Memorandum

To: Jefferson Sessions, Attorney General of the United States
Cc: Donald Trump, President of the United States
Michael Murray, Esq., Department of Justice,
Subcommittee Task Force on Marijuana Policy
From: Steph Sherer, Executive Director
Americans for Safe Access
Date: 7/26/2017
Re: State Compliance with the Cole Memo on Medical Cannabis and
Department of Justice Guidance on Enforcement

I. Introduction

On August 29, 2013, Deputy Attorney General James Cole issued a memorandum describing the priorities of federal prosecutors in states that had legalized cannabis for medical or adult use. This memorandum followed a 2009 memorandum from Deputy Attorney General from David W. Ogden which directed states not to focus federal resources on individuals who were in compliance with state law. To review the 2013 Cole Memo and other Justice Department enforcement priorities, on April 5, 2017 a subcommittee was formed by Attorney General Sessions to evaluate the Department's current enforcement policies on cannabis. The memorandum below highlights compliance with the Cole Memo guidelines in states that have comprehensive medical cannabis programs.

II. Congressional Action on Medical Cannabis Laws

Since the issuance of the 2013 Cole Memo, Congress has shown an increasing acceptance of states with robust, well-regulated medical cannabis programs, despite a continued classification of cannabis under Schedule I of the Controlled Substances Act. While no permanent legislation related to changes in the Controlled Substances has been passed by Congress, since the publishing of the Cole Memo, there have been several appropriations riders introduced that limit the ability of the Department of Justice and other agencies from interfering with legal state cannabis programs. Due to the fact that states have been amending their laws and programs to comply with the Cole enforcement guidelines, Congress has recognized that limited resources can be allocated to areas other than against medical cannabis businesses and patients that are complying with state law.

The most notable example of Congress's willingness to support the Cole Memo priorities comes from an amendment that restricts the Department of Justice from expending funds that prevent states from implementing medical cannabis programs. This amendment first passed the House in 2014 and was known as the Rohrabacher-Farr amendment (named after the bill's sponsors). Since the issuance of the Cole Memo Congress has recognized that Department of Justice funds are better spent on issue areas like gang violence, immigration issues, and the opioid crisis as opposed to enforcement actions against medical cannabis. This amendment was most recently included in the 2017 continuing resolution which expires on September 30th, 2017 and is likely to be considered in the FY18 Budget as the Rohrabacher-Blumenauer Amendment.

The amendment's text restricts the Department of Justice's ability to interfere with states' abilities with the implementation of state medical cannabis programs. This reading has been expanded by the 9th Circuit to be interpreted as that the Department of Justice can also not prosecute individual cannabis patients.[1]

Due to a combination of the Cole Memo outlining enforcement priorities and restrictions on DOJ spending the last several years, members of Congress have worked to expand the reach of medical cannabis protections. This includes calling for protections for Veterans Administration doctors to be able to discuss medical cannabis as an option with veterans and protections for physicians to recommend cannabis without worry about losing their license. In the 115th Congress, nearly 40 bills have been introduced to bridge gaps where the Cole Memo was silent including on banking issues, tax deductions for cannabis businesses that are operating lawfully under state law, patient and doctor protections and access to water for cannabis crops. Congress is often criticized for failing to act on cannabis issues, however there is wide bipartisan support for reform.[2] Unfortunately, this support often gets sidetracked due to the actions of a few members on key committees.

III. State Compliance with the 2013 Cole Memo

Since the issuance of the 2013 Cole Memo over fifteen states have created medical cannabis programs or provided significant updates to existing programs by creating centralized state distribution systems. In creating these programs, theses states were not working against the objectives of the Cole memo but rather were creating tightly regulated programs that complied with the memo's eight objectives. These objectives, listed below, have been the foundation of state regulatory schemes and have led to a significant reduction in black markets. States with

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[1] U.S. v. McIntosh, 833 F. 3d 995, (9th Cir. 2016).

[2] See e.g., Kyle Stewart, *Bipartisan Medical Marijuana Legislation Reintroduced,* (Jun. 15, 2017). http://www.rollcall.com/news/politics/bipartisan-medical-marijuana-legislation-reintroduced (describing bipartisan support for the CARERs Act).

more robust programs at the time the 2013 Cole Memo was issued have worked under the guidance of Cole to ensure that their programs comply with federal guidelines through legislative amendments and regulatory actions.

The Cole Memo outlines eight guidelines prioritizing which cases should be pursued. These include (1) preventing the distribution of marijuana to minors, (2) preventing revenue from the sales of marijuana from going to criminal enterprise, gangs, and cartels; (3) preventing state-authorized marijuana activity from being used as a cover for the pretext for the trafficking of other illicit drugs or other illegal activity (4) preventing the diversion of marijuana from states where it is legal under state law in some form to other states (5) preventing violence and the use of firearms in the cultivation and distribution of marijuana (6) preventing drugged driving and the exacerbation of the other adverse public health consequences associated with marijuana use (7) preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production and (8) preventing marijuana possession or use on federal property.

1. Preventing distribution to minors

The first enforcement priority of the Cole Memo was to ensure that cannabis does not get distributed to minors. All state medical cannabis programs have age restrictions as to who can use cannabis. While most states allow use of medical cannabis by minors, there are additional restrictions in place such as the requirement that multiple physicians certify that a minor has a qualifying condition, that a minor's parents or guardians must give informed consent, and that a parent or guardian is responsible for control and administration of doctor recommended cannabis.

a. Age Restrictions on Sales of Cannabis

In states with exclusively medical cannabis programs it is common to see age restrictions associated with registry ID cards.[3] States also maintain criminal penalties for distribution of a controlled substance to a minor.[4] Common components of medical cannabis programs include not allowing minors to purchase their own cannabis so any administration or usage of the substance is under the direction and control of either a parent or a licensed physician. By requiring parents to understand the risks and benefits of potential medical cannabis use and limiting the availability of cannabis to minors, state programs satisfy the goal of preventing distribution to minors.

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[3] *See* e.g., Del. Code Ann. Tit 16 § 4909A(b)

[4] Md. Code Ann. §5-628

b. Buffer Zones from Schools and Other Locations Where Children May Be Present

A second way states with medical cannabis programs restrict access to minors is by establishing zoning regulations for cannabis businesses from being in close proximity to schools or where other locations where children may be present.[5] In most state statutes, this buffer zone is 500 or 1000 feet, but under some local ordinances municipalities have decided to increase this distance. These zoning regulations established by state and local governments help keep cannabis businesess away from children, helping reduce the risks of distribution.

c. Advertising and Packaging Regulations

Mirroring many of the restrictions put in place on the tobacco industry by the Federal Trade Commission are applicable to the cannabis industry.[6] In compliance with the Cole Memo, state cannabis programs prohibit the use of cartoon characters in advertising, prohibit advertisements showing consumption, and prohibit other advertising material that might otherwise be attractive to children. [7]

Proper labeling and packaging also plays a significant role in reducing the distribution of cannabis to minors. Pursuant to the first objective of the Cole Memo and tight state regulations cannabis businesses must ensure that the products they sell are tamper resistant and are packaged with child proof packaging.

d. State Laws Addressing 2013 Cole Memo Priorities: Preventing Distribution to Minors

The table below demonstrates laws passed in each state with a medical cannabis program that reflect the first enforcement priority of the Cole Memo. This list is not meant to be exhaustive, but rather to show state legislative and regulatory responses adopted prevent distribution of cannabis to minors.

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[5] Mont. Code Ann. § 50-46-312(b)

[6] Press Release, Federal Trade Commission, Federal Trade Commission Dismisses Joe Camel Complaint (Jan. 27, 1999) *available at* https://www.ftc.gov/news-events/press-releases/1999/01/federal-trade-commission-dismisses-joe-camel-complaint

[7] 3 AAC 306.350

State Laws Preventing Distribution to Minors			
AK	Alaska Stat. §17.38.220(c) (2015)	**MI**	Mich. Comp. Laws § 333.26426(b) (2008)
AZ	Ariz. Rev. Stat. § 36-2804.03(B) (2015)	**MT**	Mont. Code Ann. § 50-46-307.
AR	Ark. Dept. Health Regs. Governing Medical Marijuana Registration, Testing, and Labeling §IV (C)	**NV**	Nev. Rev. Stat. § 453A.210(3).
CA	Cal. Health & Safety Code § 11362.7(e).	**NH**	2013 N.H. Laws 126-W:4(V).
CO	Colo. Const. Art XVIII, § 14 cl. 6	**NJ**	N.J. Stat. § 24:6I-5.
CT	Conn. Gen. Stat § 21a-408(10).	**NM**	N.M. Stat. § 26-2B-4(C).
DE	Del. Code Ann. Tit 16 § 4909A(b).	**NY**	NYCRR Tit. 10 §1004.11 (a)(9)(v)
DC	D.C. Code § 7-1671.02(e).	**ND**	N.D. Cent Code §19-24-04(1)(a)
FL	FL Cons. Art. X, § 29(d)(1)(a)	**OH**	Proposed Rule 3796:5-6-02
HI	Haw. Rev. Stat. 329D-17	**OR**	Or. Rev. Stat. § 475B.005(2)(a).
IL	Public Act 098-0122 § 30(a)(3)(G) (Ill., Eff. Jan 1 2014).	**PA**	P.A. Gen. Assem. 2016 Act 16 § 506
ME	Me. Rev. Stat. Tit. 22, § 2425(2).	**RI**	R.I. Gen. Laws § 21-28.6-6(b).
MD	M.D. Code Tit. 13 §3308	**VT**	Vt. Stat. Ann. Tit. 18, § 4473(b)(1).
MA	105 Code Mass. Rules 725.010(J).	**WA**	Wash. Rev. Code § 69.51A.220(1)-(4)
		WV	S.B.386, 83rd Leg. 1st Reg.Sess. (WV 2017).

2. <u>Preventing revenue from the sales of marijuana from going to criminal enterprises and preventing state authorized marijuana activity from being used as a cover for the pretext of trafficking other illicit drugs or other illegal activity</u>

The second and third enforcement guidelines of the the Cole Memo are designed to prevent revenue generated from cannabis businesses from going to criminal enterprise and to prevent legal cannabis businesses being used as a cover for other illegal activity. The phrase criminal enterprise has been traditionally associated with organized crime or large scale drug

trafficking operations.[8] Unfortunately, many cannabis operations that are in full compliance with state law and regulations fall into this category due to the federal classification of dealing in any controlled substance equating to criminal enterprise. However, states with medical cannabis programs have implemented channels to ensure that revenue from cannabis businesses is going to legitimate sources such as state revenue departments, infrastructure investments, and state education programs.

Because state cannabis programs requires registration of all cannabis businesses, thorough background checks and provide for detailed taxation regimes, it is extremely difficult for a criminal enterprise to gain entry to the cannabis market without going unnoticed. Additionally, states have relied upon guidance put forth in the 2014 FinCen memo, showing that the majority of cannabis business transactions do not violate the Cole priorities.

a. Taxation on Medical Cannabis

Many states have turned to taxing cannabis as any other good to ensure revenue is being accurately reported and is not going to criminal enterprises. Often cannabis producers or dispensaries will pay an excise tax on the gross receipts of the sale of cannabis. An example of state efforts to ensure revenue is going to legitimate sources comes from Pennsylvania. In Pennsylvania all organizations who wish to dispense cannabis must register with the Pennsylvania Department of Health and pay licensing fees to the Department. Businesses are then required to report all of their revenue and pay taxes to the Pennsylvania Department of Revenue.[9]

By treating cannabis like any other commodity through taxation and registration, States can track revenue and tax receipts from cannabis businesses. Upfront registration with the state ensures that revenue is directed to proper channels.

b. 2014 Financial Crimes Enforcement Network Memo

In addition to the guidance offered by the 2013 Cole Memo, states have worked diligently to create regulations in compliance with the 2014 Financial Crimes memo. Financial institutions, in particularly, credit unions have relied on the guidelines set forth in the 2014 FinCen memo in accepting the business of the cannabis industry. The FinCen memo designates three categories of marijuana businesses: marijuana, limited, marijuana priority, and marijuana

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[8] 21 U.S.C. § 848
[9] Pa. Dept. of Rev., *Medical Marijuana Fact Sheet,* Mar. 3, 2017, *available at* http://www.revenue.pa.gov/GeneralTaxInformation/Tax%20Types%20and%20Information/Documents/medical_marijuana_faq.pdf

termination. Marijuana limited refers to marijuana business activity that does not violate any of the priorities set forth in the Cole memo, and is in compliance with all state laws. Since the issuance of the Cole Memo, of the nearly 30,000 suspicious activity reports filed, over 70% fell into the marijuana limited category indicating an overwhelming effort towards compliance with state law and regulation. [10]

c. State Laws Addressing 2013 Cole Memo Priorities: Preventing revenue from the sales of marijuana from going to criminal enterprises and preventing state authorized marijuana activity from being used as a cover for the pretext of trafficking other illicit drugs or other illegal activity

The table below demonstrates laws passed in each state with a medical cannabis program that reflect the second enforcement priority of the Cole Memo. This list is not meant to be exhaustive, but rather to show state efforts in preventing revenue from going to criminal enterprises.

State Laws Preventing Revenues from the Sale of Marijuana from Going to Criminal Enterprises and Preventing State Authorized Marijuana Activity from Being Used as a Cover for the Pretext of Trafficking Other Illicit Drugs or Other Illegal Activity			
AK	Alaska Stat. §17.38.010(b)(2)	**MI**	Mich. Comp. Laws §§ 333.26423(h) and § 333.26424(k)
AZ	Ariz. Rev. Stat. § 36-2806 (2015)	**MT**	Mont. Code Ann. § 50-46-308.
AR	Ark. Rules and Regs. Governing the oversight of Medical Marijuana Cultivation Facilities and Dispensaries by the Alcoholic Beverage Control Division ABC RR22(c)	**NV**	Nev. Rev. Stat. § 453A.356.
CA	Cal. Health & Safety Code § 11362.83.	**NH**	2013 N.H. Laws 126-W:7.
CO	Colo. Rev. Stat. § 12-43.3-101 et. seq.	**NJ**	N.J. Stat. § 24:6:7(d)(1).
CT	Conn. Agencies Regs. § Sec. 21a-408-24	**NM**	N.M. Stat. § 26-2B-3(D).
DE	Del. Code Ann. Tit 16 § §4919A.	**NY**	NY Tax L § 490 (2014).

[10] Financial Crimes Enforcement Network, *Marijuana Banking Update*, March 31, 2017, *available at* https://www.fincen.gov/sites/default/files/shared/Marijuna_Banking_Update_Through_Q1_2017.pdf

DC	D.C. Code § 7-1671.06.	ND	N.D. Cent Code §19-24-07(a)(2)
FL	Fl. Cons. Art. X,§ 29(d)(1)	OH	Proposed Rule 3796:5-6-02
HI	HI Act 2016 Act 230 Sec. 2	OR	Or. Rev. Stat. § 475B.005(2)(b),(d).
IL	Public Act 098-0122 § 15(c) (Ill., eff. Jan. 1, 2014).	PA	P.A. Gen. Assem. 2016 Act 16 § 901
ME	Me. Rev. Stat. Tit. 22 §2430 (1)	RI	R.I. Gen. Laws § 21-28.6-12.
MD	Md. Code Ann. 10.62.08.02(c)	VT	Vt. Stat. Ann. Tit. 18, § 4474f.
MA	105 Code Mass. Rules 725.105(I).	WA	Wash. Rev. Code § 69.50.535.
		WV	S.B.386, 83rd Leg. 1st Reg.Sess. (WV 2017).

Many of the laws put in place to prevent revenue from going to criminal enterprises also are effective in preventing the use of state authorized marijuana activity as a cover for the pretext of drug trafficking of other illicit drugs or other illegal activity. Once a medical cannabis business is open to customers, they are subject to inspection by state and local authorities, preventing the sale off other drugs.

3. <u>Preventing the diversion of marijuana from where it is legal under state law in some form to other states</u>

Every state medical cannabis program has some form of restrictions on the diversion of cannabis to other states. Possession limits and diversion to non-qualified individuals are critical part of state's medical cannabis and criminal enforcement programs. In light of the Cole Memo, State Attorney Generals have developed guidance to prevent cannabis from falling into the hands of an unqualified individual such as a person who does not have a qualifying condition or to an individual in a state without a medical cannabis program.

States have strict security requirements in place at dispensaries to prevent theft or loss including physical barriers, video surveillance, and alarm systems.[11]

a. Seed to Sale Tracking

In addition to physical security at cannabis businesses, another important feature of diversion prevention that has been adopted by many states is the use of technology to ensure that all cannabis and cannabis products can be tracked. Known as seed to sale tracking, these systems allow for state regulators, law enforcement and state department of health to trace a product from its first cultivation all the way to the hands of a patient.[12] Some seed to sale tracking

[11] Ill. Admin. Code tit. 68, §1200.410 (2017) *available at* ftp://www.ilga.gov/JCAR/AdminCode/068/068012900G04100R.html

[12] *See e.g.,* https://www.metrc.com/ (a company dedicated to the tracking of cannabis and cannabis products.

systems use radio frequency identification, a tracking system that is common with other pharmaceuticals. Seed to sale tracking can create real time insight into the location of cannabis.

b. Transportation of Controlled Substances Across State Lines Remains under Federal Jurisdiction

While seed to sale regulations and security requirements for cannabis businesses show states have responded to preventing diversion, the transportation of controlled substances across state lines still remains under federal jurisdiction under the Controlled Substances Act. The DEA retains enforcement authority over every person who manufactures and transports a schedule I substance.[13] The DEA requires registrations of these activities and is better equipped to track movement of controlled substances across state lines when compared to local law enforcement.

c. State Laws Addressing 2013 Cole Memo Priorities: Preventing the diversion of marijuana from states where it is legal under state law in some form to other states

Preventing diversion of marijuana from states where it is legal to states where it is not requires partnerships between state and federal law enforcement. Regulations established by the state can limit how much cannabis an individual can possess and create technological safeguards to ensure that cannabis does not end up in the hands of an unauthorized individual. However, as cannabis travels across state lines from jurisdiction to jurisdiction the onus of enforcement lies on federal agents and the coordination of efforts between national agencies and the law enforcement arms of various states.

State Laws Preventing the Diversion of Marijuana From States Where It is Legal Under State Law in Some Form to Other States			
AK	3 AAC 306.015(b)(1), 3 AAC 306.310 (B)(5)	**MI**	Mich. Comp. Laws §§ 333.26424(a) 333.26423(d) 333.26426(a)(6).
AZ	Ariz. Rev. Stat. § 36-2806.02(A) (2015)	**MT**	Mont. Code Ann. § 50-46-330.
AR	AMMC § IV (9)(b)(ii)(VI)	**NV**	Nev. Rev. Stat. § 453A.210(2)(c).
CA	Regulated at the City and County level	**NH**	2013 N.H. Laws 126-W:1(XIII).

[13]U.S. Dept. of Justice, *Subchapter 1-Control and Enforcement,* https://www.deadiversion.usdoj.gov/21cfr/21usc/822.htm (citing to U.S.C §822)

CO	Colo. Const. Art XVIII, Section 14, cl. 3.	NJ	N.J. Stat. § 24:6I:3 "Qualifying patient."
CT	Conn. Gen. Stat § 21a-408h(G).	NM	N.M. Stat. § 26-2B-3(G).
DE	Del. Code Ann. Tit 16 § §4919A(e).	NY	NYCRR Tit. 10 §1004.3 (c)(2)
DC	D.C. Code § 7-1671.03.	ND	N.D. Cent Code §19-24-07(8)(f)
FL	Fl. Cons. Art. X, § 29(c)(1)	OH	Proposed Rule 3796:5-6-02
HI	Haw. Rev. Stat. 329-122(E)(3)	OR	Or. Rev. Stat. § 475B.005(2)(c).
IL	Public Act 098-0122 § 130(h) (Ill., eff. Jan. 1, 2014).	PA	P.A. Gen. Assem. 2016 Act 16 § 1301-02
ME	Me. Rev. Stat. Tit. 22, § 2426(1)(E).	RI	R.I. Gen. Laws § 21-28.6-6(f)(2).
MD	Md. Code Regs. 10.62.12.01-08, Md. Code Regs. 10.62.34.01	VT	Stat. Ann. Tit. 18, § 4474f(a)(2).
MA	105 Code Mass. Rules 725.004 "Qualifying Patient."	WA	Wash. Rev. Code § 69.50.525(c)
		WV	S.B.386, 83rd Leg. 1st Reg.Sess. (WV 2017).

4. Preventing violence and the use of firearms in the cultivation and distribution of marijuana

In an effort to reduce violence and the use of firearms states have developed procedures that place restrictions on not only businesses but also on individual employees. Every state with a medical cannabis program has established security requirements for medical cannabis businesses. Typical features of these security requirements included detailed site plans that included fences, locks, video cameras, alarms, electronic monitoring and other security features.[14]

a. Background checks of employees

Perhaps one of the best safeguards states have adopted in reducing violence has been the use of state and national background checks on cannabis business employees. State laws require those who are listed on an application for a medical cannabis business to submit to a national background check. These background checks generally seek to disqualify individuals who have ever been convicted of certain violent felonies. Additionally, a significant majority of states will disqualify an applicant for a cannabis business if the individual has been convicted of an offense involving a controlled substance. For example, Oregon's department of Health will disqualify an

[14] *See e.g.,* A.R.S §36-2803 Art. 3, R9-17-318

applicant if they have been convicted for the manufacture or delivery of a controlled substance in schedule I or II if the conviction occurred within two years of the application. [15]

Background checks and the fingerprinting of employees greatly reduces the number of individuals with criminal histories who are working in the medical cannabis industry. Although past criminal behavior (or lack thereof) is not a reliable predictor of future behavior, many individuals who enter the cannabis industry have no criminal history and must maintain a clean criminal record to stay in business.

c. Enforcement Raids and Violence

Much of the violence associated with cannabis businesses arises from the conflict between Drug Enforcement Administration agents and individuals who are operating businesses in compliance under state law. Prior to the first passage of the CJS amendment, smash and grab raids by the DEA were common. Injuries and fatalities were common during these occurrences due to chaotic and surprising nature in which DEA agents would conduct enforcement. Some DEA raids have turned violent because the owners of a cannabis business or who had cannabis plants in their home believed they were being robbed.[16]

Raids of lawful cannabis businesses have been more deadly than cannabis itself. Since 2010, at least 20 SWAT raids involving suspected marijuana dealers have turned deadly.[17] During this same time span, per the DEA's own data, zero individuals have died from an overdose related to medical cannabis. While states work diligently to reduce violence related to the distribution of marijuana, a reduction in the possibility of dangerous federal rais would greatly improve the situation.

d. Cannabis and Firearm Ownership

An additional goal of the Cole Memo is to reduce the use of firearms related to the distribution of marijuana. While there are a few states that expressly prohibit individuals with violent felonies from obtaining a medical cannabis registration card or a medical cannabis license, the issue of firearms at cannabis businesses has continued to remain predominantly under federal purview. Lawful firearm transactions require the completion of ATF Form 4473.[18]

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[15]Oregon Health Authority *Medical Marijuana-Background Checks*, (2017), http://www.oregon.gov/oha/PH/DISEASESCONDITIONS/CHRONICDISEASE/MEDICALMARIJUANAPROGRAM/Pages/background-check.aspx

[16] Kevin Sack, *Murder or Self Defense if Officer is Killed in Raid?*, N.Y. Times, Mar. 18, 2017 *available at* https://www.nytimes.com/interactive/2017/03/18/us/texas-no-knock-warrant-drugs.html

[17] https://github.com/newsdev/nyt-forcible-entry/blob/master/nyt-forcible-entry-deaths-2010-2016.csv

[18]Bureau of Alcohol, Tobacco, and Firearms, Form 4473, *available at* https://www.atf.gov/file/61446/download

However, users of cannabis, even if it is lawful under state law are prohibited from possessing a firearm. The ATF form goes out of its way to warn that the use or possession of marijuana remains illegal under federal law. By extension, the prohibition on this form could extend to not only users of medical cannabis but also to those involved in the industry.

e. State Laws Addressing 2013 Cole Memo Priorities: Preventing violence and the use of firearms in the cultivation and distribution of marijuana

In addition to the laws referenced below, preventing violence and unlawful firearm possession have been traditional goals of state law enforcement. Thus, this enforcement priority is not addressed in some states laws and regulations related to medical cannabis, as efforts to curb violence and firearm possession appear in existing criminal codes**.**

State Laws Preventing Violence and the Use of Firearms in the Cultivation and Distribution of Marijuana			
AK	3 AAC 306.010 (2)(C)	**MI**	Mich. Comp. Laws § 333.26423 (h).
AZ	Ariz. Rev. Stat. § 36-2801(7) (2015)	**MT**	Mont. Code Ann. § 6-18-202.
AR	AMMC §V (4)(a)(v)	**NV**	Nev. Rev. Stat. § 453A.300(1)(c).
CA	Regulated at the City and County level	**NH**	2013 N.H. Laws 126-W:7(IV)(13) (c).
CO	1 Colo. Code Regs. § 212-1.305.	**NJ**	N.J. Stat. § 24:6I:7(d)(1).
CT	Conn. Agencies Regs. § 21a-408-24(a).	**NM**	N.M. Stat. § 26-2B-7(A)(6).
DE	Del. Code Ann. Tit 16 § §4915A.	**NY**	Regulated through state criminal code
DC	D.C. Code § 22-4501 et seq.	**ND**	N.D. Cent Code §19-24-07(4)(d)
FL	Fl. Cons. Art. X, § 29(d)(1)(c)	**OH**	Proposed Rule 3796:5-6-02
HI	HI Rev. Stat 846-2.7 (b)(41)	**OR**	Or. Rev. Stat. § 475B.005(2)(e).
IL	Public Act 098-0122 § 10(l) (Ill, eff. Jan. 1, 2014).	**PA**	Regulated through state criminal code
ME	Me. Rev. Stat. Tit. 22, § 2428(5).	**RI**	R.I. Gen. Laws § 21-28.6-12(c)(1)(vi).
MD	M.D. Code Tit. 5 §601 (3)	**VT**	Stat. Ann. Tit. 18, § 4474e(j)(2).
MA	105 Code Mass. Rules 725.110.	**WA**	Wash. Rev. Code § 69.51A.200 (2)(e).
		WV	S.B.386, 83rd Leg. 1st Reg.Sess. (WV 2017).

5. <u>Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use</u>

Every state with a medical cannabis program has worked to prevent users of cannabis from getting behind the wheel. While a few states only have a general prohibition on driving while under the influence of cannabis, some states have taken this a step further and developed rigorous testing standards. However, unlike detecting the presence of alcohol, detecting the presence of marijuana in amotorisit presents unique challenges. The presence of THC or other cannabis metabolites in one's system does not necessarily mean impairment. Infact, patients may be subject to criminal penalties when they only have trace amounts of cannabis in their system. Because cannabis takes longer to process than alcohol, traditional sobriety tests may not be as effective.

States have made efforts to curb other public health risks associated with cannabis use. Physician involvement in recommending medical cannabis contributes to a reduction in risk to public health. Physicians weigh the benefits and risks of recommending any medication, including cannabis. Medical cannabis physicians are held to the same medical community standards as any other doctor, and only recommend the use of cannabis if they believe it will truly help their patient.

States with medical cannabis programs also are working to improve consumer safety of cannabis products including reducing the use of harmful chemicals in the growing process, and testing for the presence of molds, chemicals and pesticides.

a. THC metabolite testing (Presence of THC v. impairment)

Technology has advanced since the 2013 Cole memo to allow for metabolite testing of THC. Colorado's law provides an example. Under Colorado law, a driver with five nanograms of active tetrahydrocannabinol (THC) in their blood creates a reasonable inference for arrest for DUI.[19] However, Colorado's law also allows for the discretion of officer observations in addition to, or in lieu of chemical testing. Other states provide for THC testing, but have a zero tolerance policy for the presence of any metabolites, but strict rules like these are likely overly broad and unfair to patients who are not intoxicated.

Some states have taken a approach more comparable to testing for alcohol impairment through field sobriety tests such as tests that assess balance, vision and memory. It is worth

[19] Colo. Rev. Stat Ann. § 42-4-1301(a)-(c)

noting, that in between 1985 and 2014 that states with medical marijuana laws had 26% fewer traffic fatalities than states that did not have medical cannabis programs.[20]

c. Federal Agency Response to Drugged Driving

The enforcement of impaired driving is almost exclusively handled by state and local law enforcement. However, federal agencies have begun to consider how to appropriately assess impairment for medical cannabis users. The National Institute on Drug Abuse has issued a request for proposals to create technology for detecting cannabis intoxication.[21] The goal of the solicitation is to find an effective way that measures intoxication without relying solely on the presence of cannabis metabolites, which can lead to false positives.

The House of Representatives has also encouraged the National Highway Transportation and Safety Administration to expand efforts with law enforcement to use Drug Recognition Expert and Advanced Roadside Impaired Driving Enforcement. [22]

d. State Laws Addressing 2013 Cole Memo Priorities: Preventing drugged driving and the exacerbation of other public health consequences associated with marijuana use

All states have laws relating to operating a motor vehicle under the influence of cannabis on their books. Several state department of health, have expanded laws concerning public health.

State Laws Preventing Drugged Driving and the Exacerbation of Other Public Health Consequences Associated with Marijuana Use			
AK	Alaska Stat. §17.38.220(b) (2015)	**MI**	Mich. Comp. Laws § 333.26427(b)(4).
AZ	Ariz Rev. Stat § 36-2802 (D),Ariz. Admin. Cod R9-17-317.	**MT**	Mont. Code Ann. § 50-46-320.

[20] Julian Santaella-Tenorio DVM, MSc et. al., Am. J. Pub. Health 107, no. 2, US Traffic Fatalities, 1985-2014 and Thier Relationship to Medical Marijuana Laws,336-42, (Feb. 1, 2017) http://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2016.303577
[21] Solicitation Notice, U.S. Dept. of Health and Human Services, PHS 2018-1, (July 18, 2017) *available at* https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=5de8932583af162e97ca21ab1721abef&_cview=1 (seeking developers to produce an app that tests for cannabis intoxication)
[22]H.R. Rep. No 115-237 at 49, (2017) *printed at* https://www.gpo.gov/fdsys/pkg/CRPT-115hrpt237/pdf/CRPT-115hrpt237.pdf

AR	Ark. Code Ann §5-65-103(a)	NV	Nev. Rev. Stat. § 453A.300(1)(a).
CA	Cal. Health & Safety Code § 11362.79.	NH	2013 N.H. Laws 126-W:3(II)(a)(1).
CO	5 Colo. Code Regs. § 1006-2.	NJ	N.J. Stat. § 24:6I:8.
CT	Conn. Gen. Stat § 21a-408a(b)(2).	NM	N.M. Stat. § 26-2B-5(2).
DE	Del. Code Ann. Tit 16 § § 4904A.	NY	NYCRR Law Tit. 10 §1004.18
DC	D.C. Code § 7-1671.03(d)(2).	ND	N.D. Cent Code §19-24-09(7)(a)(2)
FL	Fl. Cons. Art. X, § 29(c)(3)	OH	Ohio Rev. Code Ann. § 4511.19
HI	HI Rev. Stat. 329-122 (c)(1)	OR	Or. Rev. Stat. § 475B.005(2)(f).
IL	Public Act 098-0122 § 30(a)(5) (Ill., eff. Jan. 1, 2014).	PA	75 Pa. C.S.A. §§ 3802(d)(1)-(3)
ME	Me. Rev. Stat. Tit. 22, § 2426(1)(D).	RI	R.I. Gen. Laws § § 21-28.6-7(a)(3).
MD	M.D. Code Tit. 13 §3314(a)(2)	VT	Stat. Ann. Tit. 18, § 4474c(a)(1)(A).
MA	105 Code Mass. Rules 725.650(B)(1).	WA	Wash. Rev. Code § 69.51A.060(8).
		WV	S.B.386, 83rd Leg. 1st Reg.Sess. (WV 2017).

6. Preventing the growing of marijuana on public land and attendant public safety and environmental dangers posed by marijuana production

Cultivating any crop for private consumption on public land without a permit is against the law, and all businesses and agricultural operations are subject to all existing environmental laws but at the state and federal level. No medical cannabis law has an exception for cultivation on public land or an exemption from environmental law. In states that authorize the cultivation of medical cannabis for retail sale to patients, locations where medical cannabis may be cultivated are clearly defined and controlled by local land use rules.

The cultivation of cannabis on public land is a direct consequence of prohibition. Legal jeopardy creates incentives to grow on public land—its ownership cannot be traced to the grower, and the property cannot be seized. Nonetheless, medical cannabis is typically grown under close supervision in controlled environments, not on public lands. State medical cannabis laws help further prevent the cultivation of marijuana on public land by providing legal protections for individuals and their private property.

State Laws Preventing the Growing of Marijuana on Public Land and Attendant Public

Safety and Environmental Dangers Posed by Marijuana Production			
AK	Alaska Stat. §17.38.030(1-3) (2015)	**MI**	Mich. Comp. Laws § 333.26423 (d).
AZ	Ariz. Rev. Stat. § 36-2806(E) (2015)	**MT**	Mont. Code Ann. § 50-46-308.
AR	ABC RR 6.5 (b)	**NV**	Nev. Rev. Stat. § 453A.352.
CA	Regulated at the City and County level	**NH**	2013 N.H. Laws 126-W:8(XV)(c).
CO	1 Colo. Code Regs. § 212-1.205.	**NJ**	N.J. Admin. Code 8:64-10.4.
CT	Conn. Agencies Regs. § 21a-408-20(58).	**NM**	N.M. Stat. § 26-2B-7(A)(6).
DE	Del. Code Ann. Tit 16 § 4902A(f).	**NY**	NYCRR Law Tit. 10 §1004.18
DC	D.C. Code § 7-1671.06(h).	**ND**	N.D. Cent Code §19-24-07(2)(a)
FL	Fl. Cons. Art. X, § 29(d)(1)(c)	**OH**	Proposed rule: 3796:5-5-01
HI	Haw. Rev. Stat. 329-122(C)	**OR**	Or. Rev. Stat. § 475B.005(2)(g).
IL	Public Act 098-0122 § 105(d) (Ill., eff. Jan. 1, 2014).	**PA**	P.L. 84, No. 16 §802(a)
ME	Me. Rev. Stat. Tit. 22, § 2428 (6)(I).	**RI**	R.I. Gen. Laws § 21-28.6-12(c)(1)(iv).
MD	Md. Code Regs. 10.62.10.03	**VT**	Stat. Ann. Tit. 18, § 4474e(d)(1).
MA	105 Code Mass. Rules 725.105(B)(1)(c).	**WA**	Wash. Rev. Code §69.51A.260 (2).
		WV	S.B.386, 83rd Leg. 1st Reg.Sess. (WV 2017).

7. <u>Preventing marijuana possession or use on federal property</u>

The last goal of the Cole Memo is to prevent marijuana possession and use on federal property. As state and local law enforcement have no jurisdiction on federal property, states with medical cannabis programs can not effectively create legislative solutions on this. At minimum, state and local law enforcement should cooperate with federal agents, but cooperation is likely the extent of action. Federal property, such as national parks, district courthouses, and post offices fall under the jurisdiction of the federal government.

IV. Consequences of Interruption of Access to Medical Cannabis

As indicated above, there has been significant reliance by states on the guidelines laid out by the Cole Memo. This reliance has been explicit in states like Oregon and Alaska, where the Cole Memo guidelines are codified into state law and implicit through legislative and regulatory changes to match the priorities of the Cole Memo. Every state with a medical cannabis program reflects carefully crafted responses to the Department guidelines. States are not acting in contradiction of this memo but rather, are using it as the foundation of their programs.

A shift in the Department's enforcement priorities away from those detailed in the Cole Memo would be catastrophic for the states that have developed programs, and the states that look to do so in the future. There are currently over two million patients, many of them children, who rely on medical cannabis per a doctor's recommendation and interruption of access could have disastrous health consequences for them.

Additionally, approximately 91 Americans die of opioid overdose every day. States with medical cannabis programs have nearly a 25% decrease in opioid overdose deaths. [23] Interruption in programs would undoubtedly lead to more opioid overdose deaths.

Changes to enforcement priorities would lead to a further strain on Department resources. Arresting medical cannabis manufacturers, distributors and patients would add more individuals to an already congested justice system. With a limited budget, the Department should focus on priorities of violent crime, terrorism, and other pressing priorities.

V. Summary

The Cole Memo, while not perfect, has created an effective set of guidelines for states that wish to proceed in implementing medical cannabis programs. States have mirrored their enforcement priorities with those of the federal government focusing on dangerous crime and high profile criminals rather than those who are in compliance with state law. As with any policy guideline, it is to be expected that it will evolve and change over time, but it is important to note that the guidelines put in place thus far have created functioning, tightly regulated programs. With 93% of the American public in favor of medical cannabis programs, the political consequences of interrupting access would be extremely unfavorable to the Department of Justice and the Administration. [24] Tightly regulated programs help reduce the unfavorable black market for cannabis, and represent state government willingness to implement the will of their voters and constituents.

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[23] Bachuber MA, et. al., *Medical Cannabis Laws and Opioid Analgesic Overdose Mortality in the United States,* JAMA Intern. Med. 174, (2010)

[24]

The mission of Americans for Safe Access (ASA) is to ensure safe and legal access to cannabis (marijuana) for therapeutic use and research.

ASA was founded in 2002, by medical cannabis patient Steph Sherer, as a vehicle for patients to advocate for the acceptance of cannabis as medicine. With over 100,000 active members in all 50 states, ASA is the largest national member-based organization of patients, medical professionals, scientists and concerned citizens promoting safe and legal access to cannabis for therapeutic use and research. ASA works to overcome political, social and legal barriers by creating policies that improve access to medical cannabis for patients and researchers through legislation, education, litigation, research, grassroots empowerment, advocacy and services for patients, governments, medical professionals, and medical cannabis providers.