

# COMPLIANCE



## Maintaining Compliance with the Bank Secrecy Act While Working with Marijuana-Related Businesses

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In 2014, the Financial Crimes Enforcement Network (“FinCEN”) issued guidance clarifying how financial institutions can provide services to marijuana-related businesses (“MRBs”) in a manner consistent with their obligations under the Bank Secrecy Act (“BSA”). The FinCEN guidance primarily covered three topics. First, it provided a list of actions that a financial institution should undertake when conducting its customer due diligence. Second, it required that all financial institutions with, or

those seeking to end, a business relationship with an MRB, file a suspicious activity report (“SAR”). Third, the guidance reaffirmed the obligations of a financial institution to report currency transactions in connection with MRBs and eligible transactions on FinCEN Form 8300. This article discusses how financial institutions can remain in compliance with those requirements when deciding to begin, continue, or end its relationship with an MRB.

# Conducting Compliant Due Diligence of a Marijuana-Related Business

FinCEN requires that every financial institution undertake the following five actions as part of its pre-relationship customer due diligence of an MRB:

1. Verify with the appropriate state authorities whether the business is duly licensed and registered;
2. Review the license application (and related documentation) submitted by the MRB for obtaining a state license to operate its marijuana-related business;
3. Request from state licensing and enforcement authorities available information about the MRB and related parties;
4. Develop 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); and,
5. Consider whether the MRB implicates one of the Cole Memo priorities or violates state law.

In addition to these five pre-relationship due diligence steps, FinCEN also lists the following three actions that a financial institution should undertake on an on-going basis, after the establishment of a business relationship, to both assess the risk of continued service to the MRB and to determine the type of SAR to file with FinCEN:

1. Conduct ongoing monitoring of publicly available sources for adverse information about the MRB and related parties;
2. Conduct ongoing monitoring for suspicious activity, including any of the red flags outlined in the guidance (see below); and,
3. Refresh information obtained as part of customer due diligence on a periodic basis in proportion to the risk.

A financial institution is permitted to reasonably rely on the information regarding a MRB's state licensure that it obtains in connection with its customer due diligence from state licensing authorities.

# Describing A Financial Institution's Relationship with a Marijuana-Related Business in a Suspicious Activity Report

FinCEN guidance makes it clear that financial institutions are required to file SARs on all activity involving a MRB regardless of any state law legalizing marijuana-related activity, and regardless of whether the MRB is duly licensed to operate as such under the laws of its state.<sup>1</sup> Accordingly, when preparing to file a SAR, a financial institution must utilize one of the following three phrases established by FinCEN guidance:

1. "Marijuana Limited"
2. "Marijuana Priority"
3. "Marijuana Termination"

The decision to use a particular phrase in a SAR is ultimately driven by the financial institution's customer due diligence efforts and whether it "reasonably believes" that a MRB with which it does business either implicates one of the Cole Memo priorities or violates the law of the state under which it operates.

If the financial institution provides financial services to a MRB and, after conducting its customer due diligence, "reasonably believes" that the MRB does not either implicate one of the Cole Memo priorities, or violate the law of state under which it operates, the financial institution should file a "Marijuana Limited" SAR. On the other hand, if the financial

institution, after conducting its customer due diligence, does have such "reasonable belief", it should file a "Marijuana Priority" SAR. In this situation the financial institution would continue providing the MRB in question with financial services while further investigation is conducted. Lastly, a financial institution should file a "Marijuana Termination" SAR<sup>2</sup> if the financial institution, after having established a business relationship with a MRB, decides to terminate its relationship with that MRB for any of the following reasons:

- i. the financial institution's due diligence indicates that the MRB either implicates one of the Cole Memo priorities or violates state law,
- ii. the financial institution has decided that it must terminate its business relationship with the MRB in order to maintain an effective anti-money laundering compliance program, or
- iii. the financial institution has declined to service marijuana related customers for business reasons.

When conducting customer due diligence on a MRB, the financial institution should consider whether any FinCEN noted red flags are present, which could possibly indicate activity implicating one of the Cole Memo

<sup>1</sup>The rationale for this requirement rests on the federal prohibition of the distribution and sale of marijuana, which brings a financial institution's business relationship with a MRB within the umbrella of FinCEN regulations. Those regulations require a financial institution to file a SAR when it knows, suspects, or has reason to believe that a transaction conducted or attempted by, at, or through it that:

(i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity;

(ii) is designed to evade regulations promulgated under the BSA; or,

(iii) lacks a business or apparent lawful purpose.

<sup>2</sup>FinCEN also urges that the financial institution, to the extent that it becomes aware that the MRB seeks to move to a second financial institution, use Section 314(b) voluntary information sharing (if it qualifies) to alert the second financial institution of potential illegal activity.

priorities or a violation of state law and could help determine whether the financial institution should file a “Marijuana Priority” SAR.

Where a financial institution has determined that it is required to file a Marijuana Limited SAR, it must use the term “Marijuana Limited” in the narrative section and limit the content of the SAR to the following information:

- i. identifying information of the subject and related parties;
- ii. addresses of the subject and related parties;
- iii. the fact that the filing institution is filing the SAR solely because the subject is engaged in a marijuana-related business; and
- iv. the fact that no additional suspicious activity has been identified.

A financial institution that has already filed an initial Marijuana Limited SAR should follow FinCEN’s existing guidance on the timing of filing continuing activity reports for the same activity initially reported. The continuing activity report may contain the same limited content as the initial SAR, plus details about the amount of deposits, withdrawals, and transfers in the account since the last SAR.

Where your financial institution has determined that it is required to file a Marijuana Priority SAR, it must use the term “Marijuana Priority” in the narrative section and the SAR filing must include, in accordance with existing regulations and guidance, comprehensive details about the activity in question. Details particularly relevant to law enforcement in this context include:

- i. identifying information of the subject and related parties;
- ii. addresses of the subject and related parties;
- iii. details regarding the enforcement priorities the financial institution believes have been implicated; and
- iv. dates, amounts, and other relevant details of financial transactions involved in the suspicious activity.

Finally, where a financial institution has determined that it is required to file a Marijuana Termination SAR, it must use the term “Marijuana Termination” in the narrative section and must include within its filing the basis for the termination of the relationship with the MRB. The financial institution, however, may certainly find itself in a situation where it is not well-positioned to determine whether a MRB, with which you may have an in-direct business relationship, implicates one of the Cole Memo priorities or violates state law. In such a situation, the financial institution may file a SAR without making a distinction between “Marijuana Limited” and “Marijuana Priority”.

## Reporting Currency Transactions and Completing Form 8300

The financial institution should also remember that it must, if subject to FinCEN regulations, report currency transactions in connection with MRBs the same as it would in any other context, consistent with existing regulations and with the same thresholds that apply. Similarly, if the financial institution is engaged in a non-financial trade or business, it will need to report transactions in which it receives more than \$10,000.00 in cash and other monetary instruments for the purchase of goods or services on FinCEN Form 8300.



### Further Guidance

If you have any questions about cannabis banking or specific questions about how to maintain compliance with the Bank Secrecy Act, or FinCEN regulations generally, please do not hesitate to reach out to the attorneys at Padwa Coleman & Gomes by emailing [sean@colemanandgomes.com](mailto:sean@colemanandgomes.com), where we provide comprehensive cannabis guidance to all of our clients.

<sup>3</sup>The financial institution, for instance, could be providing services to another domestic financial institution that, in turn, provides financial services to a MRB. Or, as another example, the financial institution could be providing services to a non-financial customer that provides goods or services to a MRB (e.g., a commercial landlord that leases property to a MRB).