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After Sessions Takes Off the Gloves, the Legalized Cannabis Industry Strikes Back

While the gloves are off, it's unclear who will be throwing the first punch: United States Attorney General Jeff Sessions or the legalized cannabis industry.

In this morning's attached internal guidance to all United States Attorneys entitled "Marijuana Enforcement," Mr. Sessions rescinded some of his office's prior guidelines instructing that, like its predecessors, his guidance creates no "rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal." See January 4, 2018 Sessions Memo Concerning Marijuana Enforcement, attached hereto.

Although initially misreported by many news outlets, Mr. Sessions did nothing more than re-state that each United States Attorney's office has discretion in choosing which laws to enforce.

While a shock to the industry, such a move was not unexpected. It has been the pattern of Mr. Sessions to make bold public statements as a matter of course each time that the momentum of the commercial regulated cannabis industry gains the attention of the mainstream media. Monday (New Year's Day) was one of those days. With the landmark retail legalization news (and resultant national coverage) coming out of California on Monday, and the seemingly normalized coverage of cannabis use on New Year's Eve by CNN, (<http://fortune.com/2018/01/01/cnn-new-years-eve-randi-kaye-marijuana/>), frankly, Mr. Sessions was compelled to do something.

Importantly, this does not change the legal status of marijuana; the law has not changed; "marihuana" remains a controlled substance under federal law. The practical impact is, however, far greater. In fact, today's action creates a policy void, along with more confusion, for the federal government's own employees, divisions, and agencies.

What Mr. Sessions miscalculated is that the legalized marijuana industry is just too big to be pushed around. Enjoying \$7.2 billion in sales, spanning thirty states, generating millions in tax revenues, and providing tens of thousands of jobs, the legalized marijuana industry is exerting its influence and demanding a seat at the table. Attracting Republican members of Congress who are/will be compelled to stand up for their state cannabis laws/voters and their state cannabis economies/jobs, the debate has shifted forcing Mr. Sessions to re-evaluate his strategy. For example, the State of California hired former U.S. Attorney Eric Holder one year ago as 'outside counsel' for precisely these sorts of cannabis-related matters. <https://www.nytimes.com/2017/01/04/us/california-eric-holder-donald-trump.html>. States with cannabis programs are not likely to assist the Department of Justice (DOJ) in this matter. Further,

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it is more than notable that Republican U.S. (Colorado) Senator Cory Gardner is quoted as saying “the Justice Department ‘has trampled on the will of the voters’ in Colorado and other states.” See <https://www.apnews.com/19f6bfec15a74733b40eaf0ff9162bfa/AP-NewsBreak:-US-to-end-policy-that-let-legal-pot-flourish>.

This move by the DOJ squarely puts the burden on Congress to act; at least with respect to the formal renewal of the Rohrbacher-Blumenauer amendment (which only applies to state-licensed *medical* marijuana businesses, and which has been upheld/enforced by a variety of federal courts). More importantly, it puts the onus on Congress to expand Rohrbacher-Blumenauer to cover *retail* marijuana businesses as well (like the McClintock-Polis amendment is intended to do). Legislatures in states with existing marijuana regulatory schemes should begin to consider a legislative/policy response to today’s announcement, similar to the action taken by the State of Colorado and other states to provide a pathway for retail marijuana businesses to roll into the existing medical marijuana framework, if necessary. And note that Mr. Sessions could have already taken action against retail cannabis businesses because of the fact that Rohrbacher-Blumenauer does not prohibit the same, but he has not done so. The issues presented by today’s statement are compounded by the fact that many existing cannabis licensees hold both retail and medical licenses in a variety of states. Nonetheless, the spending limitations now take center stage in the policy debate. And Congress must act to restrain this wanton action, and it must act quickly. Maybe the focus will shift to enacting legislation that reflects a reasonable approach to U.S. cannabis policy reform. See <https://www.scribd.com/document/368422211/Make-America-Hemp-Again-A-Proposal-for-Federal-Cannabis-Policy>.

It is imperative that licensed business ‘sit tight’ and stay the course, and continue operating in compliance with their respective state’s laws and regulatory scheme. Do not do anything out of the ordinary as it relates to business. More importantly, it is essential that as many people as possible in cannabis-legal states contact their Congressional Representatives and U.S. Senators to express their displeasure and concern over the DOJ’s disregard for the will of the voters. Congress needs to understand the impact of this knee-jerk change and individuals should call for the enactment of the extended spending provisions identified below.

Just maybe there is a silver lining here, as the DOJ’s announcement has the potential to truly shift the discussion about legalized cannabis away from the core issue of marijuana itself, and thus will become a debate about jobs, economy, and states’ rights (all long-held Republican ideals). The cannabis industry wins these issues.

But every silver lining has a touch of grey, and this announcement upsets the investment-backed expectations of so many companies and individuals who have worked to professionally establish this industry across the U.S. These actors have relied on the government's policy not to prosecute folks who are in compliance with their own state cannabis law and these business owners have

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been making investment decisions in reliance on this federal guidance for over eight years. The statement by Mr. Sessions raises complex questions as to the sources and availability of private and institutional financing, premised on reliance upon the predecessor policies. Further, all pending and future deals need to consider the complexities of today's action.

We also need to be aware that this action has had a very significant negative impact on many cannabis public companies, depressing the price of their stock this morning by approximately fifty percent (50%). It also has a very significant impact on those companies involved in the process of moving forward with a capital raise or becoming public. Based upon our prior conversations with the SEC, it has allowed cannabis companies to move forward based upon the memo positions taken by the DOJ. Now that these positions are no longer applicable, the essential risk factor disclosure in both SEC filings and private offerings is grey, at best. This policy change raises a number of challenges related to how the SEC may treat filings on behalf of any cannabis-related moving forward. This is significant.

At the end of the day, thankfully, this does not impact the industrial hemp, or the CBD, industries on its face. Unlike marijuana, industrial hemp *is legal under federal law* within exemptions written into the Controlled Substances Act, as well as when grown or cultivated as part of a Farm Bill-authorized state pilot program.

The Hoban Law Group will keep you up-to-date with all developments and provide you with whatever resources you may need to best weather this turbulence. Our attorneys are available to speak to those with questions or concerns regarding today's announcement. Please contact our office today at 303-674-7000 or www.hoban.law.

STATEMENT BY HOBAN LAW GROUP
(WITH CONTRIBUTIONS FROM ITS ATTORNEYS)

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Office of the Attorney General
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January 4, 2018

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: Jefferson B. Sessions, III
Attorney General

SUBJECT: Marijuana Enforcement

In the Controlled Substances Act, Congress has generally prohibited the cultivation, distribution, and possession of marijuana. 21 U.S.C. § 801 *et seq.* It has established significant penalties for these crimes. 21 U.S.C. § 841 *et seq.* These activities also 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. 18 U.S.C. §§ 1956-57, 1960; 31 U.S.C. § 5318. These statutes reflect Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime.

In deciding which marijuana activities to prosecute under these laws with the Department's finite resources, prosecutors should follow the well-established principles that govern all federal prosecutions. Attorney General Benjamin Civiletti originally set forth these principles in 1980, and they have been refined over time, as reflected in chapter 9-27.000 of the U.S. Attorneys' Manual. These principles require federal prosecutors deciding which cases to prosecute 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.

Given the Department's well-established general principles, previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.¹ This memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion in accordance with all applicable laws, regulations, and appropriations. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.

¹ Previous guidance includes: David W. Ogden, Deputy Att'y Gen., Memorandum for Selected United States Attorneys: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009); James M. Cole, Deputy Att'y Gen., Memorandum for United States Attorneys: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011); James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement (Aug. 29, 2013); James M. Cole, Deputy Att'y Gen., Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014); and Monty Wilkinson, Director of the Executive Office for U.S. Att'ys, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014).