

Feds Issue Guidance For Banks Dealing With Marijuana-Related Businesses

April 11, 2014 | [Financial Regulation, The GEE Blog](#)



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While marijuana dealing activities are not generally a topic of interest to those who are involved in the prosecution or defense of white collar criminal cases, financial institutions probably are well aware that dealing with persons involved in such activities can lead to prosecution of the financial institution. That is the “stuff” of interest to white collar criminal practitioners. With recent enactments in various states concerning medical marijuana and recreational use of marijuana, however, financial institutions have been scratching their heads about where the line is between permissible banking business and that which crosses the line. In an effort to give clarity to that question, the Department of Treasury (Financial Crimes Enforcement Network) and the Department of Justice have issued memos providing guidance for financial institutions. Perhaps, it is no surprise that the reaction in the financial community has been somewhat mixed; some opining that the memos are helpful in giving clarity to financial institutions and others that they are not particularly helpful because they are only guidelines. In October 2009, Assistant Attorney General Ogden issued a memo for “selected United States Attorneys” entitled “Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana.” That memo noted that “marijuana distribution in the United States remains the largest source of revenue for the Mexican cartels.” That memo said that the Department of Justice’s investigative and prosecutorial resources should be directed towards the “prosecution of significant traffickers of illegal drugs, including marijuana, and the disruption of illegal drug manufacturing and trafficking networks” because that remains a “core priority” for the Department. In mid-February 2014, Deputy Attorney General Cole issued a memo to all U.S. Attorneys entitled “Guidance Regarding Marijuana Related Financial Crimes” which took as its starting point a memo issued by the Department in August 2013. The February 2014 memo reminded federal prosecutors that the Department has eight priorities in enforcing the Controlled Substances Act, which include: preventing distribution of marijuana to minors; preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels; preventing the diversion of marijuana from states where it is legal under state law in some form to other states; and preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity. The August 2013 DOJ memo did not explicitly discuss the “impact it would have on certain financial crimes for which marijuana-related conduct is a predicate” (e.g., money laundering, unlicensed money transmitter statute and the Bank Secrecy Act). To close that gap, the February 2014 memo tells federal prosecutors that “in determining whether to charge individuals or institutions with any of these offenses based on marijuana-related violations of the CSA, prosecutors should apply the eight

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enforcement priorities described in the August [2013] guidance and reiterated” in the February 2014 memo. Deputy A.G. Cole’s memo noted that the Department’s August 2013 guidance “rested on the expectation that states that have enacted laws authorizing marijuana-related conduct will implement clear, strong and effective regulatory and administrative systems in order to minimize the threat posed to federal enforcement priorities” and concluded, in part, with the admonition that “[n]either the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA, the money laundering and unlicensed money transmitter statutes, of the BSA, including the obligation of financial institutions to conduct customer due diligence.” Also in mid-February 2014, the Department of the Treasury issued a guidance on “BSA Expectations Regarding Marijuana-Related Businesses.” Obviously, the memos reflect an effort by the Departments of Justice and Treasury to assist financial institutions contemplating involvement on the business end of the now-legal marijuana businesses in certain states. While it remains to be seen how helpful the memos are in actual practice and enforcement decisions, they do at least strongly suggest that, consistent with the DOJ “Priorities” identified in the Cole/ Holder February 2014 Memo, prosecutors should not be prosecuting persons involved in the industry who are not violating those “Priorities”.