# FinCEN Guidance on Banking Marijuana—Increased Legal Risk to Banks

January 23, 2018

Notwithstanding the January 4, 2018, rescission of the so-called Cole Memorandum, which established a safe harbor for banking institutions that provide, or intend to provide, deposit and lending services to persons and businesses involved in the marijuana industry, last Friday FinCEN indicated that banking institutions should continue to follow its guidance originally issued on February 14, 2014 (the "FinCEN Guidance").

The rescission of the Cole Memorandum, together with the continued effectiveness of the FinCEN Guidance, should be viewed as increasing the legal risk to banks that continue to provide banking services to cannabis-related businesses (and possibly vendors of those business and other related parties). This possible increased risk (*e.g.*, criminal prosecution) means that banks should reevaluate continued participation in the cannabis industry.

A summary of these developments and an analysis follows.

**Discussion**

Since 2013, the federal government has had an uneasy truce with a growing number of states that have legalized medical and recreational marijuana. The truce was necessary because many states have made the growing, transportation and sale of marijuana legal, even though marijuana remains a Schedule 1 drug under federal law (*see* 1956 (a)(I)(B)(i) and 1956 (a)(2)(B)(i) of Title 18 of the United States Code). (Under federal law, anyone assisting in the use or distribution of cannabis remains subject to a host of serous federal criminal penalties, including aiding and abetting liability and money laundering liability.)

On August 29, 2013, the U.S. Department of Justice issued the Cole Memorandum (named after its author, Deputy Attorney General James M. Cole), which was interpreted by many banks as providing a safe harbor from federal prosecution for banking marijuana businesses operating legally under state law.

The Cole Memorandum was followed by the FinCEN Guidance, in which FinCEN indicated that it concurred in the safe harbor from prosecution announced by the Cole Memorandum. However, due to the continued applicability of the federal criminal laws to banks providing services to cannabis businesses, the FinCEN Guidance required that banks engaged in banking marijuana businesses file special-purpose SARs that distinguished among: (a) marijuana businesses lawfully operating in a state (requiring the filing of a "marijuana limited" SAR); (b) marijuana

businesses that arguably may not be operating in a manner compliant with state laws (requiring the filing of a "marijuana priority" SAR); and (c) marijuana businesses for which the bank has concluded that a cannabis business was operating in violation of one or more red-flags identified in the Cole Memorandum (requiring the filing of a "marijuana termination" SAR).

While the majority of banks have declined to provide banking services to the ever-growing number of marijuana businesses operating legally under state law, it appears that over 300 banks (and other financial institutions such as credit unions) have chosen to rely on the safe harbor established by the interplay between the Cole Memorandum and the FinCEN Guidance. (The reluctance on the part of most banks to provide deposit and lending services is due to the recognition that doing so violates money-laundering provisions of federal law.)

This uneasy equilibrium was up-ended on January 4, 2018, when Attorney General Sessions rescinded the Cole Memorandum and reinstated DOJ prosecutorial discretion to be determined by Assistant U. S. Attorneys ("AUSAs") without reference to the Cole Memorandum's priorities. Following the rescission of the Cole Memorandum, banks have raised the question whether the FinCEN Guidance remained in effect—due to the observation that the FinCEN Guidance was by its terms directly reliant upon the authority announced in the Cole Memorandum.

On Friday, January 19, 2018, Dorsey received a communication from FinCEN in response to Dorsey's inquiry about the continued applicability of the FinCEN Guidance. Specifically, FinCEN indicated that the FinCEN Guidance was still in effect, and banks were expected to comply with its compliance procedures, including continuing due diligence and the filing of the three special categories of marijuana-related SARs.

To summarize the FinCEN Guidance, a bank providing deposit or lending services to a cannabis business must conduct certain due diligence concerning the business, which includes:

- 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 (*e.g.*, medical versus recreational customers);
- Conducting ongoing monitoring of publicly available sources for adverse information about the business and related parties;
- Conducting ongoing monitoring for suspicious activity, including for any of the red flags described in the FinCEN Guidance or the Cole Memorandum; and
- Updating due diligence information on a periodic basis and commensurate with the risk.

A bank must also determine whether a cannabis business violates state law or implicates one of the Cole Memorandum's priorities, which include:

- 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.

If the due diligence identifies state illegality or if the business conflicts with a Cole Memorandum priority, as noted above, the FinCEN Guidance requires that a bank file a SAR detailing the possible illegal conduct. If not, a bank providing deposit or lending services to a cannabis business must file a SAR notifying FinCEN that the bank is conducting banking business with a cannabis-related entity that is operating in accordance with state law.

**Analysis**

Given the rescission of the Cole Memorandum, we note several legal difficulties presented by continued reliance on the FinCEN Guidance—all of which increase the legal risk to banks providing banking services to cannabis businesses.

First, the FinCEN Guidance is reliant upon the status of the Cole Memorandum as establishing a safe harbor in the filing of SARs by which a bank admits to the federal government that it is violating federal drug and money laundering laws. In the absence of the safe harbor formerly created by the Cole Memorandum, the filing of a marijuana-related SAR is equivalent to the bank confessing that it is committing a felony, which could be used by an AUSA seeking to enforce the federal laws against a banking institution.

Second, the FinCEN Guidance imposes compliance obligations with reference to prosecution priorities that have been eliminated by the current Attorney General. Particularly in light of the fact that the FinCEN Guidance was not issued in accordance with formal administrative rule-making, there appears to be no reasonable basis to assume that an AUSA would be precluded from relying on a marijuana SAR as an admission of guilt in the prosecution of a bank or its personnel.

Accordingly, we believe that this new status quo increases the legal risks that a bank takes in banking cannabis businesses.

In addition to the increased legal risk involved in providing banking services directly to marijuana businesses, banks should also reevaluate banking relationships that more indirectly

involve cannabis. For example, companies are now actively determining whether the cultivation of marijuana should be conducted as an agri-business, and are employing bank-supplied financing to purchase facilities and equipment. Similarly, support services provided by third parties to cannabis entities may also put a bank at risk, including such diverse entities as real estate lessors, agricultural equipment suppliers and transportation concerns.

Until reliable policy is determined, the rescission of the Cole Memorandum increases possible exposure to banking institutions that make loans to, or accept deposits from, cannabis businesses, and the continued effectiveness of the FinCEN Guidance enhances, rather than mitigates, that possible exposure.

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It should be noted that this Alert is not intended to be a comprehensive analysis of the possible civil and criminal exposure presented to banks and other financial intermediaries that elect to provide banking services to cannabis businesses. It is strongly recommended that banks working in the area consult with counsel on the civil and criminal concerns summarized herein.