
Wilson Elser Moskowitz Edelman & Dicker LLP

There’s a New Sheriff in Town: Is the Honeymoon Over for Recreational Cannabis?

By Adam J. Detsky

Adam's contact details

- Denver
- p. 303.572.5348
- f. 303.572.5301
- adam.detsky@wilsonelser.com

Mr. Spicer’s words were directed at arguably the fastest growing sector of the U.S. economy: recreational marijuana. He was clear that his statements applied to the recreational sector only, providing some peace of mind to those cultivators and sellers who focus on the medicinal market. For the medical community, it was good news. For recreational license holders, however, it was a different message than was delivered during the presidential primaries, when Mr. Trump was quoted as saying: “I really believe we should leave it up to the states.” That statement alone wasn’t the ringing endorsement that the industry wanted, but it was cause for optimism. After all, the recreational cannabis market appears to align well with Mr. Trump’s agenda of creating jobs, filling previously vacant warehouses with American products and generating revenue without taxing the general population to death. There are many sleepless nights ahead for Colorado cannabis entrepreneurs, their investors and every ancillary industry profiting from marijuana. Governor John Hickenlooper along with mayors and city council officials throughout the state heard the words that have loomed over their budgets from the moment recreational marijuana passed and schools and communities began to reap the tax windfalls it created. Sean Spicer, the White House Press Secretary, uttered those words: “I do believe that you’ll see greater enforcement.”
But, political ideology aside, key persons within the new administration have never been particularly friendly toward cannabis. Vice President Mike Pence is the former governor of Indiana, one of the least progressive states in terms of maintaining comparatively severe criminal penalties for marijuana violations. The new Attorney General, Jeff Sessions, has also generated some concern. While marijuana decriminalization has advocates and opponents on both sides of the aisle, Mr. Sessions was already well known to the cannabis community for his words at an April 2016 Senate Caucus on International Narcotics Control, where he stated that the Senate needed to “send that message with clarity that good people don’t smoke marijuana.”

Still, the industry looked for a silver lining among the growing storm clouds. They tried to put a positive spin on Senator Sessions, citing his January 2017 confirmation hearings where he acknowledged that enforcing federal marijuana laws would create an undue strain on federal resources, even though he explained moments later that he “won’t commit to never enforcing federal law.” But on February 23, 2017, Mr. Spicer’s words at the White House daily briefing were clear: “I do believe that you’ll see greater enforcement.” He explained, “There’s a big difference between [medical marijuana] and recreational marijuana, and I think when you see something like the opioid addiction crisis blossoming in so many states around this country, the last thing we should be doing is encouraging people.” He continued, “There is still a federal law that we need to abide by in terms of recreational marijuana and other drugs of that nature.” That federal law, the Controlled Substances Act, still schedules marijuana as a narcotic with no recognized medicinal value, considering it to be more dangerous than cocaine and morphine.

This representation by the White House press secretary comes six months after the U.S. Department of Justice declined to reschedule marijuana. In doing so, the DOJ explained that before it reconsiders its position, additional research will be needed — research that will require years of data collection.

Mr. Spicer’s comments also appear to be at odds with pending legislation. Just two weeks ago, Congressman Dana Rohrabacher of California sponsored House Bill H.R. 975, named the Respect State Marijuana Laws Act of 2017. The bill seeks to amend the Controlled Substances Act to allow states to continue with legalization without fear of a federal crackdown, essentially providing immunity from federal prosecution so long as the requirements of state law and the DOJ’s Cole Memorandum are strictly followed. To the extent this bipartisan bill passes, the fears within the recreational cannabis community could be assuaged. There have been other, similar bills proposed over the past few years, including the Respect State Marijuana Laws Act of 2015, a bill also sponsored by Representative Rohrabacher that was defeated by a vote of 206-222.

**Analysis**

It remains unknown whether the new administration means to actively enforce federal law by targeting the budding recreational cannabis industry. The recent statement by Mr. Spicer
may simply be a tactic meant to encourage the industry to ensure strict compliance with respective state laws, or it could prove inconsistent with the position of an administration known for sending mixed messages. Regardless, the retail segment of the cannabis market should be prepared to face its greatest challenge to date.

For now, the Cole Memorandum remains the guidance for U.S. state attorneys to follow. “We will follow that guidance until, if or when we receive new or amended guidance,” said Jeff Dorschner, a spokesman for the U.S. Attorney’s Office in Colorado. Since new guidance may be coming, the industry will need to take precautions to protect their investments. There may be a silver lining for the medical cannabis market. Although the value of medical sales and cultivation licenses in Colorado have been falling as recreational cannabis has boomed, these medical licenses may soon prove to be the real commodity as the medical sector starts to appear more stable. (http://www.businessinsider.com/marijuanas-getting-cheaper-in-colorado-2016-9)