HAZY FUTURE: THE IMPACT OF FEDERAL AND STATE LEGAL DISSONANCE ON MARIJUANA BUSINESSES

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INTRODUCTION

Under the Controlled Substances Act of 1970 (“CSA”), it is a federal crime to possess, cultivate, or distribute marijuana. Historically, states largely mirrored the CSA’s criminal treatment of marijuana, with state laws making the possession, growth, and distribution of marijuana a state crime. However, starting in 1996, many states began legalizing or decriminalizing the use of marijuana for medical purposes under state law. In November 2012, voters in Colorado and Washington legalized the possession of marijuana for recreational purposes, citing marijuana enforcement costs and added tax revenue as rationales for the new policies. Colorado and Washington have since developed regulatory frameworks for the production and sale of recreational marijuana. Most recently, ballot initiatives legalizing marijuana passed in Oregon, Alaska, and the District of Columbia.

While state laws regulating marijuana have changed dramatically in the past few decades, change to the federal law through either legislation or executive action has been slow. Instead, the Department of Justice (“DOJ”) under President Obama has issued a series of memoranda encouraging United States Attorneys to exercise prosecutorial discretion to target specified federal marijuana enforcement priorities, including preventing the use of marijuana by minors, ensuring state-authorized marijuana sales do not intersect with other illegal activity, preventing driving under the influence of marijuana, and precluding marijuana use on public and federal land. These priorities represent a re-focus away from the broad prosecution of businesses operating in compliance with a state regulation. Despite

* J.D., Georgetown University Law Center, 2015. © 2015, Rosalie Winn.
6. The most notable federal legislation on marijuana in recent years is the 2015 Consolidated and Further Continuing Appropriations Act passed in December 2014, which prohibits the Department of Justice from using funds appropriated under the Act for enforcement actions against states that implement their own medical marijuana laws. See Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130 (2014). However, no changes were made to the Controlled Substances Act.
these memoranda, the underlying conflict between federal and state criminality for marijuana will continue to have a significant impact on businesses conducting sales of recreational marijuana because transactions that are legal and regulated under state law remain illegal under federal law. These recreational marijuana businesses face considerable uncertainty and risk as federal prosecutors retain full discretion to enforce the CSA and other anti-trafficking statutes against marijuana businesses and the financial institutions that work with the marijuana industry.

The discrepancy between federal and state marijuana law and the resulting uncertainty for marijuana businesses undermines the ability of states such as Colorado and Washington to develop a successful, regulated marijuana industry as intended through legalization. In comparison to the prosecutorial discretion approach utilized thus far by the Obama Administration, an administrative rescheduling of marijuana in the CSA by the President would align federal and state criminality, reduce the risks faced by marijuana businesses, and enable the development of successful, regulated marijuana industries in states that have passed legalization legislation.

Section I of this Note reviews federal authority to regulate marijuana, including the listing of marijuana as a Schedule I controlled substance under the CSA, the Supreme Court’s holding that the federal government has authority under the Commerce Clause to enforce the CSA’s prohibitions on in-state cultivation and distribution, and federalism concerns resulting from the discrepancies between state and federal marijuana laws. Section II provides an overview of evolving federal marijuana enforcement by the Obama Administration, beginning with the series of enforcement guidance memoranda issued by the Department of Justice and the Department of the Treasury, and continuing with a summary of recent federal prosecutions against medical marijuana operations. Section III introduces the new recreational marijuana regulatory frameworks developed in Washington and Colorado. Section IV examines the disconnection between federal and state law and its impact on businesses seeking to sell or distribute marijuana under state law—including continued risks of federal prosecution for recreational sales and difficulties in conducting financial transactions under federal anti-trafficking and money-laundering laws. Lastly, Section V considers alternatives for action at the federal level to reduce discrepancies between state and federal law, including an administrative rescheduling of marijuana under the CSA by the Attorney General.

I. FEDERAL AUTHORITY FOR CRIMINAL MARIJUANA SANCTIONS

Pursuant to its authority under the Commerce Clause of the Constitution, Congress has made the cultivation, distribution, and possession of marijuana a

7. The terms “marijuana businesses” and “marijuana industry” are used throughout this Note to describe businesses that operate legally under state law.
federal crime. Part A of this Section reviews the Controlled Substances Act, which establishes federal criminal sanctions for possession, cultivation, distribution, and sale of listed drugs and related anti-money laundering statutes. Part B discusses Gonzales v. Raich, which upheld the federal government’s authority under the Commerce Clause to prosecute in-state cultivation and possession of marijuana. Lastly, Part C considers questions of federalism in the context of marijuana laws.

A. The Controlled Substances Act and Money Laundering Statutes

The Controlled Substances Act of 1970 makes it a federal crime to “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” The CSA establishes five schedules of controlled substances, with placement or removal of a drug on a schedule based on potential for abuse, scientific evidence, patterns and scope of abuse, risks to the public health, dependence liability, and whether the substance is a precursor to an already-controlled substance. Schedule I is the most restrictive schedule in the CSA, as substances listed under Schedule I must have “a high potential for abuse,” “no currently accepted medical use in treatment in the United States,” and there must be “a lack of accepted safety for use of the drug or other substance under medical supervision.”

While marijuana has been listed as a Schedule I Controlled Substance since the passage of the CSA, the Attorney General has the authority under the CSA to “transfer between... schedules” or “remove any drug... from the schedules” after a formal rulemaking and a scientific and medical evaluation and recommendation from the Secretary of Health and Human Services. Despite this authority, the Drug Enforcement Administration (“DEA”), the responsible agency within the Justice Department, has consistently refused to consider moving marijuana to a different schedule or delisting marijuana from the CSA.

Because marijuana is a controlled substance, banks and other financial institutions working with marijuana producers or suppliers may be charged as co-
conspirators under the CSA. In addition to potential prosecution under the CSA, banks may also be investigated and prosecuted under federal money-laundering statutes, and may be held liable under the Bank Secrecy Act for failing to report relationships with marijuana businesses. Title 18 of the United States Code makes money laundering a criminal offense, and sections 1956 and 1957 provide that any defendant conducting or attempting to conduct a financial transaction with knowledge that the property involved in the transaction represents the proceeds of an unlawful activity, which includes violations of the CSA, may be subject to criminal penalties. The federal Bank Secrecy Act, as amended by the PATRIOT Act, imposes a legal obligation on financial institutions to know their customers’ businesses and sources of money, and requires the implementation of anti-money laundering programs and the reporting of transactions that appear to be illicit. A “willful” failure by banks to establish or maintain anti-money laundering programs exposes the banks to criminal sanctions. Due to this potential liability under the CSA and federal money laundering and banking statutes, banks have been reluctant to deal with the marijuana industry.

B. Gonzales v. Raich: Commerce Clause Authority for Federal Prosecutions of Marijuana under the CSA

In 1996, California voters passed Proposition 215 to enable access to marijuana for “seriously ill” residents. As codified into California law, the Compassionate Use Act of 1996 exempted patients from criminal prosecution for possession or cultivation of medical marijuana under the recommendation of a physician. In 2002, local law enforcement and the federal Drug Enforcement Administration raided the home of an ill woman who, pursuant to the direction of her physician, was cultivating marijuana for personal use. Although local law enforcement concluded the woman’s actions were legal under California law, the federal agents

18. Id.; M. Kendall Day, Prosecuting Financial Institutions and Title 31 Offenses, 61 U.S. ATT’Y BULL. 1, 19 (Sept. 2013), http://www.justice.gov/sites/default/files/usao/legacy/2013/09/16/usab6105.pdf (“Banks have an obligation to report or, in some cases, to refuse to conduct transactions they find suspicious—those that appear to be from an illegitimate source.”).
20. Id. § 1956(a)(1); U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL 9-2101 (2015).
22. Id. § 5318(h); see also Day, supra note 18, at 19.
24. Kamin & Warner, supra note 17.
26. Id. § 11362.5(b)(1)(B).
27. Gonzalez v. Raich, 545 U.S. 1, 6–7 (2005).
seized and destroyed her marijuana plants. In *Gonzales v. Raich*, respondent Angel Raich, along with other California medical marijuana users, sought injunctive and declaratory relief against the Attorney General of the United States and the head of the DEA to prohibit the enforcement of the CSA against users in compliance with California state law. The plaintiffs claimed that the CSA’s prohibition on marijuana as applied to intrastate use unconstitutionally exceeded Congress’s authority under the Commerce Clause, and thus impinged upon California’s sovereign ability to govern itself.

The Supreme Court upheld the federal government’s authority under the Commerce Clause to take enforcement actions against intrastate uses of marijuana. The majority opinion, written by Justice Stevens, rejected attempts to distinguish intrastate personal use of marijuana for medical purposes in accordance with state law from drug trafficking. Because the CSA was enacted pursuant to Congress’s Commerce Clause authority, the only question the majority considered was whether Congress’s policy judgment to include all activities related to marijuana cultivation and use in the CSA was rational. The Court declared that Congress had a “rational basis” for believing the intrastate manufacture and possession of marijuana would “substantially affect” interstate commerce, and the class of activities permitted under California law was an “essential part of [the federal government’s] larger regulatory scheme” under the CSA for the production, distribution, and consumption of drugs.

In a dissenting opinion, Justice O’Connor expressed concern about “excessive federal encroachment” on the “historic sphere of state sovereignty” related to the states’ traditional core police powers to define criminal law. The dissent emphasized that in the United States’ federalist system, the states play an important role as “laboratories” for “novel social and economic experiments,” and decried the application of the federal CSA as “extinguish[ing] that experiment.”

While *Gonzales* upheld the federal government’s authority to regulate marijuana, it did not restrict the authority of state governments to make their own laws on marijuana. Nor did the Court in *Gonzales* rule on the specific issue of whether Congress intended the CSA to preempt California’s medical marijuana statute.

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28. *Id.*
29. *Id.* at 7.
30. *Id.* at 7–8, 15.
31. *Id.* at 2.
32. *Id.* at 26–27.
33. *Id.* at 26.
34. *Id.* at 22.
35. *Id.* at 26–27.
36. *Id.* at 42 (O’Connor, J., dissenting).
37. *Id.* at 42–43 (O’Connor, J., dissenting).
C. Federalism Principles and State Marijuana Laws

The discrepancies between federal and state marijuana law in many jurisdictions raise significant questions of federalism. State and federal authorities have traditionally exercised overlapping jurisdiction in drug enforcement, making the relationship between state and federal law in this area complex. The Tenth Amendment prohibits the federal government from “commandeering” state government for federal purposes, while the Supremacy Clause dictates that where state and federal laws are incompatible, federal law will preempt state law.

The Tenth Amendment reserves to the states powers not delegated to the federal government. The Tenth Amendment has been interpreted as protecting state sovereignty when the federal government’s Article I powers are limited. The Supreme Court has ruled that the federal government may not command a state legislature to enact federal regulatory goals, nor may the federal government use state executive branch officers to enforce federal programs. Federalism and the Tenth Amendment therefore would likely prevent the federal government from requiring state legislatures to enact specific marijuana laws, or from mandating the use of state or local police forces to enforce the CSA.

While the federal government is prevented by the Tenth Amendment from forcing a state to act, the federal government may stop a state from acting if there is a conflict between federal and state law. Preemption of state law by federal law is rooted in the Supremacy Clause, which makes the Constitution and the laws of the United States the "supreme Law of the Land," although there is a presumption

39. See generally Garvey, supra note 2 (discussing enforcement difficulties created for the federal government by the "principles of federalism").
40. Id. at 2–4.
42. U.S. CONST. art. VI, cl. 2.
43. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).
44. New York, 505 U.S. at 157. Article I enumerates areas in which Congress has authority to legislate, including the powers to tax, borrow money, and regulate commerce, and grants Congress the implied authority to make all laws necessary for executing the enumerated powers. U.S. CONST. art. I § 8.
45. See id. at 166 (“The allocation of power contained in the Commerce Clause, for example, authorized Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”).
46. See Printz v. United States, 521 U.S. 898, 904–18 (1997) (describing a historical record of federalism to support the conclusion that state law enforcement officials cannot be directed to administer federal programs).
47. Cf. id. at 943 (“The Federal Government may not compel the States to enact or administer a federal regulatory program.” (quoting New York, 505 U.S. at 188)).
48. See Garvey, supra note 2, at 7.
49. U.S. CONST. art. VI, cl. 2.
against preemption when it comes to the historic police powers of the state.\(^50\) While there are three traditional categories of preemption (express preemption, conflict preemption, and field preemption),\(^51\) the preemptive power of the CSA is limited by the statute to situations where “there is a positive conflict between [the CSA] and that State law so that the two cannot consistently stand together.”\(^52\)

Although the preemption issue has not yet been addressed in federal court, state courts have reached divergent results on whether state programs issuing identification cards for medical marijuana users are preempted by federal law. In *County of San Diego v. San Diego NORML*, a California court upheld the identification provisions of California’s medical marijuana law.\(^53\) The court found that it was not impossible to comply with both the California statute and the CSA, since the identification cards did not “insulate the bearer from federal laws.”\(^54\) In contrast, in *Emerald Steel Fabricators v. Bureau of Labor and Industries*, the Oregon Supreme Court found that a state law issuing medical marijuana identification cards was preempted, as the law amounted to the state “[a]ffirmatively authorizing a use [for marijuana] that federal law prohibits,” which created an “obstacle” to the purposes of the CSA.\(^55\)

There are significant preemption questions about more elaborate state regulatory frameworks, such as those developed in Washington and Colorado.\(^56\) These questions are not likely to be resolved in the immediate future, as the Obama Administration has announced that the Department of Justice will not seek to challenge state marijuana laws if state regulation does not threaten federal priorities.\(^57\) While the Obama administration’s decision not to seek to preempt state law has delayed federal judicial review of preemption questions, it has not

\(^{50}\) See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“[W]e start with the assumption that the historic police powers of the States were not to be superseded... unless that was the clear and manifest purpose of Congress.”).

\(^{51}\) See *Garvey*, supra note 2, at 7–13 (discussing types of preemption and their application to state marijuana laws). Express preemption exists when Congress explicitly declares in a federal statute the extent to which conflicting state laws are superseded. *Id.* at 8. Conflict preemption is found when compliance with both a state law and the federal law is impossible, or where a state law stands as a direct obstacle to a federal legislative purpose. *Id.* Finally, field preemption occurs when Congress intends a federal scheme to “occupy the field” in a particular regulatory area, such that there is no room for state regulation. *Id.* at 9.


\(^{53}\) 81 Cal. Rptr. 3d 461 (Cal. Ct. App. 2008).

\(^{54}\) Id. at 481.

\(^{55}\) 230 P.3d 518, 529 (Or. 2010).

\(^{56}\) See *Conflicts Between State and Federal Marijuana Laws: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 20–21 (2013) [hereinafter *Hearing*] (testimony of Jack Finlaw, Chief Legal Counsel, Office of Colorado Governor John W. Hickenlooper) (discussing enforcement of drug laws in Colorado after the passage of Amendment 64, which permitted limited personal use of marijuana).

\(^{57}\) See Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, Guidance Regarding Marijuana Enforcement 3 (Aug. 29, 2013), http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf [hereinafter 2013 Memorandum from James M. Cole] (providing that where state regulatory and enforcement systems address federal priorities, “enforcement of state law by state and local law enforcement and regulatory bodies should remain the primary means of addressing marijuana-related activity”).
resolved them in the longer term and leaves considerable uncertainty for marijuana businesses. Future presidential administrations with different political agendas may seek federal preemption of state regulatory frameworks for marijuana as long as marijuana is listed as a controlled substance under the CSA. If the CSA were found to preempt a state’s legalization of marijuana, that state’s regulatory regime for marijuana would be invalidated.

II. EVOLVING FEDERAL MARIJUANA ENFORCEMENT BY THE OBAMA ADMINISTRATION

The Obama Administration’s approach to enforcement of federal drug laws has evolved over the past six years, and the guidance provided to federal prosecutors has shifted as state marijuana laws have changed. Part A of this Section summarizes marijuana enforcement guidance issued by the Department of Justice and the Department of the Treasury under the Obama Administration. Part B analyzes Department of Justice enforcement actions after the issuance of the memoranda.

A. Department of Justice and Department of the Treasury Enforcement Guidance on Marijuana

Since 2009, the Department of Justice under President Obama has issued a series of four memoranda providing guidance to United States Attorneys on federal prosecutorial discretion in enforcing the CSA against marijuana cultivation, distribution, and possession, as well as against financial institutions that provide services to marijuana businesses. The Department of the Treasury has also issued guidance focusing on the due diligence reporting obligations for financial institutions transacting with marijuana businesses. The memoranda reflect the position of the current administration, but are not binding on individual


U.S. Attorneys or future presidents who may have different political priorities than President Obama, and who may vigorously prosecute marijuana violations.

Deputy Attorney General David Ogden issued the first guidance memorandum (“Ogden Memo”) to U.S. Attorneys in 2009, instructing attorneys to focus federal prosecution efforts on “significant traffickers of illegal drugs,” rather than on “individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.” The memo noted that “[o]f course, no State can authorize violations of federal law,” and stated that the memo did not “alter in any way the Department’s authority to enforce federal law,” “provide a legal defense to a violation of federal law,” or “preclude investigation or prosecution, even when there is clear and unambiguous compliance with existing state law.” The Ogden Memo formalized the Obama Administration’s policy of focusing prosecution efforts away from medical marijuana.

Deputy Attorney General James Cole issued a follow-up to the Ogden Memo in 2011 (“2011 Cole Memo”), reiterating 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 2011 Cole Memo also clarified that the Ogden Memo was never intended to shield large-scale commercial cultivation, sale, or distribution operations from federal law, “even where those activities purport to comply with state law.” Medical marijuana advocates decried the 2011 Cole Memo as a “radical departure” from the Ogden Memo, and worried that federal enforcement would “target the people who sell medical pot to the very people Cole says should be shielded from federal assault.” The 2011 Cole Memo created considerable uncertainty for the medical marijuana industry, as dispensary owners worried about the memo “send[ing] a shock through the patient community.”

Deputy Attorney General Cole issued a new guidance memo in 2013 (“2013 Cole Memo”) in response to the legalization of recreational marijuana in Colorado and Washington. The memo indicated that federal investigation and prosecution should not focus on the commercial nature of marijuana operations in states with strong regulatory frameworks for the substance, but should instead focus on...
marijuana’s impact on federal enforcement priorities. The memo outlined eight federal enforcement priorities against marijuana:

- 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.

In states that have legalized marijuana in some form and also “implemented strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana,” conduct in compliance with state regulation is less likely to threaten federal priorities. The memo envisioned that state enforcement of state law would be the “primary means of addressing marijuana-related activity.” The memo emphasized that its purpose was solely to guide investigative and prosecutorial discretion, and did not alter the DOJ’s authority to enforce federal marijuana law or create substantive or procedural rights.

At the same time it issued the 2013 Cole Memo, the DOJ sent letters to the governors of Colorado and Washington, clarifying its plans for criminal enforcement as Colorado and Washington developed regulatory schemes for recreational marijuana sales. The correspondence reiterated that the DOJ will continue to enforce the CSA, but will not seek to preempt the state regulatory frameworks, “based upon the expectation that the state and local governments will implement strong and effective regulatory and enforcement systems that address public safety, public health and other law enforcement interests.”

69. Id.
70. Id. at 1–2.
71. Id. at 3.
72. Id.
73. Id. at 4.
74. Hearing, supra note 56, at 50 (statement of Jack Finlaw, Chief Legal Counsel, Office of Colorado Governor John W. Hickenlooper).
In February 2014, Deputy Attorney General Cole issued an additional enforce-
ment memo (“2014 Cole Memo”) focusing on the application of prosecutorial
discretion in cases or investigations involving financial institutions providing
services to marijuana businesses.\(^{75}\) The 2014 Cole Memo reiterated the eight
federal enforcement priorities found in the 2013 Cole Memo and indicated that
prosecutors should focus prosecutorial efforts on financial institutions working
with marijuana businesses suspected of violating these enforcement priorities.\(^{76}\)
The Department of the Treasury issued guidance concurrently (“Treasury Guid-
ance”), clarifying the reporting obligations of financial institutions under the Bank
Secrecy Act.\(^{77}\) Financial institutions are required to file a Suspicious Activity
Report with the Treasury if they know or have reason to suspect they are working
with a marijuana business regardless of whether the business is legal under state
law, and they must flag any suspicions that a marijuana client is violating the
federal enforcement priorities.\(^{78}\)

With DOJ indicating that marijuana reclassification is “a political and policy
issue . . . [that] deserves input from Congress,”\(^{79}\) the guidance memoranda seem to
be the Obama Administration’s attempt to allow states to experiment with changes
in marijuana policy without getting deeply involved in political questions of
marijuana legalization or reclassification. President Obama has indicated that he
views legalization in Colorado and Washington as important “experiment[s]” in
addressing issues related to current drug policies—including racial disparities in
enforcement.\(^{80}\) By issuing guidance memoranda on prosecutorial discretion,
which have no binding legal force, the President appears to be enabling the
“experiment[s]” in Colorado and Washington “to go forward.”\(^{81}\) While the
guidance memos do offer some insight into federal enforcement, they do not offer
marijuana businesses certainty as a defense against individual prosecutions.
Moreover, enforcement priorities and guidance may change with future presiden-
tial administrations, further undermining the ability of marijuana businesses to rely
on the guidance.

\(^{75}\) See 2014 Memorandum from James M. Cole, \textit{supra} note 59, at 2–3.
\(^{76}\) Id.
\(^{77}\) Treasury Guidance, \textit{supra} note 60.
\(^{78}\) Id. at 3–5.
\(^{79}\) See Michelle Ye Hee Lee, \textit{Can Eric Holder change the federal drug classification of marijuana?}, \textit{WASH.
POST} (Feb. 26, 2015), http://www.washingtonpost.com/blogs/fact-checker/wp/2015/02/26/can-eric-holder-change-
the-federal-drug-classification-of-marijuana/.
\(^{80}\) See David Remnick, \textit{Going the Distance: On and off the road with President Obama}, \textit{NEW YORKER} (Jan.
27, 2014), http://www.newyorker.com/reporting/2014/01/27/140127fa_fact_remnick?currentPage=all (mention-
ing President Obama’s acknowledgment of slippery-slope arguments that may arise as a result of legalizing
marijuana).
\(^{81}\) Id.
B. Department of Justice Marijuana Prosecutions in the Obama Administration

The Department of Justice has continued to prosecute medical marijuana providers after the issuance of the Ogden and 2011 Cole Memos. In several federal cases, as discussed below, defendants sought to use the Ogden Memo to estop prosecution, and in each case were rebuffed. Federal judges have begun struggling to interpret the legal impact of the 2013 Cole Memo, but it is unlikely that judges will find that the 2013 Cole Memo creates binding law when the Ogden memo did not, as both memos contain similar language explicitly disclaiming the creation of any legal obligation.

Federal district courts have found that the federal government is not estopped from prosecuting participants in state-authorized medical marijuana programs by the Ogden Memo. In United States v. Washington, the defendants, operators of a Montana medical marijuana dispensary, moved to dismiss federal felony marijuana distribution charges on the basis that the Ogden Memo estopped federal prosecution of marijuana businesses operating under Montana medical marijuana law. The district court rejected the defendants’ argument for estoppel by official misleading statement, finding the Ogden Memo “no way indicate[d] that [the defendant’s] conduct was permissible under federal law.” The court also rejected a promissory estoppel defense, holding that the Ogden memo was not a “clear and unambiguous” promise not to prosecute defendants acting in compliance with state law. In Sacramento Nonprofit Collective v. Holder, a California medical marijuana dispensary sought to preclude federal enforcement of the CSA through judicial and equitable estoppel, arguing that the dispensary relied on the Ogden Memo as a federal pledge not to prosecute. The district court rejected the idea that the Ogden Memo judicially or equitably estopped federal enforcement of the CSA against medical marijuana providers, noting that the Ogden Memo did not “contain a promise not to enforce the CSA.”

84. See United States v. Dayi, 980 F. Supp. 2d 682 (D. Md. 2013) (determining that changes in state marijuana laws and the federal government’s policy towards enforcement, as described in the Department of Justice memos, justified downward variance in federal marijuana sentencing).
86. 887 F. Supp. 2d at 1090–91.
87. Id. at 1095.
88. Id. at 1100.
89. 855 F. Supp. 2d at 1111.
90. Id.
Cases like Washington and Sacramento Nonprofit Collective send a message to marijuana businesses that they cannot rely on the DOJ guidance memos to provide a legal defense against federal prosecution even if a business is following DOJ guidance and its actions are legal under state law. Marijuana businesses must assume the risk of federal prosecution through their continued operation.

III. STATE RECREATIONAL MARIJUANA REGULATORY FRAMEWORKS

In November 2012, voters in Washington and Colorado passed ballot initiatives legalizing the cultivation, distribution, sale, and possession of marijuana for recreational uses.91 To implement the new laws, both states worked with the Department of Justice to develop regulatory regimes for marijuana that would comply with the federal goals laid out in the 2013 Cole Memo.92 In January 2014, Colorado allowed businesses to begin selling recreational marijuana.93

Part A of this Section will examine Washington’s goals for marijuana legalization and regulatory systems. Part B will consider Colorado’s recreational marijuana regulations.

A. Washington’s Marijuana Regulation

I-502, the ballot initiative that legalized marijuana in Washington, was drafted with the intent to “try a new approach” to marijuana use that:

1. Allows law enforcement resources to be focused on violent and property crimes;
2. Generates new state and local tax revenue for education, health care, research, and substance abuse prevention; and
3. Takes marijuana out of the hands of illegal drug organizations and brings it under a tightly regulated, state-licensed system similar to that for controlling hard alcohol.94

Washington estimated that the state would generate more than half a billion dollars in revenue each year after 2015 from the passage of Initiative 502 through a 25% marijuana excise tax, retail sales, and business taxes.95 More than sixty percent of tax revenues generated from marijuana legalization are estimated to go

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91. See Healy, supra note 4.
92. See Hearing, supra note 56, at 52 (statement of Jack Finlaw, Chief Legal Counsel, Office of Colorado Governor John W. Hickenlooper); id. at 18–19 (statement of Hon. John Urquhart, Sheriff, King County Sheriff’s Office, Seattle, Wash.).
towards education, health care, substance abuse prevention, and research.\textsuperscript{96} Before legalization, Washington is estimated to have spent $34.6 million on marijuana enforcement in 2010.\textsuperscript{97}

The Washington State Liquor and Cannabis Board (“WSLCB”) has developed the system for licensing, regulating, and taxing recreational marijuana cultivation, processing, and retail.\textsuperscript{98} The WSLCB drafted proposed rules for regulating recreational marijuana, accepted public comments, finalized the rules on December 1, 2013, and began accepting applications for licenses to produce, process, and sell marijuana.\textsuperscript{99}

The Adopted Rules incorporate the Department of Justice’s federal enforcement priorities, with the goal of streamlining Washington’s state regulatory system to address federal concerns. The Rules require background checks for license applicants and bar anyone with a recent felony conviction from receiving a license, cap production and retail space, create a “traceability” program for tracking marijuana from “seed to sale,” impose criminal penalties for sales to anyone under the age of twenty-one, and restrict advertising and licensed locations near “schools, public parks, transit centers, arcades, and other areas where children are present.”\textsuperscript{100}

Washington state officials have noted that they would like to “continue to collaborate” with the federal government on enforcement of drug laws.\textsuperscript{101} State officials emphasized the “complementary goals and values” for federal and state government, such as avoiding marijuana use by children, stopping impaired driving, and preventing the enrichment of criminals selling marijuana.\textsuperscript{102}

\textbf{B. Colorado’s Marijuana Regulation}

Amendment 64, the Colorado ballot measure on marijuana, provides that legalization of marijuana is meant to serve “the interest of the efficient use of law enforcement resources, enhance[ment of] revenue for public purposes, and individual freedom.”\textsuperscript{103} Before legalization, 60.7% of Colorado’s drug arrests in 2010 were for marijuana.\textsuperscript{104} Colorado is estimated to have spent $37.1 million on

\begin{itemize}
  \item \textsuperscript{96} Estimated Annual Tax Revenue Distributions from I-502, \textsc{Am. Civil Liberties Union of Wash.}, https://aclu-wa.org/sites/default/files/pie_graph/502_tax_revenue_chart.pdf (last visited Sept. 29, 2015).
  \item \textsuperscript{97} \textsc{Am. Civil Liberties Union, The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Based Arrests} 182 (2013), https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf.
  \item \textsuperscript{100} Id. at 1–3.
  \item \textsuperscript{101} \textit{Hearing, supra} note 56, at 44 (statement of Hon. John Urquhart, Sheriff, King County Sheriff’s Office, Seattle, Wash.).
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} \textsc{Colo. Const.}, art. XVIII, § 16, cl. 1(a).
  \item \textsuperscript{104} \textsc{Am. Civil Liberties Union, supra} note 97, at 140.
\end{itemize}
marijuana enforcement that same year.105 The first $40 million in state taxation revenue raised annually is to be directed to the Public School Capital Construction Assistance Fund.106

In Colorado, the Marijuana Enforcement Division (“MED”) of the Department of Revenue is tasked with regulation of medical and retail marijuana.107 The MED promulgated permanent rules for the regulation of recreational marijuana on September 9, 2013.108 Colorado officials have declared the purpose of the Colorado rules is to “create a robust regulatory and enforcement environment that protects public safety and prevents diversion of retail marijuana to individuals under the age of twenty-one or to individuals outside the state of Colorado,” and have emphasized Colorado’s commitment to the federal objectives outlined in the 2013 Cole Memo.109

The Colorado rules establish licensing requirements for retail marijuana stores, cultivation facilities, and manufacturers; institute testing and tracking procedures for retail marijuana; restrict sales and advertising of marijuana to minors under the age of twenty-one; and prohibit targeting out-of-state persons in advertising.110 The MED considered the guidance in the 2013 Cole Memo as it drafted the final rules, and Colorado officials have stated they are “committed to working with federal, state and local law enforcement authorities to see that the eight enforcement priorities outlined in the Cole Memo are applied on the ground in Colorado.”111

IV. IMPACTS OF FEDERAL AND STATE LEGAL DISSONANCE ON MARIJUANA BUSINESSES

After the issuance of the 2013 Cole Memo, considerable uncertainty and risk remains for marijuana businesses in states where the criminality of marijuana differs from federal criminality. Part A of this Section discusses continued risks of federal prosecution for marijuana businesses under the CSA despite state regulation and the 2013 Cole Memo. Part B considers problems marijuana businesses have in conducting financial transactions as a result of federal money laundering statutes and the resulting dangers of a cash-intensive business. The risks and difficulties for the marijuana industry are likely to chill the growth of businesses, as many potential marijuana entrepreneurs are unwilling to risk federal prosecu-

105. Id. at 77.
106. COLO. CONST. art. XVIII, § 16, cl. 5(d).
108. Hearing, supra note 56, at 50 (statement of Jack Finlaw, Chief Legal Counsel, Office of Colorado Governor John W. Hickenlooper).
109. Id. (internal quotation mark omitted).
110. See COLO. CODE REGS. §§ 212-2.201–212.2.252 (licensing requirements); id. § 212-2.1108 (2014) (out-of-state marketing prohibited); id. § 212-2.1112 (advertising to minors prohibited); id. § 212-2.503 (tracking procedure); id. § 212-2.1502 (testing procedure).
111. Hearing, supra note 56, at 52 (statement of Jack Finlaw, Chief Legal Counsel, Office of Colorado Governor John W. Hickenlooper).
tion in opening a dispensary and fear robbery and other violent crime if it is known that they handle large amounts of cash. These risks will dampen the success of the marijuana industry in Colorado and Washington, and may jeopardize state goals of increased tax revenue from a robust marijuana industry.

A. Continued Risk of Federal Prosecution for Marijuana Businesses

“De-prioritization” of marijuana prosecution under the 2013 Cole Memo leaves U.S. Attorneys with full discretion to prosecute marijuana distributors in states that have decriminalized marijuana. Cases involving previous DOJ memos have shown that the guidance memos are not interpreted to be binding or to provide defenses to federal marijuana prosecutions in states with legalized medical marijuana. Because the 2013 Cole Memo includes similar language to the 2011 Cole Memo and the Ogden Memo, courts will likely also find that the 2013 Cole Memo does not provide an estoppel defense to prosecution. The 2015 Appropriations Act prohibits the Department of Justice from spending funds appropriated under that bill on enforcement actions against medical marijuana businesses operating under state law, but does not affect enforcement against recreational marijuana businesses or actions initiated using past appropriations.

The U.S. Attorney for the District of Colorado, John Walsh, has stated that his office will focus investigation and prosecution efforts on the federal priorities outlined in the 2013 Cole Memo, but will also assess the adequacy of Colorado’s regulatory system to ensure federal public safety priorities. A U.S. Attorney in Washington similarly reiterated that her office “[w]ill continue to enforce the Controlled Substances Act.” U.S. Attorney’s Offices in states with medical marijuana programs, such as the U.S. Attorney’s Office for the Northern District of California where marijuana dispensaries have been targeted in the past, have stated that they expect no “significant change” in their enforcement of the CSA in the wake of the 2013 Cole Memo.

112. See Kamin & Warner, supra note 17 (discussing commentary from Colorado regulators, law enforcement, and marijuana businesses regarding security concerns and the difficulties posed by lack of access to banking services for marijuana businesses).
113. See 2013 Memorandum from James M. Cole, supra note 58, at 4.
114. See supra Part II.B.
Because they are not binding, the current DOJ memos also do not protect marijuana businesses against investigation and prosecution by future presidential administrations. Future presidents may not adopt the same stance towards marijuana as President Obama and could choose to prosecute the marijuana industry at any time. In addition to imposing criminal sanctions on individual businesses, a future administration may seek to preempt state marijuana laws entirely under the Supremacy Clause. These possibilities create business and public policy uncertainties for state marijuana regulatory schemes. Because the marijuana industry faces a continued risk of federal prosecution, state goals in legalization may be undermined.

B. Limited Access to Financial Services for Marijuana Businesses Due to Federal Money Laundering Statutes

The 2014 Cole Memo and the Treasury Guidance attempted to address potential enforcement concerns of financial institutions and other businesses working with dispensaries. Financial institutions have refused to provide banking services to marijuana dispensaries operating under state law, citing money-laundering and anti-trafficking laws.119 As a result, marijuana businesses have typically been unable to create bank accounts or obtain loans, and must conduct business in cash, which poses significant security risks.120 Attorney General Holder acknowledged the “public safety component” as a driver for the 2014 Cole Memo, stating that “[h]uge amounts of cash, substantial amounts of cash just kind of lying around with no place for it to be appropriately deposited, is something that would worry me, just from a law enforcement perspective.”121

Unfortunately, the 2014 Cole Memo still leaves much room for prosecutorial discretion in enforcement of money-laundering and anti-trafficking laws against financial institutions. This possibility of enforcement leaves banks anxious about doing business with marijuana dispensaries in the absence of substantive change in federal drug law. The president of the American Banking Association has stated the “guidance doesn’t alter the underlying challenge for banks . . . Possession or distribution of marijuana violates federal law, and banks that provide support for those activities face the risk of prosecution and assorted sanctions.”122 The Colorado Bankers Association called the guidance a “red light” for banks that

119. See Kamin & Warner, supra note 17.
120. See Katie Lobosco, Pot problem: Banks still don’t want this cash, CNNMoney (Apr. 14, 2015, 1:13 PM), http://money.cnn.com/2015/04/14/news/economy/pot-marijuana-banking/ (describing that because many banks will not offer marijuana businesses bank accounts, they are left “stuck with piles of cash and nowhere to put it”).
“amounts to ‘serve customers at your own risk,’” and emphasized that “[n]o bank can comply.”

With banks unwilling to run the risk of federal sanction possible under the 2014 Cole Memo and the Treasury Guidance, marijuana businesses continue to be cash-only enterprises lacking access to financial services. Lack of financial services, such as access to credit, poses a challenge to the growth of individual marijuana businesses. Furthermore, it has an overall destabilizing effect on the marijuana industry and state legalization efforts, as cash-only businesses are targets for crime, and tracking revenues in cash businesses for state tax purposes is difficult.

V. ALTERNATIVE FEDERAL ACTION: EXECUTIVE RESCHEDULING OF MARIJUANA

The Department of Justice guidance memoranda leave much uncertainty and risk for businesses in the growing marijuana industry. This Section focuses on an alternative action at the federal level to reduce dissonance between state and federal marijuana laws, and advocates for executive action to reschedule marijuana under the CSA.

The President should initiate executive action to administratively reschedule marijuana from Schedule 1 to a lower class of drug under the CSA. As discussed in Part I.A., the Attorney General has the authority under the CSA to “transfer [a drug] between . . . schedules” or “remove any drug . . . from the schedules” after a formal rulemaking and a scientific and medical evaluation and recommendation from the Secretary of Health and Human Services.124 However, through the Drug Enforcement Administration, the Department of Justice has consistently denied public petitions for rescheduling marijuana.125 Most recently, the D.C. Circuit upheld the DEA’s rejection of a petition to reschedule marijuana, finding there was substantial evidence to support DEA’s rejection based on a lack of “adequate and well-controlled studies” into the medical efficacy of marijuana.126

Although the DEA continues to oppose marijuana legalization, with the head of the DEA recently stating that DEA agents will “fight harder” against marijuana in the face of legalization,127 President Obama and former Attorney General Holder have indicated that they view federal enforcement of marijuana criminality as

125. See Letter from Michelle Leonhart, Adm’r, Drug Enforcement Administration, to Coalition for Rescheduling Cannabis (June 21, 2011), http://www.deadiversion.usdoj.gov/pubs/coalition_response.pdf (concluding, in response to a petition to reschedule marijuana, “that there is no substantial evidence that marijuana should be removed from schedule I”).
In addition to the administration’s progressive stance on state legalization, evidenced by the DOJ guidance memoranda, the President and the Attorney General have made remarks that support additional federal actions. For instance, President Obama has stated that he views marijuana to be no more harmful than alcohol, and is troubled by the disproportionate arrests of minorities for marijuana crimes. When speaking on the legalization in Washington and Colorado, the President stated that “it’s important for it to go forward because it’s important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished.” Attorney General Holder has stated that the Justice Department would be “more than glad to work with Congress if there is a desire to look at and reexamine how the drug is scheduled,” but also indicated his belief that ultimately the issue of marijuana scheduling under the CSA was something “Congress would have to change, and I think that our administration would be glad to work with Congress if such a proposal were made.”

While the Obama Administration has not yet taken steps to administratively reschedule or delist marijuana under the CSA, rescheduling the drug would help to eliminate the federal and state legal dissonance plaguing current legalization efforts and creating risks for marijuana businesses in Colorado and Washington. The Obama Administration has indicated a willingness to use executive action to move forward the President’s agenda, and there is congressional support for the administrative rescheduling of marijuana. If the President believes that the legalization experiments in Colorado and Washington are “important” for addressing some of the negative impacts of U.S. drug policy, including the disproportionate impact of drug arrests on minorities, the Obama Administration should move to ensure these experiments have a chance of success by establishing a less-restrictive federal legal status for marijuana through administrative rescheduling.

The DOJ memos on prosecutorial discretion and bank reporting guidelines are a positive step in the right direction, but administrative rescheduling of marijuana under the CSA would be a long-term solution to the current dissonance between federal and state laws that has increased the risks and challenges faced by the

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129. See Remnick, supra note 80; see also AM. CIVIL LIBERTIES UNION, supra note 97, at 4 (noting that a Black person is 3.73 times more likely than a white person to be arrested for marijuana, despite similar usage rates).

130. Remnick, supra note 80 (internal quotation marks omitted).

131. Reilly, supra note 127 (internal quotation mark omitted).


marijuana industry and state policymakers. Administrative rescheduling will remove the ability of individual prosecutors to buck the non-binding DOJ guidelines on marijuana prosecutions. Unlike the short-term executive guidance issued thus far, rescheduling will also provide a long-term federal legal status for marijuana that will continue through future presidential administrations.

CONCLUSION

The issuance of guidance memoranda for federal marijuana prosecutions has enabled state and federal cooperation on new state regulatory regimes for marijuana, but significant uncertainty and risk remains for marijuana businesses. This uncertainty undermines the ability of states to achieve the policy goals behind legalization, including increases in tax revenue from a robust marijuana industry. The Department of Justice memoranda have not resolved the fundamental dissonance in marijuana criminality between federal and states laws. As a result, marijuana businesses continue to risk federal prosecution and are limited in their access to financial services. A change in federal law, through executive action to reschedule marijuana, would lower these risks for marijuana businesses and enable states to achieve their legalization policy goals.