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Cold Comfort: Recent Federal Guidance on Handling the Proceeds of Marijuana Related Businesses Offers Little Real Assurance to Financial Institutions

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When states like Colorado and Washington announced the legal sale of marijuana for recreational use, it raised a number of concerns—legal, moral, political and practical. Given that sale and use of marijuana was still illegal under federal law, there were substantial questions about how the Department of Justice (DOJ) would approach enforcement of the Controlled Substances Act (CSA) which conflicted with state law. The DOJ offered a partial answer to that question in an August 2013 memo. The August memo urged prosecutors to allocate their limited resources to marijuana related activity that implicated one of eight factors, which included preventing distribution to minors, funneling revenue to gangs or cartels and similar societal harms.

The August guidance left open the question of how the financial services industry could handle the proceeds of legal marijuana sales. Traditionally, financial institutions could not handle accounts that involved the proceeds of such "specified unlawful activity" without risking federal prosecution. After the legalization of marijuana in Colorado and Washington, anecdotal evidence piled up about how the substantial cash from marijuana related businesses was being handled, from purely cash transactions to banks simply looking the other way to individuals deceiving banks about the nature of their businesses. The industry cried out for clear guidance. The guidance has finally arrived, but it hardly settles the issue.

On February 14, Deputy Attorney General James Cole issued a memorandum which begins by reiterating the eight priorities for marijuana enforcement under the CSA and noting that those same factors should be applied when determining whether to prosecute a financial institution for various financial crimes relating to marijuana sales. It offers examples where prosecution would be appropriate (e.g. where the institution clearly knows that the business is diverting marijuana to a neighboring state). It then includes the statement that where an institution provides services to a marijuana related business that does not implicate any of the eight priority factors than "prosecution for these offenses may not be appropriate." Not the type of statement on which most financial institutions would stake their financial future, let alone the personal liberty of their officers or directors.

The Financial Crimes Enforcement Network (FinCEN) issued its own guidelines on February 14 which, while more specific and helpful in some ways, do little to assure financial institutions about potential federal prosecution. The FinCEN guidance essentially requires an institution, as part of its ongoing customer due diligence to determine whether a particular marijuana related business either: 1) implicates one of the eight enforcement priorities in the DOJ guidance; or 2) violates state law. FinCEN suggests that the bank should perform certain tasks as part of its minimum due diligence and further identifies various red flags associated with account activity that could indicate

improper behavior. While the red flags generally provide practical and useful suggestions, many are difficult to evaluate and all of them require intensive oversight and monitoring.

Finally, the FinCEN guidance promulgates three special types of Suspicious Activity Reports (SARs) that apply to marijuana related businesses. In summary, all accounts for marijuana related businesses require the filing of a SAR. A "Marijuana Limited" SAR would be filed when there is no particular red flag and it is only being filed because it is a marijuana related business. A "Marijuana Priority" SAR would be filed if there is specific illegal activity or concern that has been identified. A "Marijuana Termination" SAR would be filed where the institution has decided to terminate the account. Such SARs would be useful to the enforcement authorities in identifying those marijuana related businesses and helping to target those which may be engaged in activities which implicate one of the DOJ enforcement priorities.

The DOJ and FinCEN guidance are a step in the right direction. However, neither provides the type of comfort that is likely to lead many institutions to begin handling the revenue of marijuana related businesses. The fact remains that processing the proceeds of marijuana related businesses is illegal under federal law. While the guidance provides tips and suggestions on how to avoid federal prosecution, whether an institution has done sufficient due diligence to merit such treatment ultimately still rests in the hands of a particular prosecutor exercising his or her discretion. Moreover, since all charging decisions are made in hindsight, the fear that an institution's due diligence efforts could be second guessed is very real. Most banks are likely to continue to avoid handling these types of accounts and the handling of marijuana related revenue is likely to continue to remain marginalized. However, for a bank willing to dedicate the necessary resources to the specialized due diligence suggested by the guidelines and with an appetite for some risk, there is a real and potentially lucrative path to navigate what were, until recently, impassable waters.

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