

LAND USE PRACTICE GROUP

## CLIENT ALERT: DOJ Signals Shift on Medical Marijuana

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In October of 2009, the United States Department of Justice issued a memorandum (the "Ogden Memo") stating that scarce federal resources should not be focused "on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." The Ogden Memo also emphasized the federal commitment to enforcing federal drug laws and that marijuana remained illegal, but it was widely perceived as marking a significant decrease in the risk of federal criminal prosecution of state-sanctioned medical marijuana activities. This perception was arguably the catalyst that sparked the rapid development of Colorado's commercial medical marijuana industry, which started toward the end of 2009.

In reaction to the development of the industry, the State of Colorado has spent the last eighteen months developing and implementing the most comprehensive medical marijuana regulatory system in the country. Operating under this regime is quite onerous for the regulated businesses, but the extensive amount of oversight involved, as well as the resulting elimination of more "amateur" businesses, has also tended to increase the perceived legitimacy of the industry. In turn, the development and institutionalization of medical marijuana as a legitimate, regulated industry has had a significant impact on real estate in Colorado, perhaps most notably by creating new demand for warehouse and retail space.

However, largely in reaction to the increase in the scope of the commercial cultivation, sale and distribution of medical marijuana, the DOJ issued a new memorandum in June of this year. It stated that the Ogden Memo was intended to refer to sick individuals and the individuals who care for them, and not to commercial medical marijuana operations. As such, the new memorandum stated that persons "in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities," are in violation of federal criminal drug laws. Those who "knowingly facilitate such activities" could include, for example, landlords that lease property to persons engaged in these illegal activities. The new memorandum also made clear that these activities should not be considered "shielded" by the Ogden Memo, and are properly the subject of federal prosecution.

Thus far, the federal government's hands-off approach in Colorado has not changed. However, the new policy makes explicit that the participants in Colorado's medical marijuana industry face a very real risk of federal criminal prosecution. This includes those who "knowingly facilitate" the business of cultivating, selling or distributing marijuana. Especially given the recent federal pronouncement, it is important for property owners to understand and recognize the risks associated with their participation in the medical marijuana industry. Though federal authorities have not clamped down on Colorado's medical marijuana industry to date, landlords of medical marijuana businesses could face federal criminal liability (for example, through "aiding and abetting" federal criminal statutes), and their properties could be subject to forfeiture.

***Otten Johnson's attorneys have substantial experience counseling clients with respect to regulatory compliance issues. For more information on this Client Alert or on real estate-related medical marijuana issues, please contact any of the attorneys in the Land Use practice group (for a listing, click here).***

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