

SEEDS OF CHANGE: THE DOJ'S NEW LAW ENFORCEMENT POSITION ON MARIJUANA

On January 4, 2018, Attorney General Jeff Sessions issued a memorandum to United States Attorneys rescinding several Obama-era directives that discouraged enforcement of the federal Controlled Substances Act of 1970 ("**CSA**") in relation to state-legal and regulated marijuana activities (the "**Sessions Memo**"). One of the repealed guidance memoranda, Guidance Regarding Marijuana Related Financial Crimes from then Deputy Attorney General James Cole from February 14, 2014 (the "**2014 Cole Guidance**"), recognized that prosecution may not be appropriate for money laundering offenses related to providing financial services to a marijuana-related business legally operating under state law. Indeed, the Sessions Memo takes aim at the 2014 Cole Guidance, stating that marijuana-related crimes "may serve as the basis for the prosecution of other crimes, such as those prohibited by the money laundering statutes, the unlicensed money transmitter statute, and the Bank Secrecy Act." By calling out these anti-money laundering laws, the Sessions Memo can be viewed as putting the financial industry on notice that its business involving the cannabis industry may once again be subject to federal enforcement efforts. To date, federal banking regulators and the Financial Crimes Enforcement Network ("**FinCEN**") have not reacted to this change in federal criminal enforcement policy, but the risk clearly exists for higher regulatory scrutiny of business deemed illegal under federal law even if it is not prohibited by state law.

THE REPEALED GUIDANCE

The Sessions Memo rescinds five prior policy memoranda regarding marijuana-related prosecution, including policy statements on state-authorized medical marijuana,¹ recreational marijuana,² provision of financial services to the marijuana industry,³ and enforcement of federal marijuana laws on Indian reservations and tribal lands.⁴ This prior guidance recommended that the Department of Justice ("DOJ") not use its limited resources in cases of state-permitted marijuana conducted in "unambiguous compliance" with states' "strong and effective regulatory and enforcement systems" for marijuana production, distribution, and possession.

While making clear that this prior guidance did not "'legalize' marijuana or provide a legal defense to a violation of federal law," it differentiated state-sanctioned and regulated marijuana conduct from serious criminal drug activity. The prior guidance emphasized that DOJ continued to actively pursue the illegal distribution and sale of marijuana by large-scale criminal enterprises, gangs, and cartels, and highlighted eight related enforcement priorities, including preventing criminals from receiving revenue from marijuana sales and preventing state-authorized marijuana activity from concealing illegal drug activity. The 2014 Cole Guidance reiterated DOJ's commitment to using its limited investigative and prosecutorial resources to prioritize enforcement of marijuana-related financial crimes involving these enforcement priorities targeting large-scale drug traffickers and organizations.

PROSECUTORIAL DISCRETION AND ENFORCEMENT UNDER THE SESSIONS MEMO

While abrogating this prior guidance on enforcement priorities, the Sessions Memo continues to recognize that DOJ has "finite resources" and that prosecutorial discretion involves balancing numerous factors in deciding whether to bring an enforcement action. These factors include federal law enforcement priorities set by the Attorney General, the seriousness of the crime, and the deterrent effect of prosecution. Thus, while inviting a revival in federal prosecution of the marijuana industry in full—and by extension, the supporting financial industry—under the CSA and related anti-money laundering laws, the likely impact of the Sessions Memo remains unclear.

Ultimately, the Sessions Memo may not spur any material change in enforcement priority. Senators from the Republican and Democratic parties, as well as marijuana advocates, have been quick to criticize the new policy by raising voter

¹ David W. Odgen, Deputy Att'y Gen., Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), *available at* <http://www.scc4.us/Portals/20/pdfs/legislation/DOJ%20Odgen%20Memo%20and%20Subsequent%20DOJ%20Clarifications.pdf>; James M. Cole, Deputy Att'y Gen., Memorandum for United States Attorneys: Guidance Regarding the Odgen Memo on Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011), *available at* <http://www.ag.state.mi.us/opinion/attachments/7262.Att.2.pdf>

² James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), *available at* <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

³ James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014), *available at* <http://media.thedenverchannel.com/documents/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014.pdf>.

⁴ Monty Wilkinson, Director of the Executive Office for U.S. Att'ys, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014), *available at* <https://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf>.

interest and economic impact arguments. Recreational use of marijuana is legal in 8 states and the District of Columbia, and 29 states in total permit the use of medical marijuana, contributing to an industry that generates billions annually in revenue. As reported by the Washington Post, Channing D. Phillips, the District's former U.S. Attorney who served from 2015 to 2017, stated that he "would be surprised if anything really changes under this new policy" in D.C. as "[t]he focus will be on traffickers and large organized crime."⁵

WHAT TO DO NEXT

Aside from these policy positions, money laundering statutes have and will continue to make it a criminal offense to engage in financial and monetary transactions with the proceeds of marijuana-related violations of the CSA and to fail to identify and report financial transactions involving the proceeds of marijuana-related violations. Consistent with guidance issued by FinCEN in 2014, financial institutions should ensure that they identify customers operating in the marijuana business, conduct appropriate due diligence on the customers' activities, and submit marijuana-related SAR filings as appropriate.⁶ In addition to complying with prior guidance that financial institutions should refuse services associated with businesses selling marijuana in states where such sales are illegal or in connection with organized crime, financial institutions should closely monitor any change in bank regulatory scrutiny and consider whether to continue supporting transactions or relationships for state-approved marijuana businesses consistent with their risk profile given this new shift in stated enforcement policy.

⁵ Keith L. Alexander, *Lawyers, legal experts watching how Sessions's new marijuana enforcement impacts District residents*, WASHINGTON POST, Jan. 4, 2018, available at https://www.washingtonpost.com/local/public-safety/lawyers-legal-experts-watching-how-sessions-new-marijuana-enforcement-impacts-district-residents/2018/01/04/af13f7aa-f197-11e7-b3bf-ab90a706e175_story.html?utm_term=.f085af64f94f.

⁶ See FIN-2014-G00, 1BSA Expectations Regarding Marijuana-Related Businesses (Feb. 14, 2014), available at <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>.

CONTACTS

David DiBari
Partner

T +1 202 912 5098
E david.dibari
@cliffordchance.com

Steven Gatti
Partner

T +1 202 912 5095
E steven.gatti
@cliffordchance.com

Megan Gordon
Partner

T +1 202 912 5021
E megan.gordon
@cliffordchance.com

Katie Barlow
Associate

T +1 202 912 5195
E katie.barlow
@cliffordchance.com

Catherine Ennis
Associate

T +1 202 912 5009
E catherine.ennis
@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 2001 K Street NW,
Washington D.C. 20006-1001, USA

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