

BANKING ALERT

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Banking on the Marijuana Business — Treasury and DOJ Clear Financial Institutions to Service State-Licensed Marijuana Businesses

On February 14, 2014, the Department of the Treasury, Financial Crimes Enforcement Network (FinCEN) issued detailed guidelines for financial institutions that do business in the 20 states and the District of Columbia that have legalized marijuana in some form. Because marijuana remains illegal at the federal level, many banks and other financial institutions have refused to do business with state-licensed marijuana businesses, fearing prosecution for money laundering or other financial crimes under the Bank Secrecy Act (BSA).

The FinCEN guidance, taken in conjunction with a Department of Justice (DOJ) memorandum issued to all United States attorneys the same day, seeks to clarify how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations and aligns the information provided in suspicious activity reports (SARs) with federal law enforcement priorities.

The FinCEN guidance enumerates eight factors that banks should consider as part of their due diligence process prior to providing financial services to any state-licensed marijuana business:

- verifying with the appropriate state authorities that the business is duly licensed and registered
- reviewing the license application and any related documentation submitted by the business in order to obtain its license
- requesting from state licensing and enforcement authorities any available information about the business and related parties
- developing an understanding of the normal and expected activity for the business, including the types of products to be sold and the type of customers to be served (e.g., medical versus recreational)
- ongoing monitoring of publicly available sources for adverse information about the business and related parties
- ongoing monitoring for suspicious activity
- updating information previously obtained as a part of the due diligence process on a periodic basis and commensurate with the risk
- assessment of whether a marijuana-related business implicates one of the Cole Memo priorities¹ or violates state law

¹ The Cole Memo, issued by James M. Cole, Deputy Attorney General on August 29, 2013, provided guidance to DOJ attorneys and law enforcement concerning marijuana enforcement priorities. The memo lists the priorities in general terms as: (i) preventing the distribution of marijuana to minors; (ii) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (iii) preventing the diversion of marijuana from states where it is legal under state law in some form to other states; (iv) preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; (v) preventing violence and the use of firearms in the cultivation and distribution of marijuana; (vi) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (vii) preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and (viii) preventing marijuana possession or use on federal property.

Because marijuana remains a controlled substance under federal law, a financial institution that ultimately decides to provide financial services to a marijuana-related business must file SARs in accordance with the FinCEN guidance, which created new categories of SAR reporting to align the reports with the needs of the Cole Memo priorities of marijuana-related law enforcement. The guidance provides for “marijuana limited” SAR filings for those marijuana-related business that a financial institution reasonably believes, based on its customer due diligence, **does not** implicate one of the Cole Memo priorities or violates state law, or a “marijuana priority” filing for those marijuana businesses that a financial institution reasonably believes, based on its customer due diligence, **does** implicate one of the Cole Memo priorities or violates state law.

The FinCEN guidance then goes on to set forth an extensive list of “red flags” that may indicate that a marijuana-related business is engaged in activity that implicates one of the Cole Memo priorities or violates state law. The FinCEN guidance notes, however, “[t]hese red flags indicate only possible signs of such activity, and also do not constitute an exhaustive list.”

The FinCEN guidance, DOJ memorandum and Cole Memo, when combined, set forth a complex due diligence and regulatory compliance scheme for banks that are currently contemplating the provision of financial services to licensed marijuana-related businesses. Financial institutions with questions about the interpretation or implementation of the FinCEN guidance or memoranda may contact any of the following Roetzel attorneys:

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