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Anti-Money Laundering Guidance Issued for Banks Seeking to Service Marijuana-Related Businesses

JODI L. AVERGUN AND JOSEPH V. MORENO

The authors of this article discuss recent anti-money laundering guidance relating to financial crimes involving marijuana businesses.

Recently, both the Department of Justice (the “Department”)¹ and the Financial Crimes Enforcement Network (“FinCEN”)² of the Department of the Treasury issued anti-money laundering (“AML”) guidance relating to financial crimes involving marijuana businesses. The Department’s guidance was intended to provide enforcement guidance to prosecutors, while the FinCEN guidance focused on describing new compliance obligations of banks and other financial institutions seeking to provide financial services to marijuana-related businesses. While the new guidance from both the Department and FinCEN expressly permits banks to engage in financial transactions involving marijuana proceeds, it is clear that the provision of financial services to the marijuana trade is fraught with considerable risk and significant compliance burdens.

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ENFORCEMENT CONSIDERATIONS

In August 2013, the Department provided guidance to federal prosecutors investigating and prosecuting marijuana-related offenses (the “Cole Memo”) in light of state legalization and decriminalization laws despite federal law to the contrary.³ The Cole Memo provided a list of eight enforcement priorities that federal prosecutors were directed to consider in deciding whether to file criminal charges for conduct related to marijuana (the “Cole Memo priorities”).⁴

The Department’s new financial guidance reiterates Congress’ determination that marijuana is a dangerous drug, and that illegal marijuana activity is a source of revenue for criminal enterprises. Nevertheless, the new guidance acknowledges the existence of legalization or decriminalization activities in at least 20 states and thus instructs prosecutors to apply the same eight enforcement priorities announced for prosecution of marijuana offenses when considering whether to bring money laundering or Bank Secrecy Act (“BSA”) charges in cases involving marijuana-related proceeds. According to the memo, if a financial institution provides banking services to a marijuana-related business knowing that one or more of the Cole Memo priorities are implicated — or if the financial institution is “willfully blind” to such activity — prosecution may be appropriate.

CUSTOMER DUE DILIGENCE REQUIREMENTS

The new FinCEN guidance is ostensibly more permissive than the Department memo and “clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations.” Pursuant to the FinCEN guidance, before deciding whether to open, close, or refuse any particular account or customer relationship, the bank should conduct “thorough” risk-based due diligence that includes a variety of tasks including, among other things:

- verifying the registration status of the business and other state licensing information and reviewing documentation underlying the license or registration application by the business;

- developing an understanding of the normal and expected activity for the business including types of products sold and services offered;
- ongoing monitoring of publicly available sources for adverse information about the business and related parties; and
- ongoing monitoring for suspicious activity.

The FinCEN guidance also provides a non-exhaustive list of red flags that may indicate a marijuana-related business is engaged in activity that implicates one of the Cole Memo priorities or violates state law.⁵ Robust customer due diligence and continual monitoring will be essential before a financial institution can safely conclude that it can reliably provide banking services to the business.

AML REPORTING REQUIREMENTS

According to the new FinCEN guidance, despite legalization of marijuana activities in many states, financial institutions remain obligated to file a suspicious activity report (“SAR”) if there is a financial transaction involving suspected marijuana sales because such transactions remain illegal under federal law. The new FinCEN guidance provides a modified SAR reporting system that allows banks to file a “limited” SAR for marijuana businesses that do not implicate any of the Cole Memo priorities, and a “priority” SAR for a customer’s marijuana business that implicates one of the Cole Memo priorities or violates state law. Banks are instructed to file a “termination” SAR if a bank deems it necessary to terminate a relationship with a marijuana-related business in order to maintain an effective AML compliance program.

OTHER RISKS TO FINANCIAL INSTITUTIONS

In addition to these enhanced customer due diligence and AML filing requirements, there are additional risks that should be taken into account by banks seeking to service marijuana-related businesses.

- *Legal and Regulatory Uncertainty.* While providing some degree of predictability about the types of activities that would warrant prosecution,

the fact remains that guidance lacks the force of law. Such guidance may be modified or withdrawn at any time by this or future White House administrations, and may be superseded by statute. Indeed, within days of its release, the new guidance was already under fire by legislators arguing that only Congress has the power to amend the drug laws that criminalize marijuana.⁶ The guidance was also criticized by industry groups such as the Colorado Bankers Association, which characterized it as amounting to “serve these customers at your own risk,” and called for an Act of Congress to adequately protect banks.⁷ Short of a change in the law, banks opting to service marijuana-related businesses will always run the risk of prosecution in the event the legal or regulatory landscape changes, especially while marijuana distribution remains illegal at the federal level and in a majority of states.

- *Burdens of Customer Monitoring and SAR Reporting.* Banks considering taking on marijuana-related businesses as customers will also be shouldering considerable new compliance and reporting burdens. Under the Department guidance, banks will effectively be responsible for identifying a variety of risk factors — both through initial customer due diligence and ongoing monitoring — some of which banks will not be well-situated to detect. For example, among the Cole Memo priorities includes the concern that marijuana is being sold to children, a fact that could be extremely difficult for a bank to ascertain from typical or even enhanced due diligence. In addition, banks will be taking on the considerable burden of filing SARs for financial transactions with these new customers, and ensuring that those SARs are compliant with the new FinCEN requirements. While smaller community banks may be the most eager to take on the new business brought by marijuana-related business, they will also be least able to conduct adequate due diligence in a timely and cost-effective manner.
- *Dealing with Cash-Heavy Businesses.* In public comments made shortly after the FinCEN guidance was released, FinCEN Director Jennifer Shasky Calvery touted the availability of banking services to marijuana-related businesses as a way to mitigate the dangers associated with conducting an all-cash business.⁸ While this may prove true over time, banks that

currently opt to do business with marijuana-related businesses will be dealing with an industry that, for the foreseeable future, will be predominantly cash-based. This circular dilemma means that early participants will face all the dangers of dealing with cash businesses, including large cash deposits whose origins are virtually impossible to track. Concerns have also been raised about the use of largely unregulated automated teller machine (ATM) networks by organized crime elements as a means of laundering money.⁹ This risk may be ameliorated over time as more banks provide services to marijuana-related businesses, including opening them up to the use of credit cards; however, in the short term early adopters will be taking on considerable legal risk that no amount of due diligence can minimize.

CONCLUSION

Despite this latest guidance by the Department and FinCEN, significant risks abound for banks considering doing business with the variety of marijuana businesses that have seemingly formed overnight. Several major financial institutions have already indicated reluctance to venture into this area due to the legal and regulatory uncertainties involved.¹⁰ Banks willing to take on this risk must be prepared to implement due diligence and monitoring programs that are even more rigorous than usual, and meticulously document all due diligence steps and conclusions. This is the only way that banks can attempt to avoid liability when the federal government inquires about particular marijuana-related customers or transactions. Given the likely lack of experience within a bank with norms of the marijuana trade or the myriad state licensing requirements, it is essential that banks proceed cautiously and consult with experienced counsel or external experts before developing policies and procedures to evaluate marijuana businesses.

NOTES

¹ James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes* (February 14, 2014), available at <http://>

[www.justice.gov/usao/waw/press/newsblog%20pdfs/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%20%2014%2014%20\(2\).pdf](http://www.justice.gov/usao/waw/press/newsblog%20pdfs/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%20%2014%2014%20(2).pdf).

² FIN-2014-G001, *BSA Expectations Regarding Marijuana-Related Businesses* (February 14, 2014), *available at* http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf.

³ James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement* (August 29, 2013), *available at* <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

⁴ Prosecutors are instructed to consider whether a prosecution is consistent with any of the following priorities:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

⁵ Red flags include, among other things, rapid movement of funds (including cash deposits and withdrawals), deposits that appear to be structured to avoid Currency Transaction Report requirements, deposits made by third parties with no apparent connection to the accountholder, account activity inconsistent with the customer's financial statements, businesses unable to show that they are licensed under state law, and businesses unable to demonstrate the legitimate source of outside investments.

⁶ See *Obama Administration Guidance to Banks on Marijuana Sale Proceeds*, Senator Chuck Grassley (R-Iowa) (February 14, 2014), *available at* http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=48407.

⁷ See *CBA statement regarding DOJ and Treasury guidance on marijuana and banking*, The Colorado Bankers Association (February 14, 2014), *available at* <http://www.coloradobankers.org/displaycommon.cfm?an=1&subarticlenbr=60>.

⁸ Remarks of Jennifer Shasky Calvery at the Florida International Bankers Association Anti-Money Laundering Conference (February 20, 2014), *available at* http://www.fincen.gov/news_room/testimony/pdf/20140220.pdf.

⁹ See David Migoya, *ATMs in or near pot shops called "disaster waiting to happen,"* The Denver Post (January 26, 2014), *available at* http://www.denverpost.com/marijuana/ci_24989802/atms-or-near-pot-shops-called-disaster-waiting.

¹⁰ See Herb Weisbaum, *No pot of gold: Banks balk on marijuana money despite US guidelines*, CNBC.com (February 21, 2014), *available at* <http://www.cnbc.com/id/101433431>.