

Revisiting the Risk of Banking Marijuana Businesses

by Joseph Lynyak

Even though as part of his confirmation hearings Attorney General Sessions informally indicated that enforcement of the federal criminal laws for marijuana businesses would not be a priority, this last week the Trump Administration may have contradicted that position.

For banks currently banking marijuana medical and recreational businesses, this apparent contradiction may require that those banks revisit the risk analysis supporting their decision to bank marijuana operations. In particular, the marijuana-related SARs required to be filed by banks engaged in banking marijuana businesses make those banks likely targets should the Department of Justice (“DOJ”) elect to take an aggressive enforcement posture.

A short history is in order.

Prior Enforcement Guidance

In a series of interpretive documents issued by FinCEN and the DOJ, based upon the so-called “Cole Memo,” those agencies provided somewhat cold comfort to banks wanting to provide deposit and lending services in states in which medical and recreational marijuana sales have been legalized.¹ While somewhat complicated in regard to the due diligence necessary by banks to provide banking services, the subject guidance has been viewed as permitting banks to consider providing bank services to marijuana businesses from a risk perspective rather from the technical (yet still applicable) legal perspective that assisting a marijuana business is a felony under several federal drug laws.

Perhaps most notably for banks was the requirement imposed by FinCEN that a bank providing services to a marijuana business file one of three new SARs:

- *Marijuana Limited SAR Filing* — which indicates that the bank reasonably believes,

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based on its customer due diligence, that the marijuana-related business does not implicate one of the Cole Memo priorities or violates state law.

- *Marijuana Priority SAR Filing* — which indicates that a bank reasonably believes, based on its customer due diligence, that the activities of a marijuana-related business implicates one of the Cole Memo priorities or violates state law.
- *Marijuana Termination SAR Filing* — which indicates that a bank has determined that the marijuana business violates anti-money laundering laws (or otherwise requires that a SAR be filed).

Recent Trump Administration Policy Announcements

As noted above, even though there have been some informal indications that the current non-enforcement approach adopted by the Obama Administration would continue, on Thursday, February 23rd, the White House Press Secretary stated that enforcement of federal drug laws aimed at limiting the proliferation of marijuana sales may occur.

Although the Press Secretary softened this warning by stating that medical marijuana businesses would not be targeted, the fact remains that the Trump Administration appears to be reconsidering the above-referenced guidance that has been relied upon by banks when electing to offer deposit and lending services to marijuana businesses.

Increased Legal Risk for Banking Marijuana Businesses

We offer the following observations regarding these developments.

First, by having filed with FinCEN one of the three new SARs (which in virtually every case would be the Marijuana Limited SAR), a bank has made an admission of probable criminal conduct on its own part if the federal government elects to initiate criminal action against the filing bank and its management. Because prosecuting criminal drug laws against individuals and small businesses is time consuming and a drain of resources, using a bank's own statement of liability in a statement made to the federal government under penalty of perjury might be a preferred strategy. Although a list of potential penalties might be available (e.g., asset forfeiture, civil and criminal penalties and RICO actions), it is certainly possible that the federal government might pressure banks to withdraw from providing banking services to marijuana businesses. A bank should also consider the possibility that fines and penalties, including criminal penalties, might be pursued not only against the bank, but also against officers, directors and employees of the bank. (Among other things, the availability of insurance coverage to pay for legal defense costs should be verified.)

Second, banks wishing to continue providing banking services to marijuana businesses should revisit the current interpretative guidance and determine whether the bank's on-going due diligence required by the guidance is commensurate with the degree of due diligence that the guidance mandates. Further, since the Administration may elect to distinguish between medical marijuana and recreational establishments, the degree of due diligence required for the two categories of marijuana businesses may be

significantly disparate in nature.

Third, a bank may elect to review the banking services it provides to vendors of marijuana businesses, such as suppliers of fertilizer, irrigation, energy and similar products and services. A related issue arises in regard to banking a company that has an affiliated entity directly involved in marijuana, but the bank's relationship is limited to non-marijuana affiliated operations. Similarly, if the vendor provides support services to both medical and recreational marijuana businesses, separating those functions may be difficult or impossible.²

Fourth, in light of what appears to be a changed enforcement posture on the part of the Trump Administration, the senior management of the bank and its board of directors should be fully briefed regarding the increased legal risk that may soon be presented.

Finally, a bank electing to continue banking marijuana businesses should consider retaining counsel with white-collar criminal experience, including AML expertise, in advance to assist should a DOJ inquiry occur. Among other things, the bank's compliance with the current guidance should be organized, and counsel should be well-versed in the enforcement perspective and strategy employed by the DOJ when it considers bringing a criminal prosecution or investigation.

¹ See, James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement* (August 29, 2013) (the "Cole Memo"); James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Supplementary Guidance* (February 14, 2104); FinCEN FIN No. 2014, *BSA Expectations Regarding Marijuana-Related Businesses* (February 14, 2014).

² It should be noted that the FinCEN guidance, at footnote 7, appears to indicate that indirect support of marijuana businesses does require the filing of one of the marijuana-related SARs.