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June 18, 2014

FinCEN Guidance - BSA Expectations Regarding Marijuana-Related Businesses

[28200]

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TO: OPERATIONS COMMITTEE No. 31-14
TRANSFER AGENT ADVISORY COMMITTEE No. 38-14 RE: FINCEN GUIDANCE - BSA
EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES

Overview

On February 14, 2014, the Department of the Treasury, Financial Crimes Enforcement Network (“FinCEN”) issued Guidance FIN 2014-G001, “BSA Expectations Regarding Marijuana-Related Businesses,” to clarify Bank Secrecy Act (“BSA”) expectations for financial institutions that provide services to marijuana-related businesses in states that have legalized certain marijuana-related activity (the “Guidance”). [\[1\]](#) The Guidance sets forth specific obligations for financial institutions providing services to marijuana-related businesses. FinCEN believes that the Guidance should enhance the availability of financial services for these businesses.

The Guidance outlines specific components of a customer due diligence program for marijuana-related businesses that will enable a financial institution to assess the risk of providing services, including consideration of whether a marijuana-related business implicates one of the Department of Justice’s priorities or violates state law. The Guidance notes that this is an important factor to consider when assessing risk as this factor also enables the financial institution to provide pertinent information in BSA reports.

Additionally, and particularly important, the Guidance states that financial institutions must file certain Suspicious Activity Reports (“SARs”) when providing services to marijuana-related businesses, irrespective of whether the activity is legal in the relevant state. [\[2\]](#) The Guidance describes three types of SARs: a “Marijuana Limited” SAR, a “Marijuana Priority” SAR, and a “Marijuana Termination” SAR. FinCEN also describes several red flags to distinguish Marijuana Priority SAR filings. The red flags may indicate a marijuana-related business is engaged in activities that implicate federal law enforcement priorities (described below) or violate state law.

Controlled Substances Act (“CSA”) and Tension with State Law

The CSA makes it a federal crime to manufacture, distribute, or dispense marijuana. [\[3\]](#) While the majority of states follow the CSA, 20 states and the District of Columbia have legalized marijuana-related activity in some form. As a result of state action legalizing certain marijuana-related activities, Deputy Attorney General James M. Cole issued a memorandum (“Cole Memo”) to all United States Attorneys to provide guidance to federal prosecutors for marijuana enforcements under the CSA. The Cole Memo reiterated the DOJ’s commitment to allocating resources towards investigating and enforcing marijuana-related violations of the CSA. In accordance with this commitment, the Cole Memo set forth several priorities (“Cole Memo priorities”) that will drive federal law enforcement efforts to investigate marijuana-related crimes. [\[4\]](#)

Customer Due Diligence and Marijuana-Related Businesses

The Guidance confirms that financial institutions have the authority to decide whether to open, close, or refuse any particular account relationship, based on its business objectives and evaluation of the risks associated with establishing a relationship with prospective customers. The Guidance states that customer due diligence is a critical aspect to making an assessment and states that the customer due diligence should include the following:

- Verifying with the appropriate state authorities whether the business is duly licensed and registered;
- Reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business;
- Requesting from state licensing and enforcement authorities 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 (recreational versus medical);
- Ongoing monitoring of publicly available sources for adverse information about the business and related parties; and
- Refreshing information obtained as part of customer due diligence on a periodic basis and commensurate with the risk.

Financial institutions may rely on the accuracy of information provided by state authorities, where states make such information available. As part of customer due diligence, financial institutions also should consider whether a marijuana-related business implicates one of the Cole Memo priorities or violates state law.

SAR Reporting for Marijuana-Related Businesses

A financial institution’s obligation to file a SAR is not relieved when state action legalizes marijuana-related activity, because the CSA prohibits the distribution and sale of marijuana as well as financial transactions involving such activity. The Guidance introduces three types of SAR filings that financial institutions must make when providing services to a marijuana-related business.

The first is the “Marijuana Limited” SAR, which is made by financial institutions whose due diligence leads to a conclusion that the marijuana-related business does not implicate one of the Cole Memo priorities or violates state law. The second is the “Marijuana Priority” SAR. Financial institutions must make this filing when their due diligence leads them to reasonably believe that the marijuana-related business implicates one of the Cole Memo priorities or violates state law. The third type of filing is the “Marijuana Termination” SAR.

Financial institutions must file this type of SAR when they terminate their relationship with a marijuana-related business in order to maintain an effective anti-money laundering compliance program. In addition, they must state the basis for the termination in the narrative section of the SAR filing.

To help financial institutions monitor and distinguish Marijuana- Priority SARs, FinCEN describes several examples of red flags that institutions should be mindful of when reviewing the activity of marijuana-related businesses. A few examples of these red flags are when the marijuana-related business's proximity to a school is not compliant with state law and when a marijuana-related business purporting to be a "non profit" is engaging in commercial activity inconsistent with that classification, or is making excessive payments to its manager(s) or employee(s). Examples of indicia that a state-licensed marijuana-related business is a pretext to launder money include the business receives more revenue than its local competitors or the business is depositing more cash than is commensurate with its reporting for federal and state tax purposes.

CTR Reporting for Marijuana-Related Businesses

Finally, the Guidance describes Currency Transaction Reporting ("CTR") requirements for marijuana-related businesses by stating that such businesses may not be treated as non-listed businesses under 31 C.F.R. § 1020.315(e)(8), and, thus, they are not eligible for CTR exemption. As such, financial institutions must file CTRs upon the receipt or withdrawal of more than \$10,000 in cash per day from these marijuana-related accounts.

Susan Olson
Senior Counsel - International Affairs

endnotes

[1] The Guidance is available at http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf.

[2] The Guidance states that since federal law prohibits the distribution and sale of marijuana, financial transactions involving marijuana-related business would generally involve funds derived from illegal activity. Guidance at 3.

[3] Controlled Substances Act, 21 U.S.C. § 801, et seq.

[4] These priorities are the following: (1) prevent the distribution of marijuana to minors; (2) preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels; (3) preventing the diversion of marijuana from states where it is legal under state law in some form to other states; (4) preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity; (5) preventing violence and the use of firearms in the cultivation and distribution of marijuana; (6) preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use; (7) preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and (8) preventing marijuana possession or use on federal property.

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