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BUZZKILL: THE AML IMPLICATIONS OF BANKING MARIJUANA-RELATED BUSINESSES

Despite FinCEN's onerous requirements and the risks involved, in recent years a growing number of financial institutions have been willing to do business with MRBs. The authors discuss the unique legal and compliance risks associated with providing financial services to the marijuana industry and recommend specific controls to mitigate the identified risks.

By Beth Moskow-Schnoll and Shawn F. Summers *

Federal law prohibits the manufacture, distribution, and possession of marijuana and financial transactions associated with such activities. Nonetheless, 34 states, as well as the District of Columbia, Guam, and Puerto Rico, have legalized the sale of marijuana to some degree,[1] and overall sales of legal cannabis within the U.S. reached $10.3 billion by the end of 2018 and are expected to reach $17 billion by the end of 2020.[2] Despite this state-level move toward legalization and the vast size of the market, most financial institutions remain reluctant to conduct transactions involving marijuana proceeds or marijuana-related businesses ("MRBs"), although that too is changing. This article discusses the unique legal and compliance risks associated with providing financial services to the marijuana industry and recommends specific controls to mitigate the identified risks.

CANNABIS

Constraints Imposed by Federal Law

Despite the decisions of many states to legalize the growth, possession, and distribution of marijuana for medical and/or recreational purposes, dealing in marijuana — including for medical purposes recognized as legitimate under state law — remains a federal crime. As explained below, the federal prohibition against possessing and distributing marijuana presents a particular problem to financial institutions seeking to

[1] Eleven states and the District of Columbia have legalized adult recreational use of marijuana, while 23 states have comprehensive medical marijuana programs only. With the adult-use states, there are a total of 34 states with medical marijuana programs. *See Where is Cannabis Legal?,* LEAFLY (Jan. 17, 2020), https://www.leafly.com/news/cannabis-101/where-is-cannabis-legal.

[2] *See* Chris Hudock, *U.S. Legal Cannabis Market Growth,* NEW FRONTIER DATA (Sept. 8, 2019), https://newfrontierdata.com/cannabis-insights/u-s-legal-cannabis-market-growth/.

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offer services to MRBs. Specifically, the mere act by a state-sanctioned MRB of depositing the proceeds of its marijuana sales into a bank account could constitute a federal offense.

Federal Drug Laws: Marijuana remains a Schedule I controlled narcotic under the federal Controlled Substances Act ("CSA"), which means that the federal Food and Drug Administration has determined that marijuana has no currently accepted medical use. As such, it is a federal felony to knowingly manufacture, distribute, dispense, or possess marijuana.[3] Likewise, it is a federal felony to attempt, or to conspire to commit, such offenses, or to aid and abet others in committing such offenses.[4] In general, these offenses can result in potentially severe prison sentences, and even can produce statutory mandatory minimum sentences of five, 10, or 20 years in cases involving large drug amounts and/or prior felony drug convictions.[5]

In 2016, the U.S. Drug Enforcement Agency ("DEA") reiterated that, in the eyes of the federal government, marijuana remains a Schedule I controlled substance.[6] Recent federal legislative efforts to reschedule marijuana or enshrine protections for state legalization — such as the Marijuana Opportunity Reinvestment and Expungement ("MORE") Act,[7] the Sensible Enforcement of Cannabis Act,[8] and the Regulate Marijuana Like Alcohol Act[9] — have gained momentum since the Democratic takeover of the House of Representatives in 2019, but none has yet been successful.[10] The furthest advanced legislation, the Secure And Fair Enforcement ("SAFE") Banking Act,[11] has essentially been passed twice by the House,[12] but would not deschedule marijuana even if it became law. Thus, states that allow marijuana for medical use or which legalize recreational use do so in defiance of federal law.

Money Laundering: Very generally, the federal offense of money laundering involves a financial transaction conducted with the proceeds of a "specified unlawful activity" ("SUA"), while knowing that the proceeds were earned through illegal activity.[13] The list of SUAs identified by Congress is specific but also extremely long (over 200 separate crimes).[14] Drug

[3] 21 U.S.C. §§ 841, 844.

[4] 21 U.S.C. § 846; 18 U.S.C. § 2.

[5] 21 U.S.C. § 841(b).

[6] Denial of Petition to Initiate Proceedings to Reschedule Marijuana, 81 Fed. Reg. 53687 (Aug. 12, 2016).

[7] H.R. 3884, 116th Cong. (2019). Among other provisions, the MORE Act would decriminalize and deschedule marijuana entirely. *See id.* § 2(a).

[8] H.R. 493, 116th Cong. (2019). The Sensible Enforcement of Cannabis Act does not deschedule marijuana, but it explicitly prohibits the Attorney General from prosecuting violations of the CSA involving state-legal marijuana. *Id. § 2(a).*

[9] H.R. 420, 116th Cong. (2019). The Regulate Marijuana Like Alcohol Act would deschedule marijuana. *See id.* § 201. The resolution number is intentional. *See* Tom Angell, *New Congressional Marijuana Bill Is Actually Numbered H.R. 420*,

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Forbes (Jan. 9, 2019), https://www.forbes.com/sites/tomangell/2019/01/09/new-congressional-marijuana-bill-is-actually-numbered-h-r-420/#47dc33172e60 ("In a hat tip to marijuana cultures, lawmakers on Capitol Hill have officially reserved the number H.R. 420 for a bill that would dramatically change federal cannabis laws.").

[10] For example, the MORE Act now has 74 cosponsors in the House, including one Republican. *Cosponsors - H.R.3884 - 116th Congress (2019-2020): Marijuana Opportunity Reinvestment and Expungement Act of 2019*, CONGRESS.GOV, https://www.congress.gov/bill/116th-congress/house-bill/3884/cosponsors (last accessed June 18, 2020).

[11] H.R. 1595, 116th Cong. (2019).

[12] The House passed the SAFE Banking Act in September 2019 with a resounding 321-103 vote, but it has not been taken up by the Senate. *See* Sean Williams, *Surprise! There's Cannabis Reform Legislation in the Latest COVID-19 Relief Bill*, THE MOTLEY FOOL (May 17, 2020), https://www.fool.com/investing/2020/05/17/surprise-theres-cannabis-reform-legislation-in-the.aspx. Subsequently, the House included the full text of the SAFE Banking Act in the HEROES Act, the pandemic relief bill it passed in May 2020, but commentators believe the SAFE Banking Act has little chance of staying in the law to final passage, even if the Senate did decide to take up the HEROES Act. *Id.*

[13] 18 U.S.C. §§ 1956 and 1957.

[14] *Id.* § 1956(c)(7).

distribution, including the distribution of marijuana, is an SUA.[15] The money laundering statutes criminalize a financial transaction using proceeds earned through an SUA.[16] A "transaction" can be very simple, and includes any bank deposit, withdrawal, or wire.[17]

In addition, Section 1956 generally requires a defendant to act with one of four possible intents: (1) an intent to conceal or disguise the nature, location, source, ownership or control of the SUA proceeds; (2) to promote the underlying SUA (here, the distribution of marijuana); (3) to avoid a transaction reporting requirement under federal law, such as the filing of a Suspicious Activity Report ("SAR") or a Currency Transaction Report ("CTR"); or (4) to commit the offense of tax evasion or filing a false tax return.[18] In the context of a financial institution providing banking services to MRBs, some of these prohibited mental states could be at issue.

Section 1957 — the so-called "spending" money laundering statute — also presents risk. Section 1957 is very broad. It merely requires a transaction involving over $10,000 in SUA funds and knowledge that the proceeds were derived from criminal activity.[19] None of the special intents previously described under Section 1956 are required; there is no need for an intent to conceal or further the underlying offense.[20] Moreover, the $10,000 threshold is triggered either by one transaction of more than $10,000 or by aggregated, related transactions, such as four related financial transactions conducted over time, each involving $3,000 in SUA funds.[21] Otherwise mundane financial transactions done with complete transparency can represent Section 1957 violations, so long as there is sufficient knowledge and the financial transactions involve over $10,000 in SUA funds.

Forfeiture: Beyond a potential criminal prosecution, the proceeds of a money laundering transaction or a controlled drug transaction can be forfeited. This complicated topic will be merely noted here. The bottom line is that the federal government can institute a separate civil forfeiture action against tainted property, or a criminal forfeiture action linked with a specific prosecution of an individual or institution, and thereby seize and obtain any and all proceeds "involved in" or "traceable to" a money laundering or drug transaction.[22] The burden of proof for a civil forfeiture action is merely a preponderance of the evidence, and the government is not obligated to actually convict anyone of a crime in order to prevail under a civil forfeiture theory. A civil forfeiture action can be brought against SUA funds held by a third party, subject to very limited defenses by the third party.

Limited Federal Policy of Prosecutorial Restraint

Even in the absence of new federal laws restraining marijuana enforcement like the SAFE Banking Act and the Sensible Enforcement of Cannabis Act, the U.S. Department of Justice and Congress have placed certain limits on the federal investigation and prosecution of cases involving marijuana-related activity that strictly complies with state law. However, and as described below, these limits merely represent policies of restraint on enforcement decisions — they do not guarantee any particular outcomes in specific cases, they do not legalize conduct that is unlawful under the CSA or the money laundering statutes, and they are not necessarily permanent.

DOJ Policy: In August 2013, James M. Cole, the then-Deputy Attorney General, issued new guidance (the "Cole Memo") regarding marijuana enforcement in states that had passed some form of marijuana reform legislation.[23] The Cole Memo concluded that threats to federal priorities under the CSA are allayed in jurisdictions that have strong and effective regulatory and enforcement systems to control marijuana growth and distribution.[24] Nonetheless, the Cole Memo reiterated DOJ's commitment to enforcing the CSA as it relates to marijuana involved offenses.[25]

To aid in effectively enforcing the CSA, the Cole Memo laid out the following enforcement priorities (the

[15] *Id.* § 1956(c)(7)(B)(i).

[16] *Id.* § 1956(a)(1).

[17] *Id.* § 1956(c)(3).

[18] *Id.* § 1956(a)(1).

[19] *Id.* § 1957(a).

[20] *See, e.g., United States v. Cefaratti*, 221 F.3d 502, 506 (3d Cir. 2000).

[21] *See, e.g., United States v. George*, 363 F.3d 666, 674–75 (7th Cir. 2004).

[22] 18 U.S.C. §§ 981–983; 21 U.S.C. § 853.

[23] James M. Cole, *Guidance Regarding Marijuana Enforcement*, U.S. DEPARTMENT OF JUSTICE (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

[24] *Id.* at 3.

[25] *Id.* at 1.

"Cole Memo Priorities") which are intended to inform decisions by federal prosecutors to investigate and prosecute marijuana-related cases: (1) "[p]reventing the distribution of marijuana to minors;" (2) "[p]reventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;" (3) "[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states;" (4) "[p]reventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;" (5) "[p]reventing violence and the use of firearms in the cultivation and distribution of marijuana;" (6) "[p]reventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;" (7) "[p]reventing the growing of marijuana on public lands, and the attendant public safety and environmental dangers posed by marijuana production on public lands;" and (8) "[p]reventing marijuana possession or use on federal property."[26] Ultimately, the Cole Memo gave federal prosecutors in states that had legalized the growing and distribution of marijuana wide discretion to assess on a case-by-case basis the extent to which a particular marijuana growth and distribution enterprise undermined the stated enforcement priorities and was therefore worthy of prosecution.[27]

The Cole Memo represented merely a policy of endowing federal prosecutors with additional discretion regarding potential charging decisions; it did not legalize under federal law marijuana-related conduct sanctioned by state law, nor did it provide any guarantees or rights regarding particular outcomes in specific cases.[28] Yet, in the years following the issuance of the Cole Memo, DOJ and other federal agencies have largely been hands-off with state marijuana-related activities so long as those activities were in compliance with the eight enforcement priorities.

Perhaps what is even more remarkable is that DOJ's forbearance has largely continued even after then-Attorney General Jeff Sessions rescinded the Cole Memo in January 2018, stating in a one-page memo of his own that "prosecutors should follow the well-established principles that govern all federal prosecutions."[29] But as it turned out, Sessions had only 10 months left as Attorney General.[30] His successor, William Barr, has consistently expressed little interest in prosecuting state-legal marijuana activities,[31] even going so far as to state publicly in April 2020 that DOJ is "operating under my general guidance that I'm accepting the Cole Memorandum for now, but I've generally left it up to the U.S. Attorneys in each state to determine what the best approach is," as if the Cole Memo had never been rescinded.[32]

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[26] *Id.* at 1–2.

[27] *Id.* at 3–4.

[28] The Cole Memo substantially tracks the analysis laid out in an earlier DOJ memorandum regarding cases involving medical marijuana. *See* David W. Ogden, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana*, U.S. DEPARTMENT OF JUSTICE (Oct. 19, 2009), https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf (the "Ogden Memo"). The Ogden Memo stated in part that "[t]his guidance regarding resource allocation does not 'legalize' marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil or criminal matter. Nor does clear and unambiguous compliance with state law . . . create a legal defense to a violation of the Controlled Substance Act. Rather, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion."

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The Ogden Memo was withdrawn by Attorney General Jeff Sessions in January 2018. *See* Jefferson B. Sessions, *Marijuana Enforcement*, U.S. DEPARTMENT OF JUSTICE (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download.

[29] *Id.*

[30] Peter Baker, Katie Benner, and Michael D. Shear, *Jeff Sessions Is Forced Out as Attorney General as Trump Installs Loyalist*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/sessions-resigns.html.

[31] Tom Angell, *Trump Attorney General Pick Puts Marijuana Enforcement Pledge in Writing*, FORBES (Jan. 28, 2019), https://www.forbes.com/sites/tomangell/2019/01/28/trump-attorney-general-pick-puts-marijuana-enforcement-pledge-in-writing/#6600eb1a5435. On the other hand, DOJ sources have claimed that it was Attorney General Barr's personal distaste for the marijuana industry, and not any bona fide antitrust concern, that was behind the Department's decision to impose painstaking reviews on several marijuana business mergers during his tenure, causing at least one deal to collapse as a result. *See Prosecutor: AG Barr Ordered Politically Motivated Probes of Cannabis Mergers*, MARIJUANA BUSINESS DAILY (June 23, 2020), https://mjbizdaily.com/allegation-attorney-general-william-barr-ordered-politically-motivated-probes-of-cannabis-mergers/.

[32] Jeff Smith, *Attorney General Barr: US Law Protecting State-Legal Marijuana Trumps Current Situation*, MARIJUANA

Therefore, although there is no guarantee that state-sanctioned marijuana-related activity that strictly complies with the Cole Memo Priorities will not be prosecuted — and there have been some exceptions involving zealous U.S. Attorneys[33] — history dictates that such activity is relatively low risk. Note, however, that this DOJ policy of discretion could change or end at any time.

Congressional Limits on Enforcement Spending — the Rohrabacher Amendment.[34] Despite the as-yet failure of permanent legislative fixes, state-legal MRBs do not depend entirely on DOJ's sufferance under the Cole Memo or otherwise. In December 2014, Congress enacted an Omnibus Appropriations Bill funding the government through September 2015.[35] This bill contained, tucked away in section 538, the "Rohrabacher Amendment" stating that no funds made available to DOJ by the bill could be used to prevent certain named states from implementing their own state laws that authorize the use, distribution, possession, or cultivation of medical marijuana.[36] In short, the amendment protects state-legal medical marijuana programs from federal interference. Because of its form as a rider on the annual appropriations bill, the Rohrabacher Amendment must be renewed on a yearly basis. So far, it has been reauthorized every year since its introduction. The amendment was most recently renewed in December 2019, through the 2020 fiscal year ending September 30, 2020.[37] Since 2017, President Trump has regularly inserted signing statements that he would treat the Rohrabacher Amendment "consistent with the President's constitutional responsibility to faithfully execute the laws of the United States," but has done nothing to interfere with its application.[38]

Federal courts have mainly upheld the amendment's protective purpose as its drafters understood it — that is, to strip DOJ's authority to spend its resources to prosecute medical marijuana-related offenses *if* the conduct was in full compliance with the state's own law regulating such conduct and there is no other illegal conduct alleged. In August 2016, the Court of Appeals for the Ninth Circuit, in the *McIntosh* case, held that the Rohrabacher Amendment "prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws."[39] District courts within the Ninth Circuit have of course followed suit, as have courts elsewhere.[40]

Although the *McIntosh* case seemingly hampers or prohibits outright DOJ's ability to prosecute growers and dispensaries who are in strict compliance with their respective state statutes regarding medical marijuana, the

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BUSINESS DAILY (Apr. 10, 2019), https://mjbizdaily.com/attorney-general-william-barr-federal-law-protecting-state-legal-marijuana-trumps-current-situation/.

[33] *See, e.g.*, Ryan Boldrey, *Owner of Five Michigan Marijuana Dispensaries Headed to Federal Prison*, MLIVE (Aug. 26, 2019), https://www.mlive.com/news/grand-rapids/2019/08/owner-of-five-michigan-marijuana-dispensaries-sentenced-to-federal-prison.html (describing how the owner of an ostensibly state-legal marijuana business was tried and convicted under the CSA in federal court after being acquitted in state court for violations of state law).

[34] The Rohrabacher Amendment is also referred to as the "Rohrabacher-Farr Amendment" and, most recently, the "Rohrabacher-Blumenauer Amendment."

[35] Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2129.

[36] *Id.* § 538, 128 Stat. at 2217.

[37] Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, § 531, 133 Stat. 2317, 2530 (2019).

[38] Tom Angell, *Trump Says He Can Ignore Medical Marijuana Protections Passed By Congress*, FORBES (Dec. 21, 2019), https://www.forbes.com/sites/tomangell/2019/12/21/trump-says-he-can-ignore-medical-marijuana-protections-passed-by-congress/#2720442a4256.

[39] *United States v. McIntosh*, 833 F.3d 1163, 1177 (9th Cir. 2016).

[40] *United States v. Jackson*, 388 F. Supp. 3d 505, 512–13 (E.D. Pa. 2019) (finding that, under *McIntosh*, DOJ could not punish violations of supervised release conditions involving Pennsylvania-legal medical marijuana); *United States v. Samp*, No. 16-cr-20263, 2017 U.S. Dist. LEXIS 46291, at *4 (E.D. Mich. Mar. 29, 2017) (holding that the Rohrabacher Amendment would forbid charging a state-legal marijuana business owner with firearms offenses for otherwise lawfully possessed firearms because it would have "materially the same effect" as prosecuting him for owning a state-legal marijuana business directly); *United States v. Moore*, 274 F. Supp. 3d 1032, 1040 (N.D. Cal. 2017) (finding that defendants had proven "their strict compliance with all relevant conditions imposed by California law on the use, distribution, possession, and cultivation of medical marijuana" and therefore enjoining the prosecution against them); *but see United States v. Ragland*, No. 2:15-cr-20800, 2017 U.S. Dist. LEXIS 97852, at *7 (E.D. Mich. June 26, 2017) (distinguishing *McIntosh* and *Samp* and allowing the Government to pursue claims where the charges allege illegal conduct apart from the element of marijuana use).

court still rejected the defendants' argument that the prosecution of marijuana-related offenses should be left solely to the states and sternly warned that the CSA is still in effect, federal law remains supreme, and "Congress could restore funding tomorrow."[41] Indeed, the case did not change the fact that the manufacture, possession, use, and distribution of marijuana violate the CSA. Thus, any inability to prosecute flows solely from the continued viability of the Rohrabacher Amendment. Further, marijuana sale proceeds continue to constitute SUA proceeds under the money laundering statutes.[42]

MRBs' Access to the Banking and Financial System

Financial institutions, such as banks and credit unions, are required to implement adequate anti-money laundering ("AML") compliance programs under the Bank Secrecy Act ("BSA").[43] Very generally, covered financial institutions must establish adequate AML programs to guard against money laundering and other criminal activity. Such programs are effectuated in part through various record keeping requirements, the performance of due diligence regarding customers and their accounts, and the filing of suspicious activity reports ("SARs").[44] Especially in light of their AML/BSA responsibilities, and for the reasons discussed above, most financial institutions have been reluctant to conduct transactions involving marijuana proceeds or to have MRBs as customers.

That began to change somewhat in 2014, when, in conjunction with DOJ's issuance of the Cole Memo, the Department of Treasury — via the Financial Crimes Enforcement Network ("FinCEN"), which administers the BSA — issued a memorandum on its BSA expectations for financial institutions seeking to provide services to MRBs (the "FinCEN Guidance").[45] The FinCEN Guidance lifted the absolute prohibition against marijuana-related bank transactions and modified reporting requirements for suspicious transactions, in response to the expanding trend among the states to legalize the medical use of marijuana.[46] In August 2014, the Federal Reserve Board of Governors, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and the Office of the Comptroller of the Currency each incorporated the FinCEN Guidance into their supervisory processes.[47]

But allowing financial institutions to bank MRBs comes with a steep price. The FinCEN Guidance places onerous compliance requirements upon financial institutions. Under the FinCEN Guidance, financial institutions must undertake regular due diligence reviews to "know their customers" in the marijuana industry. As part of this enhanced due diligence ("EDD"), banks must (1) regularly verify and review customer MRBs' state licenses and related documentation; (2) develop an understanding of each MRB's "normal and expected activity;" (3) monitor publicly available sources for adverse information about their MRB customers and related parties; (4) monitor MRBs for "red flags" of suspicious activity to identify outwardly legal MRBs that are fronts or pretexts for money laundering or marijuana-related activity not authorized by state law; (5) "consider whether a marijuana related business implicates one of the Cole Memo priorities or violates state law;" and (6) "refresh" the information obtained "on a periodic basis and commensurate with the risk."[48]

The FinCEN Guidance also requires financial institutions to file SARs, although modified to track, rather than investigate, legitimately operating MRBs and focus the government's investigative resources on

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[41] *McIntosh*, 833 F.3d at 1179 n.5.

[42] The *McIntosh* case did not address whether DOJ also was prohibited from spending funds to enforce the money laundering statutes – which are distinct from the CSA – in cases involving medical marijuana. Further, the Rohrabacher Amendment does not address the money laundering statutes. On the other hand, *Samp* at least suggests that the Rohrabacher Amendment may forbid prosecution for conduct which would otherwise be legal, but for its connection with a state-compliant marijuana business. *Samp*, No. 16-cr-20263, 2017 U.S. Dist. LEXIS 46291, at *4.

[43] 31 U.S.C. §§5311–5332.

[44] *See, e.g.*, 31 CFR § 1020.320 (requiring that "[f]inancial institutions shall file with [FinCEN] . . . a report of any suspicious transaction relevant to a possible violation of law or regulation"). The regulation also provides that "a financial institution may also file with [FinCEN] a [SAR] with respect to any suspicious transaction that it believes is relevant to the possible violation of any law or regulation" but whose reporting is not required by FinCEN regulations. *Id.*

[45] FINANCIAL CRIMES ENFORCEMENT NETWORK, FIN-2014-G001, BSA EXPECTATIONS REGARDING MARIJUANA-RELATED BUSINESSES (Feb. 14, 2014), https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses.

[46] *Id.*

[47] Board of Governors of the Federal Reserve System et al., Letter to the Honorable Jay Inslee ("Board of Governors' Letter") (Aug. 13, 2014), https://dfi.wa.gov/documents/banks/gov-inslee-interagency-response.pdf.

[48] FinCEN Guidance, *supra* note 46.

questionable and improper business activity.[49] Because marijuana is prohibited under federal law, *all* marijuana-related transactions processed by financial institutions are inherently suspicious. Therefore, the FinCEN Guidance requires a financial institution with an MRB as a customer to file one of three types of SARs: (1) "Marijuana-Limited" SARs to identify financial services provided to MRBs that, through a due diligence review, meet the state law requirements and do not violate the Cole Memo Priorities; (2) "Marijuana Priority" SARs on MRBs reasonably believed to violate state law or one or more of the Cole Memo Priorities; and (3) "Marijuana Termination" SARs in the event a financial institution terminates its relationship with an MRB customer "in order to maintain an effective" AML program.[50] Thus, a financial institution that does business with an MRB must file SARs regarding *all* of the financial services provided to that customer.

Adding to the regulatory burden associated with banking MRBs is the fact that financial institutions are obligated to file CTRs on the receipt or withdrawal of more than $10,000 in cash per day.[51] Since credit card networks generally will not provide services to MRBs, cash is the most common form of payment at dispensaries. Thus, dispensaries may routinely make deposits of over $10,000 in cash, but because an MRB is not eligible for any exemption from a bank's CTR filing obligations, a CTR must be filed for all such deposits.

Overall sales of legal cannabis within the U.S. reached $10.4 billion in 2018 and are expected to reach $17 billion by the end of 2020.[52] Thus, despite FinCEN's onerous requirements, in recent years, a growing number of financial institutions have been willing to do business with MRBs. FinCEN's most recent Marijuana Banking Update, which includes data through the fourth quarter of 2019, indicates that the number of depository institutions, such as banks and credit unions, actively providing banking services to MRBs increased from 512 in October 2018 to 739 in December 2019.[53] Since FinCEN issued its guidance requiring SARs for MRBs, it has received over 114,859 SARs, with the vast majority — 85,193 — being "Marijuana-Limited" SARs. In the first quarter of 2017, filings of "Marijuana-Limited" SARs increased significantly, while the number of "Marijuana Priority" and "Marijuana Termination" SARs remained relatively static, and that trend has continued.[54] Thus, while more banks and credit unions are accepting MRBs as customers, there has not been a corresponding increase in the amount of observed suspicious activity.

Assessing and Mitigating the Risk

As discussed above, because federal law continues to criminalize marijuana-related activity, there are a myriad of risks associated with providing financial services to MRBs. However, with the implementation of proper controls, such risks can be mitigated to a certain extent, although at a hefty cost.

As the FinCEN Guidance stated, whether to onboard MRB customers is a "risk-based decision."[55] Of course, the greatest risk is possible federal consequences, including prosecution and seizure of assets. That risk is small and growing smaller, provided a bank follows the FinCEN Guidance. A search we conducted could find no case in which a financial institution was prosecuted solely for providing services to a state-legal MRB. And financial institutions are unlikely to be sanctioned by their regulators either. Federal regulators adopted the FinCEN Guidance in 2014,[56] and, in August 2019, Rodney Hood, Chairman of the National Credit Union Administration, stated that credit unions will not be sanctioned for providing services to state-legal MRBs.[57]

Another risk a financial institution must consider is reputational. The bank must assess what its customer base and the communities it serves will think if the bank chooses to do business with MRBs.

A financial institution also must consider whether it can afford to bank MRBs — the related revenue could

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[49] *Id.*

[50] *Id.*

[51] *Id*. *See also* 31 C.F.R. § 1010.311.

[52] Hudock, *supra* note 2.

[53] FINANCIAL CRIMES ENFORCEMENT NETWORK, MARIJUANA BANKING UPDATE (Dec. 2019), https://www.fincen.gov/sites/default/files/shared/291404_1st_Q_FY2020_Marijuana_Banking_Update_Public.pdf.

[54] FINANCIAL CRIMES ENFORCEMENT NETWORK, MARIJUANA BANKING UPDATE (Dec. 2018), https://www.fincen.gov/sites/default/files/shared/Marijuana_Banking_Update_Public_Dec_2018.pdf.

[55] FinCEN Guidance, *supra* note 47.

[56] Board of Governors' Letter, *supra* note 49.

[57] David Baumann, *CUs Won't Be Sanctioned for Providing Marijuana Banking: NCUA Chairman Hood*, CREDIT UNION TIMES, (August 5, 2019), https://www.cutimes.com/2019/08/05/cus-wont-be-sanctioned-for-providing-marijuana-banking-ncua-chairman-hood/?slreturn=20200515100037#.

be high, but so are the compliance costs. Does it have the financial wherewithal to implement and maintain AML/BSA and risk management programs with sufficient resources and systems to conduct the EDD and monitoring required by the FinCEN Guidance? Its monitoring and reporting processes must include resources commensurate with the risks to ensure proper CTR and SAR compliance. The financial institution's programs must be robust enough for it to know whether its MRB customers are in compliance with relevant state law and the Cole Memo Priorities. MRBs in violation of state law or one of DOJ's enforcement priorities are more likely to be targets of federal or state enforcement actions. And any financial institution servicing them is therefore also more likely to be a target. Implementing and maintaining robust risk management programs is costly, so before onboarding its first MRB, a financial institution should conduct a break even analysis.

As part of its risk assessment, the financial institution should establish risk limits. The limits could be based, for instance, on the number of MRB customers or accounts it will accept, or what percent of revenue MRB business should represent.

In assessing the risk of onboarding an MRB, a financial institution must conduct due diligence. Customer due diligence is mandated by the FinCEN Guidance and critical to understanding anticipated transactions and implementing a suspicious activity monitoring system in order to reduce the financial institution's reputational, compliance, and transaction risks. In addition to the due diligence listed in the FinCEN Guidance,[58] the EDD should include reviewing the MRB's financial records, including, but not limited to gross receipts, to determine the MRB's source of funding and so as to be able to compare those records to cash activity. The financial institution also should aggregate related account activity, such as personal accounts and related business accounts, for reporting purposes.

A financial institution should screen its MRB customers against state-licensed businesses on an ongoing basis and refresh all the information obtained as part of its MRB due diligence on a periodic basis and commensurate with the risk. Moreover, the financial institution should contractually require the MRB to notify the bank within five days of any material status change or adverse information, such as loss or suspension of its license or that it, or any of its principals (including owners and managers), are under investigation or arrest or have been convicted of a crime. The financial institution also could require the MRB to certify, on an ongoing basis, that its licensing status has not changed and that neither it nor its principals is the subject of any investigation or criminal prosecution.

The information gathered while conducting due diligence should be used to determine whether an MRB implicates one of the Cole Memo Priorities or violates state law. In making this determination, the financial institution should consider whether any of the red flags listed in the FinCEN Guidance are present. Furthermore, relevant employees, including legal staff, those responsible for conducting MRB due diligence, and those who will be providing services to the MRB, should receive targeted training at least annually.

CONCLUSION

Federal law continues to criminalize marijuana-related activity. Thus, facilitating financial transactions for an MRB could be deemed by the federal government to constitute money laundering. However, since DOJ issued the Cole Memo, DOJ and other federal agencies have generally been hands-off with marijuana-related activities, so long as those activities strictly comply with DOJ's eight enforcement priorities. Therefore, although there is no guarantee that state-sanctioned marijuana-related activity will not be prosecuted, such activity appears to be relatively low risk. Note, however, that this DOJ policy of prosecutorial restraint could change or end at any time.

The controls discussed in this article and in the FinCEN Guidance, if correctly implemented and maintained, should greatly mitigate the identified risks associated with doing business with an MRB. However, such controls are expensive, and no controls can remove all risk. Thus, a financial institution must determine how much risk it can tolerate, and if the benefits of banking an MRB outweigh what risk remains once controls have been implemented. ■

[58] FinCEN Guidance, *supra* note 46.