



Attorney General’s Memorandum on Federal Marijuana Enforcement: Possible Impacts

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On January 4, 2018, Attorney General Jeff Sessions [sent a memorandum](#) on federal marijuana enforcement policy (Sessions Memorandum) to all [U.S. Attorneys](#) that immediately rescinds guidance documents specific to marijuana enforcement that were [issued under the Obama Administration](#). Generally, the Obama-era guidance documents afforded state and local government officials, businesses, and individuals [some measure of reassurance](#) that they could facilitate or participate in state-authorized marijuana cultivation, distribution, sale, and possession activities without much concern of federal interference, despite the fact that federal law [generally prohibits most conduct involving marijuana](#).

The [Sessions Memorandum](#) instructs U.S. Attorneys to “follow the [well-established principles](#) that govern all federal prosecutions,” in light of the Department of Justice’s (DOJ’s) “finite resources.” Although the Sessions Memorandum notes that it is intended “solely as a guide to the exercise of investigative and prosecutorial discretion,” it seemingly decentralizes federal marijuana prosecutorial decisions by giving greater flexibility to individual prosecutors, instead of having a more uniform, DOJ-wide marijuana enforcement policy. It also indicates that such discretion must be “in accordance with all applicable laws, regulations, and appropriations,” which would include – albeit temporarily – an appropriations rider scheduled to end on [January 19](#) that prohibits DOJ from using appropriated funds to prevent certain jurisdictions “[from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana](#).” This language, one federal appellate court has [observed](#), is “not a model of clarity” and is likely susceptible to different interpretations. Furthermore, Congress could choose to readopt the current language, [expand the language](#) to protect conduct that is in compliance with either state medical or recreational marijuana laws, or not include it in future spending measures, adding to the uncertainty regarding the future of marijuana enforcement. Congress could also [change marijuana’s legal status](#) under federal law.

The increased uncertainty triggered by the Sessions Memorandum highlights the ongoing tension between state and federal marijuana laws. Regardless of state laws purporting to authorize the use of marijuana for either medical or recreational purposes, the [federal Controlled Substances Act \(CSA\)](#) prohibits the cultivation, sale, distribution, or possession of marijuana (except by those authorized to engage in federally approved research) and provides criminal penalties for engaging in these activities. Currently,

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eight states and the District of Columbia have laws permitting both recreational and medical use of marijuana, while 38 states allow the medical use of some form of marijuana or a marijuana extract called cannabidiol (CBD). Though the Sessions Memorandum's full impact remains to be seen, it may cause confusion as to the likelihood of industry participants facing federal criminal liability.

Federal Appropriations Restrictions on DOJ Actions Regarding Medical Marijuana

The Sessions Memorandum provides federal prosecutors with the same discretion in their approach to federal marijuana violations that they enjoy with regard to other criminal violations, simultaneously allowing for either continued restraint or more aggressive enforcement. It would appear, therefore, that the actual impact of the Sessions Memorandum will depend on how it is interpreted and implemented by U.S. Attorneys in states that have adopted laws authorizing the use of marijuana for medical or recreational purposes.

As noted, prosecutorial decisions by individual U.S. Attorneys remain subject to existing legal limitations, including the appropriations rider included in several recent appropriations acts. The rider does not restrict federal enforcement actions for conduct that is in compliance with state *recreational* marijuana laws. But with respect to state-authorized *medical* marijuana conduct, the different interpretations of the provision may have a substantial effect on the permissibility of federal prosecutions for such conduct. For example, the provision could be viewed broadly, so as to prohibit the DOJ from using appropriated funds to take any action that inhibits participation in a state-authorized medical marijuana activity, or more narrowly, so as only to prevent the use of appropriated funds for medical marijuana-related enforcement actions taken directly against states or state officials.

To date, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) is the only federal appellate court to provide an interpretation of the rider's meaning. In *United States v. McIntosh*, the Ninth Circuit heard an appeal of consolidated cases in which California citizens sought to enjoin the DOJ from expending funds to carry out marijuana-based prosecutions. The actual claim in *McIntosh* was that the DOJ had violated the separation of powers by spending funds without authorization from Congress in contravention of the Appropriations Clause. After determining that the plaintiffs had standing to pursue such a claim, the court went on to interpret the rider's scope. The court looked to the plain meaning of "implement" and determined that the rider should be construed as prohibiting DOJ from using funds to take actions that prevent medical marijuana states from "giving *practical effect* to their state laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

The court concluded that federal criminal prosecutions inhibit the state's attempts at providing for the "non-prosecution of individuals who engage in the permitted conduct," and that "at a minimum, [the rider] prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws." However, the court noted that in order to be covered by the rider, the conduct in question must be in "strict compliance" with state law.

McIntosh represents the established interpretation of the rider in the Ninth Circuit. The opinion, however, has had wider practical impact, as it has been cited with approval by district courts in [Michigan](#) and [Missouri](#), which are outside of, and therefore not bound by, the Ninth Circuit. In addition, the U.S. Court of Appeals for the Tenth Circuit [appears](#) to have suggested that it too concurs with the Ninth Circuit's interpretation.

Practical Implications of Withdrawing Previous Guidance

As previously noted, the impact of the Sessions Memorandum will likely depend on how it is interpreted and implemented by individual U.S. Attorneys, especially with regard to state policies on recreational marijuana that are not protected by the appropriations rider. The U.S. Attorney for the District of

Massachusetts, for example, has [stated](#) that he “cannot []provide assurances that certain categories of participants in the state-level marijuana trade will be immune from federal prosecution.” But regardless of its implementation, the memorandum has highlighted the general uncertainty associated with the marijuana legalization movement, and the ease and speed with which a change in executive branch policy can unsettle the system. This point was made somewhat presciently in 2016 by the [Ninth Circuit](#) in *McIntosh*, which noted that a new president would soon be elected whose “administration could shift enforcement priorities to place greater emphasis on prosecuting marijuana offenses.” Even in the absence of immediate federal enforcement efforts, the apparent increase in risk faced by marijuana businesses as a result of the rescission of the safe harbors established by Obama-era guidance may have a chilling effect on the industry. The mere possibility of federal marijuana enforcement has already negatively impacted marijuana [stocks](#), and could also reverse the [recent uptick](#) in financial institutions willing to offer services to the fledgling industry.

Author Information

Todd Garvey
Legislative Attorney

Brian T. Yeh
Legislative Attorney

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