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## "Canna Business" in the Trump Era?

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### ***How the Sessions Memo Affects the Cannabis Industry in Michigan and Beyond***

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#### **I. Introduction**

As the cannabis industry continues to grow across the nation (marijuana use is legal in some fashion in approximately 29 states already), the general public and those with vested business interests in the industry itself are anxious to see whether that growth will either continue or pause in the Trump Era. In Michigan, we are tracking the possibilities of recreational marijuana legalization as early as 2019, following an anticipated vote in the November 2018 general election. That anxiousness is even more pronounced given a recent decision from United States Attorney General Jeff Sessions, who released a memo on January 4, 2018 (the "Sessions Memo") rescinding federal guidance that had reassured states that they would not be punished for legalizing marijuana. Politics aside, that rescission has left the public and the industry with more questions than answers. This article attempts to provide a critical update on the status of this developing topic and explores the potential impact on the Cannabis industry in Michigan and beyond.

#### **II. What is the Overall Effect of the Sessions Memo?**

Aside from drawing plenty of press, the Sessions Memo does not appear to be a direct attack on the cannabis industry – at least not on its face. The memo does not specifically direct federal prosecutors to do much of anything. It does not direct federal attorneys to prosecute states in which medical or recreational marijuana usage has been legalized. Rather, it purports to return to the status quo that existed before the 2013 Cole Memo<sup>[1]</sup>, where U.S. Attorneys exercised wide discretion in choosing

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whether to enforce federal laws against behavior in states that had legalized medical or recreational marijuana. Therein lies the concern: what will the federal prosecutors within each state actually do? It sets the stage for potential inconsistent enforcement (or lack thereof) and an overall unpredictable environment. Such uncertainty undermines confidence in the industry and raises concerns with investors and consumers in the industry – not the typical recipe for those seeking growth in the industry.

### **III. Quick Status Update on Michigan Cannabis Law**

The Michigan Cannabis industry has recently transformed due to the Michigan legislature's passage of the Medical Marihuana Facilities Licensing Act (MMFLA). The MMFLA allows licensed businesses to grow, process, transport, test, and dispense medical marijuana. The Department of Licensing and Regulatory Affairs (LARA) and the Bureau of Medical Marijuana Regulation (BMMR) were granted oversight under the act. Emergency rules are currently in place [2]. The BMMR has the responsibility to work with the Medical Marihuana Licensing Board (MMLB) to promulgate permanent rules to carry out the regulatory scheme.

LARA began accepting applications on December 15, 2017. The 45-page application is somewhat nuanced, with hefty disclosure and reporting requirements.

### **IV. Potential Effect on Michigan**

It is not clear how the Sessions Memo will affect the Cannabis industry in Michigan, if at all. Interim U.S. Attorney Matthew Schneider stated that his priorities are violent crime, gangs, corruption and terrorism, not marijuana [3]. Former U.S. Attorney Barbara McQuade believes that the Sessions Memo will have little to no effect on Michigan at all [4]. Michigan Attorney General Bill Schuette does not appear to be changing his position. According to Schuette, any new prosecution priorities would be left up to attorneys for the federal government [5].

### **V. Potential Effect on Other Jurisdictions**

Similar to Michigan, it is not clear how other states with existing marijuana laws will be affected. One would think that states where recreational marijuana has been legalized (e.g. California and Colorado) would be prime targets for federal enforcement action. However, the majority of U.S. Attorneys and politicians in those states have expressed no desire to enforce federal law.

#### ***a. Will law enforcement be waiting on customers outside the marijuana store?***

Several attorneys general have stated that they will not change their stance towards marijuana prosecution. For example, Colorado U.S. Attorney Bob Troyer stated that the Sessions Memo would not change his stance towards the prosecution of marijuana related offenses [6]. The Attorney General of Oregon, Ellen Rosenblum, similarly stated that the Sessions Memo would not change her stance on marijuana prosecution in Oregon [7]. The Attorney General of California, Xavier Becerra, expressed similar sentiments [8]. Each generally embraces a laissez-faire approach consistent with the Cole

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Memo, limiting enforcement where there is strict adherence to the state's cannabis laws.

On the other hand, in 2012 (before the Cole Memo), several medical marijuana dispensaries operating in compliance with Colorado's medical marijuana regime were sent letters by U.S. Attorney John Walsh to cease operation because they were within 1,000 feet of schools [9]. Although federal intrusion continued in Colorado until the end of 2012, it is significant that Walsh only targeted dispensaries within 1,000 feet of schools (which is generally considered illegal in most states in which recreational or medicinal distribution of permitted). That is, these prosecutions seemed to have been initiated on the impulse of a single U.S. Attorney, rather than following the directive of the entire Department of Justice.

### ***b. What is the potential liability for operators and investors in the cannabis industry if the feds start enforcing federal law?***

The Sessions Memo arguably foreshadows potential white collar prosecutions against bad actors. The Sessions Memo opens with: "cultivation, distribution and possession of marijuana . . . may serve 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." [10] This is a specific reference to banking and storing money. These are hot topics among industry newcomers: deep pocketed business people from outside the industry, private equity, and others whose interest piqued. The threat of this type of potential exposure may scare away these newcomers, thereby significantly reducing the industry's access to capital.

### ***c. What about business or service providers that do business with a licensee?***

#### *i. Attorneys*

In 2015, California issued guidance to its attorneys, advising them that an attorney may "ethically represent the client on the facts provided that the legal advice and assistance is limited to activities permissible under state law and the lawyer advises the client regarding possible liability under federal law and other potential adverse consequences under state and federal laws." It seems likely that most states are following this same procedure.

#### *ii. Banking*

There is some concern with banks that choose to work with marijuana businesses. The Financial Crimes Enforcement Network (FinCEN) previously issued guidance based on the Cole memo. FinCEN has not issued new guidance yet, but plans to continue to work with the DOJ and stakeholders on the issue. [12]

Senate Bill 1152, the "SAFE Banking Act", proposes to create protections for depository institutions that provide financial services to cannabis-related businesses.[13] Unfortunately, the future of the bill is not promising. The Senate Bill was introduced in May 2017 and has gained little traction.

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### VI. Summary

Butzel Long's team of qualified professionals will continue to monitor the legal developments in Michigan and beyond. It is imperative that those with vested interests in the Cannabis industry (owners, investors, and consumers) stay on top of the recent developments and take proactive action (where necessary) to protect themselves and their investments, especially considering the Sessions Memo. Our firm has a cross-disciplinary group of talented lawyers who are actively engaged in following these issues and developing up-to-date guidance for our clients. Please be sure to stay in contact with your Butzel Long attorney to stay abreast of any and all developments.

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*Disclaimer: Possessing, using, distributing and/or selling marijuana or marijuana-based products is illegal under federal law, regardless of any state law that may decriminalize such activity under certain circumstances. Although federal enforcement policy may at times defer to states' laws and not enforce conflicting federal laws, interested businesses and individuals should be aware that compliance with state law in no way assures compliance with federal law, and there is a risk that conflicting federal laws may be enforced in the future. No legal advice we give is intended to provide any guidance or assistance in violating federal law.*

[1] The Cole memo directed federal prosecutors to limit enforcement regarding cannabis prohibition under the Controlled Substances Act where there was clear and unambiguous compliance with existing state laws that legalized marijuana. <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

[2] MMFLA Emergency Rules [http://www.michigan.gov/documents/opt/Emergency\\_Rules\\_Medical\\_Marihuana\\_Facilities\\_Licensing\\_Act\\_607643\\_7.pdf](http://www.michigan.gov/documents/opt/Emergency_Rules_Medical_Marihuana_Facilities_Licensing_Act_607643_7.pdf)

[3] Schneider Interview [no longer available].

[4] Stateside Staff. Michigan Radio, Despite Sessions' shift on marijuana, former U.S. attorney McQuade expects 'business as usual'(January 5, 2018) <http://michiganradio.org/post/despite-sessions-shift-marijuana-former-us-attorney-mcquade-expects-business-usual>

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[5] Gerstein, Michael. Detroit News, Sessions' memo a new worry for medical pot in Michigan (January 4, 2018) <http://www.detroitnews.com/story/news/politics/2018/01/04/sessions-memo-michigan-marijuana/109164590/>

[6] Greenwood, Max. The Hill, Colorado: No immediate change in marijuana prosecutions (January 4, 2018) <http://thehill.com/homenews/state-watch/367454-us-attorney-in-colorado-says-there-will-not-be-immediate-change-in>

[7] Shepard, Katie. Willamette Week, Oregon Politicians Livid as U.S. Attorney General Jeff Sessions Jettisons Federal Agreement to Keep Hands Off Legal Weed (January 4, 2018) <http://www.wweek.com/news/2018/01/04/oregon-politicians-livid-as-u-s-attorney-general-jeff-sessions-jettisons-federal-agreement-to-keeps-hands-off-legal-weed/>

[8] Halper et al., LA Times, Trump administration targets recreational pot, placing thousands of marijuana businesses in California at risk (January 4, 2018) <http://www.latimes.com/politics/la-na-pol-pot-sessions-20180104-story.html>

[9] Huff Post, Medical Marijuana Crackdown In Colorado: 10 More Dispensaries Near Schools Forced To Shut Down (September 9, 2012) [https://www.huffingtonpost.com/2012/09/19/medical-marijuana-crackdo\\_n\\_1896385.html](https://www.huffingtonpost.com/2012/09/19/medical-marijuana-crackdo_n_1896385.html)

[10] U.S. Attorney General. Marijuana Enforcement (January 4, 2018) <https://www.justice.gov/opa/press-release/file/1022196/download>

[11] San Francisco Bar Association, Opinion 2015-1 (June 2015) [https://www.sfbar.org/ethics/opinion\\_2015-1.aspx](https://www.sfbar.org/ethics/opinion_2015-1.aspx)

[12] Zhang, Mona. Forbes Magazine, Marijuana Investors Aren't Scared By Sessions' Change In Pot Policy (January 6, 2018) <https://www.forbes.com/sites/monazhang/2018/01/06/marijuana-investors-arent-scared-by-sessions-change-in-pot-policy/2/#47bf8ed36032>.

[13] S.B. 1152, 115 Cong. (2017) <https://www.congress.gov/bill/115th-congress/senate-bill/1152/text>