support. It adds one sentence to the end of the CSA: ***"Notwithstanding any other provision of law, the provisions of this subchapter related to marihuana shall not apply to any person acting in compliance with State laws relating to the production, possession, distribution, dispensation, administration, or delivery of marihuana."***[9]

FOOTNOTES

1. https://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf
2. https://dfi.wa.gov/documents/banks/dept-of-justice-memo.pdf
3. https://cdn.ca9.uscourts.gov/datastore/opinions/2016/08/16/15-10117.pdf
4. http://www.king5.com/article/news/local/it-should-be-up-to-the-states-what-trump-said-about-marijuana-during-campaign/281-504941365
5. https://www.justice.gov/opa/press-release/file/1022196/download
6. http://clerk.house.gov/evs/2015/roll283.xml
7. http://clerk.house.gov/evs/2015/roll285.xml
8. https://www.congress.gov/bill/115th-congress/senate-bill/1152/text
9. https://www.congress.gov/bill/115th-congress/house-bill/975/text