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With states passing marijuana laws, what does the federal government do?

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As the author of Illinois' Medical Marijuana Law FAQ Handbook, perhaps the most common question posed to me concerning Illinois' legalization of medical marijuana is, "How does the federal government intend to respond to Illinois' Compassionate Use of Medical Cannabis Pilot Program Act and other states that have adopted a similar law?"

It appears that the federal government has provided us with even more clarity going into 2015.

Originally, in October and June 2011, the U.S. Department of Justice issued guidance to federal prosecutors concerning its position pertaining to medical marijuana enforcement pursuant to the federal Controlled Substance Act.

In the 2009 and 2011 memoranda, the Justice Department stated that it was not "an efficient use of federal resources to focus enforcement efforts on seriously ill individuals or on their individual caregivers."

Two years later, in a memorandum dated Aug. 29, 2013, former deputy U.S. attorney general James M. Cole offered further guidance in light of many states legalizing the possession of small quantities of marijuana.

The August 2013 memorandum stated, in effect, that the federal government will rely on, and expect, the applicable states and local law enforcement agencies to address marijuana activity within their borders through the implementation of strong and effective regulatory enforcement and policing systems of their state's drug enforcement and narcotic laws.

Instead, the U.S. government and its law enforcement and prosecutorial resources will only be exercised when the use, possession, cultivation or distribution of marijuana threatens any of the following eight prevention priorities of the federal government:

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

The financial and banking industry voiced its concerns that the Justice Department memo left unaddressed the federal government's position with respect to the impact of states' marijuana laws on certain financial crimes for which marijuana-related conduct is a predicate.

Consequently, the department issued a memorandum dated Feb. 14, 2014, to provide banks and financial institutions additional yet limited guidance. The memorandum warned that the money-laundering statutes, the unlicensed money remitter statute and the Bank Secrecy Act remain in effect with respect to marijuana-related conduct.

It advised that financial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution and conduct transactions with money generated by marijuana-related conduct could similarly face criminal liability.

The Justice Department then qualified the foregoing by stating that 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.

Therefore, when determining whether to charge financial institutions with any of aforementioned offenses based on marijuana-related violations of the Controlled Substance Act, federal prosecutors were advised to apply the eight enforcement priorities described in the Aug. 29 memorandum with respect to its transactions.

In addition, the Justice Department warned that financial institutions must apply appropriate policies, procedures and controls sufficient to address the risks posed by marijuana business clients, including by conducting customer due diligence designed to identify conduct that relates to any of the eight prevention priorities.

In December, buried within its \$1.1 trillion approved spending bill, Congress approved legislation that many marijuana opponents interpret as providing that in states where medical marijuana is legal, there would no longer be a need to fear raids by federal drug enforcement agents at state-approved medical cannabis dispensaries or related cultivation centers.

Section 538 states, in effect, that none of the funds in the Controlled Substance Act can be used by the Justice Department to prevent any of the 33 states listed therein, including Illinois, Michigan and Nevada, from implementing their own state laws that authorize the use, distribution, possession or cultivation of medical marijuana.

What appears clear is a common theme issued by the Justice Department and Congress. That is, the federal government is not interested in exercising or exhausting its law enforcement and prosecutorial resources to prosecute those who lawfully participate (in accordance with their state's marijuana laws) in the use, distribution, possession or cultivation marijuana so long as states are doing their job to closely regulate and enforce its laws related to marijuana use and/or does not any conflict with any of its eight prevention priorities expressed by the federal government.

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