

# Banking and Medical Marijuana

Division of Financial Institutions  
Department of Commerce and Consumer Affairs  
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# Agenda



- FDIC Guidance
- Department of Justice Memo
- FinCEN Guidance
- Bank considerations
- Conclusion

# FDIC FIL-5-2015 (02.12.15)



- Encourage institutions to take a risk-based approach in assessing individual customer relationships rather than declining to provide banking services to entire categories of customers.
- Institutions are expected to assess the risks posed by an individual customer on a case-by-case basis.
- Implement controls to manage the relationship commensurate with the risks associated with each customer.

# Practical Considerations

- Banks are hesitant to provide certain types of banking services due to concerns that they will be unable to comply with BSA.
- It is not possible for a financial institution to detect and report all potentially illicit transactions.
- Isolated or technical violations, which occur within an otherwise adequate system of policies, procedures, and processes, generally do not prompt serious regulatory concern.
- The risk-based BSA/AML program established and maintained should allow the institution to appropriately manage customer accounts, while generally detecting and deterring illicit financial transactions.

# DOJ (Cole Memorandum-08.29.13)

## Guidance Regarding Marijuana Enforcement



- The Department's expectation is that states and local governments that have enacted laws authorizing marijuana-related conduct will implement strong and effective regulatory and enforcement systems that will address the threat those state laws could pose to public safety, public health, and other law enforcement interests.
- If state enforcement efforts are not sufficiently robust to protect against the harms set forth above, the federal government may seek to challenge the regulatory structure itself in addition to continuing to bring individual enforcement actions, including criminal prosecutions, focused on those harms.
- Clarifies DOH's commitment to enforcing the Controlled Substances Act by focusing on 8 priorities.

# DOJ Cole Memo – (08.29.13)

## 8 Enforcement Priorities



- Prevent the distribution of marijuana to minors;
- Prevent revenue from sales to criminal enterprises, gangs, and cartels;
- Prevent the diversion of marijuana from state to state;
- Prevent state-licensed marijuana activity to be used as a cover/pretext for other illegal drugs or activity;
- Prevent violence & the use of firearms related to production & distribution;
- Prevent drugged driving and other adverse public health consequences;
- Prevent the growing of marijuana on public lands; and
- Prevent marijuana possession or use on federal property.

# DOJ Cole Memo – Update 02.14.14



- Complementary & coincided with publication of FinCEN's guidance
- Provides updated guidance to federal prosecutors concerning marijuana enforcement in the exercise of investigative and prosecutorial discretion under the CSA.
- The Cole Memo guidance applies to all of DOJ's federal enforcement activity, including civil enforcement and criminal investigations and prosecutions, concerning marijuana in all states.
- This guidance and any state or local law does NOT provide a legal defense to a violation of federal law, including any civil or criminal violation of the CSA, the money laundering and unlicensed money transmitter statutes, or the BSA, including the obligation of financial institutions to conduct customer due diligence.

# DOJ Cole Memo – Update 02.14.14



- Financial institutions and individuals choosing to service marijuana-related businesses that are not compliant with such state regulatory and enforcement systems, are more likely to risk activities that implicates the eight federal enforcement priorities.
- Financial institutions must continue to apply appropriate risk-based anti-money laundering policies, procedures, and controls sufficient to address the risks posed by these customers.
- Prosecutors will continue to review marijuana-related prosecutions on a case-by-case basis and weigh all available information and evidence in determining whether particular conduct falls within the identified priorities.

# FinCEN Expectations

## FIN-2014-G001 (02.14.14)



- Guidance was issued due to the recent state initiatives to legalize certain marijuana-related activity and related guidance by the U.S. Department of Justice (“DOJ”) concerning marijuana-related enforcement priorities.
- This guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations, and sets out the various BSA reports to be filed in alignment with federal and state law enforcement priorities.
- They believed this guidance would enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.

# FinCEN Considerations

- In general, the decision to open, close, or refuse any particular account or relationship should be made by each financial institution.
- Use the appropriate CIP and CDD standard.
  - Verify that the business is duly licensed and registered;
  - Review the license application (and related documentation);
  - Request information about the business and related parties (state & law enforcement);
  - Develop an understanding of the normal and expected activity for the business;
  - Ongoing monitoring for publicly available adverse information about the business and related parties;
  - Ongoing monitoring for suspicious activity; and
  - Refresh CDD information on a periodic basis, commensurate with the risk.

# FinCEN SAR filing

- SAR filing is NOT affected by state law
- Financial institution is required to file a SAR if the financial institution knows, suspects or has reason to suspect that a transaction:
  - Involves money from illegal activity
  - Designed to evade BSA laws & regulations
  - Lacks a business or apparent lawful purpose
- Federal law prohibits distribution and sale of marijuana.
  - Transactions would generally involve proceeds of illegal activity.
  - Requirement to file a SAR, even if licensed under state law.

# FinCEN SAR filings – Marijuana Limited



- Financial institutions providing financial services to a marijuana-related business that it reasonably believes, based on its customer due diligence, does not implicate one of the Cole Memo priorities or violate state law should file a “Marijuana Limited” SAR.
  - Identifying the subject and related parties;
  - Addresses of the subject and related parties;
  - The fact that the filing institution is filing the SAR solely because the subject is engaged in a marijuana-related business; and
  - Use term “MARIJUANA LIMITED” and state & describe the fact that no additional suspicious activity has been identified.
- Know when to upgrade to “MARIJUANA PRIORITY.”
- Timing of SAR filings unchanged.

# FinCEN SAR filing – Marijuana Priority



- Based on its customer due diligence, implicates one of the Cole Memo priorities, violates state law or changes in activities noted.
- Use term “MARIJUANA PRIORITY” and describe in detail about the suspicious activity.
  - Identifying the subject and related parties;
  - Addresses of the subject and related parties;
  - Details regarding the enforcement priorities the financial institution believes have been implicated; and
  - Dates, amounts, and other relevant details of financial transactions involved in the suspicious activity.

# FinCEN SAR – Marijuana Termination



- Used when a financial institution deems it necessary to terminate a relationship with a marijuana-related business in order to maintain their BSA/AML program.
- Use term “MARIJUANA TERMINATION” and note in the narrative the basis for the termination.
- FinCEN encourages Section 314(b) voluntary information sharing if the financial institution becomes aware that the business is opening an account at another financial institution.

# FinCEN Priority SAR – Red Flags

- A customer appears to be using a state-licensed marijuana-related business as a front or pretext to launder money derived from other criminal activity (i.e., not related to marijuana) or derived from marijuana-related activity not permitted under state law.
- The business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating within the laws.
- The business is unable to demonstrate the legitimate source of significant outside investments.
- A customer seeks to conceal or disguise involvement in marijuana-related business activity by using a “consulting,” “holding,” or “management” company (not related to marijuana) but is depositing cash that smells like marijuana.

## FinCEN SAR – Red Flags (con't)

- Publicly available sources and databases about the business, its owner(s), manager(s), or other related parties, reveal negative information.
- The business, its owner(s), manager(s), or other related parties are, or have been, subject to an enforcement action by the state or local authorities.
- A marijuana-related business engages in international or interstate activity, including by receiving cash deposits from locations outside the state or large interstate transfers, or otherwise transacting with persons or entities located in different states or countries.

# FinCEN SAR – Red Flags (con't)

- The owner(s) or manager(s) of a marijuana-related business reside outside the state in which the business is located.
- A marijuana-related business is located on federal property or the marijuana sold by the business was grown on federal property.
- A marijuana-related business's proximity to a school is not compliant with state law.
- A marijuana-related business purporting to be a "non-profit" is engaged in commercial activity inconsistent with that classification, or is making excessive payments to its manager(s) or employee(s).

# Cash Intensive/High Risk Businesses

## **Risk Assessments:**

- Include in Risk Assessment and risk rate appropriately
- Verify that the Risk Assessment includes all products and services offered to these type of businesses.

## **Management Oversight and Corporate Governance:**

- Determine that the bank infrastructure supports the volume, nature, and risk level of the cash intensive business.
- Determine that the BSA Officer and staff have requisite knowledge and understanding of the cash intensive business.

# Cash Intensive/High Risk Businesses

## **CDD and Ongoing Oversight**

- Understand the type of business conducted.
- Verify beneficial ownership information (control of account).
- Verify account purpose and activity levels and alignment with similar business types.
- Understand business capital source and cash activity volumes.
- Identify and review related business interests.
- If on-site visits completed, do they collect BSA/AML information to support activity levels?
- Is customer exemption from reporting?
- Understand cash operating requirements (premises limit)

# Update – HDFI Exam Procedures

- Board of Directors must have full knowledge of risks and must approve policy or exception to policy.
- Policies, procedures, and infrastructure must be adequate to address risk.
- Review agreements with 3<sup>rd</sup> party service providers (armored car).
- CIP must be completed and monitored.
- Training must be appropriate for various positions.
- Public records request (if DOH allows) of application.
- SARs filed and policy for filing SARs consistent with FinCEN guidance.
- Adequate controls to identify marijuana related accounts.
- Consideration of Cole Memo priorities.
- Exit plan if the current DOJ policy of “prosecutorial discretion” changes.

# Update – Bank considerations

- A credit union was denied access to the Federal Reserve System.
- Banks and credit unions in states with recreational marijuana closed employee and related vendor accounts.
- Cost of the marijuana related accounts.
- Whether a bank will allow payroll deposits or other vendor payments from another financial institution that opened marijuana related accounts.
- Lending policies must be adequate. DOJ and FinCEN may need to provide additional guidance.

# Conclusion

- Banks and other financial institutions may open accounts for high risk businesses such as medical marijuana related businesses based on the risk assessment and risk tolerance of the financial institution.
- Banks and other financial institutions must implement and follow appropriate customer due diligence standards.
- Regulators will be examining banks for BSA/AML compliance.

# Contact Information



Iris Ikeda

Commissioner

Division of Financial Institutions

Department of Commerce and Consumer Affairs

335 Merchant Street #221

Honolulu, HI 96813

808.586.2820

<http://cca.hawaii.gov/dfi/>

Twitter: @Hawaii DFI