Clearing the Haze: Rohrabacher Amendment Does Not Change Federal Policy Regarding Medical Marijuana

Notwithstanding current news reporting to the contrary, the medical marijuana industry should not rely on the Rohrabacher amendment to preclude enforcement of federal drug laws. Before those in the medical marijuana industry get too excited about the Rohrabacher amendment, the fine print needs to be closely examined. On May 29, 2014, by a vote of 219-189, the House of Representatives added an amendment sponsored by Rep. Dana Rohrabacher (R-CA) to the Fiscal Year 2015 Commerce, Justice, Science Appropriations Act that would bar the Justice Department (including the DEA) from preventing "States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."[1] *The Washington Times* incorrectly reported that the amendment would "halt federal prosecutions of medical marijuana in states that have legalized the drug's use with a doctor's prescription."[2] Similarly, *The Los Angeles Times* reported that the measure "would prohibit the Drug Enforcement Administration from busting state-licensed medical marijuana operations."[3] Notwithstanding these reports, the Rohrabacher amendment does nothing to prevent the DEA from enforcing federal drug laws, namely the Controlled Substances Act (CSA).

The Rohrabacher amendment is a funding limitation, which means that if enacted it would restrict the federal government from spending congressionally appropriated funds on any federal activity which would "prevent" states from "implementing" their own medical marijuana laws. The federal government does not do that now and has no plans to do so. Although, states engage in various regulatory activities which the federal government does not now disturb, a federal CSA takedown of a medical marijuana distributor that is regulated under state law does not "prevent" a state from "implementing" their own medical marijuana law. Such a takedown may be contrary to the purpose or spirit of the state law, but it does not prevent or interfere with any state government activity. In short, the Rohrabacher amendment does not prevent the DEA, U.S. Attorneys, or other Department of Justice officials from fully enforcing the CSA.

The only action the Rohrabacher amendment might prohibit is a direct federal legal challenge to the legitimacy of state marijuana laws that conflict with the CSA. Arguably, the Rohrabacher amendment would prevent the federal government from bringing a civil lawsuit seeking to enjoin states that have legalized medical marijuana from implementing their own medical marijuana laws. Such a lawsuit theoretically could be brought under a preemption theory—the argument being that the CSA trumps state medical marijuana laws through the operation of the Supremacy Clause of the U.S. Constitution. This, however, was never a realistic fear. The Rohrabacher amendment does nothing to limit federal enforcement powers under the CSA. The only limitations are those imposed on the DEA or federal prosecutors by Justice Department policy, the latest of which was announced in an August 29, 2013, memorandum issued by the Deputy Attorney General to all U.S. Attorneys.[4]

For the Rohrabacher amendment to have been an effective bar to the enforcement of the CSA against medical marijuana businesses, the amendment should have been drafted to limit the expenditure of

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appropriated funds on CSA enforcement in states that have authorized the use, distribution, possession, or cultivation of medical marijuana. Below is the Rohrabacher amendment with changes that would prevent the CSA from being enforced against state-authorized medical marijuana businesses:

> None of the funds made available in this Act to the Department of Justice may be used, with respect to the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin, to enforce the Controlled Substances Act (21 USC 801 et. seq.) against persons authorized by ~~prevent such States from implementing their own~~ State law~~s that authorize the~~ to use, distribut~~eion~~, possess~~ion~~, or cultivat~~eion of~~ medical marijuana.

[1] 160 Cong. Rec. 82, H4982 (May 29, 2014) (daily ed.) (emphasis added).
[2] *See* http://www.washingtontimes.com/news/2014/may/30/house-votes-halt-federal-meddling-medical-marijuan/
[3] *See* http://www.latimes.com/nation/politics/politicsnow/la-pn-gop-marijuana-20140530-story.html
[4] *See* http://www.justice.gov/iso/opa/resources/305201382913275685746 7.pdf

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