

ARTICLE:**DO YOU FEEL LUCKY, BANKER? THE SHAKY PROSPECTS FOR FINANCIAL TRANSACTIONS WITH MARIJUANA-RELATED BUSINESSES***Brad Scheick****I. Introduction**

Federal law prohibits the manufacture, possession, or use of marijuana for any purpose, including medical purposes.¹ This prohibition notwithstanding, as of January of 2018, 29 states plus the District of Columbia have legalized marijuana for medical purposes, six states have legalized marijuana for recreational use, and Maine and Massachusetts have approved legalization measures that have not yet taken effect.² Because of this conflict between federal law and the growing state-level legalization movement, financial institutions, the majority of which are governed by federal law or, in the case of state-chartered banks and credit unions, are reliant upon systems and services overseen and administered by federal agencies, are wary of potential federal enforcement actions and, as a result, state-legal marijuana-related businesses are largely denied access to the banking system. This means that marijuana-related businesses are generally unable to open checking accounts, accept credit and debit cards, use electronic payroll services or remote bill pay, or access the automated clearing house (“ACH”) electronic payment system. It also means that these businesses, and in some cases businesses that serve or support them, such as property owners who lease space to dispensaries or cultivators, have difficulty obtaining bank loans and lines of credit, forcing them to rely on high-interest, short-term hard money loans to meet financing needs.

This article provides an overview of the primary federal laws and regulations governing financial institutions, and the potential penalties thereunder, that have prevented the banking industry from becoming more engaged with the state-legal marijuana industry, describes various federal actions that have been taken to address these concerns and to increase banking access for state-legal marijuana-related businesses, and discusses the implications of these federal actions for marijuana-related businesses and those businesses that service them.

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II. Treatment of Marijuana Under the Controlled Substances Act

The Controlled Substances Act (the “CSA”) lists marijuana as a Schedule I drug—the category of drugs deemed most hazardous by the federal government and of no practical use—and, as such, the manufacture, distribution, possession, and use of marijuana is strictly prohibited under federal law for all purposes.³ Further, it is unlawful under the CSA for any person to knowingly aid in the commission of any such activities or to open, lease, rent, use, maintain, manage, or control any place for the purpose of conducting such activities.⁴ This includes any parties that lease space to others for the distribution or production of marijuana.

Penalties for the violation of the CSA can include fines and imprisonment, both for parties directly involved in the manufacture, distribution, or use of a controlled substance and for parties found to have aided or conspired with such directly involved parties.⁵ Additionally, any real or personal property used in the commission of a violation of the CSA is subject to federal asset forfeiture. Therefore, any party that violates the CSA, including parties such as landlords that support or aid marijuana related businesses but are not directly involved in marijuana manufacture, distribution, or use, can have their property seized by the federal government. Because of this, loans made by financial institutions to marijuana-related businesses or to other parties that support or aid marijuana-related businesses can at any time be rendered unsecured as a result of the seizure of the borrower’s assets and, as a result, real property owners engaged in a marijuana-related business or who lease their property to a third party marijuana-related business, find very few banks willing to loan against that property.

III. Other Federal Barriers to Banking Access for Marijuana-Related Businesses

Federal anti-money laundering laws make it illegal for financial institutions to handle funds generated from illegal activities, including violations of federal drug laws, and impose various obligations and limitations on financial institutions to ensure that the banking system is not used to facilitate violations of the CSA. Specifically, under the Money Laundering Control Act of 1986, it is a criminal offense for any person or entity to conduct or attempt to conduct a financial transaction where that party knows that the funds involved represent the proceeds of some form of unlawful activity and such party is conducting the transaction with the intent of promoting a ‘specific unlawful activity,’ such as

activity in violation of the CSA, or for the purpose of avoiding state or federal currency transaction reporting requirements.⁶ For purposes of this prohibition, the term “financial transaction” is broadly defined as “(A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.”⁷

Further, the Financial Recordkeeping and Reporting of Currency and Foreign Transactions Report Act of 1970 (commonly referred to as the Bank Secrecy Act)⁸ (the “BSA”) requires financial institutions to file certain reports with respect to currency transactions and their customer relationships in order to identify potential criminal activity and to provide paper trails to support criminal, tax, and regulatory investigations. Under the BSA and its applicable regulations, financial institutions are required to file a Currency Transaction Report (“CTR”) with respect to each currency transaction involving more than \$10,000. Financial Institutions are also required to monitor suspicious activity on the part of their clients and to file suspicious activity reports (referred to as “SARs”) of any suspicious activities. SARs must be filed in connection with transactions aggregating more than \$5,000 and which the institution knows or has reason to suspect (i) involve funds derived from an illegal activity or constitute an attempt to disguise funds derived from illegal activity, (ii) are intended to evade the reporting or other requirements of the BSA, or (iii) lack a business or apparent lawful purpose.⁹

Persons or institutions found to have violated the anti-money laundering laws or the BSA by engaging in financial transactions involving the proceeds of ‘specific unlawful activity’ or by failing to properly report financial transactions involving the proceeds of suspected activity prohibited under the CSA can face significant fines or imprisonment, and can have their assets seized by the federal government to satisfy any fines, judgments, or forfeiture orders.¹⁰

For banks and other financial institutions, this means that providing services to marijuana-related business can result in civil and criminal penalties for such institutions and potentially their individual employees, regulatory agency sanctions and penalties, and loss of access to federally controlled components of the national banking system, the ACH, or the Federal Reserve system.¹¹ Also,

because any violation of the anti-money laundering laws or the BSA also constitutes a violation of the laws governing federal deposit and share insurance, in the event of such a violation the federal insurers (the FDIC for national banks and the NCUA for federal and state chartered credit unions) can impose their own actions for monetary penalties and, in the worst case scenario, can revoke the subject institution's deposit insurance, a move that effectively forces the closure of the institution.¹²

IV. Developments in Federal Enforcement Priorities

In response to the proliferation of state-level medical and recreational marijuana legalization measures, and in order to mitigate the related risks and problems resulting from the inability of state-legal marijuana businesses to obtain banking services, the Obama administration relaxed some of the above described policies as described below. However, not only did those efforts yield only marginal changes, but some of them have now been rolled back under the Trump administration and there may be further rollbacks.

Specifically, in 2013 and 2014 the U.S. Justice Department and the Treasury Department issued guidance intended to align the federal government's marijuana law enforcement priorities with the state-level legalization movement and to clarify for financial institutions how they could permissibly serve marijuana customers within the confines of the BSA. This guidance did yield some incremental improvements in banking access for marijuana-related businesses—for example, the number of depository institutions servicing marijuana-related business increased from approximately 105 in 2014¹³ to approximately 400 by the end of the third quarter of 2017¹⁴—but it alone did not provide adequate protection for the financial industry to get comfortable with doing business with marijuana-related businesses. Further, on January 4, 2018, Attorney General Jeff Sessions rescinded the Department of Justice guidance.¹⁵

A. Department of Justice Guidance

In August 2013, Deputy Attorney General James M. Cole, on behalf of the DOJ, issued a memorandum, generally referred to as the “Cole Memo,” announcing that the DOJ was deprioritizing enforcement of federal marijuana laws in states that adopted legalization measures.¹⁶ To focus enforcement efforts and resources on more serious, criminal activity, the Cole Memo instructed federal prosecutors to weigh eight enforcement priorities in determining when

to bring charges in connection with marijuana-related provisions of the CSA. Those eight priorities included:

1. Preventing the distribution of marijuana to minors;
2. Preventing the revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
3. Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
8. Preventing marijuana possession or use on federal property.¹⁷

Pursuant to the Cole Memo, where these specified priorities are not implicated, prosecution of state-legal marijuana-based businesses or the financial institutions serving them may not be appropriate.¹⁸

Following issuance of the Cole Memo, financial institutions were left in a position of uncertainty as to whether the Department of Justice would adopt the same de-prioritization approach reflected in the Cole Memo with respect to enforcement of the CSA, the BSA, and the anti-money laundering statutes with respect to financial institutions doing business with marijuana-related businesses. To address this uncertainty, in a guidance memorandum regarding marijuana-related financial crimes (the “2014 DOJ Memo”) issued February 14, 2017, the Department of Justice clarified that it expected all United States Attorneys to apply the same eight priorities identified in the Cole Memo in determining whether to charge financial institutions in connection with marijuana-related activity.¹⁹

On January 4, 2018, however, Attorney General Jeff Sessions issued a single-page guidance memorandum to all United States Attorneys (the “Sessions Memo”) in which he emphasized Congress’ determination, as evidenced by marijuana’s treatment under the CSA, that “marijuana is a dangerous drug and that marijuana activity is a serious crime” and effectively rescinded both the Cole Memo and the 2014 DOJ Memo.²⁰ In this memo, Sessions also reiterated that involvement in marijuana-related activities may also serve as the basis for prosecution under the anti-money laundering statutes and the BSA.

B. FinCEN Guidance:

In conjunction with the 2014 DOJ Memo, in an attempt to provide further comfort to financial institutions and to “enhance the availability of financial services for, and the financial transparency to, marijuana-related businesses,” the Department of the Treasury, through the Financial Crimes Enforcement Network (“FinCEN”), issued a guidance memorandum (the “FinCEN Guidance”) clarifying how financial institutions can provide services to marijuana-related business consistent with their obligations under the BSA.²¹

In the FinCEN Guidance, FinCEN indicated that it agreed with the approach adopted by the Justice Department in the Cole Memo and described due diligence and monitoring protocol for servicing marijuana-related business that, in FinCEN’s view, would be sufficient for compliance with the BSA and the anti-money laundering statutes. A key obligation for institutions under the FinCEN Guidance is that they know their customers and confirm that those customers are complying with applicable state and local laws and are not engaging in any of the activities prohibited by the Cole Memorandum. To that end, the FinCEN Guidance requires that, in assessing the risks of providing services to a marijuana-related business, a financial institution perform consumer due diligence including the following:

- (i) verifying with the appropriate state authorities whether the business is duly licensed and registered;
- (ii) reviewing the license application (and related documentation) submitted by the business for obtaining a state license to operate its marijuana-related business;
- (iii) requesting from state licensing and enforcement authorities available information about the business and related parties;
- (iv) 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);
- (v) ongoing monitoring of publicly available sources for adverse information about the business and related parties;
- (vi) ongoing monitoring for suspicious activity . . . ; and
- (vii) refreshing informa-

tion obtained as part of customer due diligence on a periodic basis and commensurate with the risk.²²

If, after conducting the above-described diligence, a financial institution elects to provide services to marijuana-related businesses, because such marijuana-related activities by their very nature involve funds derived from activity that is illegal under federal law, the institution is required to file a SAR as required under the BSA with respect to all marijuana-related business transactions. Further, where one or more specified red flags appear with respect to a marijuana-related business or transaction, the subject financial institution must file a special, more detailed (and thus more burdensome) SAR, referred to in the FinCEN Guidance as a “Marijuana Priority” SAR filing. These red flags include, among others (i) receipt by the business of substantially more revenues than expected; (ii) the business deposits more cash than is commensurate with the amount of revenue it reports for federal and state tax purposes; (iii) the business has excessive deposits or withdrawals compared to its competitors; and (iv) the business’s financial statements are inconsistent with actual account activity.²³ The presence of any one of these red flag factors specified in the FinCEN Guidance can alone provide sufficient grounds for a financial institution to reasonably believe that a marijuana-related business customer could be violating one of the Cole Memo priorities and, thereby, trigger the institution’s obligation to file a Marijuana Priority SAR. Accordingly, institutions doing business with marijuana-related businesses must actively monitor all of their marijuana-related business customers for all these factors in order to remain in compliance with the FinCEN Guidance.

C. Effects of Department of Justice and FinCEN Guidance.

The FinCEN Guidance together with the Cole Memo and the 2014 DOJ Memo created a narrow path forward for some marijuana-business related banking activities, primarily for deposit-type relationships such as checking accounts.²⁴ However, most of the nation’s financial institutions—and virtually all large national banks—have opted not to offer their services to the marijuana-related industry.

This reluctance stems from both the significant burden imposed on financial institutions to comply with the FinCEN Guidance, as discussed above, and concerns that, because the FinCEN Guidance does not have the force of law and can be withdrawn at any time, it does not provide adequate assurances against future enforcement actions by the federal government. In fact, in the

2014 DOJ Memo, the Department of Justice reiterated that anti-money laundering laws, the BSA, and other banking laws remain in effect with respect to marijuana-related conduct notwithstanding the FinCEN Guidance and that, as a result, “[f]inancial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under the money-laundering statutes (18 U.S.C.A. §§ 1956 and 1957), the unlicensed money transmitter statute (18 U.S.C.A. § 1956), and the BSA” and that “financial institutions that conduct transaction with money generated by marijuana-related conduct could face criminal liability under the BSA for, among other things, failing to identify or report financial transactions that involve the proceeds of marijuana-related violations of the CSA.”²⁵ Moreover, the FinCEN Guidance does not bind other government agencies with jurisdiction over financial institutions or over the various federal systems and services on which financial institutions rely, such as the FDIC, the NCUA, or the Federal Reserve. Thus, compliance with the FinCEN Guidelines offers no protection against enforcement actions or the imposition of penalties by these other agencies.

The rescission of the Justice Department guidance significantly increases the exposure of financial institutions that provide services to marijuana-related businesses and will likely further dissuade financial institutions from entering that market. It eliminates any obligations on federal prosecutors to focus their enforcement efforts on activities implicating the more serious risks prioritized in the Cole Memo and thereby leaves them free to take a broader and more aggressive approach to prosecutions with respect to all marijuana-related activities, even where permitted under and conducted in compliance with state laws. Also, because the FinCEN Guidance was issued in conjunction with the 2014 DOJ Memo and relies heavily on the protections provided for state-legal marijuana-related activities under the Cole Memo, the Sessions Memo significantly undermines the continued utility and reliability of the FinCEN Guidance.

D. Rohrabacher-Farr Amendment:

In addition to the above-described Justice Department and FinCEN Guidance, in 2014 Congress passed, as a rider to an omnibus spending bill, the so-called Rohrabacher-Farr Amendment (now also referred to as the Rohrabacher-Blumenauer Amendment), which prohibits the Department of Justice from spending any funds to prevent states’ implementation of their medical marijuana laws. This amendment was originally set to sunset on September 30,

2017, but, as of the date of writing, it has been extended through September 30, 2018.²⁶

As interpreted by the Ninth Circuit, the Rohrbacher-Farr Amendment prohibits the Department of Justice from spending any funds it receives under federal government appropriations acts for the prosecution of parties engaged in or supporting conduct permitted under state medical marijuana laws and who are in full compliance with such laws.²⁷ Importantly, however, this amendment addresses only medical marijuana-related activities and, therefore, it does not prohibit the Department of Justice from using its funds to pursue parties involved in recreational marijuana-related activities. Moreover, the protections afforded by the Rohrbacher-Farr Amendment survive only as long as Congress continues to renew the amendment itself and, if and when it is allowed to expire, the Department of Justice will be free to pursue all marijuana-related activity, both medical and non-medical.

V. Implications for Marijuana-Related Businesses

As noted above, the rescission of the Cole Memo and the 2014 DOJ Memo give federal authorities the freedom to prosecute individuals and business engaged in marijuana-related activities, as well as those individuals and businesses that assist them, including banks and financial institutions that handle money on behalf of such marijuana-related businesses or make loans to them. Thus, banks and other financial institutions now have much more difficulty in accurately assessing the potential legal exposure associated with doing business with marijuana-related business. Therefore, until it becomes more clear how federal prosecutors, FinCEN, and other federal agencies are going to respond to the Sessions Memo, it is likely that those institutions that have not previously begun providing services to marijuana-related business will continue to so refrain and that many of those institutions that have previously begun the provide services to marijuana-related businesses will either limit or entirely discontinue those activities.

As a result, state-legal marijuana-related businesses can expect to continue to be denied access to most banks and financial institutions for the foreseeable future. Additionally, because of the threat of asset forfeiture under the CSA and other federal laws, individuals and businesses working with such marijuana-related businesses or providing services to them, such as equipment suppliers or landlords planning to lease space to dispensaries or other marijuana-related

businesses, will likely find that most financial institutions remain reluctant to accept collateral used in connection with marijuana-related activities, including real property on which such activities are conducted. This will continue to make it difficult for such parties to obtain traditional bank loans to fund any marijuana-touching activities or assets and will therefore leave higher cost hard-money loans and private investments as the primary sources for capital for these parties.

ENDNOTES:

¹Controlled Substances Act, 21 U.S.C.A. §§ 801 et. seq.

²Evan Halper, Joseph Tanfani, and Patrick McGreevy, *Trump Administration Targets Recreational Pot, Placing Thousands of Marijuana Businesses in California at Risk*, LA Times, January 4, 2018.

³Controlled Substances Act, 21 U.S.C.A. §§ 801, et. seq.

⁴*Id.* at § 856(a).

⁵*Id.* at § 846.

⁶18 U.S.C.A. § 1956.

⁷18 U.S.C.A. § 1956(c)(4).

⁸31 U.S.C.A. §§ 5311 et. seq.

⁹12 C.F.R. 21.11(c).

¹⁰18 U.S.C.A. § 1956(b).

¹¹*Banking Access Strategies for Cannabis-Related Businesses, A Report for the State Treasurer's Cannabis Banking Working Group*, November 7, 2017, available at: www.treasurer.ca.gov/cbwg/resources/reports/110717-cannabis-report.pdf.

¹²12 U.S.C.A. §§ 1786, 1818.

¹³FinCEN, Remarks of Jennifer Shasky Calvery, August 12, 2014, available at: www.fincen.gov/news/speeches/remarks-jennifer-shasky-calvery-director-financial-crimes-enforcement-network-10.

¹⁴FinCEN, *Marijuana Banking Update*, September 30, 2017, available at: www.fincen.gov/sites/default/files/shared/273281%20EA%204th%20Q%20MJ%20Stats_Public_Web.pdf.

¹⁵Jefferson B. Sessions, III, Attorney General, *Memorandum for All United States Attorneys: Marijuana Enforcement*, January 4, 2018, available at: www.justice.gov/opa/press-release/file/1022196/download.

¹⁶James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement*, August 29, 2013, available at: www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

¹⁷*Id.* at 2.

¹⁸*Id.*

¹⁹James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes*, February 14, 2014.

²⁰Jefferson B. Sessions, III, Attorney General, *Memorandum for All United States Attorneys: Marijuana Enforcement*, January 4, 2018, available at: www.justice.gov/opa/press-release/file/1022196/download.

²¹Department of Treasury, Financial Crimes Enforcement Network, *BSA Expectations Regarding Marijuana-Related Businesses*, February 14, 2014, available at: www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf.

²²*Id.* at 2-3.

²³*Id.* at 4.

²⁴FinCEN, *Marijuana Banking Update*, September 30, 2017, available at: www.fincen.gov/sites/default/files/shared/273281%20EA%204th%20Q%20MJ%20Stats_Public_Web.pdf.

²⁵James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Related Financial Crimes*, February 14, 2014.

²⁶*Trump Signs Spending Bill That Included Medical Marijuana Protections*, Marijuana Business Daily, March 23, 2018, available at: <https://mjbizdaily.com/trump-signs-spending-bill-includes-medical-marijuana-protections/>.

²⁷*United States v. McIntosh*, 833 F.3d 1163, 1178 (9th Cir. 2016).