

GALLET DREYER & BERKEY, LLP

ATTORNEYS AT LAW

Banking Marijuana Businesses

*To bank or not to bank
That (!) is the question*

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**Don't get confused by all
the hype –
It's still 1,000% illegal under Federal
law – the same as heroin.**

How Did We Get Here?

1. New York State law permits medical marijuana dispensing and licenses dispensaries
2. Other states permit medical and sometimes recreational marijuana
3. The “Cole Memo” (2013)
4. FinCEN guidance (2014)
5. Sessions withdraws the Cole Memo (2018)
6. Continuation of FinCEN guidance (implicitly every quarter)

Federal Legislative Initiatives

**Pending House Bill –
Supported by IBA, ABA, CUNA**

**Immunity from
Criminal
Prosecution**

**Proceeds no longer
considered money
laundering**

SARs still required

But it's not the law and may never be, so we will ignore.

What is a “Marijuana Business?”

No clear definition of what is a marijuana business

- **Growing it**
- **Transporting it**
- **Processing it – from baking edibles to putting it into vape devices.**
- **Selling it**
- **Distributing it**

Lending to landlords whose tenants dispense it?

What to do if you want to accept deposits?

- Risk Assessment
 - (talk to your federal regulator)*
 - KYC and EDD
- Verify no Cole Memo priorities
 - Verify no other **Red Flags**
 - Wash, rinse, repeat

The Cole Memo Priorities

(what are the federal concerns?)

Prevent distribution to minors (*Oops! Medical Marijuana.*)

Prevent revenue going to a criminal enterprise

No diversion to states where illegal

Marijuana business not a cover for other illegal drugs

No violence or firearms in cultivation or distribution

No drugged driving

No growing on federal land

No use on federal land

FinCEN Expectations

Evaluate the risks – just like any other new product risk assessment. Make sure you satisfy your new product policy.

- a) Is there a valid state license.**
- b) Review license application and supporting materials (including financiers)**
- c) Talk to state licensing authority {AND your primary fed bank regulator}**
- d) Understand the level of business and expected cash flow from normal business**
- e) Continuous monitoring of media sources re: business and its principals**
- f) Ongoing monitoring – red flags and refresh CDD information**

FinCEN Expectations (Cont.)

CDD/EDD issues.

- a) Evaluate the business**
 - a) Are any of the Cole Memo priorities implicated?**
- b) Review license application and supporting materials**
- c) Talk to state licensing authority**
- d) Understand the level of business and expected cash flow from normal business**
- e) Continuous monitoring of media sources re: business and its principals**
- f) Ongoing monitoring – red flags and refresh CDD information**

SARs Always Required!

SARs are required for “marijuana-related” businesses

➤ **Three kinds of Marijuana SARs:**

- 1. Marijuana Limited**
- 2. Marijuana Priority**
- 3. Marijuana Termination**

Marijuana Limited SAR

1. None of the Cole Memo priorities are implicated
2. Business is lawful under state law.
3. Limited content required
 - a) Identify subject and related parties
 - b) Provide address of subject and related parties
 - c) Filing is because subject is in marijuana-related business
 - d) No additional suspicious activity identified
 - e) State “MARIJUANA LIMITED” in narrative.
4. Continuous activity refiling **IS REQUIRED!**

Marijuana Priority SAR

1. Implicates at least one Cole Memo Priority (**RED FLAGS**) OR
2. Business is NOT lawful under state law
3. Content should follow normal SAR guidance
4. Make sure you include the following, which law enforcement wants:
 - a) Identifying information
 - b) Addresses
 - c) Details as to what enforcement priorities are implicated
 - d) Dates, amounts and other details
 - e) State “MARIJUANA PRIORITY” in narrative

FinCEN Marijuana Red Flags

Business appears to be a front to launder money derived from other crimes.

1. Substantially more revenue/cash than reasonably expected or than local competitors
2. Business can't demonstrate that revenue is derived exclusively from legal activity
3. Excessive cash deposits or withdrawals
4. CTR structuring
5. Rapid movement of funds
6. Unconnected third party deposits
7. Excessive commingling of funds
8. Financial statements inconsistent with volume
9. Surge in purchases from third parties

More Red Flags

- ❖ No documentation of current license
- ❖ Outside investments in business from suspicious sources
- ❖ Concealing involvement in marijuana-related business
- ❖ Publicly available data reveals negative information
- ❖ Enforcement action by the state or local authorities
- ❖ International or interstate activity (e.g., large out-of-state deposits and withdrawals)
- ❖ Principals reside outside the state
- ❖ “Non-profit” company is engaged in commercial activity or pays excessive compensation

Marijuana Termination SAR

- 1. If you terminate relationship to allow the bank to maintain effective AML program**
- 2. Explain basis for termination in narrative**
- 3. State “MARIJUANA TERMINATION” in narrative**
- 4. If aware that business is moving to another financial institution, FinCEN urges use of 314(b) information sharing (if applicable) to alert other bank**

Don't Forget Your CTRs

- **CTRs are still required**
- **Structuring is still illegal**
- **Marijuana-related business CANNOT be exempted even if you maintain an exemption list**

What's Behind the FinCEN Policy?

- **The devil you know is better than the devil you don't**
- **Keep you friends close and your enemies closer**
- **Unbanked marijuana businesses are perceived to be a greater crime risk**

Other Non-depository Services?

- **Lending?**
 - **Almost nothing written about it**
 - **Collateral . . . Business assets – NO**
 - **State law may require filing as a “financier” of the business**
 - **Why take the risk? The next good idea will be the first good idea.**
- **Funds transfers?**
- **Debit cards?**

Is Anyone Banking Marijuana?

Marijuana Banking Update

Depository Institutions (by type) Providing Banking Services to Marijuana Related Businesses¹
(Data ending 31 December 2018)

