



STATE OF DELAWARE

OFFICE OF THE GOVERNOR

TATNALL BUILDING, SECOND FLOOR
WILLIAM PENN STREET, DOVER, DE 19901

JACK A. MARKELL
GOVERNOR

PHONE: 302-744-4101
FAX: 302-739-2775

December 7, 2011

The Honorable Charles M. Oberly, III
United States Attorney for the District of Delaware
United States Attorney's Office
P.O. Box 2046
Wilmington, Delaware 19899

RE: The Delaware Medical Marijuana Act

Dear Mr. Oberly:

Thank you for meeting with me to discuss the Delaware Medical Marijuana Act (the "Act"). I write to follow-up on our conversation, provide further background on the Act, and continue our dialogue about federal prosecution priorities as they relate to implementation of the Act by state employees over the next several months.

As we discussed, the Delaware Medical Marijuana Act was passed by the General Assembly this spring to provide protections under state law for persons who use marijuana to ease the pain and suffering that result from debilitating medical conditions such as cancer, HIV, or amyotrophic lateral sclerosis, also known as Lou Gherig's Disease. (78 Del. Laws c. 23; 16 Del. C. § 4901A, *et seq.*). The Act provides for the limited and regulated distribution of medical marijuana to medically-qualified individuals in a manner intended to limit the illicit use of marijuana for recreational purposes and its deleterious effects on our communities.

The Act was crafted and considered in light of guidance from the U.S. Department of Justice that federal prosecution resources would not be focused on patients and their caregivers acting "in clear and unambiguous compliance" with state laws. (Memorandum from David W. Ogden to U.S. Attorneys, Oct. 19, 2009) (the "Ogden Memo").

However, more recent guidance from the U.S. Department of Justice suggests that in jurisdictions that have recently legalized medical marijuana, such as Delaware, the federal

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government may prosecute persons who cultivate, sell or distribute medical marijuana, and those "who knowingly facilitate such activities ... regardless of state law." (Memorandum from James M. Cole to U.S. Attorneys, June 29, 2011) (the "Cole Memo").

This guidance is particularly significant in light of federal enforcement actions undertaken recently in California, which targeted distributors of medical marijuana. Although the distribution of medical marijuana in California differs in significant respects from that contemplated by Delaware's Medical Marijuana Act, and although I understand there are questions about whether the facilities targeted in California were operating in compliance with state law, these recent developments nonetheless cause me concern on behalf of the public employees charged with implementing Delaware's Act.

In light of the Cole Memo and recent enforcement actions, I write to solicit your guidance on federal prosecution priorities in Delaware as they relate to the Act. Specifically, I ask that you affirm the position taken in the Ogden Memo that patients who possess marijuana in accordance with state law are not a prosecution priority of your office. I further ask that you affirm that "compassion centers" that distribute medical marijuana under the Act and in compliance with state law are not a prosecution priority as "commercial enterprises that unlawfully market and sell marijuana for profit." (Ogden Memo at 2). Finally, I ask that you provide reassurance that the state employees who regulate medical marijuana activities will not be prosecuted for undertaking the duties required of them by Delaware law.

* * *

The Delaware Medical Marijuana Act was drafted to create a regulated system that limits who can receive medical marijuana and how it can be provided to them. The Act was crafted to address public safety concerns and takes into account guidance from the U.S. Department of Justice about its prosecution priorities.

Specifically, the 2009 Ogden Memo states federal prosecution resources should not be focused on individuals acting "in clear and unambiguous compliance with state law." As one example, "prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regiment consistent with state law" were not likely to be prosecuted by federal authorities. (Ogden Memo at 1-2). To that end, the Act limits use of medical marijuana to registered qualifying patients, defined as persons diagnosed by a physician to have a debilitating medical condition defined in the Act. 16 *Del. C.* § 4902A(3). Physicians must certify that their patient is likely to receive "therapeutic or palliative benefit" from marijuana, and the certification can only be provided in the course of a bona fide physician-patient relationship, which does not include relationships limited to authorization to receive

medical marijuana. *Id.* at § 4902A(19). The certification must be presented to the Department of Health and Social Services for a registry identification card, which gives the registered qualifying patient the legal protections of the Act. *Id.* at §§ 4908A, 4903A.

The Ogden Memo further provides that the prosecution of "caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana" is unlikely to be an efficient use of limited federal resources. (Ogden Memo at 2). To that end, the Delaware Medical Marijuana Act limits who can provide individuals with marijuana. Only registered compassion centers may cultivate, manufacture and deliver marijuana, and only centers and registered caregivers may provide it to patients. 16 *Del. C.* § 4902A(12). Compassion centers must be not-for-profit, their facilities must be secure, and they may not transact in marijuana for any purpose other than assisting registered qualifying patients. *Id.* at § 4919A. Criminal background checks for all compassion center employees are required, and the centers may not hire persons who have committed an excluded felony offense at any time or a misdemeanor drug offense within 5 years. *Id.* at § 4918A(a). This compassion center distribution model avoids reliance on widespread production and distribution of marijuana by unregulated sources that may produce marijuana for diversion to non-medical purposes.

Because medical marijuana is distributed through regulated compassion centers, patients do not need to rely on "commercial enterprises that unlawfully market and sell marijuana for profit," which were expressly cited by the Ogden Memo as a prosecution priority. (Ogden Memo at 2). Unlike those commercial enterprises, compassion centers are prohibited from operating for profit. 16 *Del. C.* § 4919A(a). They are also prohibited from advertising to the public. *Id.* at § 4919A(k). They face loss of licensure and other penalties if they operate in a manner other than allowed by state law. *Id.* at § 4919A(o), (p).

Although Delaware's compassion center structure was designed to create a limited and regulated distribution method, the guidance from the Department of Justice this summer creates some doubt about whether operators of compassion centers will be the subject of federal prosecution. The Cole Memo highlights unnamed jurisdictions that "within the past 12 months," have authorized "multiple large-scale, privately-operated industrial marijuana cultivation centers," and it states that persons who operate such facilities may be subject to federal prosecution, "even where those activities purport to comply with state law." (Cole Memo at 2).

As such, the Cole Memo appears to be a departure from the Ogden Memo. Under the Ogden Memo, Delaware's compassion centers are not "commercial enterprises" subject to priority prosecution because they do not sell marijuana "for profit," do not market its sale to the public, and provide marijuana only in a manner consistent with state law. (Ogden Memo at 2). But the Cole Memo makes no mention of not-for-profit status or marketing. Instead, the Cole

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Memo targets for prosecution facilities that are "privately-operated," as Delaware's will be, and that are "large-scale" or "industrial." (Cole Memo at 2). Furthermore, the Ogden Memo provides reassurance that "individuals whose actions are in clear and unambiguous compliance with existing state laws" do not face likely prosecution, whereas the Cole Memo appears to target state-authorized cultivation centers, even when their activities "purport to comply with state law." (Ogden Memo at 1; Cole Memo at 2).

The Cole Memo further states that persons who "knowingly facilitate" the "business of cultivating, selling or distributing marijuana" may be subject to prosecution, "regardless of state law." (Cole Memo at 2). This could be understood to suggest that the U.S. Department of Justice may prosecute individuals who, in compliance with state law, in some small way facilitate its cultivation, sale, or distribution, even if the person does not themselves possess or sell the marijuana, and even if their actions are in accord with state law. This is of obvious concern to me on behalf of the employees of the Department of Health and Social Services for whom the General Assembly imposed the duty of administering Delaware's Medical Marijuana Act. The Ogden Memo does not address this subject, and instead emphasizes that individuals whose actions are in compliance with state law are not a prosecution priority.

In sum, the Cole Memo appears to be expressly targeting distribution methods – like that chosen by the General Assembly – that rely on a limited number of distribution centers to avoid the type of unregulated self-cultivation and diversion that have resulted in problems in other states. By doing so, the Cole Memo may be read to suggest that the federal government may prosecute exactly those highly-regulated compassion centers and anyone who "knowingly facilitates" their efforts to keep marijuana from being put to non-medical use.

* * *

These apparent distinctions between the 2009 and 2011 memos are particularly concerning in light of recent efforts by U.S. Attorneys in other jurisdictions to target persons who purport to be distributing marijuana in compliance with state-sanctioned medical marijuana programs. The Delaware Medical Marijuana Act was structured to limit the non-medical diversion of marijuana and other types of misuse seen in other states, and its implementation requires substantial efforts that are now underway. If the Cole Memo and these recent prosecutions signal that federal prosecution priorities in this area have changed, it would be helpful to know more about that as the state carries out its duties under the Act.

In hopes of clarifying federal intentions in this area, this letter solicits any confirmation you might provide that the guidance offered by the Ogden Memo, as relied upon by those who drafted and voted upon the Delaware Medical Marijuana Act, remains in force.

The Hon. Charles M. Oberly, III

December 7, 2011

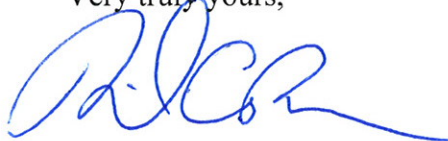
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Specifically, I ask for your confirmation that the guidance of the Ogden Memo remains in effect, and that: (i) patients who receive medical marijuana in accordance with state law are not a prosecution priority of your office; and (ii) the not-for-profit compassion centers authorized by the Delaware Medical Marijuana Act, if operated in accordance with state law, are not a prosecution priority for your office because they do not "market and sell marijuana for profit."

Further, I would appreciate any confirmation you can provide that employees of the Department of Health and Social Services, whose efforts will help to prevent medical marijuana misuse, will not be a prosecution priority for your office merely by virtue of undertaking their statutory obligations under the Act. To the extent it would be helpful to have a further discussion of exactly what those duties are, how they are being undertaken, and what the regulations may look like, I would be happy to have further discussions with you or your colleagues at your convenience.

Your consideration of these concerns is very much appreciated. Thank you again for the opportunity to discuss these issues, and I look forward to speaking with you further.

Very truly yours,



Michael A. Barlow
Legal Counsel

CC: The Honorable Joseph R. Biden, III
Attorney General
The Honorable Rita Landgraf
Secretary of the Department of Health and Social Services



U.S. Department of Justice

*United States Attorney's Office
District of Delaware*

*Nemours Building
1007 Orange Street, Suite 700
P.O. Box 2046
Wilmington, Delaware 19899-2046*

*(302) 573-6277
FAX (302) 573-6220*

February 9, 2012

Mr. Michael A. Barlow, Esquire
Legal Counsel
Office of the Governor
Tatnall Building, Second Floor
William Penn Street
Dover, DE 19901

Re: The Delaware Medical Marijuana Act

Dear Mr. Barlow:

This letter acknowledges receipt of your letter dated December 7, 2011, concerning the Department of Justice's guidance on investigations and prosecutions in states that authorize the medical use of marijuana. This letter is written to clarify the U.S. Department of Justice's guidance on this issue.

The United States Congress has determined that marijuana is a controlled substance, and it has placed marijuana on Schedule I of the Controlled Substances Act, 21 U.S.C. § 801, *et seq.* (the "CSA"). 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. Moreover, those who engage in financial transactions involving the proceeds of such activities may also be in violation of federal money laundering statutes and other federal financial laws.

As stated in the October 2009 Ogden Memorandum, "the prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks continues to be a core priority" of the Department. This Department's commitment to the enforcement of the CSA was reiterated in the June 2011 Cole Memorandum which advised that the prosecution of business enterprises that unlawfully cultivate, distribute, or sell marijuana remains a core priority, regardless of state law. The Cole Memorandum is consistent with, and a further explanation of, the Ogden memorandum.

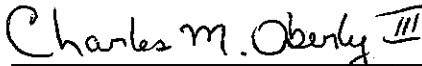
Your letter asks the Department to confirm that "patients who receive medical marijuana in accordance with state law are not a prosecution priority of [the U.S. Attorney's] office." Both the Ogden and Cole Memoranda state that the Department of Justice will likely not focus

its limited resources on the prosecution of seriously ill individuals who use marijuana as part of a medically recommended treatment regimen consistent with state laws, or on their individual caregivers. The Cole Memorandum further clarifies that the “term ‘caregiver’ . . . means just that: *individuals* providing care to individuals with cancer or other serious illnesses.” (Emphasis added).

Enterprises engaged in the cultivation, manufacturer, and sale of marijuana directly violate federal law. Accordingly, individuals and organizations that participate in the unlawful cultivation and distribution of marijuana could be subject to civil and criminal remedies. Moreover, state employees who conduct activities mandated by the Delaware Medical Marijuana Act are not immune from liability under the CSA. The USAO will evaluate all potential civil and criminal enforcement actions on a case-by-case basis in light of the priorities of the Department of Justice and the USAO’s available resources.

I hope that this letter assists the State of Delaware, and potential licensees in making informed decisions about the cultivation, manufacturer, and distribution of marijuana, as well as related financial transactions.

Sincerely,


CHARLES M. OBERLY, III
United States Attorney



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OFFICE OF THE GOVERNOR
TATNALL BUILDING, SECOND FLOOR
WILLIAM PENN STREET, DOVER, DE 19901

JACK A. MARKELL
GOVERNOR

PHONE: 302-744-4101
FAX: 302-739-2775

February 10, 2012

The Honorable Charles M. Oberly, III
United States Attorney for the District of Delaware
United States Attorney's Office
P.O. Box 2046
Wilmington, Delaware 19899

RE: The Delaware Medical Marijuana Act

Dear Mr. Oberly:

Thank you for your letter of yesterday. As you know, the Governor's administration, legislators, and many others understood that the position of the United States Department of Justice, as set forth by Deputy Attorney General Ogden, when the Delaware Medical Marijuana Act was passed was that "**pursuit of [the Department's drug enforcement] priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.**" (Memorandum from David W. Ogden to U.S. Attorneys, Oct. 19, 2009) (bold emphasis in original).

As a result of the June 2011 memorandum from Deputy Attorney General Cole, recent federal enforcement actions in other states, and as confirmed by your letter dated yesterday, I now understand clearly that federal prosecution priorities have changed.

I understand that, regardless of compliance with state law, any "individuals and organizations that participate in the unlawful cultivation and distribution of marijuana could be subject to civil and criminal remedies." (Letter from Charles Oberly, February 9, 2012.) I further understand that persons "who engage in financial transactions involving the proceeds of [marijuana distribution "in any capacity"] may also be in violation of federal money laundering statutes and other federal financial laws." (*Id.*)

While I appreciate that the Department of Justice does not intend to prosecute patients with serious illnesses and their individual caregivers, that discretion provides little

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comfort to those persons charged with ensuring that the marijuana received by patients with cancer, HIV and other conditions is safe and well-regulated. That includes the state employees implementing the Act. I asked whether those employees were a prosecution priority for your office, and your answer confirmed only that they "are not immune from liability under" the Controlled Substances Act. (*Id.*)

As a result of the Department's apparent change in policy and statement that it may prosecute persons involved in the distribution of marijuana regardless of whether they are clearly complying with or implementing Delaware's medical marijuana laws and regulations, the Governor and the Secretary of the Department of Health and Social Services have conferred, and at this point the state plans to suspend further work on regulating and licensing compassion centers in our state.

As you know, the compassion centers authorized by the Delaware Medical Marijuana Act are the vehicle by which patients with a documented medical need can receive safe, regulated access to medical marijuana. In the absence of such compassion centers, patients may be forced to obtain marijuana illicitly, unlawfully grow their own marijuana, or forgo use of medical marijuana entirely. That appears to be the unfortunate consequence of a federal policy that appears to offer mercy to cancer patients and others with a serious medical need for marijuana, but actually threatens criminal and civil sanction for those who might help them safely obtain that relief.

Although we are highly disappointed in what is a clear change of guidance from your colleagues in Washington, I appreciate your willingness to engage in a dialogue with me about this issue. Please feel free to contact me at your convenience if it would be fruitful to discuss this matter further.

Very truly yours,



Michael A. Barlow
Legal Counsel

CC: The Honorable Joseph R. Biden, III
Attorney General
The Honorable Rita Landgraf
Secretary of the Department of Health and Social Services