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GENERAL MEMORANDUM 18-001

Attorney General Sessions Rescinds Obama-Era Marijuana Policy for Indian Tribes

On January 4, 2018, U.S. Attorney General Jeff Sessions sent the attached memorandum to all United States Attorneys announcing the termination of previous policies issued under the Obama Administration regarding the federal enforcement of federal criminal law prohibitions against marijuana activities in jurisdictions that met key criteria. This new memorandum also rescinds a policy specifically applicable to Indian tribes wishing to engage in marijuana-related activities. The Sessions Memorandum does not replace the rescinded memoranda with any new guidance.

The 2013 Cole Memorandum to U.S. Attorneys described situations in which each U.S. Attorney could exercise discretion not to take enforcement actions against individuals or officials in states which had in place robust regulatory and enforcement systems governing recreational or medicinal marijuana production, processing, and sales. The Cole Memorandum described eight priority areas that the states would have to address - including preventing the distribution of marijuana to minors, the use of marijuana in criminal activities, and the diversion of marijuana to states that have not legalized marijuana. In 2014, the U.S. Justice Department issued similar guidance to U.S. Attorneys through the Wilkinson Memorandum regarding the production, processing, and sale of recreational and medicinal marijuana in Indian Country. In states such as Washington, Oregon, and Nevada, a number of Indian tribes have entered both the recreational and medicinal marijuana markets since the issuance of the Wilkinson Memorandum. Others have been considering undertaking such enterprises. Those tribes will need to review the Sessions Memorandum and review their legal options going forward.

The Sessions Memorandum makes clear that the Cole and Wilkinson Memoranda are no longer in effect and that all U.S. Attorneys are free to prosecute marijuana related activities under existing federal laws and in accordance with the U.S. Attorney's Manual.

We note that, of course, the Cole and Wilkson Memoranda did not legalize marijuana in the states and Indian Country. Both memoranda stated that the U.S. Attorneys always retained the power and discretion to take enforcement action as they saw necessary. Thus, the Sessions Memorandum does nothing to change any federal laws. Furthermore, the Sessions Memorandum provides that U.S. Attorneys retain their discretion to investigate or prosecute marijuana crimes based upon "relevant considerations" including "federal law enforcement priorities, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of particular crimes on the community." Thus, it is possible that U.S. Attorneys who already have declined to take actions against actors in states which have legalized

marijuana will continue to decline to do so. The same possibility exists for Indian Country as well.

We also note that the Sessions Memorandum rescinds the 2014 Cole Memorandum (also called the FinCen Memorandum) regarding the ability of banks and other financial institutions to provide their services to marijuana-related businesses and still comply with the Bank Secrecy Act. Banks, credit unions, and other financial institutions have remained leery about providing services to marijuana-related businesses and the Sessions Memorandum will likely have a further chilling effect on the financial industry and its willingness to provide banking services to individuals, organizations, and tribes involved in the marijuana industry.

The Sessions Memorandum does not address the Rohrabacher-Farr Amendment which currently prevents the Department of Justice from using appropriated funds to prevent states from "implementing their own state laws that authorize the use, distribution, possession or cultivation of medical marijuana." (The Amendment only addresses medicinal marijuana and not recreational marijuana.) The Amendment was set to expire at the end of FY 2017 (September 30, 2017) but several continuing resolutions (CRs) have been enacted since that time which largely extended FY 2017 terms and conditions (including the Rohrabacher-Farr Amendment) to January 19, 2018. It is unclear if Congress will pass another short-term CR that extends the Amendment or if Congress will include the Amendment in any deal they reach on an FY 2018 Omnibus spending bill. If not, the Amendment and its protections will expire.

The impetus for any new federal investigations or prosecutions against actors in Indian Country will continue to be determined on a case-by-case basis by each U.S. Attorney. Because of the lack of any new guidance, there remains a great deal of uncertainty as to whether U.S. Attorneys in states covering Indian Country will begin new enforcement actions against tribes, tribal businesses, or consultants in the tribal marijuana industry.

Please let us know if we may provide additional information about this Memorandum.

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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).