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New Guidance on Providing Financial Services to Medical Marijuana Businesses

Connecticut recently awarded licenses to four medical marijuana producers, marking the beginning of Connecticut's legal medical marijuana industry. Although medical marijuana businesses are licensed and heavily regulated by the State of Connecticut,[1] they have had difficulty securing basic financial services due to ambiguities in federal policy. Financial institutions are wary of servicing such clients owing to the requirements of the Bank Secrecy Act and the provisions of the Controlled Substances Act. As a result, many state-authorized marijuana enterprises have been forced to run essentially cash-based businesses.

In an effort to remedy the financial industry's reticence to service the nascent marijuana market, the Department of Justice ("DOJ") and Treasury Department Financial Crimes Enforcement Network ("FinCEN") issued guidance clarifying how financial institutions may provide services to marijuana-related businesses without inviting federal investigation and prosecution.[2]

The guidance made clear that the DOJ and law enforcement do not intend to investigate or prosecute financial institutions that serve certain medical marijuana businesses. However, financial institutions are required to conduct due diligence on any potential marijuana-related client to determine if the business implicates one of the DOJ's enforcement priorities (such as selling to minors or preventing revenue from going

to criminal enterprises) or if the business violates state law.[3] FinCEN cautioned financial institutions conducting such diligence to be particularly aware of certain red flags, such as whether the customer is using a state-licensed business as a front to launder money for another criminal activity; the business cannot demonstrate a legitimate source of funding; or the business engages in international or interstate activity.

FinCEN also explained that the state legalization of marijuana does not alter a financial institution's responsibility to file suspicious activity reports ("SARs") relating to the activity of its marijuana business customers.[4] The FinCEN guidance modifies this responsibility, however, by creating a graded-SAR system that distinguishes between ostensibly legitimate marijuana-related businesses and those that trigger DOJ priorities or violate state law. If a bank reasonably believes, based on its customer due diligence, that the marijuana business does not implicate any DOJ priority or state law, it may file a "Marijuana Limited" SAR. This form only requires the financial institution to provide the client's identifying information and explain to law enforcement that diligence uncovered no suspicious activity. If, however, diligence reveals activities identified as a priority in the Cole Memorandum or that violate state law, a financial institution must file a more detailed SAR, a "Marijuana Priority" SAR, which requires substantially more information. In either case, financial institutions that

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provide banking services to marijuana businesses will need to file continuing activity SARs three times a year as long as they are servicing marijuana businesses.[5]

Financial institutions have responded to the guidance with understandable caution. Although the government has made clear that it does not intend to investigate or prosecute financial institutions that follow the guidance, the guidance does not protect financial institutions from investigation.

That said, the guidance represents a government attempt to articulate a path by which banks can service marijuana businesses. Those banks that move to service these businesses first could gain a prime position in a rapidly growing industry. If you have any questions about the recent guidance or wish to discuss issues specific to your financial institution, please contact:

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[1] See Conn. Gen. Stat. § 21a-408, et seq.

[2] Department of the Treasury, BSA Expectations Regarding Marijuana-Related Businesses (Feb. 14, 2014), available at http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-G001.pdf; U.S. Department of Justice, Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014), available at <http://www.justice.gov/usao/co/news/2014/feb/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%20%2014%2014.pdf>.

[3] The DOJ first set forth these priorities in the "Cole Memorandum" in August 2013. See Department of Justice, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

[4] See, e.g., 31 CFR § 1020.320. Financial institutions shall file with FinCEN, to the extent and in the manner required, a report of any suspicious transaction relevant to a possible violation of law or regulation.

[5] For more information, see Department of the Treasury, Frequently Asked Questions Regarding the FinCEN Suspicious Activity Report (SAR) http://fincen.gov/whatsnew/html/sar_faqs.html.

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