LEGAL MEMORANDUM

QUESTION PRESENTED:

What are the federal criminal and civil and other liabilities of "medical" marijuana dispensaries and physicians, government employees, landlords and financiers who participate in any way in the growing, possession, manufacture, distribution, or sales of "medical" marijuana under state "medical" marijuana laws?

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THE CONFLICT BETWEEN STATE "MEDICAL" MARIJUANA LAWS AND FEDERAL LAW

Based on an analysis of federal law, it is clear that "medical" marijuana dispensaries or persons such as physicians and government employees and others acting under state "medical" marijuana laws may be subject to prosecution by the U.S. Government under the federal Controlled Substances Act (CSA) because the state "medical" marijuana laws are preempted by the CSA. Congress enacted the CSA for the purposes of consolidating various drug laws into a comprehensive statute, providing meaningful regulation over legitimate sources of drugs to prevent diversion into illegal channels, and strengthening law enforcement tools against international and interstate drug trafficking. 21 U.S.C. § 801 et seq. [FN1]

Recent DOJ letter makes their position clear

On June 29, 2011, the United States Attorney General issued a final clarifying statement on this issue to the United States Attorneys. The letter stated that:

> Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA. Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws.
>
> The Department of Justice is tasked with enforcing existing federal criminal laws in all states, and enforcement of the CSA has long been and remains a core priority. [FN2]

The state "medical" marijuana laws are preempted by the CSA

The United States Supreme Court has clearly upheld federal supremacy when it comes to state laws on "medical" marijuana. In the case of U.S. v. Oakland Cannabis Buyer's Co-op, the Court dealt its first blow to the medical use of marijuana in a case involving a California cooperative that distributed marijuana. The Oakland Cannabis Buyers' Cooperative was organized to distribute marijuana to qualified patients for medical purposes in the wake of Proposition 215, California's initiative legalizing medical use of crude marijuana. The Court held that there is no medical necessity exception to the CSA's prohibitions on manufacturing and distributing marijuana. The CSA reflects a determination that marijuana has no medical benefits worthy of an exception. Whereas other drugs can be dispensed and prescribed for medical use (21 U.S.C. § 829) the same is not true for marijuana, which has "no currently accepted medical use" at all (21 U.S.C. § 811). [FN3]

In the case of Gonzales v. Raich, some users and growers of "medical" marijuana under the California law claimed the CSA was unconstitutional as applied to them. The Supreme Court held that application of CSA provisions criminalizing the manufacture, distribution, or possession of marijuana for medical purposes was constitutional. Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except as authorized by the CSA. All controlled substances are classified into five schedules based on their accepted medical uses, their potential for abuse, and their psychological and physical effects on the body. Marijuana is classified as a Schedule I substance, based on its high potential for abuse, no accepted medical use, and no accepted safety for use in medically supervised treatment. [FN4]

In an Oregon state case regarding the state "medical" marijuana law, the Oregon Supreme Court also held that the state "medical" marijuana law was preempted by the CSA. Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries, 230 P.3d 518 (OR 2010)

ISSUE TWO
THE FEDERAL LAWS THAT MAY APPLY TO DISPENSARIES, GOVERNMENT EMPLOYEES, PHYSICIANS, LANDLORDS AND FINANCIERS

Because the provisions of the state "medical" marijuana laws that authorize the possession, use, cultivation and distribution of marijuana are preempted by the CSA, those dispensaries, government employees, physicians, landlords and financiers who act pursuant to the state laws are at risk of violating federal laws. [FN5] This includes, but is not limited to:

1. It is illegal to manufacture, distribute, or possess with intent to distribute any controlled substance including marijuana. 21 U.S.C. § 841

2. It is unlawful to use any communication facility to commit felony violations of the CSA. 21 U.S.C. § 843

3. It is illegal to conspire to commit any of the crimes set forth in the CSA. 21 U.S.C. § 846

4. It is unlawful to knowingly open, lease, rent, maintain, or use property for the manufacturing, storing, or distribution of controlled substances. 21 U.S.C. § 856

5. It is unlawful to distribute or manufacture controlled substances within 1,000 feet of schools, colleges, playgrounds, and public housing facilities, and within 100 feet of any youth centers, public swimming pools, and video arcade facilities. 21 U.S.C. § 860. There are enhanced penalties for distributing to anyone under the age of 21. 21 U.S.C. § 859.

6. There are federal anti-money laundering statutes that make illegal certain financial transactions designed to promote illegal activities, including drug trafficking, or to conceal or disguise the source of the proceeds of that illegal activity. 18 U.S.C. § 1956 and 1957

7. It is possible that there may be prosecutions for aiding or abetting or assisting in the violation of a federal law. "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C. §§ 2, 3

8. Since violations of the CSA can be federal felonies, anyone having knowledge of the actual commission of a federal felony cannot conceal it and must report it as soon as possible to a federal judge or other person in civil or military authority under the United States. 18 U.S.C. § 4

9. They may also be charged with a conspiracy when two or more persons conspire to commit any offense against the United States.18 U.S.C. § 371

Consequences of a violation of the CSA

Potential actions the Department of Justice could consider include civil injunctive actions to prevent cultivation and distribution of marijuana, civil fines, criminal prosecution and prison sentences. 21 U.S.C. § 844(a). There can also be the forfeiture of all property used or intended for use in connection with drug trafficking, including, but not limited to, real property, motor vehicles, funds, as well as books, records, and research. 21 U.S.C. § 881.

Racketeer Influenced and Corrupt Organizations Act (RICO)

The DOJ may initiate criminal proceedings under the Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C. § 1962. See United States v. Hocking, 860 F.2d 769 (7th Cir. 1988)("governmental or public entities fit within the definition of 'enterprise' for purposes of RICO"). All property constituting or derived from, directly or indirectly, the proceeds of racketeering activities is subject to forfeiture regardless of any provision of state law. 18 U.S.C. § 1963(a)

The RICO statute also gives rise to a civil cause of action which may be brought by a private citizen injured by the racketeering activity where such activity proximately caused the injury. 18 U.S.C. § 1964

The tax consequences of trafficking in "medical" marijuana

Trafficking in "medical" marijuana has negative tax consequences even if the sale of marijuana is legal under a state "medical" marijuana law. The Internal Revenue Code states:

> No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances (within the meaning of schedule I and II of the Controlled Substances Act) which is prohibited by Federal law or the law of any State in which such trade or business is conducted. 6 U.S.C. § 280E (expenditures in connection with the illegal sale of drugs).

Marijuana is a schedule I controlled substance for tax purposes, even if it is "medical" marijuana recommended by a physician. Provision of medical marijuana constitutes "trafficking" within the meaning of the Internal Revenue Code section disallowing business expense deductions for expenditures "in connection with the illegal sale of drugs," even though the activity was pursuant to a state statute. Californians Helping to Alleviate Medical Problems, Inc., v. Commissioner of Internal Revenue, 128 T.C. 173, 93 TCM 3973 (2007)

Internal Revenue Service (IRS) audits of dispensaries have begun. [FN6]

Violations of the Federal Food, Drug, and Cosmetic Act

Medical marijuana inhalers, bongs, pipes, containers and other drug paraphernalia are advertised for "medical" marijuana. This now makes drug paraphernalia into medical devices for the delivery of a medical drug. Medical devices are strictly regulated by the federal Food and Drug Administration (FDA). In order for a "bong" or marijuana smoking pipe or other such device to be used it will have to be approved as a medical device by the FDA. It will also have to be properly labeled under federal law. [FN7]

ISSUE THREE
THE LIABILITY OF DISPENSARIES, GOVERNMENT EMPLOYEES, PHYSICIANS, LANDLORDS AND FINANCIERS

Dispensaries

As all the letters from the U.S. Attorneys indicate, "medical" marijuana dispensaries that sell, grow and distribute marijuana will be prosecuted and have their assets seized. A number of enforcement actions are in progress in California, Michigan, Montana, and Washington. [FN8]

Government employees

The state "medical" marijuana laws may provide for government employees to do the following actions that may put them in violation of the CSA:

1. Issue "medical" marijuana patient ID cards to qualifying patients or caregivers so they can receive and use marijuana.

2. Maintain a confidential list of the persons to whom it has issued "medical" marijuana identification cards that cannot be turned over to law enforcement agencies (including federal law enforcement) unless to verify that a person who is engaged in the suspected medical use of marijuana is lawfully in possession of a card. However, government employees and representatives cannot obey both the 18 U.S.C. § 4 obligation to report federal felonies and the state law confidentiality obligations. This will cause them to violate either state or federal laws. See, County of San Diego v. San Diego NORML,165 Cal App.4th 798, 81 Cal.Rptr.3d 461 (2008)(CSA preempts state laws that positively conflict so that simultaneous compliance with both sets of laws is impossible). See, 21 U.S.C. § 903.

3. Regulate and inspect or support marijuana dispensaries and growing operations. If government employees are involved in affirmative actions to protect, facilitate or oversee the manufacture, distribution, and use of marijuana, they are in direct violation of federal law. 18 U.S.C. § 4

Are state or local government employees immune from prosecution?

The case of U.S. v. Rosenthal, 454 F.3d 943 (CA 9 2006) dealt with the issue of granting immunity from federal narcotics law to any duly authorized officer of a political subdivision of a state. The court referred to 21 U.S.C. § 885(d) that states, in full:

> Except as provided in sections 2234 and 2235 of Title 18[relating to illegal procurement and execution of search warrants], no civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter, or upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances. Rosenthal, 454 F.3d at 948

However, for an official to be "lawfully engaged" in the enforcement of a law relating to controlled substances, and therefore entitled to protection under statute creating immunity from federal narcotics laws, the law that the official is enforcing must itself be consistent with federal law and the state "medical" marijuana laws are not. United States v. Rosenthal, 266 F.Supp.2d 1068, 1078 (ND CA 2003). Immunity then does not apply.

Physicians

Under some state "medical" marijuana laws, physicians shall provide written instructions for a registered qualifying patient or his caregiver to present to a dispensary concerning the total amount of usable marijuana that a patient may be dispensed. This is far more than just a physician discussing with a patient the use of medical marijuana which may be protected by the First Amendment of the Constitution. This is taking an action to facilitate the use of marijuana. These actions by a physician violate federal law by aiding and abetting by acting with specific intent to provide the patient with the means to acquire marijuana knowing that the patient intends to acquire marijuana. Conant v. Walters, 309 F.3d 629 (CA 9 2002); cert denied Walters v. Conant, 540 U.S. 946 (U.S. Oct 14, 2003)

Enforcement actions against physicians have begun. [FN9]

Medical malpractice

A doctor may still be civilly liable to his patient, or a third party, for the adverse consequences of recommending marijuana. A physician who assists a patient to obtain marijuana may face a professional negligence claim for recommending a drug for which no standard of care has been

adopted and which has an unknown likelihood of future harm and for which the federal Food and Drug Administration has declared that "no sound scientific studies supported medical use of marijuana for treatment in the United States, and no animal or human data supported the safety or efficacy of marijuana for general medical use" [FN10]

Property owners and landlords

The letters from the U.S. Attorneys make it clear that property owners and landlords who rent or provide a location for "medical" marijuana dispensaries are subject to prosecution. It is unlawful to knowingly open, lease, rent, maintain, or use property for the manufacturing, storing, or distribution of controlled substances. 21 U.S.C. § 856

Financiers and banks

Those who provide financing for "medical" marijuana operations may be subject to prosecution. For example, federal anti-money laundering statutes make it illegal to engage in financial transactions designed to promote illegal activities, including drug trafficking, or to conceal or disguise the source of the proceeds of that illegal activity. 18 U.S.C.§1956 and 1957

Conclusion

Anyone who participates in the growing, possession, manufacturing, distribution, or sales of "medical" marijuana under state law or aids or facilitates or finances such actions is at risk of federal prosecution or other liability.

References

[FN1] A legal memorandum by David Ogden, Deputy U.S. Attorney General, dated October 19, 2009, caused some confusion. It stated that as a general matter, pursuit of medical marijuana prosecutions should not focus federal resources in states on seriously ill individuals who are using "medical" marijuana whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. However, he also clearly stated that this guidance did not provide a legal defense to violations of federal law nor does clear and unambiguous compliance with state law create a legal defense to a violation of the Controlled Substances Act. For example he left open the option of prosecuting anyone who grows or distributes marijuana such as "medical" marijuana dispensaries. However, the memorandum was widely misinterpreted by the "medical" marijuana growers and distributors that they would be immune to federal prosecution as long as they complied with state law. They were wrong. The memorandum did not preclude investigation and prosecution of them. United States v. Stacy 696 F. Supp. 2d 1141 (S.D. Cal. 2010)

[FN2] June 29, 2011 memorandum from James M. Cole, Deputy Attorney General SUBJECT: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (attached)

[FN3] U.S. v. Oakland Cannabis Buyers' Co-op., 532 U.S. 483 (2001); U.S. v. Oakland Cannabis Buyers' Cooperative, 190 F.3d 1109 (9th Cir. 1999), rev'd, 532 U.S. 483 (2001); see also, Alliance for Cannabis Therapeutics v. Drug Enforcement Admin., 15 F.3d 1131 (D.C. Cir. 1994); National Organization for Reform of Marijuana Laws (NORML) v. Drug Enforcement Administration, U. S. Dept. of Justice, 559 F.2d 735 (D.C. Cir. 1977); National Org. for the Reform of Marijuana Laws v. Drug Enforcement Admin. & Dept. of Health, Education & Welfare, No. 79-1660 (D.C. Cir. Oct. 16, 1980); National Organization for Reform of Marijuana Laws (NORML) v. Ingersoll, 497 F.2d 654 (D.C. Cir. 1974).

There is an implied cause of action in the Supremacy Clause for a preemption claim. See Burgio & Campofelice, Inc. v. New York State Dept. of Labor, 107 F.3d 1000, 1006-07 (2d Cir. 1997) (discussing ERISA preemption); Wright Elec., Inc. v. Minnesota State Bd. of Elec., 322 F.3d 1025, 1028 (8th Cir. 2003) (same).

Federal Courts have federal question jurisdiction over preemption claims under 28 U.S.C. § 1331. Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 643 (2002)

[FN4] Gonzales v. Raich, 545 U.S. 1 (2005); See, 21 U.S.C. § 841(a)(1), 844(a); 21 U.S.C. § 812; 21 U.S.C. § 811, 812; 21 U.S.C. § 812; 21 U.S.C. § 812(b)(1)

[FN5] See: Letter of John F. Walsh, United States Attorney District of Colorado, to John Suthers Attorney General State of Colorado dated April 26, 2011; Letter from Jenny A. Durkan, US Attorney for the Western District of Washington and Michael C. Ormsby US Attorney Eastern District of Washington to the Governor of Washington Christine Gregoire, dated April 14, 2011 and the other letters in the Appendix.

[FN6]

Medical Marijuana Businesses Targeted By IRS
http://www.huffingtonpost.com/2011/03/18/medical-marijuana-busines_0_n_837519.html

IRS Opens Audit of Denver Medical-Marijuana Dispensary", The Denver Post, 4/26/2011.
http://www.denverpost.com/news/marijuana/ci_17927752

IRS Targets Medical Marijuana Businesses." March 18, 2011.
http://coloradoindependent.com/79820/irs-targets-medical-marijuana-businesses?utm_campaign=twitter&utm_medium=twitter&utm_source=twitter (last accessed on April 14, 2011)

"Medical Marijuana Tax Problems?" March 23, 2011.
http://blogs.forbes.com/robertwood/2011/03/23/medical-marijuana-tax-problems/ (last accessed on April 14, 2011)

[FN7] 21 CFR 801.5 (Medical Devices - labeling - Adequate directions for use means directions under which the layman can use a device safely and for the purposes for which it is intended.

This includes quantity of dose, frequency of administration or application, duration of administration or application, time of administration or application, in relation to time of meals, time of onset of symptoms, or other time factors, route or method of administration or application, preparation for use, i.e., adjustment of temperature, or other manipulation or process. See also: 21 CFR803.3 (Medical Device Reporting); 21 CFR 807.93 (Premarket Notification Procedures); 21 CFR 808.3 (Medical Device Classification); 21 CFR 860.7 (Determination of safety and effectiveness includes the conditions of use for the device, the probable benefit to health from the use of the device weighed against any probable injury or illness from such use and the reliability of the device and there is reasonable assurance that a device is safe when it can be determined, based upon valid scientific evidence).

[FN8] See, e.g.:

It is estimated that there have been 100 "medical" marijuana raids during the Obama administration.

http://www.mjbusinessreport.com/wires/article.cfm?title=New-Jersey-Letter-US-Attorney&id=kyjbffxaipjgeoz

Michigan - Dispensaries

http://www.reuters.com/article/2011/04/13/us-medical-marijuana-idUSTRE73C5DA20110413

California - Dispensaries

http://www.theatlanticwire.com/national/2011/03/medical-marijuana/35878/

Montana - Dispensaries

http://billingsgazette.com/news/local/article_01f9d21f-b862-5ae5-bd48-7b17723d869d.html?oCampaign=hottopics

Washington - Dispensaries

http://www.kxly.com/news/27708933/detail.html

[FN9] Michigan doctor jailed.

http://www.mlive.com/news/saginaw/index.ssf/2011/04/federal_agents_jail_michigan_d.html

[FN10] www.fda.gov/bbs/topics/NEWS/2006/NEW01362.html

FDA STATEMENT - INTER-AGENCY ADVISORY REGARDING CLAIMS THAT SMOKED MARIJUANA IS A MEDICINE

Claims have been advanced asserting smoked marijuana has a value in treating various medical conditions. Some have argued that herbal marijuana is a safe and effective medication and that it should

be made available to people who suffer from a number of ailments upon a doctor's recommendation, even though it is not an approved drug.

Marijuana is listed in schedule I of the Controlled Substances Act (CSA), the most restrictive schedule. The Drug Enforcement Administration (DEA), which administers the CSA, continues to support that placement and FDA concurred because marijuana met the three criteria for placement in Schedule I under 21 USC 812(b)(1) (e.g., marijuana has a high potential for abuse, has no currently accepted medical use in treatment in the United States, and has a lack of accepted safety for use under medical supervision). Furthermore, there is currently sound evidence that smoked marijuana is harmful. A past evaluation by several Department of Health and Human Services (HHS) agencies, including the Food and Drug Administration (FDA), Substance Abuse and Mental Health Services Administration (SAMHSA) and National Institute for Drug Abuse (NIDA), concluded that no sound scientific studies supported medical use of marijuana for treatment in the United States, and no animal or human data supported the safety or efficacy of marijuana for general medical use. There are alternative FDA-approved medications in existence for treatment of many of the proposed uses of smoked marijuana.

FDA is the sole Federal agency that approves drug products as safe and effective for intended indications. The Federal Food, Drug, and Cosmetic (FD&C) Act requires that new drugs be shown to be safe and effective for their intended use before being marketed in this country. FDA's drug approval process requires well-controlled clinical trials that provide the necessary scientific data upon which FDA makes its approval and labeling decisions. If a drug product is to be marketed, disciplined, systematic, scientifically conducted trials are the best means to obtain data to ensure that drug is safe and effective when used as indicated. Efforts that seek to bypass the FDA drug approval process would not serve the interests of public health because they might expose patients to unsafe and ineffective drug products. FDA has not approved smoked marijuana for any condition or disease indication.

A growing number of states have passed voter referenda (or legislative actions) making smoked marijuana available for a variety of medical conditions upon a doctor's recommendation. These measures are inconsistent with efforts to ensure that medications undergo the rigorous scientific scrutiny of the FDA approval process and are proven safe and effective under the standards of the FD&C Act.

Accordingly, FDA, as the federal agency responsible for reviewing the safety and efficacy of drugs, DEA as the federal agency charged with enforcing the CSA, and the Office of National Drug Control Policy, as the federal coordinator of drug control policy, do not support the use of smoked marijuana for medical purposes.

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

June 29, 2011

MEMORANDUM FOR UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use

Over the last several months some of you have requested the Department's assistance in responding to inquiries from State and local governments seeking guidance about the Department's position on enforcement of the Controlled Substances Act (CSA) in jurisdictions that have under consideration, or have implemented, legislation that would sanction and regulate the commercial cultivation and distribution of marijuana purportedly for medical use. Some of these jurisdictions have considered approving the cultivation of large quantities of marijuana, or broadening the regulation and taxation of the substance. You may have seen letters responding to these inquiries by several United States Attorneys. Those letters are entirely consistent with the October 2009 memorandum issued by Deputy Attorney General David Ogden to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana (the "Ogden Memo").

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large scale criminal enterprises, gangs, and cartels. The Ogden Memorandum provides guidance to you in deploying your resources to enforce the CSA as part of the exercise of the broad discretion you are given to address federal criminal matters within your districts.

A number of states have enacted some form of legislation relating to the medical use of marijuana. Accordingly, the Ogden Memo reiterated to you that prosecution of significant traffickers of illegal drugs, including marijuana, remains a core priority, but advised that it is likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers. The term "caregiver" as used in the memorandum meant just that: individuals providing care to individuals with cancer or other serious illnesses, not commercial operations cultivating, selling or distributing marijuana.

The Department's view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed. There has, however, been an increase in the scope of

commercial cultivation, sale, distribution and use of marijuana for purported medical purposes. For example, within the past 12 months, several jurisdictions have considered or enacted legislation to authorize multiple large-scale, privately-operated industrial marijuana cultivation centers. Some of these planned facilities have revenue projections of millions of dollars based on the planned cultivation of tens of thousands of cannabis plants.

The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA. Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws.

The Department of Justice is tasked with enforcing existing federal criminal laws in all states, and enforcement of the CSA has long been and remains a core priority.

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