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CANNABIS INDUSTRY POLICY PRIORITIES

116TH SESSION OF CONGRESS (2019-2020)



It was not long ago, January 1, 2014 to be exact, that the first state-legal sale of non-medical cannabis occurred in the state of Colorado. Shortly thereafter, adults in Washington state were also able to purchase cannabis legally in stores subject to state regulation and taxation. Since that time, eight other states plus the District of Columbia have enacted laws to make the adult use of cannabis legal, with Michigan becoming the first state in the Midwest to do so when its residents approved a ballot measure in November 2018.

On top of all of this, there are now 33 states – including all of the adult-use states – with effective medical marijuana laws, providing patients in nearly all of these states with access to this helpful medicine through state-regulated dispensaries. Despite this widespread embrace of both medical and adult-use cannabis at the state level, the federal government still considers cannabis an illegal substance in all circumstances. (The one significant exception to the federal government's prohibition of cannabis is hemp, which is cannabis with less than 0.3% THC, made legal with the passage of the 2018 Farm Bill.)

There have been varying responses to the state-federal cannabis dichotomy over the past few years. In August 2013, the Department of Justice, through a memo issued by Deputy Attorney General James Cole – the “Cole Memo”¹ – established a sensible and balanced means of addressing the interests of federal law enforcement authority and the desire of states to regulate the production and sale of cannabis. In short, the Department explained that it would not target individuals acting in compliance with state law, as long as their conduct did not interfere with eight specific federal law enforcement priorities, such as preventing revenues from going to criminal enterprises and preventing the diversion of cannabis to other states.

Less than six months later, in February 2014, the Department of Justice and the Treasury Department, through the Financial Crimes Enforcement Network (FinCEN), released additional guidance for financial institutions serving cannabis industry clients. The release of this guidance was an acknowledgement by the federal

government of the dangers posed by a lack of access to banking services in the industry. The Department of Justice memo, again issued by Deputy AG Cole and often referred to as “Cole II,”² reiterated the Cole Memo enforcement priorities and added, “if a financial institution or individual offers services to a marijuana-related business whose activities do not implicate any of the eight priority factors, prosecution for these offenses may not be appropriate.” The FinCEN guidance informed financial institutions of their obligations when working with cannabis industry clients, including the filings of marijuana-related Suspicious Activity Reports (SARs).

Since December 2014, individuals engaged in the production and distribution of medical marijuana in accordance with state law have also enjoyed the protections of the Rohrabacher-Farr Amendment. This amendment, named for the congressional sponsors of the measure when it was first enacted, Rep. Dana Rohrabacher (R-CA) and Rep. Sam Farr (D-CA),³ and attached annually to federal spending bills, prohibits the Department of Justice from spending funds to interfere with state medical marijuana laws. The Ninth Circuit has interpreted this amendment to mean that the Department cannot spend funds to prosecute individuals who were acting in compliance with state medical cannabis laws.⁴


Following the election of Donald Trump as the 45th president of the United States in November 2016, there was uncertainty about how the new administration would approach state cannabis laws. During the campaign, candidate Trump expressed support for states that had carved their own path on cannabis, saying in response to a reporter's question about whether Colorado should be able to have adult-use cannabis sales, “I think it's up to the states, yeah. I'm a states person. I think it should be up to the states, absolutely.”⁵ His commitment to states' rights on cannabis was put to the test, however, with his selection of Alabama Senator Jeff Sessions as his Attorney General.


On January 4, 2018, then-Attorney General Sessions declared in a one-page memo that he had rescinded the Cole Memo, Cole II, a similar memo related to cannabis activity on tribal land, and two

older memos.⁶ He directed U.S. Attorneys to instead “follow the well-established principles that govern all federal prosecutions,” which require federal prosecutors 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.” But, notably, the rescission of the memos was not accompanied by stepped up enforcement of cannabis laws by the Department of Justice. Through the end of 2018, the federal government had not initiated enforcement actions against individuals acting in compliance with state cannabis laws.


Later in 2018, there were even signs that President Trump’s support for state cannabis laws was evolving from theoretical to actual. In June, he said that he “probably will end up supporting” the STATES Act, a bill introduced by Senators Elizabeth Warren (D-MA) and Cory Gardner (R-CO), which would exempt individuals acting in compliance with state cannabis laws from the provisions of the federal Controlled Substance Act.


Given the pace of change at the state level and the support for reform at the highest level of the federal government, it seems clear that we are at a critical juncture in the history of federal cannabis policy. The question is not *whether* federal laws will change, but *how* they should change. We are therefore providing below what the National Cannabis Industry Association considers federal policy priorities for the 116th session of Congress.

 **Appropriations - Retain medical marijuana protections and extend similar protections to adult-use cannabis laws.** The Democratic takeover of the U.S. House of Representatives should have a significant impact on the push for reforming federal cannabis laws. Over the past few years, nearly all cannabis-related amendments on a variety of bills had been blocked by Rep. Pete Sessions (R-TX) as chair of the House Rules Committee. With Rep. Sessions’ party out of power and Rep. Sessions no longer in Congress, we expect a return to regular order that will allow the House to once again consider cannabis-related amendments to federal appropriations bills. The amendment process may not even be necessary for the Rohrabacher-Farr Amendment, which is likely to be included in the base bills introduced in committee. But a significant goal for the cannabis industry in the 116th session will be to enact a similar amendment to prohibit the Department of Justice from spending funds to interfere with *any* state cannabis law. An amendment to accomplish this goal has been introduced in the past by Rep. Tom McClintock (R-CA) and former Rep. Jared Polis (D-CO) and has garnered significant support. In fact, in 2015, the McClintock-Polis Amendment received 206 votes on the House floor.⁷ Given trends in support for cannabis policy reform in Congress, it seems very likely that this amendment would receive majority support if the sponsors were granted the opportunity to introduce it on the House floor again. Members of both the House and Senate should seek any opportunity to insert this amendment into a future appropriations bill.

 **Enact the Secure and Fair Enforcement (SAFE) Banking Act – a permanent solution to the cannabis banking problem.** The elimination of the Cole II guidance to financial institutions has added one more layer of complication and uncertainty to an already unreliable system. Although the FinCEN guidance is still in place (as of this writing) and numerous financial institutions are still serving cannabis industry clients, too many other banks and credit unions are reluctant to serve the industry. And even those companies with accounts at financial institutions generally do not have access to merchant services,

forcing many of them to rely on cash transactions. This is a public safety threat that will not be eliminated until there is a permanent legislative fix to the banking problem. Congress needs to pass the Secure and Fair Enforcement (SAFE) Banking Act, which has been introduced by Sen. Jeff Merkley (D-OR) in the Senate and Rep. Ed Perlmutter (D-CO) in the House. Under the provisions of this bill, a financial institution may not be held liable pursuant to any Federal law nor may it be penalized by federal regulators for providing services to state-legal cannabis businesses. The strong support for this legislation was evident in the 115th Congress, when Rep. Perlmutter’s bill garnered 95 co-sponsors. Given the positive impact this change in the law would have on public safety, it should receive serious consideration in the 116th session.

 **Enact the STATES Act to exempt individuals acting in compliance with state cannabis laws from the provisions of the Controlled Substances Act.** While the appropriations amendments described above would provide individuals in the cannabis industry a critical level of protection against prosecution by federal officials, there is significant uncertainty associated with provisions that must be renewed every year. Individuals acting in compliance with state cannabis laws in order to take production and sale out of the underground market deserve more certain legal standing. The STATES Act would accomplish this goal by exempting their state-legal activity from prohibitions contained in the Controlled Substances Act. It would also have the added benefit of exempting state-legal cannabis operators from Section 280E of the Internal Revenue Code, which currently prevents these operators from taking deductions for ordinary business expenses. Finally, it would encourage greater involvement by financial institutions in the cannabis industry by establishing that funds associated with state-legal cannabis activity shall not trigger federal money laundering laws. The STATES Act will rightly be a primary lobbying objective for a broad range of companies, organizations, and associations in the 116th session of Congress.

 **Looking forward – Build support for bills and proposals that will be the foundation of a responsible, federally-regulated cannabis market.** Even with the passage of all of the legislation described above, cannabis would remain unregulated at the federal level. This will certainly not be the case in the long-term. So it is up to cannabis industry leaders to begin advocating for the kinds of policies they would like to see enacted in the future. There are many issues to be addressed. How should cannabis be taxed and what is an appropriate rate? Should cannabis be regulated like tobacco? Like alcohol? Like a dietary supplement? Or will different regulations apply to different kinds of cannabis products? Should cannabis distributors be a mandatory part of the supply chain? How can we encourage diversity in ownership and opportunity in the cannabis industry? The National Cannabis Industry Association will be studying all of these issues and working with allies in Congress to promote and advance the kind of legislation that will allow for a vibrant, fair, and sensibly regulated cannabis market in the United States.

FOOTNOTES

- [1. https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf](https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf)
- [2. https://dfl.wa.gov/documents/banks/dept-of-justice-memo.pdf](https://dfl.wa.gov/documents/banks/dept-of-justice-memo.pdf)
- Since the time the amendment was first enacted, it has been championed in committee by Senator Patrick Leahy (D-VT) and Rep. David Joyce (R-OH), so it is occasionally referred to as the Leahy Amendment or the Joyce Amendment.
- [4. https://cdn.ca9.uscourts.gov/datastore/opinions/2016/08/16/15-10117.pdf](https://cdn.ca9.uscourts.gov/datastore/opinions/2016/08/16/15-10117.pdf)
- [5. http://www.king5.com/article/news/local/it-should-be-up-to-the-states-what-trump-said-about-marijuana-during-campaign/281-504941365](http://www.king5.com/article/news/local/it-should-be-up-to-the-states-what-trump-said-about-marijuana-during-campaign/281-504941365)
- [6. https://www.justice.gov/opa/press-release/file/1022196/download](https://www.justice.gov/opa/press-release/file/1022196/download)
- [7. http://clerk.house.gov/evs/2015/roll1285.xml](http://clerk.house.gov/evs/2015/roll1285.xml)