THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2018 APR -5 A 11:51

NO: 2017-0469

APPEAL OF ANDREW PANAGGIO

RULE 10 APPEAL FROM THE NEW HAMPSHIRE COMPENSATION APPEALS BOARD PURSUANT TO RSA 541

CAB No. 2017-L-0246

INSURER-APPELLEE'S BRIEF

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The insurer-appellee is satisfied with the questions presented for review as set forth in the employee-appellant's brief. *See* N.H. Supreme Court Rule 16(4)(a).

PERTINENT STATUTES AND REGULATIONS

The insurer-appellee is satisfied with the pertinent statutes and regulations as set forth in the employee-appellant's brief. *See* N.H. Supreme Court Rule 16(4)(a).

STATEMENT OF THE FACTS AND THE CASE

The employee, Andrew Panaggio, injured his lower back on July 9, 1991. *C.R. 14.*[1] The insurer accepted the claim and the parties eventually reached a lump sum settlement following the employee's L4-L5 fusion surgery. *App. 9.*[2] The employee has been prescribed opiates for his back pain throughout the years. *C.R. 14.* The employee has used marijuana for years, but in May of 2016 he asked his provider for a prescription under the New Hampshire state medical marijuana law. *C.R. 14-15.* The employee's provider

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[1] Citations to the Certified Record will be labeled as *C.R.*

[2] The Insurer is not in exact agreement with the contents of the employee's Appendix to his brief. The Insurer is including as an Appendix to this brief the documents that it finds relevant for the Court to decide this appeal. N.H. Supreme Court Rule 17(1). Citations to the Appendix will be labeled in this brief as *App.* Similar to the employee's Appendix, the insurer's appendix will be numbered sequentially after the Certified Record for ease of reference.

completed the necessary paperwork and the employee was issued a medical marijuana "card" pursuant to RSA 126-X:4. *C.R. 15*. The employee purchased marijuana from an alternative treatment center and subsequently submitted the bill to the insurer for reimbursement. *C.R. 32*.

The insurer denied the employee's request for reimbursement. *C.R. 15*. The employee thereafter filed the current claim at the Department of Labor. *C.R. 31*. The employee's claim was denied at the Department of Labor, and he timely appealed to the Compensation Appeals Board (hereinafter "Board"). *C.R. 30*. The Board, in a decision dated June 6, 2017, affirmed the Hearing Officer's decision denying the employee's claim for reimbursement of the costs for medical marijuana. *C.R. 14*. The employee thereafter appealed to this Court pursuant to Rule 10.

SUMMARY OF THE ARGUMENTS

The Board's did not err in denying the employee's claim for reimbursement of the cost of medical marijuana. The Board correctly found that ordering the insurer to reimburse the employee for medical marijuana would force the insurer to violate Federal law. Federal law clearly supersedes state law under the Supremacy Clause of the United States Constitution. Marijuana unquestionably remains an illegal Schedule I drug under the Federal

Controlled Substances Act. While the former federal government under President Obama administered a policy of non-enforcement of marijuana crimes in states with legalized medical marijuana, the current administration under President Trump has clearly indicated a renewed effort and policy to prosecute such crimes. Thus, an order against the insurer would force the insurer to be in express violation of federal law and open the insurer to federal prosecution.

Further, the New Hampshire medical marijuana act specifically exempts any health insurance provider from liability for any request for reimbursement of the cost of marijuana. RSA 126-X:3,III. The Board did not err in holding that workers' compensation carriers are included within the statutory provision exempting "health insurance providers," and it did not err in holding that the statute precludes any claim for reimbursement, such as the claim at issue here.

The Board did not commit an error of law on any of the grounds argued by the employee.

ARGUMENTS

I. STANDARD OF REVIEW

The standard of review of Compensation Appeals Board decisions by the Supreme Court is well settled.

> "We will not disturb the board's decision absent an error of law, or unless, by a clear preponderance of the evidence, we find it to be unjust or unreasonable." Appeal of Fay, 150 N.H. 321, 324, 837 A.2d 329 (2003). The appealing party "has the burden of demonstrating that the board's decision was erroneous." Id. In addition, where resolution of the appeal requires us to interpret the workers' compensation statute, "[w]e construe [it] liberally, resolving all reasonable doubts in statutory construction in favor of the injured employee in order to give the broadest reasonable effect to its remedial purpose." Appeal of Lalime, 141 N.H. 534, 537-38, 687 A.2d 994 (1996) (quotation and brackets omitted).

Appeal of Belair, 158 N.H. 273, 276 (2009).

II. THE BOARD DID NOT ERR IN DENYING THE EMPLOYEE'S CLAIM, AS ORDERING THE INSURER TO REIMBURSE THE EMPLOYEE FOR MEDICAL MARIJUANA WOULD VIOLATE FEDERAL LAW.

The Board correctly held that requiring the insurer to reimburse the employee for medical marijuana would open the insurer to criminal prosecution under federal law, and therefore the insurer "is not able to provide medical marijuana." *C.R. 16-17.* The Board's holding and reasoning is entirely correct and does ***not*** constitute an error of law.

a. Marijuana remains illegal under Federal law as a Schedule I drug in the Controlled Substances Act.

Chapter 126-X allows qualifying patients with certain medical conditions or debilitating symptoms to obtain and use marijuana for medicinal use. Chapter 126-X does not

(and cannot) alter or provide an exception to federal law. Even if the Act purported to do so, New Hampshire law cannot override federal law. *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause). See also Gonzales v. Raich, 545 U.S. 1, 29 (2005) ("[L]imiting the activity to marijuana possession and cultivation 'in accordance with state law' cannot serve to place respondents' activities beyond congressional reach. The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail."); U.S. v. Hicks, 722 F. Supp. 2d 829, 833 (E.D. Mich. 2010) ("It is undisputable that state medical-marijuana laws do not, and cannot, supersede federal laws that criminalize the possession of marijuana."); U.S. v. Landa, 281 F. Supp. 2d 1139, 1145 (N.D. Cal 2003) ("[O]ur Congress has flatly outlawed marijuana in this country, nationwide, including for medicinal purposes.").

The federal Controlled Substances Act ("CSA") has long classified marijuana as a Schedule I controlled substance and prohibits its use under any circumstance. *See* 21 U.S.C. § 812(c) (17); 21 U.S.C. § 844(a). Congress set forth three criteria that Schedule I controlled substances must meet:

> (a) The drug or other substance has a high potential for abuse;

(b) The drug or other substance ***has no currently accepted medical use*** in treatment in the United States; and
(c) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

21 U.S.C. § 812(b)(1)(A)-(C) (emphasis added).

As a Schedule I drug, marijuana may not be prescribed, administered, or dispensed, and it is illegal to possess, use, purchase, sell, or cultivate. 21 U.S.C. § 801, *et seq.* Further, it is illegal under federal law for any person to attempt or ***conspire*** to do so, 21 U.S.C. § 846 ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."), or to ***aid or abet*** someone who does so, 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). The Controlled Substances Act criminalizes marijuana use and possession even for medicinal purposes, with the only exception being for federally approved research. 21 U.S.C. § 823(f).

Over the years, there have been repeated attempts either to repeal the rules and regulations that place marijuana in Schedule I or to re-classify it as a Schedule

II substance, which would allow for its medical use.[3] Nevertheless, as recently as 2015 the U.S. Department of Health and Human Services recommended to the Drug Enforcement Administration that it continue to be maintained in Schedule I.[4] The DEA accepted this recommendation in 2016, refusing once again to legalize marijuana's use for medical purposes.[5]

The New Hampshire legislature has acknowledged the conflict between state and federal law by enacting a statute clarifying that a health insurance provider may not be compelled to reimburse a patient for costs associated with the use of medical marijuana. RSA 126-X:3,III ("Nothing in this chapter shall be construed to require: (a) Any health insurance provider, health care plan, or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis; . . .").

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[3] *See, e.g.*, Memorandum from Acting Commissioner of Food and Drugs to Acting Assistant Secretary for Health, "Recommendation to Maintain Marijuana in Schedule I of the Controlled Substances Act" (May 20, 2015). *App. 26-29.* Other Schedule II drugs include oxycodone, fentanyl, cocaine and methamphetamine. 21 U.S.C. § 812(b)(1).

[4] Letter from Karen B. DeSalvo, MD, MPH, MSc, Acting Assistant Secretary for Health to Hon. Chuck Rosenberg, Acting Administrator, Drug Enforcement Agency (June 3, 2015). *App. 30-31.*

[5] Letter from Chuck Rosenberg, Acting Administrator of Drug Enforcement Agency to Hon. Gina Raimondo, Hon. Jay Inslee, and Bryan Krumm (August 11, 2016). *App. 32-35.*

The employee relies heavily on the impact of the Rohrabacher-Farr amendment to argue that the insurer's concerns with federal law are immaterial.[6] The Rohrabacher-Farr amendment prohibits the Department of Justice from spending funds to interfere with the implementation of state medical marijuana laws.

As courts in other jurisdictions have made clear, the Rohrabacher-Farr amendment is temporary in nature and does not insulate an individual or entity from federal prosecution at a later date. See U.S. v. McIntosh, 833 F.3d 1163 (2016). McIntosh concerned the continued federal prosecution of various marijuana growers in California after the implementation of the Rohrabacher-Farr Amendment. The Ninth Circuit Court of Appeals held that the amendment "prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana

[6] The Rorhabacher-Farr amendment is a legislative rider attached to a December 2014 appropriations bill which states: "None of the funds made available in this Act to the Department of Justice may be used, with respect to the State[] of . . . [New Hampshire] . . . to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana." Consolidated and Further Continuing Appropriations Act, 2015, 113 P.L. 235, § 538, 128 Stat. 2130, 2217 (2014).

Laws and who fully complied with such laws." McIntosh, 833 F.3d at 1178.

However, the court further clarified that its holding and the amendment do not provide immunity from prosecution for federal marijuana crimes:

> The prior observation should also serve as a warning. ***To be clear, [the Rohrabacher-Farr amendment] does not provide immunity from prosecution for federal marijuana offenses***. The CSA prohibits the manufacture, distribution, and possession of marijuana. ***Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) is committing a federal crime***. The federal government can prosecute such offenses for up to five years after they occur. See 18 U.S.C. § 3282. Congress currently restricts the government from spending certain funds to prosecute certain individuals. But ***Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding***. Moreover, a new president will be elected soon, and a new administration could shift enforcement priorities to place greater emphasis on prosecuting marijuana offenses.
>
> Nor does any state law "legalize" possession, distribution, or manufacture of marijuana. Under the Supremacy Clause of the Constitution, state laws cannot permit what federal law prohibits. U.S. Const. art VI, cl. 2. Thus, while the CSA remains in effect, states cannot actually authorize the manufacture, distribution, or possession of marijuana. Such activity remains prohibited by federal law.

McIntosh, 833 F.3d at 1179 (emphasis added). It should also be specifically noted, in line with the court's concerns regarding the temporary nature of the Rohrabacher-Farr amendment, that the most recent extension of the amendment expires on September 30, 2018. Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 538.

Thus, the Rohrabacher-Farr amendment cannot be read to immunize the insurer in this case from violating Federal law. Marijuana's clear classification as a Schedule I drug renders it indisputably illegal under Federal law.

b. The current federal administration's renewed vigor for prosecuting marijuana crimes subjects the insurer to the significant threat of federal prosecution.

The employee asserts in his brief that there is "no genuine threat of criminal liability" for an insurer that reimburses an employee for medical marijuana. *See* Employee's Brief at 24. However, this position downplays the current administration's clear effort to reinstitute federal prosecution of marijuana crimes, and completely ignores the five-year statute of limitations for federal crimes. 18 U.S.C. § 3282.

Beginning in 2009, the Justice Department issued a series of guidance memoranda for U.S. Attorneys regarding the enforcement of federal drug laws in states that had

legalized medical and/or recreational marijuana. The first one, known as the "Ogden Memorandum,"[7] applied specifically to federal investigations and prosecutions in states that had enacted laws authorizing the medical use of marijuana. In pertinent part, it stated as follows:

> Congress has determined that marijuana is a dangerous drug, and the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels.
>
> . . . .
>
> The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's effo11s against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives.
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> . . . .
>
> As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.[8]

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[7] "Memorandum for Selected United States Attorneys on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana," David W. Ogden, Deputy Attorney General (October 19, 2009). *App. 14-16.*

[8] *App. 14-15.*

The Ogden Memorandum marked the beginning of the Obama administration's "hands-off" approach towards prosecution of those who distributed or possessed marijuana in compliance with their own states' medical marijuana laws. Nevertheless, the memo cautioned that its guidance neither "legalized" marijuana nor provided a legal defense to a violation of the Controlled Substances Act. Rather, it was intended "solely as a guide to the exercise of investigative and prosecutorial discretion."[9]

In subsequent memoranda issued in 2011,[10] 2013[11] and 2014,[12] the Justice Department sought to clarify its enforcement priorities. The most cited of these was issued in August 2013 and came to be known as the "Cole Memorandum." It established eight enforcement priorities, and directed federal prosecutors to leave less serious violations to state and local authorities.[13]

Each of the three memoranda issued by Cole reiterated that the guidance was meant solely to aid federal attorneys

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[9] *App. 15.*
[10] "Memorandum for United States Attorneys," James M. Cole, Deputy Attorney General (June 29, 2011). *App 17-18.*
[11] "Memorandum for All United States Attorneys," James M. Cole, Deputy Attorney General (August 29, 2013). *App. 19-22.*
[12] "Memorandum for All United States Attorneys," James M. Cole, Deputy Attorney General (February 14, 2014). *App. 23-25.*
[13] *App. 19-20.*

in exercising their investigative and prosecutorial discretion. The memos neither altered the Department's ability to enforce federal law nor provided a legal defense to any violation of federal law:

> As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA.

App. 22.

As noted above, Congress also acted to protect medical marijuana patients from prosecution under federal law beginning in 2014 via the Rohrabacher-Farr Amendment.[14] The amendment prohibited the Justice Department from spending funds to prevent a state from implementing its own laws authorizing the use, distribution, possession or cultivation of medical marijuana. The legislation thus did not prohibit medical marijuana prosecutions *per se*; it simply prevented the Justice Department to pay for them. As courts in other jurisdictions have made clear, the Rohrabacher-Farr amendment is temporary in nature and does

[14] Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538.

not insulate an individual or entity from federal prosecution at a later date. See U.S. v. McIntosh, 833 F.3d 1163 (2016).

Because it originated as part of a spending bill, the Rohrabacher-Farr Amendment (now known as the Rohrabacher-Blumenauer Amendment) must be renewed with every new appropriations bill. Currently, the amendment has been extended through September 30, 2018.[15]

Recent developments in the current federal administration prove the fragile nature of the protections afforded to those who participate in a state's medical marijuana program. Neither the Rohrabacher-Farr Amendment nor the Cole Memorandum have changed marijuana's legal status as a Schedule I controlled substance. Congress continues to restrict the appropriated funds by tacking the amendment on to the most recent funding bill. However, Congress can take away these protections at any time. As the McIntosh court noted, "Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed

[15] Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, § 538.

offenses while the government lacked funding." McIntosh, 833 F.3d at 1179 n.5.[16]

The same is true for the former protections of the Cole Memorandum. As the McIntosh court presciently noted in 2016, "[A] new president will be elected soon, and a new administration could shift enforcement priorities to place greater emphasis on prosecuting marijuana offenses." Id. This is exactly what has occurred. Under the new Trump administration, in January 2018 the Justice Department issued a new memorandum, which now requires federal prosecutors deciding which marijuana activities 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."[17] The memorandum explicitly states, "previous nationwide guidance specific

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[16] The McIntosh court specifically warned, "To be clear, [the Rohrabacher-Farr amendment] ***does not provide immunity*** from prosecution for federal marijuana offenses. . . . Anyone in any state who possesses, distributes, or manufactures marijuana for medical or recreational purposes (or attempts or conspires to do so) ***is committing a federal crime***. The federal government can prosecute such offenses for up to five years after they occur. See 18 U.S.C. § 3282." McIntosh, 833 F.3d at 1179 n.5 (emphasis added).

[17] "Memorandum for All United States Attorneys," from Jefferson B. Sessions, III, Attorney General (January 4, 2018). *App. 42.*

to marijuana enforcement is unnecessary and is rescinded, effective immediately."[18] Thus, under the current administration, individuals who possess marijuana for personal use in states where doing so is now legal are no longer afforded any specific protection from prosecution under Federal law.

The Justice Department's decision to rescind the Cole Memorandum's previous guidance has a huge impact on the present case. In every case cited by the employee in which a court or administrative body of another state has ordered payment, the Cole Memorandum played an integral part in the decision. The employee points to cases from Maine, Connecticut, New Mexico, and Massachusetts in support of his claim. It goes without saying that decisions of foreign jurisdictions are not controlling in this Court. However, even if considered for their persuasive value, these decisions are entirely undermined by their reliance on the now-obsolete Cole Memorandum. *See* Noll v. LePage Bakeries, Inc., Me. W.C.B. No. 16-25 (App. Div. *en banc* Aug. 23, 2016)[19]; Bourgoin v. Twin Rivers Paper Co., LLC, Me. W.C.B.

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[18] *App. 42.* In a footnote, the memorandum references the 2009 Ogden Memorandum and the 2011, 2013 and 2014 Cole memoranda as the "previous guidance" to be rescinded.

[19] "The ALJ also cited to a Justice Department Memorandum articulating a policy of noninterference with states' rights regarding medical marijuana, further weakening

No. 16-26 (App. Div. *en banc* Aug 23, 2016)[20]; Petrini v. Marcus Dairy, Inc., Conn. C.R.B. No. 7-15-7 (May 12, 2016) (available at http://wcc.state.ct.us/crb/2016/6021crb.htm)[21]; Vialpando v. Ben's Automotive Services, 331 P.3d 975 (N.M. Ct. App. 2014)[22]; Lewis v. Am. Gen. Media, 355 P.3d 850 (N.M. Ct. App. 2015)[23]; Barbuto v. Advantage Sales and Marketing, LLC, 477 Mass. 456 (2017).[24]

Lepage's argument that reimbursement would place it at risk of prosecution for violating federal law." Noll, *supra* at *9.

[20] "For the reasons set forth in Noll v. Lepage Bakeries, Me. W.C.B. No. 16-25 (App. Div. en banc 2016), we reject Twin Rivers' arguments on these issues and affirm the ALJ's decision." Bourgoin, *supra* at *5.

[21] The Petrini decision is one of an underlying workers' compensation administrative agency and contains no discussion of the legal issue regarding violation of federal law. It therefore has no persuasive value in the current case.

[22] "In the [Cole Memorandum], the Department of Justice identified eight areas of enforcement priority and indicated that outside of those priorities it would generally defer to state and local authorities." Vialpando, *supra* at 980.

[23] "Employer's argument raises only speculation in view of existing Department of Justice and federal policy. Nothing in the Department of Justice's second memorandum alters its position regarding the areas of enforcement set forth in the initial memorandum." Lewis, *supra* at 859.

[24] Barbuto does not discuss the Cole Memorandum, but it is easily distinguishable and bears no impact on the present case. It is an appellate review of a motion to dismiss a claim for handicap discrimination for the termination of an employee who failed a drug test. She used medical marijuana via a valid license, but her use was entirely off-site and not before or within working hours. The employer therefore had no involvement with her use or acquirement of

The earliest case that the employee relies upon is Vialpando v. Ben's Automotive Services, 331 P.3d 975 (N.M. Ct. App. 2014), cert. denied, 331 P.3d 924 (N.M. 2014). There, the employer challenged a workers' compensation judge's order that it reimburse the injured worker for money spent on medical marijuana under New Mexico's medical marijuana act. The appellate court rejected the federal law argument, with specific reference to the Cole Memorandum, as follows:

> Although not dispositive, we note that the Department of Justice has recently offered what we view as equivocal statements about state laws allowing marijuana use for medical and even recreational purposes. On the one hand, the Department of Justice affirmed that marijuana remains illegal under the [Controlled Substances Act] and that federal prosecutors will continue to aggressively enforce the statute. But, on the other hand, and in the same documents, the Department of Justice identified eight areas of enforcement priority and indicated that outside of those priorities it would generally defer to state and local authorities.

Id. at 980.

Faced with the federal government's apparent deference on the issue, the court declined to reverse on the basis of

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marijuana. Here, obviously, the involvement of the employer and insurer is much more concrete, as we are being asked to pay for, and directly aid and abet in, the employee's use of marijuana.

federal law or public policy and affirmed the decision ordering the employer to pay. Id.

The New Mexico appellate court revisited the issue in Lewis v. Am. Gen. Media, 355 P.3d 850 (N.M. Ct. App. 2015). Relying on its decision in Vialpando, the court again affirmed an order to pay. The court referenced both the Cole Memorandum and the Rohrabacher-Farr Amendment in support of its holding. "In view of the equivocal federal policy and the clear New Mexico policy as expressed in the Compassionate Use Act," the court held that it would allow the workers' compensation judge's reimbursement order to stand.

The cases from Maine cited by the employee used the same rationale to approve an injured worker's claim for reimbursement for medical marijuana under the Maine medical marijuana act. In Noll, *supra*, the Appellate Division of the Maine Workers' Compensation Board found that Maine's medical marijuana act "authorizes conduct that would otherwise be illegal under federal law." Id. at ¶ 12. The board referenced both the Cole Memorandum and the Vialpando decision in approving the order to pay. "We find no basis in federal law or policy identified by the parties that would preclude a self-insured employer from reimbursing an injured employee for costs associated with medical

marijuana use pursuant to the [Maine medical marijuana act] and the Workers' Compensation Act." Id. at ¶ 15. The board used the same rationale in its decision in Bourgoin, *supra*.[25]

The primary focus and reliance in each of these cases has been on the Cole Memorandum's directive to use a "hands-off" approach to prosecution of marijuana crimes. However, whether the federal government will continue to maintain its "hands-off" policy with respect to medical marijuana in states where it is legal remains to be seen. The Justice Department's recent decision to rescind the Cole Memorandum indicates that it is poised to take a more aggressive posture. The same may hold true for the current administration's willingness to yield to the provisions of the Rohrabacher-Blumenauer Amendment. In early May 2017, Attorney General Sessions wrote to Congressional leaders urging that the amendment not be renewed as part of the spending bill Congress was considering at the time.[26] President Trump also signified this more aggressive approach when he added a signing statement to the 2017

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[25] The Bourgoin case is currently on appeal to the Maine Supreme Court.

[26] *See* Letter from Jefferson B. Sessions, III, Attorney General, to Hon. Mitch McConnell, Hon. Paul Ryan, Hon. Charles Schumer, and Hon. Nancy Pelosi (May 1, 2017). *App. 36-38.*

Appropriations Act indicating that the administration may ignore the Rohrabacher-Farr Amendment.[27]

Given the current administration's clear renewed emphasis on prosecuting marijuana crimes, it is a realistic and substantial concern for an employer, or its workers' compensation insurance carrier, to fear federal prosecution if it provides reimbursement for an injured worker's medical marijuana purchases.

c. The insurer would be in express violation of federal law if it is ordered to reimburse the employee for medical marijuana.

The employee's assertion that he is the only individual or entity open to federal prosecution is flatly incorrect. The employee argues that the insurer has "raise[d] only a handwaving concern about criminal liability." *See* Employee's Brief at 15. This assertion is also without merit. The insurer has consistently raised at all levels of litigation its overwhelming concern regarding

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[27] President Trump's signing statement evidences the administration's intent to potentially ignore the amendment and enforce federal law. *See* Statement by President Donald J. Trump on Signing H.R. 244 into Law (May 15, 2017). *App. 39-41.* ("[The Rohrabacher-Farr Amendment] provides that the Department of Justice may not use any funds to prevent implementation of medical marijuana laws by various States and territories. I will treat this provision consistently with my constitutional responsibility to take care that the laws be faithfully executed.").

the violation of the Controlled Substances Act if ordered to reimburse the employee for payment of marijuana.

If the insurer here is ordered to reimburse the employee for the payment of medical marijuana, it would be in express violation of 21 U.S.C. § 841(a)(1) (prohibiting a person from knowingly possessing a controlled substance as defined by federal law); 21 U.S.C. § 846 (prohibiting a person from attempting or conspiring to commit a violation of federal law related to controlled substances); and 18 U.S.C. § 2(a) ("Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."). An order against the insurer would force it to be complicit in the employee's possession and use of marijuana; to conspire to distribute, use, and possess marijuana; and to aid and abet the employee in his use and possession of marijuana, as well as to aid and abet a marijuana dispensary in the distribution of marijuana.

Such a decision would force the insurer to be in express violation of Federal law. As discussed above, the employee's possession and use of marijuana, even for state-authorized medicinal purposes, clearly violates the Federal Controlled Substances Act. If the insurer is ordered to pay for the employee's marijuana, the insurer would be in clear

violation of the Federal Controlled Substances Act. The Board wisely recognized these legitimate criminal concerns in its decision denying the employee's claim. The Board did not err in upholding the supremacy of federal law in this case, and its decision should be affirmed.

III. THE BOARD DID NOT ERR IN HOLDING THAT RSA 126-X:3,III PRECLUDES REQUESTS FOR REIMBURSEMENTS.

The employee-appellant argues that the provisions of RSA 126-X:3,III do not preclude requests for reimbursement, and that the Board erred in finding that such requests are prohibited. The employee-appellant adopts an extremely narrow view as to the provisions of RSA 126-X:3,III.

The statute at issue states, "Nothing in this chapter shall be construed to require: (a) Any health insurance provider, health care plan, or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis . . ." RSA 126-X:3,III. As the Board correctly found, "This is clearly a provision to protect such providers from being subject to criminal prosecution under federal law. Presumably, that is a more troubling prospect for an entity that provides reimbursement across state lines." *C.R. 17.*

The clear purpose of the statute is to prevent any reimbursement of medical marijuana by any entity that would

be subject under contract or law to pay. While the state may have its own medical marijuana laws, the reimbursement being requested from a national corporation encompasses going beyond the actual state. The insurer would be involved in interstate commerce and is certainly subject to federal law (as discussed above). The statute addresses these concerns by specifically excluding "***any*** claim for reimbursement." RSA 126-X:3,III.

The chapter in question, RSA 126-X *et seq.*, created a new permissible use at the state level for medical marijuana. Prior to the enactment of this statute, "any claim for reimbursement" of marijuana costs by an injured worker would unquestionably be denied as illegal at both the federal and state level. The employee states in his brief that RSA 126-X:3,III "does not newly create an affirmative statutory obligation for any enumerated entity to reimburse any patient for money spent on therapeutic cannabis. Crucially, neither does this language explicitly prohibit such obligations." *See* Employee's Brief at 25. However, that is exactly what the plain and unambiguous language of the statute creates--an explicit prohibition to require an insurer to pay a claim for reimbursement.

The language of RSA 126-X:3,III is simple, direct, and unambiguous. "Nothing in [the medical marijuana act] ***shall***

be construed to require . . . ***any*** claim for reimbursement." The word "shall" is mandatory, not permissive, in nature. Green v. School Administrative Unit #55, 168 N.H. 796, 799 ("[T]he word 'shall' requires mandatory enforcement."). The plain and unambiguous meaning of the statute therefore prohibits ***any*** claim for reimbursement, necessarily including a claim for reimbursement of the cost of marijuana under the workers' compensation act.

IV. THE BOARD DID NOT ERR IN HOLDING THAT WORKERS' COMPENSATION CARRIERS ARE INCLUDED AS EXEMPT PROVIDERS UNDER RSA 126-X:3,III.

The employee's final argument is that the Board erred in holding that workers' compensation carriers are included as exempt providers under RSA 126-X:3,III. As workers' compensation carriers act for all intents and purposes as a private health insurer in paying for injured workers' medical treatment, the Board correctly interpreted the statute as exempting workers' compensation carriers. The employee's reading of the statute is too narrow and the Board did not err in holding that workers' compensation carriers are exempt.

As discussed above, RSA 126-X:3,III exempts "any health insurance provider, health care plan, or medical assistance program" from liability for a claim for reimbursement for the therapeutic use of cannabis. The

workers' compensation insurer in this matter, CNA, is tantamount to a health insurance provider for the employee's injuries and is therefore subject to the exemption provided by the statute. As the Board correctly reasoned, "Worker's compensation carriers provide payments for medical treatment just as health insurers do. They also provide medical assistance. The law provides, and we order worker's compensation carriers to pay 'medical bill indemnification' just as other insurers and medical assistance programs do." *C.R. 17.* The Board's interpretation of the statute is correct.

Many of the states that have legalized medical marijuana have adopted similar provisions that exempt "health insurance providers" from any obligation to pay for its use. *See* 8 LEX K. LARSON, LARSON'S WORKERS · COMPENSATION § 94.06 (Matthew Bender Rev. Ed). Larson, the preeminent national workers' compensation treatise (also cited in the employee's brief), interprets these statutes--which contain the same or similar exclusionary language as RSA 126-X:3,III--as "acknowledging the inconsistency between state and federal law," and thus "making it clear" that an insurer "may not be compelled to reimburse a patient for

costs associated with the use of medical marijuana." LARSON, *supra* § 94.06.[28]

The plain language of RSA 126-X:3,III permits only one result -- an insurer cannot be compelled to reimburse the employee for his medical marijuana purchases. The Board correctly interpreted the statute to include workers' compensation carriers within the exemption. There is no error.

CONCLUSION

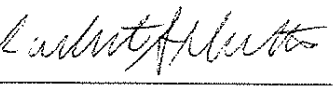
The landscape of medical marijuana is ever changing. Twenty-nine states now allow medical marijuana, and nine permit recreational use. The one constant is that marijuana remains illegal on the federal level; it is a Schedule I drug and there is no legislation on the horizon to change that status. It remains irrefutably illegal at the Federal level, and Federal law is supreme. The employee's assertion that any violation of Federal law is immaterial due to the

[28] In concluding that the language of these statutes exempt workers' compensation carriers, Larson specifically cited to the statutes in Alaska, Delaware, D.C., Massachusetts, New Jersey, Oregon, Rhode Island, and Washington (all of which contain the "health insurer" language without specifically exempting "workers' compensation insurers). Larson also cited to the statutes in Arizona, Illinois, Michigan, Montana, and Vermont (which all ***do*** specifically exempt workers' compensation insurers) without differentiating between the statutes. His interpretation that "an insurer or self-insurer may not be compelled to reimburse" for medical marijuana applies to all of the statutes equally. *See* LARSON, *supra* § 94.06.

Cole Amendment and the Rohrabacher-Farr Amendment has always been erroneous because of the five-year statute of limitations for Federal crimes; but the rationale behind that argument has been further undercut by the recent shadow cast by the new Federal administration's approach and guidance regarding enforcement of the Controlled Substances Act.

The Board did not commit an error of law on any of the grounds argued by the employee, and the insurer therefore respectfully request that this Honorable Court affirm the Board's decision denying the employee's claim.

Respectfully submitted,
CNA Insurance Company,
By its attorney,



Robert S, Martin, Esq.
NH Bar ID#: 266215
Tentindo, Kendall, Canniff & Keefe LLP
510 Rutherford Avenue
Boston, MA 02129
(617) 242-9600

Dated: April 6, 2018

STATEMENT REGARDING ORAL ARGUMENT

By order dated September 28, 2017, this appeal was assigned for argument before the full court. The Insurer's oral argument will be presented by Attorney Robert Martin.

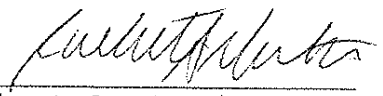
APPEALED DECISION APPENDED

The Insurer certifies that the appealed decision from the Compensation Appeals Board is in writing and is appended to this Brief.

CERTIFICATE OF SERVICE

I, Robert S. Martin, Esq., hereby certify that on April 6, 2018, I served, by first class mail and electronic mail, a true and exact copy of the foregoing paper to the following:

Jared O'Connor, Esq.
Shaheen & Gordon, P.A.
80 Merrimack Street
Manchester, NH 03101
joconnor@shaheengordon.com



Robert S. Martin, Esq.

APPENDIX

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State of New Hampshire

COMPENSATION APPEALS BOARD

Hugh J. Gallen
State Office Park
Spaulding Building
95 Pleasant Street
Concord, NH 03301
603/271-3176
TDD Access: Relay NH
1-800-735-2964
FAX: 603/271-5015
http://www.nh.gov/labor

June 6, 2017

Jared O'Connor Esq.
Shaheen & Gordon PA
80 Merrimack St
Manchester NH 03101

Re: Andrew Panaggio V W.R. Grace & Company
Docket # 2017-L-0248

Dear Attorney O'Connor:

Enclosed is a copy of the decision rendered by the Compensation Appeals Board in the above-captioned matter.

Any party to the proceeding aggrieved by an order or decision of the Panel may appeal same to the Supreme Court pursuant to RSA 541:6 Appeal. - ***Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal the petition to the Supreme Court.***

Should either party wish to utilize an audio recording of the hearing, it will be held for six months from the date of the decision. After that time, it will be destroyed in accordance with our retention policy. The digital recording is available through the Department of Labor for a fee of $20.00.

Respectfully submitted,

Richard Mitchell, Esq., Panel Chair
Compensation Appeals Board

Cc: James O'Sullivan, Esq.

RECEIVED
JUN - 8 2017

000001

State of New Hampshire

COMPENSATION APPEALS BOARD

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June 6, 2017

DECISION OF THE WORKERS' COMPENSATION APPEAL BOARD

ANDREW PANAGGIO

V.

W.R. GRACE & COMPANY

DOCKET # 2017-L-0248

APPEARANCES: Jared O'Connor, Esquire, appeared for Andrew Panaggio
James O'Sullivan, Esquire, appeared for CNA Insurance Company

ISSUE: RSA 281-A: 23 – Medical, Hospital and Remedial Care

WITNESS: Andrew Panaggio

DATE OF INJURY: July 9, 1991

HEARING: A *de novo* hearing of appeal of a decision dated December 22, 2016 was held at the New Hampshire Department of Labor, Concord, New Hampshire on May 12, 2017

PANEL: The panel was composed of Dennis Murphy, Susan Jeffery and Richard Mitchell, Esquire, chairperson.

BACKGROUND

The claimant, Andrew Panaggio, injured his lower back on July 9, 1991. The claim was accepted and a lump sum settlement was reached after he had a fusion of L4-5. Although he has been prescribed opiates (55, 50A[1]) for his back pain and temporarily after unrelated knee surgery, he prefers cannabis for pain relief. He has been using marijuana medicinally for years, but in May of 2016 he asked his provider, Nurse Miller,

[1] Numbers in parentheses refer to pages in the medical packet provided by the claimant.

for a prescription under our then new state medical marijuana law (24K). She concurred and completed the necessary paperwork (7-9) and he was issued his "card".

Mr. Panaggio was credible that cannabis is palliative and has the added benefit of reducing his need for opiates (which exacerbate his diverticulitis). He has filled prescriptions since he got the card. Only the first bill was submitted (10). Although he does not use the maximum available under the terms of the law and takes advantage of a discount given to those with Social Security benefits, his monthly cost is about $600.

The carrier has denied the claim on two grounds. First, it is not legal for it to reimburse the provider or claimant and second, that the prescription is not medically reasonable or necessary.

As support for its second argument, the carrier cites a publication from the Food and Drug Administration entitled "FDA and Marijuana: Questions and Answers" (supplement submitted by carrier, 1 *et seq.*). In that publication, the FDA notes that "the FDA has not found any such product [as medicinal cannabis] safe or effective for the treatment of any disease or condition". It continues that clinical studies are necessary.

Based upon this "finding" of no findings, the carrier argues that the efficacy of medical marijuana is not proven and therefore not a reasonable treatment.

This argument is specious.

As will be seen below, marijuana is still categorized as a Tier I drug by the FDA and the Drug Enforcement Administration. Therefore, it is illegal to possess it under federal law. This presents two problems. A lab cannot possess it to study it.[2] It is well known that the FDA's requirements for testing to garner approval are an onerous and expensive process. Trials are also necessary. There are very good reasons for no studies. Possession by the lab would be a federal crime as would possession by the patients in a trial. Also, no drug company would be able to get a patent for a plant grown throughout the country by both professionals and amateurs. Therefore, no pharmaceutical company would be willing to spend the millions of dollars to obtain the FDA's approval of cannabis' for any condition.

[2] There is currently only one lab in the country with dispensation to possess marijuana for testing purposes, although more have applied.

Based upon the claimant's credible testimony and Ms. Miller's opinion, Mr. Panaggio's use is reasonable and medically necessary, notwithstanding the FDA's self-serving "Questions and Answers".

However, it is found that the carrier is not able to provide medical marijuana.

As noted, possession of marijuana is still a federal crime. This is made abundantly clear on the medical marijuana card issued by the state. It is first explained that NHRSA 126-X "does not exempt a person from federal criminal penalties for the possession of cannabis". It then explains that "The *current* federal administration has declared its intention not to pursue or target patients...who possess or use small amounts of cannabis for therapeutic use... [Emphasis added]".

This language was on the material Mr. Panaggio received when he was approved for medical cannabis in 2016 and he testified that he fully understood it. The then current administration was that of President Obama. The claimant put into evidence the two memoranda by Deputy Attorney General James M. Cole that outlined the Obama administration's position (claimant's supplement 6 and 10) of not prosecuting possession of small amounts. Ironically, on the very day of this hearing, current Attorney General Sessions announced that this administration would resume prosecuting more stridently criminals involved in the drug trade whether they were violent offenders or not. Clearly New Hampshire's Department of Health and Human Services knew when it authored this paragraph that the only constant in government is change.

The claimant cites United States v McIntosh, a Ninth Circuit Court of Appeals decision (claimant's supplement, 13). In ten cases brought in two states where medical marijuana was legal, the petitioners asked that their criminal prosecutions for marijuana possession either be dismissed or enjoined. The basis was that Congress had not funded such criminal prosecutions. The appeals court remanded the case to the District Courts to "consider the temporal nature of the lack of funds [for prosecution] along with Appellants' rights to a speedy trial under the Sixth Amendment..." (claimant's supplement, 44).

In the McIntosh case the Appeals Court recognized the same issue as the NHDHHS did: "We note the temporal nature of the problem with these

prosecutions...But Congress could appropriate funds for such prosecutions tomorrow". Ibid.

More locally, our medical marijuana statute carves out protections for potential providers. NHRSA 126:3 (III) states: "Nothing in this chapter shall be construed to require: (a) Any health insurance provider, health care plan, or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis".

This is clearly a provision to protect such providers from being subject to criminal prosecution under federal law. Presumably, that is a more troubling prospect for an entity that provides reimbursement across state lines.

The claimant first argues that a worker's compensation carrier is not any one of these protected entities because it is not specifically listed and if the Legislature, in its abundant wisdom, had wanted to include worker's comp carriers; it would have specifically named them.

Worker's compensation carriers provide payments for medical treatment just as health insurers do. They also provide medical assistance. The law provides, and we order worker's compensation carriers to pay "medical bill indemnification" just as other insurers and medical assistance programs do. It is found that section III(a) applies to worker's compensation carriers.

It is also argued that worker's compensation insurance is listed by the Insurance Department as a casualty company, not a health insurer. That is a distinction without a difference. Like medical payments coverage in automobile policies, worker's compensation coverage provides direct payment to health care providers. Whether it is a casualty company or a health insurer, it is being asked to make a reimbursement not legal under state or federal law.

The claimant also points to cases in Maine and New Mexico in which the worker's compensation carrier was ordered to make reimbursement for medical marijuana where it was legally prescribed. These cases are not applicable. A review of both Maine's and New Mexico's medical cannabis laws reveal that they do not have the same or, in fact, any, exemption for providers of any type.

DECISION

For the reasons stated above, the majority of the panel finds that although medically reasonable and necessary, the denial of the carrier for reimbursement of the claimant's medical marijuana is upheld.

Richard Mitchell, Esq., Panel Chair
Compensation Appeals Board

RM/tb

I respectfully disagree with the majority in this case. The decision in this matter was not based on the reasonableness of the treatments or its relationship to the injury but on the law. The majority concluded that the prescribing of medical marijuana was illegal under both NH and federal law.

The NH statute on the Use of Cannabis for Therapeutic Purposes, RSA 126-X:3, III, in part says, "Nothing in this chapter shall be construed to require: (a) Any health insurance provider, health care plan, or medical assistance program to be liable for any claim for reimbursement for the therapeutic use of cannabis..." The panel's majority accepted the insurer's argument that because NH Workers' Compensation statute provides for medical costs to be paid workers' compensation insurers are a health insurance provider under this law. I disagree for two reasons.

1) This interpretation of the law is not contained in the simple reading of the law's language. If the legislature had wanted to include workers' compensation insures, these insurers could have been listed.
2) Also, Workers' Compensation insurers are listed by the NH Insurance Department under Property and Casualty insurers along with Auto and Home insurers. No casualty insurers are listed in the cannabis statute as being exempt from the reimbursement requirement.

The second legal argument that a majority of the panel accepted is that marijuana is still illegal under federal law as it remains included in Schedule I of the Controlled Substances act and requiring the insurer to provide reimbursement would make the insurer complicit in this legal violation. I disagree with this finding as well. First, the insurer cites no specific section of the Federal Controlled Substances Act that reimbursement to the claimant would violate. Second, US Department of Justice Policy contained in an August 29, 2013 memorandum to all US attorneys on Guidance Regarding Marijuana Enforcement, identifies eight areas of marijuana enforcement priority and that outside of those areas it would generally defer to state and local authorities. None of the eight areas of enforcement include challenging state medical marijuana laws.

In addition, the United States Congress in a rider to the Consolidated Appropriations Act of 2016, passed in 2015, prohibited the Department of Justice from spending funds to prevent states' implementation of their medical marijuana laws.

Until and unless the US Department of Justice changes its policy and congress repeals its rider, the insurer's federal legal argument is not persuasive.

The claimant complied with NH's medical marijuana law, has a permit to use card issued by the state of NH, and has a prescription for its use from a licensed medical provider. That the claimant admits to using illegal marijuana to relive his symptoms prior to the state's passage of its legalization is irrelevant. He is using medical marijuana to avoid the use of opiods with all of their side effects. This use has been recognized in NH law.

Palliative care has long been an accepted part of NH's Workers' Compensation statute. The NH Supreme Court has repeatedly stated that it "construes the Workers' Compensation Law liberally to give broadest reasonable effect to its remedial purpose."

For all of the above reasons, I believe the claimant has met his burden of proof and I would require the insurer to reimburse the claimant for the costs of his medical marijuana.

DISSENT,

Dennis Murphy, Panel Member
Compensation Appeals Board

DM/tb

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF LABOR
CONCORD, N.H. 03301

REQUEST FOR LUMP SUM SETTLEMENT

Andrew J. Panaggio — Employee S.S. No. [redacted]
WR Grace & Co. — Employer's Identification No. 13-511-4230
(9-digit number assigned by proper federal agency)
CNA Insurance Co. — Insurance Carrier 0088
(Number)

We Andrew J. Panaggio (Name of Employee or Dependent) Residing at 367 Mammoth Road (Number and Street)
City or Town of Pelham State of New Hampshire 03076

and CNA Insurance Co. as the carrier for WR Grace & Co.
(Name of Employer or Insurance Company)
Office address 1250 Hancock Street, P.O. Box 9167, Quincy, MA 02269
(Number and Street) (City or Town) (State)
hereby request approval of a lump sum settlement of $ 160,000.00 on account of an injury on July 9, 1991, while employed by WR Grace & Co. as provided in Revised Statutes
(Name of Employer)
Annotated 281-A:37, as amended, Workers' Compensation Law for the following reasons: There is a dispute between the parties as to the extent of disability and its causal relationship to employment. This is a complete settlement of all claims under RSA 281-A with the sole exception of the medical provisions. In settlement of all claims for workers compensation, the claimant agrees to accept and the employer agrees to pay a lump sum of $160,000.00. This lump sum is compensation for disability that will affect the claimant for the rest of his life. The claimant's remaining life expectancy is 36.8 years, or 441.6 months. Therefore, even though paid in a lump sum, the claimant's benefits shall be considered to be paid at the rate of $294.38 per month for 441.6 months (or approximately $67.99 per week for 1,912.1 weeks). This amount is calculated after deducting the requested attorney's fees of 18.75%.

Dated May 29, 1997

WITNESS — INJURED EMPLOYEE

ATTYS FEES $30,000.00 APPROVED

EMPLOYER OR INSURANCE COMPANY
James E. Owen
By its Attorney

The above request for payment of a Lump Sum Settlement is hereby approved.

AUGUST 14, 1997

Attorney's fees in the amount of $30,000.00 (18.75% of lump sum settlement) is hereby approved.

000009

LUMP SUM SETTLEMENT PROPOSAL

RSA 281:33 (281-A:37) provides that lump sum settlement agreements may be permitted at the discretion of the Labor Commissioner or his designated representative when it is in the best interest of all concerned. Please provide the following information for the Department's consideration in reviewing the proposed lump sum settlement:

Employee: Andrew J. Panaggio Date of Birth: [redacted]

Employer: WR Grace & Co. Date of Injury: 07/09/91

Comp. Rate $544.79 AWW $877.00 Carrier: CNA Insurance

Claimant Attorney (if applicable) Fred K. Mayer, III

Carrier Attorney (if applicable) James E. Owers

Has there been any hearing at the Department? Y X N

If so, when: September 9, 1991

Has the decision been appealed? No What is status of appeal? N/A

1. **What is the claimant's current medical status? Please summarize briefly, then attach all physician office notes (including the most recent office visit), surgical reports, and any IME reports.**

Status post L4-5 fusion with bone grafts and rods.

2. **Has the treating physician released the claimant to work?**
Full No or Part-Time No
Regular No or Light duty No
Is the claimant working? Y N X

3. **Briefly outline the claimant's educational background and work history.**

The claimant is a high school graduate. He graduated Newfound Memorial High School in Bristol, NH, in 1978 and then attended Plymouth State College for one year. He initially went to work at WR Grace in 1979 as a general production helper. At the time of his accident, he was still with WR Grace, but had worked his way up to a level 5 chemical operator.

4. **Are there any other barriers to employment? (e.g., language, other non-work related condition, etc.)**

None.

5. **Has a Permanent Impairment Award been approved by the Department? If not, has there been a determination of permanent impairment? If determined but not approved, please attach the supporting medical report(s).**

Yes. The Department approved a permanent impairment award for a 12.5% whole person impairment. The award was previously paid by the carrier.

6. **Are there any outstanding medical bills? If so, are any of these in dispute?**

The claimant is informed that there remains an outstanding balance in the amount of $222.70 for physical therapy services rendered by Healthsouth (formerly Advantage) between 11/24/94 and 12/12/94.

7. **What are the claimant's vocational/employment prospects or plans?**

The claimant has no vocational/employment prospects or plans. The claimant is looking to invest a significant portion of the proposed lump sum settlement in a variable annuity so as to provide some retirement income.

8. **What, if any, vocational rehabilitation services have been provided to the claimant?**

Vocational rehabilitation services were provided. However, after an initial assessment performed in June of 1995, the vocational rehabilitation consultant concluded that it would be "highly improbable that Mr. Panaggio would benefit from a vocational rehabilitation plan with the goal of returning him to competitive employment."

9. **Has a Second Injury Fund application been filed?**

No.

10. **Is the claimant receiving Social Security Disability benefits?**

Yes.

11. **Is a third party action pending or anticipated?**

No.

12. **Please provide the rationale and calculations that form the basis for this settlement proposal. If a vocational rehabilitation plan is included in these calculations, a copy of the approved rehabilitation plan must be attached.**

RATIONALE: (the reason why this case should be settled at this time)

The parties agree that it is in the best interests of the employer and the employee that settlement be in the form of a lump sum. The requested settlement will settle all claims, known and unknown, under RSA 281-A, as amended, with the exception of claims for medical benefits. The lump sum will avoid potential disputes between the parties as to the extent of disability and the causal relationship of the continuing disability to the employment.

CALCULATIONS: (list the actual figures for each item considered in the settlement. Add them and show the TOTAL SETTLEMENT)

Proposed Lump sum:	$160,000
Requested attorney's fees:	$ 30,000
Anticipated Net Settlement to Claimant:	$130,000

The proposed lump sum is compensation for disability that will affect the claimant for the rest of his life. The claimant's remaining life expectancy is 36.8 years or 441.6 months. Therefore, even though paid in a lump sum, the claimant's benefits shall be considered to be paid at the rate of $294.38 per month for 441.6 months (or approximately $67.99 per week for 1,912.1 weeks). This amount is calculated after deduction of the requested attorney's fee of 18.75%.

Employee's Signature

5-29-97
Date

Employee's Attorney's Signature
(if applicable)

5-29-97
Date

Carrier/Employer Representative Signature

6-2-97
Date

AFFIDAVIT

Andrew J. Panaggio

v.

WR Grace & Co.

D.O.I.: 07/09/91

This is to attest that I have been fully apprised as to my rights under RSA 281-A:

I have been advised that I have a right to:

Total Disability pursuant to RSA 281-A:28.

Vocational Rehabilitation if I meet the criteria set forth in RSA 281-A:25.

Temporary Partial Payments pursuant to RSA 281-A:31.

Permanent Scheduled Impairment Award as outlined in RSA 281-A:32.

Continued Medical Treatment as provided by RSA 281-A:23 and RSA 281-A:24.

It has also been explained that a Lump Sum is a final settlement of all past, present and future claims under all sections of RSA 281-A with the sole exception of the medical provisions of RSA 281-A:23 and 24 which are always open as long as the treatment is related to the original injury.

The carrier has the right to controvert any medical claims.

Date: 5-29-97

Witness

Claimant: Andrew J. Panaggio

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

October 19, 2009

MEMORANDUM FOR SELECTED UNITED STATES ATTORNEYS

FROM: David W. Ogden
Deputy Attorney General

SUBJECT: Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana

This memorandum provides clarification and guidance to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana. These laws vary in their substantive provisions and in the extent of state regulatory oversight, both among the enacting States and among local jurisdictions within those States. Rather than developing different guidelines for every possible variant of state and local law, this memorandum provides uniform guidance to focus federal investigations and prosecutions in these States on core federal enforcement priorities.

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 the illegal distribution and sale of marijuana is a serious crime and provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. One timely example underscores the importance of our efforts to prosecute significant marijuana traffickers: marijuana distribution in the United States remains the single largest source of revenue for the Mexican cartels.

The Department is also committed to making efficient and rational use of its limited investigative and prosecutorial resources. In general, United States Attorneys are vested with "plenary authority with regard to federal criminal matters" within their districts. USAM 9-2.001. In exercising this authority, United States Attorneys are "invested by statute and delegation from the Attorney General with the broadest discretion in the exercise of such authority." *Id.* This authority should, of course, be exercised consistent with Department priorities and guidance.

The prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority in the Department's efforts against narcotics and dangerous drugs, and the Department's investigative and prosecutorial resources should be directed towards these objectives. As a general matter, pursuit of these priorities should not focus federal resources in your States on

individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources. On the other hand, prosecution of commercial enterprises that unlawfully market and sell marijuana for profit continues to be an enforcement priority of the Department. To be sure, claims of compliance with state or local law may mask operations inconsistent with the terms, conditions, or purposes of those laws, and federal law enforcement should not be deterred by such assertions when otherwise pursuing the Department's core enforcement priorities.

Typically, when any of the following characteristics is present, the conduct will not be in clear and unambiguous compliance with applicable state law and may indicate illegal drug trafficking activity of potential federal interest:

- unlawful possession or unlawful use of firearms;
- violence;
- sales to minors;
- financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law;
- amounts of marijuana inconsistent with purported compliance with state or local law;
- illegal possession or sale of other controlled substances; or
- ties to other criminal enterprises.

Of course, no State can authorize violations of federal law, and the list of factors above is not intended to describe exhaustively when a federal prosecution may be warranted. Accordingly, in prosecutions under the Controlled Substances Act, federal prosecutors are not expected to charge, prove, or otherwise establish any state law violations. Indeed, this memorandum does not alter in any way the Department's authority to enforce federal law, including laws prohibiting the manufacture, production, distribution, possession, or use of marijuana on federal property. This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law or the absence of one or all of the above factors create a legal defense to a violation of the Controlled Substances Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion.

Finally, nothing herein precludes investigation or prosecution where there is a reasonable basis to believe that compliance with state law is being invoked as a pretext for the production or distribution of marijuana for purposes not authorized by state law. Nor does this guidance preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law, in particular circumstances where investigation or prosecution otherwise serves important federal interests.

Your offices should continue to review marijuana cases for prosecution on a case-by-case basis, consistent with the guidance on resource allocation and federal priorities set forth herein, the consideration of requests for federal assistance from state and local law enforcement authorities, and the Principles of Federal Prosecution.

cc: All United States Attorneys

Lanny A. Breuer
Assistant Attorney General
Criminal Division

B. Todd Jones
United States Attorney
District of Minnesota
Chair, Attorney General's Advisory Committee

Michele M. Leonhart
Acting Administrator
Drug Enforcement Administration

H. Marshall Jarrett
Director
Executive Office for United States Attorneys

Kevin L. Perkins
Assistant Director
Criminal Investigative Division
Federal Bureau of Investigation

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.

cc: Lanny A. Breuer
Assistant Attorney General, Criminal Division

B. Todd Jones
United States Attorney
District of Minnesota
Chair, AGAC

Michele M. Leonhart
Administrator
Drug Enforcement Administration

H. Marshall Jarrett
Director
Executive Office for United States Attorneys

Kevin L. Perkins
Assistant Director
Criminal Investigative Division
Federal Bureau of Investigations

U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General

Washington, D.C. 20530

August 29, 2013

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Enforcement

In October 2009 and June 2011, the Department issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). This memorandum updates that guidance in light of state ballot initiatives that legalize under state law the possession of small amounts of marijuana and provide for the regulation of marijuana production, processing, and sale. The guidance set forth herein applies to all federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.

As the Department noted in its previous guidance, 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 Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

These priorities will continue to guide the Department's enforcement of the CSA against marijuana-related conduct. Thus, this memorandum serves as guidance to Department attorneys and law enforcement to focus their enforcement resources and efforts, including prosecution, on persons or organizations whose conduct interferes with any one or more of these priorities, regardless of state law.[1]

Outside of these enforcement priorities, the federal government has traditionally relied on states and local law enforcement agencies to address marijuana activity through enforcement of their own narcotics laws. For example, the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property. Instead, the Department has left such lower-level or localized activity to state and local authorities and has stepped in to enforce the CSA only when the use, possession, cultivation, or distribution of marijuana has threatened to cause one of the harms identified above.

The enactment of state laws that endeavor to authorize marijuana production, distribution, and possession by establishing a regulatory scheme for these purposes affects this traditional joint federal-state approach to narcotics enforcement. The Department's guidance in this memorandum rests on its expectation that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests. A system adequate to that task must not only contain robust controls and procedures on paper; it must also be effective in practice. Jurisdictions that have implemented systems that provide for regulation of marijuana activity

[1] These enforcement priorities are listed in general terms; each encompasses a variety of conduct that may merit civil or criminal enforcement of the CSA. By way of example only, the Department's interest in preventing the distribution of marijuana to minors would call for enforcement not just when an individual or entity sells or transfers marijuana to a minor, but also when marijuana trafficking takes place near an area associated with minors; when marijuana or marijuana-infused products are marketed in a manner to appeal to minors; or when marijuana is being diverted, directly or indirectly, and purposefully or otherwise, to minors.

must provide the necessary resources and demonstrate the willingness to enforce their laws and regulations in a manner that ensures they do not undermine federal enforcement priorities.

In jurisdictions that have enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana, conduct in compliance with those laws and regulations is less likely to threaten the federal priorities set forth above. Indeed, a robust system may affirmatively address those priorities by, for example, implementing effective measures to prevent diversion of marijuana outside of the regulated system and to other states, prohibiting access to marijuana by minors, and replacing an illicit marijuana trade that funds criminal enterprises with a tightly regulated market in which revenues are tracked and accounted for. In those circumstances, consistent with the traditional allocation of federal-state efforts in this area, enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity. If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.

The Department's previous memoranda specifically addressed the exercise of prosecutorial discretion in states with laws authorizing marijuana cultivation and distribution for medical use. In those contexts, the Department advised that it likely was not an efficient use of federal resources to focus enforcement efforts on seriously ill individuals, or on their individual caregivers. In doing so, the previous guidance drew a distinction between the seriously ill and their caregivers, on the one hand, and large-scale, for-profit commercial enterprises, on the other, and advised that the latter continued to be appropriate targets for federal enforcement and prosecution. In drawing this distinction, the Department relied on the common-sense judgment that the size of a marijuana operation was a reasonable proxy for assessing whether marijuana trafficking implicates the federal enforcement priorities set forth above.

As explained above, however, both the existence of a strong and effective state regulatory system, and an operation's compliance with such a system, may allay the threat that an operation's size poses to federal enforcement interests. Accordingly, in exercising prosecutorial discretion, prosecutors should not consider the size or commercial nature of a marijuana operation alone as a proxy for assessing whether marijuana trafficking implicates the Department's enforcement priorities listed above. Rather, prosecutors should continue to review marijuana cases on a case-by-case basis and weigh all available information and evidence, including, but not limited to, whether the operation is demonstrably in compliance with a strong and effective state regulatory system. A marijuana operation's large scale or for-profit nature may be a relevant consideration for assessing the extent to which it undermines a particular federal enforcement priority. The primary question in all cases – and in all jurisdictions – should be whether the conduct at issue implicates one or more of the enforcement priorities listed above.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum 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. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

cc: Mythili Raman
Acting Assistant Attorney General, Criminal Division

Loretta E. Lynch
United States Attorney
Eastern District of New York
Chair, Attorney General's Advisory Committee

Michele M. Leonhart
Administrator
Drug Enforcement Administration

H. Marshall Jarrett
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Assistant Director
Criminal Investigative Division
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U.S. Department of Justice

Office of the Deputy Attorney General

The Deputy Attorney General *Washington, D.C. 20530*

February 14, 2014

MEMORANDUM FOR ALL UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding Marijuana Related Financial Crimes

On August 29, 2013, the Department issued guidance (August 29 guidance) to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act (CSA). The August 29 guidance reiterated the Department's commitment to enforcing the CSA consistent with Congress' determination that marijuana is a dangerous drug that serves as a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. In furtherance of that commitment, the August 29 guidance instructed Department attorneys and law enforcement to focus on the following eight priorities in enforcing the CSA against marijuana-related conduct:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

Under the August 29 guidance, whether marijuana-related conduct implicates one or more of these enforcement priorities should be the primary question in considering prosecution

under the CSA. Although the August 29 guidance was issued in response to recent marijuana legalization initiatives in certain states, it applies to all Department marijuana enforcement nationwide. The guidance, however, did not specifically address what, if any, impact it would have on certain financial crimes for which marijuana-related conduct is a predicate.

The provisions of the money laundering statutes, the unlicensed money remitter statute, and the Bank Secrecy Act (BSA) remain in effect with respect to marijuana-related conduct. Financial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under the money laundering statutes (18 U.S.C. §§ 1956 and 1957), the unlicensed money transmitter statute (18 U.S.C. § 1960), and the BSA. Sections 1956 and 1957 of Title 18 make it a criminal offense to engage in certain financial and monetary transactions with the proceeds of a "specified unlawful activity," including proceeds from marijuana-related violations of the CSA. Transactions by or through a money transmitting business involving funds "derived from" marijuana-related conduct can also serve as a predicate for prosecution under 18 U.S.C. § 1960. Additionally, financial institutions that conduct transactions with money generated by marijuana-related conduct could face criminal liability under the BSA for, among other things, failing to identify or report financial transactions that involved the proceeds of marijuana-related violations of the CSA. *See, e.g.*, 31 U.S.C. § 5318(g). Notably for these purposes, prosecution under these offenses based on transactions involving marijuana proceeds does not require an underlying marijuana-related conviction under federal or state law.

As noted in the August 29 guidance, the Department is committed to using its limited investigative and prosecutorial resources to address the most significant marijuana-related cases in an effective and consistent way. Investigations and prosecutions of the offenses enumerated above based upon marijuana-related activity should be subject to the same consideration and prioritization. Therefore, in determining whether to charge individuals or institutions with any of these offenses based on marijuana-related violations of the CSA, prosecutors should apply the eight enforcement priorities described in the August 29 guidance and reiterated above.[1] For example, if a financial institution or individual provides banking services to a marijuana-related business knowing that the business is diverting marijuana from a state where marijuana sales are regulated to ones where such sales are illegal under state law, or is being used by a criminal organization to conduct financial transactions for its criminal goals, such as the concealment of funds derived from other illegal activity or the use of marijuana proceeds to support other illegal activity, prosecution for violations of 18 U.S.C. §§ 1956, 1957, 1960 or the BSA might be appropriate. Similarly, if the financial institution or individual is willfully blind to such activity by, for example, failing to conduct appropriate due diligence of the customers' activities, such prosecution might be appropriate. Conversely, if a financial institution or individual offers

[1] The Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) is issuing concurrent guidance to clarify BSA expectations for financial institutions seeking to provide services to marijuana-related businesses. The FinCEN guidance addresses the filing of Suspicious Activity Reports (SAR) with respect to marijuana-related businesses, and in particular the importance of considering the eight federal enforcement priorities mentioned above, as well as state law. As discussed in FinCEN's guidance, a financial institution providing financial services to a marijuana-related business that it reasonably believes, based on its customer due diligence, does not implicate one of the federal enforcement priorities or violate state law, would file a "Marijuana Limited" SAR, which would include streamlined information. Conversely, a financial institution filing a SAR on a marijuana-related business it reasonably believes, based on its customer due diligence, implicates one of the federal priorities or violates state law, would be label the SAR "Marijuana Priority," and the content of the SAR would include comprehensive details in accordance with existing regulations and guidance.

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 August 29 guidance rested on the expectation that states that have enacted laws authorizing marijuana-related conduct will implement clear, strong and effective regulatory and enforcement systems in order to minimize the threat posed to federal enforcement priorities. Consequently, financial institutions and individuals choosing to service marijuana-related businesses that are not compliant with such state regulatory and enforcement systems, or that operate in states lacking a clear and robust regulatory scheme, are more likely to risk entanglement with conduct that implicates the eight federal enforcement priorities.[2] In addition, because financial institutions are in a position to facilitate transactions by marijuana-related businesses that could implicate one or more of the priority factors, financial institutions must continue to apply appropriate risk-based anti-money laundering policies, procedures, and controls sufficient to address the risks posed by these customers, including by conducting customer due diligence designed to identify conduct that relates to any of the eight priority factors. Moreover, as the Department's and FinCEN's guidance are designed to complement each other, it is essential that financial institutions adhere to FinCEN's guidance.[3] Prosecutors should continue to review marijuana-related prosecutions on a case-by-case basis and weigh all available information and evidence in determining whether particular conduct falls within the identified priorities.

As with the Department's previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department's authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA, the money laundering and unlicensed money transmitter statutes, or the BSA, including the obligation of financial institutions to conduct customer due diligence. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct of a person or entity threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended, 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. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.

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[2] For example, financial institutions should recognize that a marijuana-related business operating in a state that has not legalized marijuana would likely result in the proceeds going to a criminal organization.

[3] Under FinCEN's guidance, for instance, a marijuana-related business that is not appropriately licensed or is operating in violation of state law presents red flags that would justify the filing of a Marijuana Priority SAR.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Food and Drug Administration
Silver Spring, MD 20993

May 20, 2015

TO: Acting Assistant Secretary for Health

FROM: Acting Commissioner of Food and Drugs

SUBJECT: Recommendation to Maintain Marijuana in Schedule I of the Controlled Substances Act

ACTION

Attached are the Food and Drug Administration's (FDA) scientific and medical evaluations and recommendations on the scheduling of marijuana under the Controlled Substances Act (CSA), prepared in response to two petitions submitted to the Drug Enforcement Administration (DEA). Each contains the same recommendation to maintain marijuana in Schedule I of the CSA.

On December 17, 2009, Mr. Bryan Krumm submitted a petition to DEA, requesting that proceedings be initiated to repeal the rules and regulations that place marijuana in Schedule I of the CSA. Mr. Krumm contends that marijuana has an accepted medical use in the United States, has proven safety and efficacy, is safe for use under medical supervision, and does not have the abuse potential for placement in Schedule I of the CSA. In 2011, the DEA Administrator requested that the U.S. Department of Health and Human Services (HHS) provide a scientific and medical evaluation of the available information and a scheduling recommendation for marijuana, in accordance with the provisions of 21 U.S.C. 811(b).

On November 30, 2011, Governors Lincoln D. Chafee of Rhode Island and Christine O. Gregoire of Washington also submitted a petition to DEA requesting that proceedings be initiated to repeal the rules and regulations that place marijuana in Schedule I of the CSA. Specifically, they requested the reclassification of marijuana from Schedule I to Schedule II of the CSA. The petition contends that marijuana has an accepted medical use in the United States, is safe for use under medical supervision, and has a relatively low abuse potential compared to Schedule II substances in the CSA. In June 2013, the DEA Administrator requested that HHS provide a scientific and medical evaluation of the available information and a scheduling recommendation for marijuana, in accordance with the provisions of 21 U.S.C. 811(b).

FDA and the National Institute on Drug Abuse (NIDA) have carefully considered the available scientific and medical evidence for marijuana presented under the eight factors determinative of control under the CSA, 21 U.S.C. 811(c). Pursuant to the requests in the petitions, FDA broadly evaluated marijuana, and did not focus its evaluation on particular strains of marijuana or components or derivatives of marijuana. In the development of this scientific and medical evaluation for the purpose of scheduling, we reviewed and analyzed considerable data related to marijuana's abuse potential. The data include the pharmacology of marijuana and its components, the prevalence and frequency of marijuana use, the widespread availability of

marijuana for nonmedical use, the ease of obtaining or manufacturing marijuana, and at-risk populations including children and adolescents. In addition, we reviewed the scientific literature on whether marijuana has a currently accepted medical use, and we analyzed studies evaluating medical treatment with marijuana. Our review of the published clinical studies is also attached.

DISCUSSION

FDA recommends that marijuana be maintained in Schedule I of the CSA. NIDA concurs with this recommendation.

Since our 2006 scientific and medical evaluation and scheduling recommendation responding to a previous DEA petition, research with marijuana has progressed. However, more research should be conducted into marijuana's effects, including potential medical uses for marijuana and its derivatives. Our review of the available evidence and the published clinical studies indicated some study design challenges that need to be addressed to ensure that future studies generate scientific data that can be used to determine whether marijuana has an accepted medical use. For example, we recommend that studies need to focus on consistent administration and reproducible dosing of marijuana, potentially through the use of administration methods other than smoking. A summary of our review of the published literature on the clinical uses of marijuana, including our recommendations for future research, is attached to this document.

FDA and NIDA also believe that work continues to be needed to ensure support by the federal government for the efficient conduct of clinical research using marijuana and its derivatives. Concerns have been raised about whether the existing federal regulatory system is flexible enough to respond to increased interest in research into the potential therapeutic uses of marijuana and marijuana-derived drugs. For instance, several states have moved to facilitate marijuana research and have directly questioned whether, for instance, research marijuana may be procured from sources other than the existing single NIDA contractor.[1] The leaders of the Senate Caucus on International Narcotics Control have asserted that DEA registration "present[s] significant practical problems for researchers."[2] In addition, they stated that "it is unclear why marijuana is the only Schedule I substance for which [Public Health Service (PHS)] review and approval is required."[3]

Discrete Aspects of Federal Marijuana Oversight for Potential Review

Upon examining the current federal regulatory system, FDA and NIDA note the following discrete aspects of marijuana oversight that might be reviewed by HHS or DOJ/DEA, as appropriate, with the goal of promoting efficient and scientifically rigorous research with marijuana and its constituents. Interagency coordination may be necessary to ensure that any

[1] A Colorado statute directs the state attorney general to "seek authority from the federal government to permit Colorado institutions of higher education to contract with [NIDA] to cultivate marijuana and its component parts for use" in state-funded marijuana research (C.R.S.A. § 25-1.5-106.5).
[2] Letter from Sen. Dianne Feinstein and Sen. Charles Grassley to Att'y Gen. Eric Holder, and Sec'y Sylvia M. Burwell (Oct. 20, 2014).
[3] *Id.*

revisions to federal marijuana regulations result in an appropriate level of oversight and are consistent with treaty obligations.

1. *DEA registration of additional cultivators of marijuana for research*
   There is currently only one cultivator of marijuana that is registered with DEA for that purpose. DEA may wish to review whether, consistent with statutory requirements and any applicable treaty obligations, it may register additional cultivators of marijuana.

2. *PHS review of marijuana research protocols*
   PHS review of research protocols is not required in order to conduct research of other substances, including research of other Schedule I substances. Many aspects of PHS review arguably duplicate FDA's review of investigational new drug (IND) applications. HHS may wish to consider whether the PHS review process is unnecessary and could be discontinued.[4]

3. *Registration requirements for researchers of marijuana-derived drugs*
   Researchers of Schedule I drugs, including marijuana and marijuana-derived drugs, must submit research protocols to be reviewed by DEA in order to become registered to conduct such research. DEA may wish to consider whether it may invoke its statutory waiver authority, under 21 USC § 822(d), to waive the registration requirement for certain researchers of marijuana or marijuana-derived drug products.[5] For instance, DEA may wish to consider whether such a waiver might be appropriate if it were subject to certain conditions, such as compliance with FDA requirements (e.g., an effective IND), or by limiting the waiver's applicability to research with certain marijuana-derived constituents (e.g., cannabidiol (CBD)) that may have reduced abuse potential. (An HHS analysis of the abuse potential of these constituents, as described in #4 below, may be useful to inform this decision.)

4. *Evaluation of the abuse potential of certain marijuana constituents*
   Similar to the current "8-factor analysis" conducted for marijuana, HHS may wish to consider whether a similar evaluation conducted for CBD or other constituents of marijuana could help inform decision-making about those constituents. For example, depending on the outcome, such an evaluation could help provide a basis for a recommendation to remove those constituents from Schedule I or could support reduced restrictions on research of the constituents, such as the limited DEA registration waiver for researchers discussed in #3 above. Removal of certain marijuana constituents from Schedule I may make it easier to conduct rigorous scientific studies of those constituents to support submission of a new drug application to FDA. We note that the leaders of the Senate Caucus on International Narcotics Control have recently requested that HHS and

[4] In 2014, FDA and NIDA separately endorsed dissolving the PHS committee and presented that recommendation to the Office of the Assistant Secretary for Health.
[5] 21 USC 822(d) provides: "The Attorney General may, by regulation, waive the requirement for registration of certain manufacturers, distributors, or dispensers if he finds it consistent with the public health and safety."

DOJ evaluate the appropriate schedule of CBD.[6] In order to meet this request, a study of the human abuse potential of CBD would likely be needed, because sufficient information in this area is not yet available.

5. *Reassessment of the Legal and Regulatory Framework for Marijuana Rescheduling* NIDA points out that another potential area for review is the legal and regulatory framework applied to (1) the assessment of abuse liability for substances in Schedule I (including the comparative standard used to assess the relative risk of abuse) and (2) the assessment of currently accepted medical use for drugs that have not been approved by FDA. While potentially daunting (depending on its scope and nature), re-evaluation of the legal and regulatory framework by DOJ/DEA and HHS could identify ways to encourage appropriate scientific research into the potential therapeutic uses of marijuana and its constituents.

In summary, both FDA and NIDA believe that it is important to continue to review the federal support for research into the potential therapeutic uses of marijuana, and that there is a potential public health value in exploring options like those outlined above with a goal of promoting efficient and scientifically rigorous research.

CONCLUSION

FDA and NIDA have evaluated the medical and scientific information available on marijuana in accordance with 21 U.S.C. § 811(b)-(c) and recommend that the available data warrant that marijuana be maintained in Schedule I of the CSA. We recommend that these findings be conveyed to the DEA Administrator.

We have prepared, for your signature, a letter of transmittal to the DEA Administrator, which includes the necessary scientific and medical evaluation and scheduling recommendation documents in response to the two petitions/requests from DEA recommending the maintaining of marijuana in Schedule I of the CSA. We have also attached our review of the published clinical studies.

Stephen M. Ostroff, M.D.

Attachments

[6] On May 13, 2013, the Caucus leaders requested that "HHS, in concert with DOJ, immediately evaluate the factors determinative of control or removal from [CSA] schedules for CBD, and make a scheduling recommendation for it...." Letter from Sen. Dianne Feinstein and Sen. Charles Grassley to Sec'y Sylvia M. Burwell (May 13, 2015).

DECISION

Approved _____ Disapproved _____ Date 6/3/15

JUN - 3 2015

The Honorable Chuck Rosenberg
Acting Administrator
Drug Enforcement Administration
U.S. Department of Justice
8701 Morrissette Drive
Springfield, VA 22152

Dear Mr. Rosenberg:

Pursuant to the Controlled Substances Act (CSA, 21 U.S.C. § 811(b), (c), and (f)), the Department of Health and Human Services (HHS) is recommending that marijuana continue to be maintained in Schedule I of the CSA.

The Food and Drug Administration (FDA) and the National Institutes of Health's National Institute on Drug Abuse (NIH/NIDA) have also considered the abuse potential and dependence-producing characteristics of marijuana.

Marijuana meets the three criteria for placing a substance in Schedule I of the CSA under 21 U.S.C 812(b)(1). As discussed in the enclosed analyses, marijuana has a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision. Accordingly, HHS recommends that marijuana be maintained in Schedule I of the CSA. Enclosed are two documents prepared by FDA's Controlled Substance Staff (in response to petitions filed in 2009 by Mr. Bryan Krumm and in 2011 by Governors Lincoln D. Chafee and Christine O. Gregoire) that form the basis for the recommendation. Pursuant to the requests in the petitions, FDA broadly evaluated marijuana, and did not focus its evaluation on particular strains of marijuana or components or derivatives of marijuana.

FDA's Center for Drug Evaluation and Research's current review of the available evidence and the published clinical studies on marijuana demonstrated that since our 2006 scientific and medical evaluation and scheduling recommendation responding to a previous DEA petition, research with marijuana has progressed. However, the available evidence is not sufficient to determine that marijuana has an accepted medical use. Therefore, more research is needed into marijuana's effects, including potential medical uses for marijuana and its derivatives. Based on the current review, we identified several methodological challenges in the marijuana studies published in the literature. We recommend they be addressed in future clinical studies with marijuana to ensure that valid scientific data are generated in studies evaluating marijuana's safety and efficacy for therapeutic use. For example, we recommend that studies need to focus on consistent administration and reproducible dosing of marijuana, potentially through the use of

administration methods other than smoking. A summary of our review of the published literature on the clinical uses of marijuana, including recommendations for future studies, is attached to this document.

FDA and NIDA also believe that work continues to be needed to ensure support by the federal government for the efficient conduct of clinical research using marijuana. Concerns have been raised about whether the existing federal regulatory system is flexible enough to respond to increased interest in research into the potential therapeutic uses of marijuana and marijuana-derived drugs. HHS welcomes an opportunity to continue to explore these concerns with DEA.

Should you have any questions regarding these recommendations, please contact Corinne P. Moody, Science Policy Analyst, Controlled Substance Staff, Center for Drug Evaluation and Research, FDA, at (301) 796-3152.

Sincerely yours,

Karen B. DeSalvo, MD, MPH, MSc
Acting Assistant Secretary for Health

Enclosures

U.S. Department of Justice
Drug Enforcement Administration

Office of the Administrator *Springfield, VA 22152*

August 11, 2016

The Honorable Gina M. Raimondo
Governor of Rhode Island
82 Smith Street
Providence, Rhode Island 02903

The Honorable Jay R. Inslee
Governor of Washington
P.O. Box 40002
Olympia, Washington 98504-0002

Mr. Bryan A. Krumm
[redacted]

Dear Governor Raimondo, Governor Inslee, and Mr. Krumm:

The enclosed materials provide the legal and factual bases for our decision, in response to your petitions, regarding the rescheduling of marijuana.[1] I will get to that decision, but I will first highlight broader considerations with respect to (1) the law regarding drug scheduling and (2) the current state of marijuana research.

The Law Regarding Drug Scheduling:

The Controlled Substances Act (CSA) mandates that scheduling decisions be based on medical and scientific data and other data bearing on the relative abuse potential of the drug. Under the CSA, the Food and Drug Administration (FDA), in consultation with the National Institute on Drug Abuse (NIDA), reviews, analyzes, and assesses that data and its medical and scientific conclusions legally bind the Drug Enforcement Administration (DEA).

The FDA and the DEA make a determination based on a full review of the relevant scientific and medical literature regarding marijuana. That process, too, is outlined in the enclosed materials.

A substance is placed in Schedule I if it has no currently accepted medical use in treatment in the United States, a lack of accepted safety for use under medical supervision, and a high potential for abuse. These criteria are set by statute.

[1] Governors Raimondo and Inslee succeeded petitioner Governors Chafee and Gregoire, respectively.

Schedule I includes some substances that are exceptionally dangerous and some that are less dangerous (including marijuana, which is less dangerous than some substances in other schedules). That strikes some people as odd, but the criteria for inclusion in Schedule I is not relative danger.

In that sense, drug scheduling is unlike the Saffir-Simpson scale or the Richter scale. Movement up those two scales indicates increasing severity and damage (for hurricanes and earthquakes, respectively); not so with drug scheduling. It is best not to think of drug scheduling as an escalating "danger" scale – rather, specific statutory criteria (based on medical and scientific evidence) determine into which schedule a substance is placed.

Marijuana Research:

Research is the bedrock of science, and we will – as we have for many years – support and promote legitimate research regarding marijuana and its constituent parts. For instance, DEA has never denied an application from a researcher to use lawfully produced marijuana in a study determined by the Department of Health and Human Services (HHS) to be scientifically meritorious.

In fact, during the last two plus years, the total number of individuals and institutions registered with DEA to research marijuana, marijuana extracts, derivatives, and tetrahydrocannabinols (THC) has more than doubled, from 161 in April 2014 to 354 at present. Some of the ongoing research includes studies of the effects of smoked marijuana on human subjects. Folks might be surprised to learn that we support this type of research. But, we do.

DEA and NIDA have also increased the amount of marijuana available for research. Indeed, we consistently meet legitimate demand by researchers for marijuana. Currently, NIDA is filling requests for research marijuana in an average of 25 days.

We will continue to work with NIDA to ensure that there is a sufficient supply of marijuana and its derivatives (in terms of quantity and the variety of chemical constituents) to support legitimate research needs. This includes approving additional growers of marijuana to supply researchers. Details of this proposal to support legitimate research will be published in the Federal Register.

Further, in December 2015, we waived certain regulatory requirements for researchers conducting FDA-authorized clinical trials on cannabidiol (CBD), a constituent part of marijuana. These waivers, when granted, enable researchers to modify or expand the scope of their studies more easily. Currently, there are 90 researchers registered with the DEA to conduct CBD research on human subjects. We have approved every waiver application that has been submitted by these researchers – to date, a total of 47.

If, for instance, CBD proves to be safe and effective for the treatment of a specific medical condition, such as childhood epilepsy (some trials have shown promise), that would be a wonderful and welcome development. But we insist that CBD research – or any research – be sound, scientific, and rigorous before a product can be authorized for medical use. That is specifically – and properly – the province of the FDA.

DEA continues to work on other measures to support marijuana research. For instance, DEA is building an online application system for researchers to apply for Schedule I research registrations, including for marijuana. DEA also is drafting clear guidance to assist Schedule I researchers in that application process.

The Decision:

The FDA drug approval process for evaluating potential medicines has worked effectively in this country for more than 50 years. It is a thorough, deliberate, and exacting process grounded in science, and properly so, because the safety of our citizens relies on it.[2]

Using established scientific standards that are consistent with that same FDA drug approval process and based on the FDA's scientific and medical evaluation, as well as the legal standards in the CSA, marijuana will remain a schedule I controlled substance. It does not have a currently accepted medical use in treatment in the United States, there is a lack of accepted safety for its use under medical supervision, and it has a high potential for abuse.

If the scientific understanding about marijuana changes – and it could change – then the decision could change. But we will remain tethered to science, as we must, and as the statute demands. It certainly would be odd to rely on science when it suits us and ignore it otherwise.

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[2] The FDA's scientific assessment determines the safety and efficacy of drugs intended for human consumption. The FDA's team, charged with conducting that assessment, consists of clinical pharmacologists, epidemiologists, toxicologists, physicians, chemists, statisticians and other scientists, working together to ensure approved drugs are safe and effective. As our partners at HHS note, "[An] expert [in this discipline] is an individual qualified by scientific training and experience to evaluate the safety and effectiveness of a drug." Although medical doctors are highly trained and qualified to treat patients with FDA-approved drugs, as HHS notes, "[m]edical practitioners who are not experts in evaluating drugs are not qualified to determine whether a drug is generally recognized as safe or effective or meets NDA (New Drug Application) requirements." 57 FR 10499. Simply put, evaluating the safety and effectiveness of drugs for their intended use is a highly specialized endeavor undertaken by the FDA's Center for Drug Evaluation and Research.

The DEA and FDA continue to believe that scientifically valid and well-controlled clinical trials conducted under investigational new drug applications are the proper way to research all potential new medicines, including marijuana. Furthermore, we believe that the drug approval process is the proper way to assess whether a product derived from marijuana or its constituent parts is safe and effective for medical use.

We fully support legitimate medical and scientific research on marijuana and its constituent parts and we will continue to seek ways to make the process for those researchers more efficient and effective.

Sincerely,

Chuck Rosenberg
Acting Administrator

Enclosures

Office of the Attorney General

Washington, D. C. 20530

May 1, 2017

The Honorable Mitch McConnell
Majority Leader
U.S. Senate
Washington, DC 20510

The Honorable Charles Schumer
Minority Leader
U.S. Senate
Washington, DC 20510

The Honorable Paul Ryan
Speaker
U.S. House of Representatives
Washington, DC 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
Washington, DC 20515

Re: Department of Justice Appropriations

Dear Senators McConnell and Schumer, Speaker Ryan, and Representative Pelosi:

I write to renew the Department of Justice's opposition to the inclusion of language in any appropriations legislation that would prohibit the use of Department of Justice funds or in any way inhibit its authority to enforce the Controlled Substances Act (CSA).

As you know, the most recent continuing resolution contained a rider that restricts the Department from using appropriated funds to prevent certain states "from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana," even though marijuana remains unlawful under the Controlled Substances Act. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015); Further Continuing and Security Assistance Appropriations Act, 2017, Pub. L. No. 114-254, § 101, 130 Stat. 1005, 1006 (2016) (extending 2016 Consolidated Appropriations Act).

Last year, and over the Department's objection, the U.S. Court of Appeals for the Ninth Circuit misinterpreted this provision broadly to apply both to Department actions that prevent states from implementing their laws regarding medical marijuana and to Department prosecutions of certain individuals and organizations that operate under those laws. *United States v. Mcintosh*, 833 F.3d 1163 (9th Cir. 2016). The court held that the Department may not prosecute violations of the CSA with respect to marijuana unless a court concludes that the individuals or organizations are not in compliance with state medical marijuana law. As a result, in the Ninth Circuit, many individuals and organizations that are operating in violation of the CSA and causing harm in their communities may invoke the rider to thwart prosecution.

I believe it would be unwise for Congress to restrict the discretion of the Department to fund particular prosecutions, particularly in the midst of an historic drug epidemic and potentially long-term uptick in violent crime. The Department must be able to use all lawful tools available to combat the transnational drug organizations and dangerous drug traffickers who threaten American lives.

Drug traffickers already cultivate and distribute marijuana inside the United States under the guise of state medical marijuana laws. In particular, Cuban, Asian, Caucasian, and Eurasian criminal organizations have established marijuana operations in state-approved marijuana markets. E.g., U.S. Dep't of Justice & Drug Enforcement Administration, *National Drug Threat Assessment* 116-17 (2016). The individuals in these organizations often find a place for themselves within state regulatory systems. For example, just this past month in Colorado, state authorities alleged that an individual who held an active Colorado license for operating a medical marijuana business was the ringleader of a criminal organization that also shipped marijuana out of state. *See* Jesse Paul, *Eight of 10 People Indicted in Colorado Marijuana Trafficking Operation Listed as Hunting State for Licenses*, Denver Post (Mar. 28, 2017).

Smoking marijuana, in addition, has significant negative health effects. According to the National Institute on Drug Abuse, marijuana use is linked to an increased risk of psychiatric disorders such as psychosis, respiratory ailments such as lung infections, cognitive impairments such as IQ loss, and substance use disorder and addiction. NIDA, *Drug Facts on Marijuana* (Feb. 2017). One recent study conducted in part by researchers at Duke University showed, for example, that people who started smoking marijuana frequently in their teens lost an average of eight IQ points by middle age. *Id.* It is thus unsurprising that in the last administration both the Department of Health and Human Services and the DEA concluded that "marijuana has a high potential for abuse, no currently accepted medical use in treatment in the United States, and a lack of accepted safety for use under medical supervision." Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53,688, 53,689 (Aug. 12, 2016).

For these reasons, I respectfully request that you oppose the inclusion of such language in Department appropriations. Please do not hesitate to contact me if you have any questions.

Sincerely,

Jefferson B. Sessions III
Attorney General

cc: The Honorable Richard Shelby, Chairman, Senate Subcommittee on Commerce, Justice, Science, and Related Agencies
The Honorable Jeanne Shaheen, Ranking Member, Senate Subcommittee on Commerce, Justice, Science, and Related Agencies
The Honorable John Culberson, Chairman, House Subcommittee on Commerce, Justice, Science, and Related Agencies
The Honorable José Serrano, Ranking Member, House Subcommittee on Commerce, Justice, Science, and Related Agencies

cc: The Honorable Thad Cochran, Chairman, Senate Committee on Appropriations
The Honorable Patrick Leahy, Vice Chairman, Senate Committee on Appropriations
The Honorable Rodney P. Frelinghuysen, Chairman, House of Representatives Committee on Appropriations
The Honorable Nita M. Lowey, Ranking Member, House of Representatives Committee on Appropriations

Statement on Signing the Consolidated Appropriations Act, 2017

May 5, 2017

Today I have signed into law H.R. 244, the Consolidated Appropriations Act, 2017, which authorizes appropriations that fund the operation of the Federal Government through September 30, 2017.

Certain provisions of this bill (e.g., Division C, sections 8049, 8058, 8077, 8081, and 8116; Division J, under the heading "Contribution for International Peacekeeping Activities") would, in certain circumstances, unconstitutionally limit my ability to modify the command and control of military personnel and materiel or unconstitutionally vest final decision-making authority in my military advisers. Further, Division B, section 527; Division C, section 8101; and Division F, section 517 each restrict the transfer of Guantanamo detainees to the United States; Division C, section 8103 restricts the transfer of Guantanamo detainees to foreign countries and does not include an exception for when a court might order the release of a detainee to certain countries. I will treat these, and similar provisions, consistently with my constitutional authority as Commander in Chief.

Certain provisions (e.g., Division C, sections 8040, 8075, 8114, 9005, 9011, 9014, and under the headings "Operation and Maintenance, Defense-Wide," "Afghanistan Security Forces Fund," "Counter-ISIL Train and Equip Fund," and "Joint Improvised Threat Defeat Fund") require advance notice to the Congress before the President may direct certain military actions or provide certain forms of military assistance. In approving this bill, I wish to reiterate the longstanding understanding of the executive branch that these types of provisions encompass only military actions for which providing advance notice is feasible and consistent with my constitutional authority and duty as Commander in Chief to protect national security.

Numerous provisions could, in certain circumstances, interfere with the exercise of my constitutional authorities to negotiate international agreements (e.g., Division B, sections 509, 519, 530; Division J, sections 7010(c), 7013(a), 7025(c), 7029, 7031(e)(2), 7037, 7042, 7043, 7044, 7045, 7048, 7060, 7070, and 7071), to receive ambassadors (e.g., Division J, section 7031(c)), and to recognize foreign governments (e.g., Division J, section 7070(b)(2)(A)). My Administration will treat each of these provisions consistently with my constitutional authorities in the area of foreign relations.

Division E, section 622 prohibits the use of funds to pay the salaries and expenses for several advisory positions in the White House. The President has well-established authority to supervise and oversee the executive branch and to obtain advice in furtherance of this supervisory authority. The President also has the prerogative to obtain advice that will assist him in carrying out his constitutional responsibilities, not only from executive branch officials and employees outside the White House, but also from advisers within it. Legislation that significantly impedes my ability to supervise or obtain the views of appropriate senior advisers violates the separation of powers by undermining my ability to exercise my constitutional responsibilities, including to take care that the laws be faithfully executed. My Administration will, therefore, construe section 622 consistently with these Presidential prerogatives.

Division B, section 537 provides that the Department of Justice may not use any funds to prevent implementation of medical marijuana laws by various States and territories. I will treat

this provision consistently with my constitutional responsibility to take care that the laws be faithfully executed.

Several provisions (e.g., Division C, section 10006(b); Division D, section 401; Division J, section 7041(b)(3); Division N, sections 310, 311, 402, 502(d), and 503) mandate or regulate the submission of certain executive branch information to the Congress. I will treat these provisions in a manner consistent with my constitutional authority to withhold information that could impair foreign relations, national security, the deliberative processes of the executive branch, or the performance of my constitutional duties. In particular, Division E, section 713(1) and (2) prohibits the use of appropriations to pay the salary of any Federal officer or employee who interferes with or prohibits certain official communications between Federal employees and Members of Congress or who takes adverse action against an officer or employee because of such communications. I will construe these provisions not to apply to any circumstances that would detract from my authority to supervise, control, and correct employees' communications with the Congress related to their official duties, including in cases where such communications would be unlawful or could reveal confidential information protected by executive privilege.

Division C, section 8009 prohibits the use of funds to initiate a special access program unless the congressional defense committees receive 30 days' advance notice. The President's authority to classify and control access to information bearing on the national security flows from the Constitution and does not depend upon a legislative grant of authority. Although I expect to be able to provide the advance notice contemplated by section 8009 in most situations as a matter of comity, situations may arise in which I must act promptly while protecting certain extraordinarily sensitive national security information. In these situations, I will treat these sections in a manner consistent with my constitutional authorities, including as Commander in Chief.

Several provisions (e.g., Division C, section 8134; Division J, section 7063; and Division K, section 418) prohibit the use of funds to deny an Inspector General access to agency records or documents. I will construe these, and similar provisions, consistently with my authority to control the dissemination of information protected by executive privilege.

Several provisions prohibit the use of funds to recommend legislation to the Congress (e.g., Division A, section 716; Division C, sections 8005, 8014, 8070(a)(2), 8076; and Division H, section 210), or require recommendations of legislation to the Congress (e.g., Division C, section 8012(b), 8035(b); Division F, section 532; Division G, sections 101, 102, and a proviso under the heading "Administrative Provisions—Forest Service"; Division N, sections 605(c) and 610). Because the Constitution gives the President the authority to recommend "such Measures as he shall judge necessary and expedient" (Article II, section 3), my Administration will continue to treat these, and similar provisions, as advisory and non-binding.

Numerous provisions authorize congressional committees to veto a particular use of appropriated funds (e.g., Division C, section 8058), or condition the authority of officers to spend or reallocate funds on the approval of congressional committees (e.g., Division A, sections 702, 706, and 717; Division D, sections 101(a) and 201(a); Division G, sections 403 and 409; Division K, sections 188, 222, 405 and 406). These are impermissible forms of congressional aggrandizement in the execution of the laws other than by enactment of statutes. My Administration will notify the relevant committees before taking the specified actions and will accord the recommendations of such committees all appropriate and serious consideration.

but it will not treat spending decisions as dependent on the approval of congressional committees.

My Administration shall treat provisions that allocate benefits on the basis of race, ethnicity, and gender (e.g., Division B, under the heading "Minority Business Development"; Division C, sections 8016, 8021, 8038, and 8042; Division H, under the headings "Departmental Management Salaries and Expenses," "School Improvement Programs," and "Historically Black College and University Capital Financing Program Account"; Division K, under the heading "Native American Housing Block Grants"; and Division K, section 213) in a manner consistent with the requirement to afford equal protection of the laws under the Due Process Clause of the Constitution's Fifth Amendment.

DONALD J. TRUMP

The White House,
May 5, 2017.

NOTE: H.R. 244, approved May 5, was assigned Public Law No. 115–31. An original was not available for verification of the content of this statement.

Categories: Bill Signings and Vetoes : Consolidated Appropriations Act, 2017, signing statement.

Subjects: Budget, Federal : Appropriations :: Consolidated; Cuba : Guantanamo Bay, U.S. Naval Base :: Detention of alleged terrorists; Defense and national security : Classified national security information; Health and medical care : Marijuana, medical uses; Legislation, enacted : Consolidated Appropriations Act, 2017; Presidency, U.S. : Constitutional role and powers; Presidency, U.S. : Separation of powers; Terrorism : Counterterrorism efforts; Terrorism : Transfer of detainees at Guantanamo Bay.

DCPD Number: DCPD201700312.

Office of the Attorney General
Washington, D. C. 20530

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).