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May 9, 2011

The Honorable Roger Goodman
State Representative, 45th District
PO Box 40600
Olympia, WA 98504-0600

The Honorable Mary Lou Dickerson
State Representative, 36th District
PO Box 40600
Olympia, WA 98504-0600

The Honorable Tami Green
State Representative, 28th District
PO Box 40600
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The Honorable Fred Finn
State Representative, 35th District
PO Box 40600
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The Honorable Andy Billig
State Representative, 3rd District
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The Honorable Sherry Appleton
State Representative, 23rd District
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The Honorable Mary Helen Roberts
State Representative, 21st District
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The Honorable Judy Clibborn
State Representative, 41st District
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The Honorable Eileen Cody
State Representative, 34th District
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The Honorable Jim Moeller
State Representative, 49th District
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The Honorable Jeannie Darneille
State Representative, 27th District
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The Honorable Deb Eddy
State Representative, 48th District
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The Honorable Dave Upthegrove
State Representative, 33rd District
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The Honorable Joe Fitzgibbon
State Representative, 34th District
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The Honorable Hans Dunshee
State Representative, 44th District
PO Box 40600
Olympia, WA 98504-0600

Dear Representatives:

Your recent letter requests our "urgent opinion and counsel in the wake of Governor Gregoire's veto of most substantive sections of Senate Bill 5073, related to medical use of cannabis."[1] We respond to those questions by outlining the relevant background, including information about Washington's medical marijuana laws, SB 5073, the federal Controlled Substances Act, and the relationship between the federal and state law. We also describe the analysis that courts use to determine whether federal law preempts state law regarding medical marijuana, and otherwise respond to your questions.

Background

We begin by noting that your questions arise in an unusual context. This is so because, under federal law, the Controlled Substances Act (CSA), possession, use, and distribution of marijuana are illegal. In contrast, the vetoed provisions of SB 5073 generally would create a licensing and regulatory system authorizing possession, use, and distribution of marijuana for certain medical purposes. Additionally, federal law vests considerable discretion in federal officials regarding the enforcement of the CSA, including in the United States Department of Justice and in the United States Attorneys for the federal judicial districts in Washington and around the country. Washington law cannot constrain the enforcement of the CSA or control the manner in which federal officials exercise discretion under that law.

A brief overview of Washington's existing laws governing the medical use of marijuana, of SB 5073, and the CSA provides important background for your questions.

Washington's Medical Marijuana Law

As to existing Washington law, in 1998, Washington voters approved Initiative 692. Generally speaking, I-692 provided a defense against criminal prosecution under *state* law for the medicinal use of marijuana by patients with certain medical conditions. In order to qualify to use marijuana for medical purposes, a patient must have been diagnosed by a health care professional as having a terminal or debilitating medical condition. RCW 69.51A.010(4). Washington law also permits patients to grow medical marijuana for their own use, or to designate a provider to grow marijuana for them. State law limits the amount of medical

[1] The legislature enacted the bill as Engrossed 2d Substitute Senate Bill 5073 (SB 5073). The sections signed into law by the governor constitute Laws of 2011, c. 181, and will be codified in chapter 69.51A RCW.

marijuana that a patient or designated provider may possess. RCW 69.51A.080. It also provided similar protection for health care professionals who advise patients regarding the medical use of marijuana and provide patients with documentation authorizing its use. RCW 69.51A.030.

SB 5073

Sections of SB 5073 that the governor signed into law will provide health care professionals with protection from arrest, search, criminal prosecution, or professional discipline for providing certain services regarding medical marijuana. This applies if the health care professional examines the patient, documents the patient's terminal or debilitating condition, informs the patient of other treatment options, and documents other measures attempted to treat the condition. Health care professionals are prohibited from engaging in certain activities involving medical marijuana, and may not operate a practice that consists solely of authorizing the medical use of marijuana or advertise the medical use of marijuana. RCW 69.51A.030 (as amended by SB 5073, § 301). The newly-enacted provisions of SB 5073 also provide for a defense for certain qualifying patients, if criminally charged with marijuana-related offenses under state or local laws. RCW 69.51A.040 (as amended by SB 5073, § 401). The new law also authorizes qualifying patients and their designated providers to form collective gardens to grow medical marijuana. SB 5073, § 403. These provisions of SB 5073 will take effect on July 22, 2011.

The governor, however, vetoed several sections of SB 5073 as enacted by the legislature. The provisions vetoed by the governor proposed to establish a licensing regime, under which the state would issue licenses authorizing certain persons to produce, use, and dispense medical marijuana. SB 5073, §§ 601-807. Additional vetoed sections proposed a state registry for qualifying patients, and protection against arrest by state or local authorities for patients who register. SB 5073, § 901. The governor also vetoed sections of SB 5073 that define terms or otherwise interrelate with the vetoed sections. Those sections, accordingly, have not become law. Wash. Const. art. III, § 12 (veto powers).

Federal Law

Under the CSA, it is a federal crime to manufacture, distribute, or possess with intent to distribute any controlled substance, including marijuana. 21 U.S.C. § 841. The CSA additionally defines other federal crimes, including offenses relating to the use of real property to manufacture, store, or distribute marijuana (21 U.S.C. § 856), distribute or manufacture marijuana near schools, colleges, playgrounds, public housing facilities, and other specified locations (21 U.S.C § 860), or conspiring to commit any crime set forth in the CSA. 21 U.S.C. § 846.

As you are aware, the United States Attorneys for the Eastern and Western Districts of Washington have jointly advised the governor that the enforcement of the CSA remains a core federal priority. Letter from Durkan and Ormsby to Governor Gregoire at 1 (April 14, 2011)

(U.S. Attorneys' Letter).[2] "This core priority includes prosecution of business enterprises that unlawfully market and sell marijuana." *Id.* This applies, as the federal authorities have explained, "even if such activities are permitted under state law." *Id.*

Additional Matters

With this background in mind, we note three additional matters before turning to the specific questions that you have posed. First, of course, if there is sufficient legislative support to do so, the legislature has the authority to override the governor's partial veto of SB 5073. Wash. Const. art. III, § 12.

Second, you have requested our "urgent opinion and counsel." The urgency of your request forecloses the opportunity to employ our opinion process, which involves extensive legal research, analysis, and critical review. Accordingly, the legal analysis provided in this letter reflects our informal thinking and is intended to help guide your deliberations. It is not, however, a formal Opinion of the Attorney General.

Third, as explained above, in large measure your letter asks for our views with respect to how a federal law—the CSA—would be interpreted, administered, and enforced by the federal government. As you likely appreciate, this Office neither controls nor influences such decisions. The exercise of prosecutorial discretion by the federal government depends upon the facts and circumstances of each case, in addition to their interpretation of federal law. As noted, the views of the United States Attorneys for the Eastern and Western Districts of Washington are already a matter of public record.

We now address the specific questions that you have posed.

1. **Where the federal Controlled Substances Act prohibits state activities that create a "positive conflict" between state and federal laws (*see* 21 U.S.C. § 903), would the exercise of our state's (and its instrumentalities') regulatory, licensing and zoning powers related to cannabis cultivation, processing and dispensing, as set forth in SB 5073, create a "positive conflict" with federal law, even where no state employee would be required to engage in specific activities that are prohibited by the Controlled Substances Act?**

Your first question essentially asks whether SB 5073, if enacted to include the sections vetoed by the Governor, would be preempted by the CSA. It is also predicated upon a legal assumption that under SB 5073, "no state employee would be required to engage in specific activities that are prohibited by the Controlled Substances Act."

A discussion of the general legal framework that a court would use to determine whether a state law is preempted by a federal law may guide your thinking on this question. As a general

[2] A copy of the cited letter is attached for ease of reference.

proposition, when Congress enacts a federal law on a particular subject, that federal law prevails over conflicting state laws. *United States v, Gillock*, 445 U.S. 360, 370, 100 S. Ct. 1185, 63 L. Ed. 2d 454 (1980). As a result, when Congress legislates on a particular subject, "it is empowered to pre-empt state laws to the extent it is believed that such action is necessary to achieve its purposes." *City of New York v. FCC*, 486 U.S. 57, 63, 108 S. Ct. 1637, 100 L. Ed. 2d 48 (1988). Courts resolve preemption claims by examining the specific federal and state laws at issue to determine whether Congress superseded the authority of states to act with regard to a particular subject. *E.g., Altria Group, Inc. v. Good,* 555 U.S. 70 ___, 129 S. Ct. 538, 543, 172 L. Ed. 2d 398 (2008).

In enacting the CSA, Congress set forth in statute its intent regarding the preemption of conflicting state laws:

> No provision of this title shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this title and that State law so that the two cannot consistently stand together.

21 U.S.C. § 903. This provision indicates that Congress intended to preempt conflicting state laws, without entirely occupying the field of narcotics regulation. *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372, 120 S. Ct. 2288, 147 L. Ed. 2d 352 (2000) ("And even if Congress has not occupied the field, state law is naturally preempted to the extent of any conflict with a federal statute").

For two reasons, however, your question is not otherwise amenable to response by a legal opinion from this Office. First, your question presumes a legal conclusion. You ask us to assume that "no state employee would be required to engage in specific activities that are prohibited by the Controlled Substances Act." The United States Attorneys who exercise federal jurisdiction in Washington have informed the governor that "state employees who conducted activities mandated by the Washington legislative proposals would not be immune from liability under the CSA." U.S. Attorneys' Letter at 2. To make the assumption you suggest would limit any meaningful response to your question. Second, we ordinarily are hesitant to construe federal statutes, as ultimately our view is not controlling with respect to federal authorities. While this consideration does not always dictate that we refrain from providing guidance on such questions, it carries additional weight where, as here, authorized federal officials have already stated the position of the United States with respect to the issue.

2. **What is the likelihood, in consideration of current federal policy respecting individuals whose actions are "in clear and unambiguous compliance with existing state laws," (see so-called "Holder Memorandum" of 10/29/09) that Washington State employees would be subject to federal criminal liability for activities to implement the cannabis cultivation, processing and dispensing system as set forth in SB 5073, where no such comparable federal criminal liability has ever been attached to any state employees in the past and where state employees' activities in this case would fall far short of "aiding and abetting" the violation of federal law?**

Your second question asks this office to predict the level of risk that the federal government would bring a criminal action against state employees for administering the provisions of SB 5073 that the governor vetoed. This question does not seek an opinion on a question of law, and consequently cannot be answered by a legal opinion. This Office has no control over enforcement of the CSA, and cannot meaningfully predict what the United States may or may not do in that respect. Their exercise of prosecutorial discretion is dependent on the facts and circumstances of each case, as well as on their interpretation of federal law.

3. **How enforceable is Washington's medical cannabis law in general and what is the permissible extent of Washington' police power to protect health, welfare and safety of the people in the face of the absolute federal prohibition of cannabis?**

Your final question asks whether Washington's existing medical marijuana law is enforceable. This inquiry essentially poses a question as to the validity of a duly-enacted state law. Part of the role of the Attorney General is to defend challenges to the validity of state laws. As a matter of longstanding historical practice, we decline to provide legal opinions with respect to the validity of such laws, as doing so may jeopardize our ability to defend them.

Conclusion

Finally, your letter indicates that you are in the process of "craft[ing] a new proposal concerning Washington's medical cannabis law. We would be happy to review such a proposal and discuss legal options with you as that process goes forward.

Sincerely,

Jeffrey T. Even

JEFFREY T. EVEN
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Enclosure

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Honorable Christine Gregoire
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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