

Q&A with ... Benton Bodamer

Benton Bodamer is a member of Dickinson Wright's cannabis practice group, and regularly advises clients on complex national and cross-border issues.

Q: What is the Trump administration's public strategy when it comes to cannabis?

A: To not have a public strategy.

Q: Could you elaborate a bit?

A: Yeah, so the reason we have a robust medical, and now adult use cannabis industry in the U.S. is former president, Barack Obama, came into office and inherited 13 states that had medical, but didn't really have medical in the way that we know it today in states where there's a thriving local economy and local marketplace.

There were enough questions that sufficient people were afraid to get into the industry, certainly financing was nonexistent, and because of Obama's stated views — you had the Ogden memo, you later had the second Cole memo that permitted the industry to exist. So you had federal action through executive non-action, where Obama's Justice Department wasn't going to pursue certain kinds of offenses, as long as they were consistent with a regulated state marketplace.

That's what allowed 13 medical states to turn into 33, and the possibility of more medical states. With the number of rec states, when he took off as being zero, fast forward to today and the legitimacy of that portion of the industry has taken off as well.

So I think the Obama administration's public stance was to put out a model and say we're not going to pursue players in this marketplace. At one point,

that marketplace started to go too far, when you saw California proposing an initiative to go adult-use, had Eric Holder saying, 'hey, California, don't do that.' California didn't pass it.

But then, essentially, the very next year, he had two states that did. So that's what precipitated the second Cole memo where Obama basically said, 'Look, we're going to allow this to happen, as long as it's consistent with us with the state marketplace, and by the way, follow these criteria. Namely, the eight criteria in the Cole memo.'

His public views were, we're not going to touch it, as long as you're following these guideposts and Trump came into office and really almost immediately had the Sessions memo, which I think perfectly embodies Trump's views on the cannabis industry, 'Whatever Obama said, I don't agree with.'

The Cole memo is not law anymore, according to the Sessions memo. The Ogden memo is not law anymore, according to the Sessions memo. Against that backdrop, you have pieces that Trump can't control, he can't realistically control Rohrabacher-Farr and its progeny, which continues to be part of the continuing resolution and withhold funds effectively for federal prosecutions of state compliant medical industry participants.

Notably, that doesn't apply to adult-use, and I think that's an important distinction. The Republicans have pushed the Democrats to not get it in there, and they haven't really let them get that through. I think McConnell has stopped it and I think that's telling you know, that the Republicans don't believe that the public generally is there from an adult-use standpoint, and I think the Democrats generally would probably concede that nationwide.

Generally, the public isn't quite there. For medical, though, I think the public is generally there.

That's the political football at this point is adult-use versus medical. How are we characterizing this, but nobody wants to be making public statements about it as an entire party because everyone knows that toward the middle, you're going to find people on the other side, politically independent middle ground that disagree.

Q: What is happening behind the closed doors with the administration and agencies under the executive branch?

A: Yeah. So, since we don't have their words, they're not really putting out strong positions, you have to look at what they've done — there are widespread actions by various agencies that are instructive, or at the very least, interesting. Look at Attorney General William Barr, what his Justice Department has done from an antitrust perspective, namely, challenging or holding up every single cannabis-related transaction that required Hart Scott Rodino Act approval for extended periods of time. Transactions that should have been approved or pre-cleared within 30 days or shorter, dragged out for six months for no apparent reason, other than animus or curiosity about the industry or both.

Q: How about any notable action by the DEA?

A: Well, interesting on that front, I think if you look at what's happening with hemp right now. Hemp, I would have thought, would be non-controversial. Yet you have the DEA coming out with proposed rules on hemp that would effectively make illegal processing of hemp into CBD products, which is pretty shocking if you think about who was pushing for hemp when you look at Kentucky.

When you think about Mitch McConnell and the idea that the 2018 Farm Bill somehow magically got it wrong to prohibit the industry that was anticipated to develop out of the cultivation of hemp from existing, that seems like the

wrong answer intuitively, yet that's the one the DEA has put forward in its proposed rules.

There are those who would say, 'Well, we're just working with the statute — that's technically what the language of the statute says.' I think that's a bit of gaslighting. Prior to the 2018 Farm Bill, you had the predecessor Farm Bill, that allowed for cultivation of hemp, but didn't explicitly exclude it from the Controlled Substances Act. The DEA took the position then that if you do anything with it, it magically turns into the scheduled substance. Well, that's effectively the exact same position they've just taken vis a vis the entire hemp industry, if you process it, at the moment you extract the THC content, you've just created a controlled substance that you don't have a license for which is federally non-compliant. So no one should be processing hemp if you follow the letter of the DEA's proposed interim final rule.

Q: A lot of folks have started to make hay about this, especially in light of the interest that has been growing over Delta-8-THC.

A: You have over 100 cannabinoids that we know very little about and, as more come online, the fact that federal legislation made all of them not subject to the Controlled Substances Act, and then you would have potential that the DEA is coming along and effectively trying to put those individual cannabinoids that are specifically accepted from the Controlled Substances Act back under their jurisdiction, is instructive.

Q: Taking a step back and looking at everything from a 30,000-foot view, is there any cohesive plan that you see with cannabis when it comes to the Trump administration?

A: I don't know about a cohesive plan. It seems more like there's a quiet emboldening of individual agencies to take action.

You have a series of subpoenas that have come out and seemingly fishing expeditions. So Department of Justice's subpoena, for example, to the California Bureau of Cannabis Control, multiple subpoenas asking the

Southern District of California for information on California regulators and for them to disclose documentation about cannabis businesses licenses, shipping manifests, and regulators declined to comply with a DEA subpoena.

Now you have the DOJ stepping in and pushing for a court to essentially give unfettered access to what would serve as a roadmap to who are the participants in this industry. The Justice Department won the most recent version of that court battle so it is currently entitled to receive that information.

There's a similar effort with the Weedmaps subpoena where you have federal prosecutors who are looking at California cannabis companies in what's really looked at as a wide ranging fishing expedition probe.

Prosecutors of the U.S. Attorney's Office for the Eastern District of California launched a probe of cannabis companies in California, and in so doing issued a subpoena seeking records that are held by Weedmaps. So that's the West Coast, and then you can go out to the East Coast, where you have federal actions taken against companies in Maine.

You have federal actions to take a similar approach to seeking broad information about the local market participants in Massachusetts, related to potential fraud and the host community agreements, which one would think the Attorney General Maura Healey of Massachusetts could handle quite effectively. Yet, you have these fishing expeditions by the federal investigatory arm and I think you put those two together it really starts to paint a picture of the Department of Justice that wants to stop all of or slow down all of the merger and acquisition activity.

It's dangerous to bring up in an election year, so I don't blame them for being nervous about that. They'll deal with it next year.

But I think that it's just like alcohol with taking down the prohibition against alcohol. The federal government sees states as incubators of change and the federal government is not going to say, "Oh, we screwed up, let's stop this prohibition."

States, one at a time, we're going to override it. So first, it was incremental, I believe, first, it was New York for beer. And then it was other states for beer, and then it was hard liquor, and then you could brew your own beer and there's still some counties that are dry. And that's the same thing that's going to happen, I think, with marijuana.