

Clarification From FinCEN — Updating Marijuana Limited SARs

by Joseph Lynyak

The Financial Crimes Enforcement Network (“FinCEN”), a bureau of the Department of the Treasury, issued guidance on February 14, 2014 (the “Cannabis Guidance”)¹, to clarify Bank Secrecy Act expectations for financial institutions seeking to provide services to marijuana-related businesses. We recently received confirmation from FinCEN that financial institutions continue to be required to update their Suspicious Activity Reports (“SARs”) on marijuana-related businesses – a requirement that is being missed by some financial institutions. This Alert addresses the continuing obligation by financial institutions providing banking services to participants in the cannabis industry to regularly update “Marijuana Limited” SAR filings.

FinCEN’s Cannabis Guidance was an attempt to reconcile compliance with the SAR filing requirement for suspicious criminal activity with the Obama Administration’s decision to deemphasize prosecution of cannabis-related business, provided that the cannabis activity was lawful under the laws of a particular state. Following due diligence by a financial institution, a bank account could be opened for a cannabis-related entity, but a Marijuana Limited SAR was required to be filed with FinCEN. The Cannabis Guidance reads, in part, as follows:

A financial institution 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. The content of this SAR should be limited to the following information: (i) identifying information of the subject and related parties; (ii) addresses of the subject and related parties; (iii) the fact that the filing institution is filing the SAR solely because the subject is engaged in a marijuana-related business; and (iv) the fact that no additional suspicious activity has been identified. Financial institutions should use the term “MARIJUANA LIMITED” in the narrative section.

While many financial institutions providing banking services to cannabis-related entities have complied with the filing of Marijuana Limited SARs (including the filing of SARs for

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companies providing goods and services to cannabis growers and sellers), anecdotal evidence has indicated that many financial institutions have not focused on the ongoing obligation to refile and update Marijuana Limited SARs as indicated in the Cannabis Guidance:

A financial institution should follow FinCEN's existing guidance on the timing of filing continuing activity reports for the same activity initially reported on a "Marijuana Limited" SAR. The continuing activity report may contain the same limited content as the initial SAR, plus details about the amount of deposits, withdrawals, and transfers in the account since the last SAR. However, if, in the course of conducting customer due diligence (including ongoing monitoring for red flags), the financial institution detects changes in activity that potentially implicate one of the Cole Memo priorities or violate state law, the financial institution should file a "Marijuana Priority" SAR. (emphasis added)

Stated another way, merely filing an initial Marijuana Limited SAR is not sufficient—if ongoing due diligence indicates that cannabis-related activity is continuing, the financial institution must update the previously filed Marijuana Limited SAR based upon the new due diligence that is performed. As set forth in a footnote in the Cannabis Guidance (referencing a FinCEN FAQ) regarding continuing activity:

Financial institutions with SAR requirements may file SARs for continuing activity after a 90-day review with the filing deadline being 120 days after the date of the previously related SAR filing. Financial institutions may also file SARs on continuing activity earlier than the 120-day deadline if the institution believes the activity warrants earlier review by law enforcement.

So, for filings where a subject has been identified, the timeline is as follows:

- Identification of suspicious activity and subject: Day 0.
- Deadline for initial SAR filing: Day 30.
- End of 90-day review: Day 120.
- Deadline for continuing activity SAR with subject information: Day 150 (120 days from the date of the initial filing on Day 30).
- If the activity continues, this timeframe will result in three SARs filed over a 12-month period.

Compliance Considerations

FinCEN recently confirmed the obligation to regularly update Marijuana Limited SARs, which presents significant compliance obligations on financial institutions. While it may not be possible to correct prior filing omissions, alternative approaches might be considered to address a compliance shortcoming.

First, for cannabis-related persons and companies that are directly involved in the cultivation, production and sale of cannabis, financial institutions should commence updating prior due diligence within prescribed timeframes to confirm that those persons and entities continue to comply with state cannabis laws. As noted in the cannabis

Guidance, the updated SAR “may contain the same limited content as the initial SAR, *plus details about the amount of deposits, withdrawals, and transfers in the account since the last SAR*” (emphasis added). For those states in which a licensing scheme has been established, licensees should certify continuing compliance with law and that compliance should be reflected on an updated SAR. (While beyond the scope of this Alert, a financial institution should verify that a cannabis-related entity has expected levels of cash flow and other performance criteria (as outlined in the Cannabis Guidance) that does not warrant the filing of a “Marijuana Priority” or a “Marijuana Termination” SAR.)

Second, for vendors supplying products and services to cannabis entities—such as irrigation, accounting and other services—the due diligence required may include determining whether the product or service originally provided to the cannabis entity is still actively being provided by the vendor. Alternatively, if a vendor is no longer involved in cannabis-related activity, the general rules governing the filing of a SAR would be applicable.

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While questions can be directed to FinCEN’s hotline, compliance determinations in this area are difficult and complicated. In the instance of inadvertent filing errors, care should be exercised to properly correct such errors and reflect appropriate compliance on a go-forward basis.

¹ <https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses>.