

Client Alert

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Banking Marijuana-related Businesses, but at What Compliance Cost and Risk?

The Financial Crimes Enforcement Network (“FinCEN”), in coordination with the US Department of Justice (“DOJ”), issued formal guidance to clarify BSA expectations of financial institutions with respect to banking marijuana-related business as clients (the “Guidance”).¹ The Guidance clarifies that financial institutions can provide services to marijuana-related businesses consistent with their Bank Secrecy Act (“BSA”) obligations. FinCEN Director Jennifer Shasky Calvery said she was unaware of any banks that have been punished for servicing legal marijuana-related businesses.

Director Shasky commented on the Guidance at the 14th Annual Florida International Bankers Association AML Compliance Conference on February 20, 2014, attended by over 1500 BSA/AML compliance professionals, but was not inclined to take any questions or have any side bar discussions. She noted that “this is a unique and complex issue, and only legislative change can fully and completely address it. We believe that FinCEN’s approach best balances the multiple competing interests currently at play.”

The Guidance came after an exhaustive exercise by FinCEN, studying SAR data and trends, and is intended to reduce the burden on banks,” one senior FinCEN official stated.² The obligation to file a SAR is unaffected by any state law that legalizes marijuana-related activity. A financial institution is required to file a SAR if, consistent with FinCEN regulations, the financial institution knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution: (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity; (ii) is designed to evade regulations promulgated under the BSA, or (iii) lacks a business or apparent lawful purpose. Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity. “Now, the necessity is limited, reducing the banks’ burden a bit, and more importantly clarifies where law enforcement focuses its attention.”³ Consistent therewith, the DOJ is using its “limited” investigative and prosecutorial resources to address the most significant marijuana-related cases in an effective and consistent way.⁴

Under the Guidance, FinCEN splits the SAR Filing with respect to marijuana activity into tiers: “Marijuana Limited” SAR Filings, “Marijuana Priority” SAR Filings and “Marijuana Termination” SAR Filings. Good marijuana/bad marijuana/no marijuana? Financial Institutions are effectively the new line of defense when identifying illegal marijuana business activity and banks that wish to bank marijuana-related business may need to hire more BSA/AML analysts depending on the level and volume of

¹ FIN-2014-G001.

² The Denver Post

³ The Denver Post

⁴ On August 29, 2013, the DOJ issued guidance to federal prosecutors concerning marijuana enforcement under the Controlled Substances Act.

activity. Soon banks will be better versed in the drug trade than DEA agents who receive 18 weeks of training.

Banks that establish accounts with marijuana-related businesses should review their CIP and conduct customer due diligence efforts to ensure that they comply with the Guidance. Among other things, financial institutions should:

Verify with state authorities that the business is properly licensed and registered;

Request from state licensing and enforcement authorities information about the business and related parties;

Understand the normal and expected activity for the business, including the types of products to be sold and the customers served (e.g., medical versus recreational customers);

Conduct ongoing monitoring of publicly available sources for adverse information about the business and related parties;

Conduct ongoing monitoring for suspicious activity, including the red flags described in the Guidance;

Request financial statements of the business in order to accurately profile the customer (does the activity match the revenue);

Ask the business whether they are splitting the transactional activity between banks; and

Continue to scrub for OFAC, at the business level as well as the activity level.

In addition, financial institutions should update their BSA/AML compliance program and SAR policy to incorporate the subject matter – many BSA/AML compliance programs that we have reviewed to date have not been updated to reflect the new regulations 31 C.F.R. Chapter X (formerly 31 C.F.R. Part 103) and terrorist financing. Add marijuana-related business to the list. An update to your risk assessment will also be necessary. As we have previously indicated, all institutions will need to upgrade their responses to third party risk to address heightened regulatory expectations. With every marijuana-related business you bank, the more risk, and in turn, an increase in BSA risk profile. Financial Institutions ask what is the magic number before your BSA risk profile increases? Those banking marijuana-related businesses will not have a hard time guessing the answer, you are one exam away from finding out.

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