

Client Alert

January 2018

Attorney General Jeff Sessions Announces Return to Traditional Guidelines for Prosecuting Marijuana Crimes; Rescinds Cole Memo Referenced in FinCEN Guidance

Attorney General Jeff Sessions issued a [one-page memorandum](#) last week rescinding all prior guidance regarding the enforcement of marijuana offenses. The memorandum, titled “Marijuana Enforcement,” cites federal statutes prohibiting the “cultivation, distribution, and possession of marijuana” under the Controlled Substances Act (CSA) and directs prosecutors to follow the principles outlined in Chapter 9-27.000 of the U.S. Attorney’s Manual in deciding which marijuana-related offenses to prosecute. The guidance did not reference guidance previously issued by FinCEN, [“BSA Expectations Regarding Marijuana-Related Businesses,”](#) FIN-2014-G001.

FinCEN guidance on the subject addresses in detail the factors set forth in the [Cole Memo](#) in providing guidance for banks on how they can provide services to marijuana businesses in states legalizing certain marijuana-related activity consistent with their Bank Secrecy Act (BSA) obligations. Issued in February 2014, the Cole Memo established enforcement priorities with respect to marijuana enforcement aimed at prevention of distribution to minors and the association of marijuana with criminal gangs and crimes of violence, among others. It is unclear whether FinCEN will revisit its prior guidance, which it stated would “enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.”

The new guidance from the Department of Justice (DOJ) is a change in policy, not law. Even prior to the new directive from Attorney General Sessions, FinCEN acknowledged that the CSA makes it illegal under federal law to manufacture, dispense or distribute marijuana. The directive from Attorney General Sessions represents a policy shift to broaden prosecutorial discretion to pursue marijuana offenses under the CSA, notwithstanding legalization under state law in certain respects.

Several news outlets are reporting that FinCEN is maintaining its earlier guidance regarding suspicious activity reporting and customer due diligence for marijuana businesses without taking a position on whether derisking is warranted or discouraged in light of the new guidance. In addition, legislation was introduced this week designed to restrict federal spending used to prosecute individuals and business entities involved in marijuana-related activities where the activity is legal under applicable state law. See H.R.4779, 115th Congress (2017-2018).

Implications

It is unclear whether and to what extent FinCEN will revise its prior guidance for financial institutions providing services to marijuana-related businesses. Financial institutions providing services to marijuana-related businesses in any capacity should consider the new guidance in terms of its overall risk assessment as well as the risk attributed to specific customers maintaining accounts associated with marijuana activity. Outside counsel should also be consulted to assist with the assessment of risk, particularly as to the analysis of conflicts between state and federal law.

In addition, banks should consider direct communication with regulators to address concerns relative to ongoing banking activity. While the federal banking regulators may not publicly offer a position, banks may be able to get insight from supervisory staff at their prudential regulators as to whether and how the rescission of the Cole Memo will affect review of marijuana-related businesses in the bank's next exam.

Although the violations of law under the CSA have always covered marijuana activity, the new direction from the DOJ emphasizes that there is no longer an implied safe harbor for marijuana-related businesses, including for medical marijuana, at the federal level. The directive does not necessarily mean there will be an increase in prosecutions, but the guidance should trigger a review from both a supervisory and an enforcement perspective of risk and consideration of the feasibility of continuing to bank marijuana-related businesses going forward.

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