STATE OF MICHIGAN

BILL SCHUETTE, ATTORNEY GENERAL

MICHIGAN MEDICAL MARIHUANA ACT: Return of marihuana to patient or caregiver upon release from custody

PREEMPTION:

Section 4(h) of the Michigan Medical Marihuana Act, Initiated Law 1 of 2008, MCL 333.26424(h), which prohibits the forfeiture of marihuana possessed for medical use, directly conflicts with and is thus preempted by, the federal Controlled Substances Act, 21 USC 801 *et seq*., to the extent section 4(h) requires a law enforcement officer to return marihuana to a registered patient or primary caregiver upon release from custody.

Opinion No. 7262

November 10, 2011

Honorable Kevin Cotter
State Representative
The Capitol
Lansing, Michigan

You have asked whether a law enforcement officer1[1] who arrests a patient or primary caregiver registered under the Michigan Medical Marihuana Act (MMMA or Act), Initiated Law 1 of 2008, MCL 333.26241 *et seq.*, must return marihuana1[2] found in the possession of the patient or primary caregiver upon his or her release from custody.

Under the MMMA, the medical use of marihuana is permitted by "state law to the extent that it is carried out in accordance with the provisions of [the] act." MCL 333.26427(a), 333.26424(d)(1) and (2). Pursuant to section 7(e), "[a]ll other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana as provided for by this act." MCL 333.26427(e). The Act "constitutes a determination by the people of this state that there should exist a very limited, highly restricted exception to the statutory proscription against the manufacture and use of marihuana in Michigan." *People v King*, ___ Mich App ___; ___ NW2d ___ (Docket No. 294682, issued February 3, 2011), lv gtd 489 Mich 957 (2011). "All the MMMA does is give some people limited protection from prosecution by the state, or from other adverse state action in carefully limited medical marijuana situations." *Casias v Wal–Mart Stores, Inc*, 764 F Supp 2d 914, 922 (WD Mich, 2011). Thus, by enacting the MMMA, the people did not repeal any statutory prohibitions regarding marihuana. The possession, sale, delivery, or manufacture of marihuana remain crimes in Michigan. *Id*., citing *People v Redden*, 290 Mich App 65, 92; 799 NW2d 184 (2010) (O'Connell, J., concurring.).1[3] The same is true under federal law. The Controlled Substances Act (CSA), 21 USC 801 *et seq.*, makes all marihuana-related activity illegal, including the possession, manufacture, and distribution of marihuana. See 21 USC 812(c), 823(f), and 844(a).[14]

The MMMA protects from state prosecution or other penalty registered qualifying patients, MCL 333.26424(a), and registered primary caregivers, MCL 333.26424(b), who engage in the "medical use" of marihuana in accordance with all conditions of the Act. MCL 333.26427(a), 333.26424(d)(1) and (2). The term "medical use" is broadly defined and includes the "acquisition, possession, cultivation, manufacture, use, internal possession, delivery, transfer, or transportation of marihuana." MCL 333.26423(e). In order to qualify for full protection under the Act, patients and caregivers must apply for and receive a registry identification card from the Michigan Department of Licensing and Regulatory Affairs. MCL 333.26424(a) and (b).[15]

A qualifying patient with a valid registry identification card may possess up to 2.5 ounces of usable marihuana, and cultivate up to 12 marihuana plants, unless the patient has designated a primary caregiver and specified that the caregiver will cultivate marihuana for the patient. MCL 333.26424(a). A primary caregiver who has a valid registration card may possess up to 2.5 ounces of usable marihuana per patient, and may also cultivate 12 marihuana plants per patient if the patients have so specified. MCL 333.26424(b), 333.26426(d).[16] Thus, registered patients and primary caregivers are not subject to arrest, prosecution, or other penalty as long as they are in possession of the statutorily permitted amounts of marihuana, and are in compliance with the remaining provisions of the Act.

Relevant to your question, the MMMA specifically prohibits the forfeiture of marihuana possessed in connection with the medical use of marihuana. Section 4(h) of the Act provides:

> Any marihuana, marihuana paraphernalia, or licit property that is possessed, owned, or used in connection with the medical use of marihuana, as allowed under this act, or acts incidental to such use, *shall not be* seized or *forfeited*. [MCL 333.26424(h); emphasis added.]

The term "forfeited" is not defined in the Act. An undefined statutory term must be accorded its plain and ordinary meaning. MCL 8.3a; *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). Resort to lay or legal dictionaries is appropriate in interpreting statutes. *Oakland County Bd of County Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998). The word "forfeit" has a well-understood meaning in the law. It means "[t]o lose, or lose the right to, by some error, fault, offense, or crime." Black's Law Dictionary (6th ed), p 650. Thus, as used in section 4(h), "forfeited" means the permanent loss of marihuana or related property as a consequence of having done something improper.

According section 4(h) its plain meaning, and reading it in conjunction with section 7(e), MCL 333.26427(e), which renders conflicting state statutes subject to the MMMA, section 4(h) prohibits the forced or involuntary surrender of marihuana if the person in possession is a registered patient or caregiver in complete compliance with all other provisions of the MMMA. Therefore, if a registered patient or caregiver's marihuana is confiscated by law enforcement during the course of an arrest, if the person's registration card is valid and the possession complies with the MMMA, the officer must return the marihuana to the patient or caregiver upon release from custody.

But this does not conclude the analysis because, as stated above, federal law prohibits the manufacture, distribution, or possession of marihuana. The CSA provides that "[e]xcept as

authorized by this title, it shall be unlawful for any person knowingly or intentionally -- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ." 21 USC 841(a)(1). The CSA categorizes marihuana as a Schedule I controlled substance. 21 USC 812(c) (Schedule I) (c)(10). And its use remains a federal crime. See 21 USC 812(c)(10).1[7] Simple possession of marihuana is also a crime, 21 USC 844(a), and possession for "personal use" renders the offender "liable to the United States for a civil penalty in an amount not to exceed $10,000." 21 USC 844a(a).1[8]

"As a state law authorizing the use of medical marihuana, the MMMA cannot negate, nullify or supersede the federal Controlled Substances Act, which criminalized the possession and distribution of marihuana throughout the entire country long before Michigan passed its law." *United States v Michigan Dep't of Community Health*, ___ F Supp 2d ___ (WD Mich, amended opinion, June 9, 2011), (2011 US Dist LEXIS 59445; 2011 WL 2412602). "Thus, the MMMA has no effect on federal law, and the possession of marijuana remains illegal under federal law, even if it is possessed for medicinal purposes in accordance with state law." *United States v Hicks*, 722 F Supp 2d 829, 833 (ED Mich, 2010).

The question thus centers on the relationship between section 4(h) of the MMMA, which prohibits the forfeiture of marihuana, and the provisions of the CSA.

"The doctrine of federal preemption has its origin in the Supremacy Clause of article VI, cl 2, of the United States Constitution, which declares that the laws of the United States 'shall be the supreme Law of the Land . . . .'" *Ryan v Brunswick Corp*, 454 Mich 20, 27; 557 NW2d 541 (1997), abrogated in part on other grounds by *Sprietsma v Mercury Marine*, 537 US 51; 123 S Ct 518; 154 L Ed 2d 466 (2002). Whether a federal statute preempts state law is a question of federal law. *Allis–Chalmers Corp v Lueck*, 471 US 202, 214; 105 S Ct 1904; 85 L Ed 2d 206 (1985). There is a strong presumption against preemption of state law, and preemption may be found only where it is the clear and unequivocal intent of Congress. *Cipollone v Liggett Group, Inc*, 505 US 504, 516; 112 S Ct 2608; 120 L Ed 2d 407 (1992). This is especially true in the area of health and safety, which has historically been left to state regulation. *Ryan*, 454 Mich at 27, citing *Hillsborough County v Automated Medical Labs, Inc*, 471 US 707, 715; 105 S Ct 2371; 85 L Ed 2d 714 (1985). Nevertheless, "[w]here state and federal law 'directly conflict,' state law must give way." *PLIVA, Inc v Mensing*, ___US ___; 131 S Ct 2567, 2577; 180 L Ed 2d 580 (2011) (citation omitted); *Gonzales*, 545 US at 29.1[9]

In any preemption case, the ultimate test is the intent of Congress in passing the federal law. *Wyeth v Levine*, 555 US 555, 565; 129 S Ct 1187; 173 L Ed 2d 51 (2009); *Medtronic, Inc v Lohr*, 518 US 470, 494; 116 S Ct 2240; 135 L Ed 2d 700 (1996). Congress's intent may be express or implied; either through express language in the federal statute or through the federal statute's structure and purpose. *Altria Group v Good*, 555 US 70, 76; 129 S Ct 538; 172 L Ed 2d 398 (2008).

Under conflict preemption principles,1[10] where state and federal law "directly conflict," state law must give way. *Wyeth*, 555 US at 583 (Thomas, J., concurring in judgment); see also *Crosby v Nat'l Foreign Trade Council*, 530 US 363, 372; 120 S Ct 2288; 147 L Ed 2d 352 (2000) ("state law is naturally preempted to the extent of any conflict with a federal statute"). State and federal law conflict where it is "impossible" to "comply with both state and federal requirements." *PLIVA, Inc*,131 S Ct at 2577, quoting *Freightliner Corp v Myrick*, 514

US 280, 287; 115 S Ct 1483; 131 L Ed 2d 385 (1995) (internal quotation marks omitted).

Section 4(h) of the MMMA, forbidding forfeiture of marihuana, directly conflicts with the CSA's prohibition against possession or distribution of marihuana because it is impossible for a law enforcement officer to comply with both federal and state law.

As discussed above, under section 4(h) a law enforcement officer must return marihuana to a registered patient or caregiver if the individual's possession complies with the MMMA. But the CSA prohibits the possession or distribution of marihuana under any circumstance. If a law enforcement officer returns marihuana to a patient or caregiver as required by section 4(h), the officer is distributing or aiding and abetting the distribution or possession of marihuana by the patient or caregiver in violation of the CSA. Thus, a Michigan law enforcement officer cannot simultaneously comply with the federal prohibition against distribution or aiding and abetting the distribution or possession of marihuana and the state prohibition against forfeiture of marihuana.1[11] In other words, it is "impossible" for state law enforcement officers to comply with their state-law duty not to forfeit medical marihuana, and their federal-law duty not to distribute or aid in the distribution of marihuana. See *PLIVA*, 131 S Ct at 2577-2578 (holding state statutes preempted where it was impossible for drug manufacturers to comply with state law and applicable federal law).1[12] Under these circumstances, the unavoidable conclusion is that section 4(h) of the MMMA is preempted by the CSA to the extent it requires law enforcement officers to return marihuana to registered patients or caregivers.1[13] As a result, law enforcement officers are not required to return marihuana to a patient or caregiver.

By returning marihuana to a registered patient or caregiver, a law enforcement officer is exposing himself or herself to potential criminal and civil penalties under the CSA for the distribution of marihuana or for aiding or abetting1[14] the possession or distribution of marihuana. Section 841(a) of the CSA applies to "any person," which, courts have presumed, covers government employees as well as private citizens.1[15] While section 885(d) of the CSA, 21 USC 885(d), confers immunity on state law enforcement officers who violate its provisions while "lawfully engaged in the enforcement of any law . . . relating to controlled substances," returning marihuana to a registered patient or caregiver under the MMMA could not be considered lawful "enforcement" of a law related to controlled substances. "Enforcement" in this context means the prosecution of unlawful possession or distribution of controlled substances. See *United States v Rosenthal*, 266 F Supp 2d 1068, 1078-1079 (ND Cal, 2003), aff'd in part, reversed in part 445 F3d 1239, opinion amended and superseded on denial of rehearing 454 F3d 943 (2006). Otherwise, a state could contradict the fundamental purpose of the CSA and immunize any state officials who participate in the competing state regime. *Id.*1[16] Moreover, the state officers' conduct would remain "unlawful" in any event because immunity does not decriminalize the underlying conduct, it only provides protection from prosecution or other penalty.

The people of this State, even in the exercise of their constitutional right to initiate legislation, cannot require law enforcement officers to violate federal law by mandating the return of marihuana to registered patients or caregivers. This conclusion is consistent with the federal district court's opinion in *United States v Michigan Dep't of Community Health*, ___ F Supp 2d ___, *supra*, which held that the MMMA's confidentiality provision, MCL 333.26426(h), was preempted by 21 USC 876 to the extent it precluded compliance with a federal subpoena sought in conjunction with an investigation under the CSA. It also accords with the Oregon Supreme Court's decision in *Emerald Steel Fabricators, Inc v Bureau of Labor and Industries*, 348 Or 159; 230 P3d 518, 529 (2010), which held that Oregon's medical marihuana law authorizing the use of marihuana and exempting its use from prosecution, was preempted by the CSA to the extent it "affirmatively authorizes the use of medical marijuana, . . . leaving it without effect."

It is my opinion, therefore, that section 4(h) of the Michigan Medical Marihuana Act, MCL 333.26424(h), which prohibits the forfeiture of marihuana possessed for medical use, directly conflicts with and is thus preempted by, the federal Controlled Substances Act, 21 USC 801 *et seq*., to the extent section 4(h) requires a law enforcement officer to return marihuana to a registered patient or primary caregiver upon release from custody.

BILL SCHUETTE
Attorney General

[1] Although this opinion uses the term "officer," the discussion applies to any employee or agent of a state or local law enforcement agency responsible for returning confiscated or seized items.

[2] "Marijuana" and "marihuana" are both acceptable spellings for the name of this drug. The spelling "marihuana" is used in the MMMA and the Public Health Code, MCL 333.1101 *et seq*., but "marijuana" is the more commonly used spelling. The statutory spelling is used here except in quotes that use the more common spelling.

[3] Marihuana remains a Schedule 1 controlled substance under the Michigan Public Health Code, MCL 333.7212(1)(c), meaning that "the substance has a high potential for abuse and has no accepted medical use in treatment in the United States or lacks accepted safety for use in treatment under medical supervision," MCL 333.7211. Similarly, the manufacture, delivery, or possession with intent to deliver marihuana remains a felony, MCL 333.7401(1) and (2)(d), and possession of marihuana remains a misdemeanor offense, MCL 333.7403(2)(d).

[4] The MMMA acknowledges that it does not supersede or alter federal law. MCL 333.26422(c) provides, "[a]lthough federal law currently prohibits any use of marihuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law."

[5] The MMMA expressly refers to the Department of Community Health. However, the authority, powers, duties, functions, and responsibilities under the Act were transferred from the Department of Community Health to the Department of Licensing and Regulatory Affairs under Executive Order 2011-4.

[6] A qualifying patient may designate one primary caregiver "to assist with [the] patient's medical use of marihuana." MCL 333.26423(g), 333.26424(b). A primary caregiver may only assist up to five registered patients, to whom he or she is connected through the registration process. MCL 333.26424(b) and 333.26426(d).

[7] "For marijuana (and other drugs that have been classified as 'schedule I' controlled substances), there is but one express exception, and it is available only for Government-approved research projects, § 823(f)." *United States v Oakland Cannabis Buyers' Coop*, 532 US 483, 490; 121 S Ct 1711; 149 L Ed 2d 722 (2001).

[8] A registered patient or caregiver has no right to the return of marihuana under federal law. First, 21 USC 881(a)(1) provides that "[a]ll controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this title" "shall be subject to forfeiture to the United States and no property right shall exist in them." Second, the Supreme Court has held that no person can have a legally protected interest in contraband per se. See *United States v Jeffers*, 342 US 48, 53; 72 S Ct 93; 96 L Ed 59 (1951). And in *Cooper v City of Greenwood, MS*, 904 F2d 302, 305 (CA 5, 1990), the court held, "[c]ourts will not entertain a claim contesting the confiscation of contraband *per se* because one cannot have a property right in that which is not subject to legal possession." As explained in *United States v Harrell*, 530 F3d 1051, 1057 (CA 9, 2008), "[a]n object is contraband per se if its possession, without more, constitutes a crime; or in other words, if there is no legal purpose to which the object could be put." Given that it is illegal under federal law for any private person to possess marihuana, 21 USC 812(c), 841(a)(1), 844(a), marihuana is contraband per se as a matter of federal law, which means no person can have a cognizable legal interest in it. See *Gonzales v Raich*, 545 US 1, 27; 125 S Ct 2195; 162 L Ed 2d 1 (2005) ("[t]he CSA designates marihuana as contraband for *any* purpose") (emphasis in original).

[9] The Supreme Court, however, has clarified that Congress does not have the authority to commandeer the processes of states "by directly compelling them to enact and enforce a federal regulatory program." *New York v United States*, 505 US 144, 161; 112 S Ct 2408; 120 L Ed 2d 120 (1992) (citation omitted). Thus, the preemption power is constrained by the Supreme Court's anti-commandeering rule. The CSA, however, contains no language compelling state action or attempting to commandeer state law enforcement employees.

[10] In answering your question, it is not necessary for this opinion to address other forms of preemption, such as express, field, or obstacle preemption.

[11] While appellate courts in California and Oregon have upheld the return of medical marihuana, *City of Garden Grove v Superior Court of Orange County*, 157 Cal App 4th 355; 68 Cal Rptr 3d 656 (2007), *State v Kama*, 178 Or App 561; 39 P3d 866 (2002), these decisions are of questionable value in light of recent decisions. See *Pack v*

Superior Court of Los Angeles County, 199 Cal App 4th 1070 (2011), and *Emerald Steel Fabricators, Inc v Bureau of Labor and Industries*, 348 Or 159; 230 P3d 518, 529 (2010).

1[12] Section 903 of the CSA contemplates that conflicting state laws will be preempted where "there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together." 21 USC 903.

1[13] This office has previously found other state statutes preempted by federal law. See, e.g., OAG 2001-2002, No 7074, p 9 (January 24, 2001) (finding section 1905(3) of the Insurance Code preempted by the federal Liability Risk Retention Act of 1986); OAG 1991-1992, No 6679, p 28 (April 29, 1991) (finding section 23 of the Michigan Mortgage Brokers, Lenders and Services Licensing Act dealing with loan processing fees preempted by the federal Depository Institutions Deregulation and Monetary Control Act of 1980.); and OAG 1989-1990, No 6649, p 351 (July 11, 1990) (concluding that section 301(a) of the federal Labor Management Relations Act of 1947 preempted the Michigan Department of Labor from determining state law claims for wages and fringe benefits brought by employees under 1978 PA 390).

1[14] 18 USC 2(a) states: "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

1[15] The CSA defines "distribute" as "to deliver . . . a controlled substance," and it further defines the terms "deliver" or "delivery" as "the actual, constructive, or attempted transfer of a controlled substance." 21 USC 802(11), 802(8). In *United States v Vincent*, 20 F3d 229, 233 (CA 6, 1994), the United States Court of Appeals for the Sixth Circuit held that in order to establish the knowing or intentional distribution of a controlled substance, "the government needed only to show that defendant knowingly or intentionally delivered a controlled substance. 21 USC § 802(11). It was irrelevant for the government to also show that defendant was paid for the delivery." Distributing a small amount of marijuana for no remuneration is treated as simple possession, and is a misdemeanor offense. See 21 USC 841(b)(4).

1[16] This analysis is consistent with the views expressed by the United States Department of Justice. An April 14, 2011, letter from the two federal prosecutors in the State of Washington, advised the Governor of Washington that if a medical marihuana proposal became law that "state employees who conduct[ ] activities mandated by the Washington legislative proposals would not be immune from liability under CSA." Similarly, a June 29, 2011, memorandum issued by United States Deputy Attorney General James Cole provides that "[s]tate laws or local ordinances are not a defense to civil or criminal enforcement of federal law . . . including enforcement of the CSA." The letter and memorandum are attached to this opinion.

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

June 29, 2011

MEMORANDUM FOR UNITED STATES ATTORNEYS

FROM: James M. Cole
Deputy Attorney General

SUBJECT: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use

Over the last several months some of you have requested the Department's assistance in responding to inquiries from State and local governments seeking guidance about the Department's position on enforcement of the Controlled Substances Act (CSA) in jurisdictions that have under consideration, or have implemented, legislation that would sanction and regulate the commercial cultivation and distribution of marijuana purportedly for medical use. Some of these jurisdictions have considered approving the cultivation of large quantities of marijuana, or broadening the regulation and taxation of the substance. You may have seen letters responding to these inquiries by several United States Attorneys. Those letters are entirely consistent with the October 2009 memorandum issued by Deputy Attorney General David Ogden to federal prosecutors in States that have enacted laws authorizing the medical use of marijuana (the "Ogden Memo").

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States. Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large scale criminal enterprises, gangs, and cartels. The Ogden Memorandum provides guidance to you in deploying your resources to enforce the CSA as part of the exercise of the broad discretion you are given to address federal criminal matters within your districts.

A number of states have enacted some form of legislation relating to the medical use of marijuana. Accordingly, the Ogden Memo reiterated to you that prosecution of significant traffickers of illegal drugs, including marijuana, remains a core priority, but advised that it is likely not an efficient use of federal resources to focus enforcement efforts on individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or their caregivers. The term "caregiver" as used in the memorandum meant just that: individuals providing care to individuals with cancer or other serious illnesses, not commercial operations cultivating, selling or distributing marijuana.

The Department's view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed. There has, however, been an increase in the scope of

commercial cultivation, sale, distribution and use of marijuana for purported medical purposes. For example, within the past 12 months, several jurisdictions have considered or enacted legislation to authorize multiple large-scale, privately-operated industrial marijuana cultivation centers. Some of these planned facilities have revenue projections of millions of dollars based on the planned cultivation of tens of thousands of cannabis plants.

The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA. Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws.

The Department of Justice is tasked with enforcing existing federal criminal laws in all states, and enforcement of the CSA has long been and remains a core priority.

cc: Lanny A. Breuer
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Honorable Christine Gregoire
Washington State Governor
P.O. Box 40002
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April 14, 2011

Re: Medical Marijuana Legislative Proposals

Dear Honorable Governor Gregoire:

We write in response to your letter dated April 13, 2011, seeking guidance from the Attorney General and our two offices concerning the practical effect of the legislation currently being considered by the Washington State Legislature concerning medical marijuana. We understand that the proposals being considered by the Legislature would establish a licensing scheme for marijuana growers and dispensaries, and for processors of marijuana-infused foods among other provisions. We have consulted with the Attorney General and the Deputy Attorney General about the proposed legislation. This letter is written to ensure there is no confusion regarding the Department of Justice's view of such a licensing scheme.

As the Department has stated on many occasions, Congress has determined that marijuana is a controlled substance. Congress placed marijuana in Schedule I of the Controlled Substances Act (CSA) and, as such, growing, distributing, and possessing marijuana in any capacity, other than as part of a federally authorized research program, is a violation of federal law regardless of state laws permitting such activities.

The prosecution of individuals and organizations involved in the trade of any illegal drugs and the disruption of drug trafficking organizations is a core priority of the Department. This core priority includes prosecution of business enterprises that unlawfully market and sell marijuana. Accordingly, while the Department does not focus its limited resources on seriously ill individuals who use marijuana as part of a medically recommended treatment regimen in compliance with state law as stated in the October 2009 Ogden Memorandum, we maintain the authority to enforce the CSA vigorously against individuals and organizations that participate in unlawful manufacturing and distribution activity involving marijuana, even if such activities are permitted under state law. The Department's investigative and prosecutorial resources will continue to be directed toward these objectives.

Consistent with federal law, the Department maintains the authority to pursue criminal or civil actions for any CSA violations whenever the Department determines that such legal action is warranted. This includes, but is not limited to, actions to enforce the criminal provisions of the CSA such as:

- 21 U.S.C. § 841 (making it illegal to manufacture, distribute, or possess with intent to distribute any controlled substance including marijuana);

- 21 U.S.C. § 856 (making it unlawful to knowingly open, lease, rent, maintain, or use property for the manufacturing, storing, or distribution of controlled substances);

- 21 U.S.C. § 860 (making it unlawful to distribute or manufacture controlled substances within 1,000 feet of schools, colleges, playgrounds, and public housing facilities, and within 100 feet of any youth centers, public swimming pools, and video arcade facilities);

- 21 U.S.C. § 843 (making it unlawful to use any communication facility to commit felony violations of the CSA); and

- 21 U.S.C. § 846 (making it illegal to conspire to commit any of the crimes set forth in the CSA).

In addition, Federal money laundering and related statutes which prohibit a variety of different types of financial activity involving the movement of drug proceeds may likewise be utilized. The Government may also pursue civil injunctions, and the forfeiture of drug proceeds, property traceable to such proceeds, and property used to facilitate drug violations.

The Washington legislative proposals will create a licensing scheme that permits large-scale marijuana cultivation and distribution. This would authorize conduct contrary to federal law and thus, would undermine the federal government's efforts to regulate the possession, manufacturing, and trafficking of controlled substances. Accordingly, the Department could consider civil and criminal legal remedies regarding those who set up marijuana growing facilities and dispensaries as they will be doing so in violation of federal law. Others who knowingly facilitate the actions of the licensees, including property owners, landlords, and financiers should also know that their conduct violates federal law. In addition, state employees who conducted activities mandated by the Washington legislative proposals would not be immune from liability under the CSA. Potential actions the Department could consider include injunctive actions to prevent cultivation and distribution of marijuana and other associated violations of the CSA; civil fines; criminal prosecution; and the forfeiture of any

property used to facilitate a violation of the CSA. As the Attorney General has repeatedly stated, the Department of Justice remains firmly committed to enforcing the CSA in all states.

We hope this letter assists the State of Washington and potential licensees in making informed decisions regarding the cultivation, manufacture, and distribution of marijuana.

Very truly yours,

Jenny A. Durkan
United States Attorney
Western District of Washington

Michael C. Ormsby
United States Attorney
Eastern District of Washington

U.S. Department of Justice

Office of the Deputy Attorney General

Washington, D.C. 20530

June 29, 2011

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Deputy Attorney General

SUBJECT: Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use

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The Department's view of the efficient use of limited federal resources as articulated in the Ogden Memorandum has not changed. There has, however, been an increase in the scope of

commercial cultivation, sale, distribution and use of marijuana for purported medical purposes. For example, within the past 12 months, several jurisdictions have considered or enacted legislation to authorize multiple large-scale, privately-operated industrial marijuana cultivation centers. Some of these planned facilities have revenue projections of millions of dollars based on the planned cultivation of tens of thousands of cannabis plants.

The Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law. Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA. Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws.

The Department of Justice is tasked with enforcing existing federal criminal laws in all states, and enforcement of the CSA has long been and remains a core priority.

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