



# Financial services in the cannabis industry: A compliance guide

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Interest in cannabis is at an all-time high. In 2020, Americans bought \$18.3 billion in cannabis products, a \$7.6 billion increase from 2019. The surging popularity of the plant is running parallel to the move towards legalized cannabis. The Agriculture Improvement Act of 2018, Pub. L. No. 115-334 (the 2018 Farm Bill), removed hemp (non-psychoactive cannabis) from the Controlled Substances Act (CSA), opening the door for the sale of hemp-derived products, including popular cannabidiol (CBD) products. While marijuana (psychoactive cannabis) is still an illegal controlled substance under the federal law, 36 states have legalized it for medical use and 15 states and Washington, DC have legalized recreational cannabis, with more states expected to follow soon, including New York.

Commercial cannabis growers, producers, manufacturers, and sellers need access to capital and financial services to flourish in those jurisdictions where the sale of cannabis products is legal. However, because hemp has only recently been legalized, and marijuana remains federally illegal, financial institutions must navigate federal anti-money laundering laws, remaining aware that knowingly engaging in financial transactions involving proceeds generated from the sale of cannabis might be illegal, depending on whether the proceeds are derived from hemp and related products (legal) or marijuana and related products (illegal). The Bank Secrecy Act (BSA) and its anti-money laundering implementing regulations, as well as the CSA and other federal statutes, subject financial institutions to enforcement actions and, potentially, to significant civil monetary penalties. Further, individuals found to have willfully violated the BSA are subject to civil and criminal fines of up to \$250,000 per violation and/or five years in prison. As a result, financial institutions have been unable or unwilling to provide services to many cannabis-related businesses.

However, with the removal of hemp from the CSA controlled substance list, and as ever more jurisdictions broadly legalize cannabis products, spurring growth in the commercial cannabis industry, some financial institutions are finding it more compelling to “go green.” Here, we provide an overview of the guidance issued by federal law enforcement agencies to financial institutions addressing the provision of services to the cannabis industry consistent with their BSA obligations.





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# Providing financial services to cannabis-related customers

## Guidance for cannabis-related customers: hemp v. marijuana

In providing services to a cannabis-related customer, a financial institution must first determine whether the customer's business is engaged in the sale or manufacture of hemp, marijuana, or both. Cannabis is a genus of flowering plants in the Cannabaceae family. Hemp and marijuana are classifications of cannabis based on the level of delta-9 tetrahydrocannabinol (THC), the primary psychoactive ingredient in cannabis, in the plant. If the plant has less than or equal to .3 percent THC by dry weight, then the plant is hemp. Otherwise, it is marijuana.

Hemp is federally legal, while marijuana remains illegal under the CSA. The Financial Crimes Enforcement Network (FinCEN) has released specific guidance for financial institutions regarding the provision of services to hemp- and marijuana- related customers (discussed below).<sup>1</sup> The FinCEN guidance was issued to clarify expectations for financial institutions with respect to their BSA obligations. However, the guidance is in tension with existing federal statutes, because FinCEN, like any federal regulatory agency, cannot make legal that which is prohibited by federal law.

## Commingled hemp- and marijuana-related activities

Many potential customers involved in the cannabis industry have business related to both hemp and marijuana. To the extent customer activities pertaining to hemp-related businesses are commingled with marijuana-related activities, FinCEN instructs financial institutions to treat the customer and/or activities as marijuana-related; thus, any services the institution elects to provide are subject to FinCEN's 2014 marijuana-related guidance (see below). If, however, the proceeds from marijuana-related activities are separated, or the customer and the financial institution can identify the specific proceeds that are either hemp- or marijuana- related, then the financial institution can limit application of the marijuana-related guidance to marijuana-related activities.<sup>2</sup>

<sup>1</sup> FinCEN "Guidance Regarding Due Diligence Requirements under the Bank Secrecy Act for Hemp-Related Business Customers" (June 29, 2020).

<sup>2</sup> *Id.*

# Providing financial services to marijuana-related customers

## Marijuana BSA Guidance

As discussed above, financial institutions are aware that engaging in financial transactions involving funds generated from the sale of marijuana is a violation of federal law. In 2014, following the legalization of marijuana in a number of states, FinCEN issued guidance to clarify “how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations” (Marijuana BSA Guidance).<sup>3</sup> The Marijuana BSA Guidance was also intended to “enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.”<sup>4</sup> Importantly, however, the Marijuana BSA Guidance confirmed, “Because federal law prohibits the distribution and sale of marijuana, financial transactions

involving a marijuana-related business would generally involve funds derived from illegal activity,”<sup>5</sup> leading to uncertainty and discomfort for many financial institutions, and resulting in few ultimately serving marijuana businesses. As discussed below, FinCEN’s Marijuana BSA Guidance is explicitly based on a 2013 Department of Justice guidance commonly referred to as the Cole Memo, issued by James Cole, Deputy Attorney General during the Obama Administration.<sup>6</sup> However, the Cole Memo was explicitly non-binding on the United States and, in any event, rescinded by the US Attorney General in 2018, increasing the uncertainty facing financial institutions with potential customers in the marijuana industry.

## MARIJUANA DILIGENCE OBLIGATIONS

The Marijuana BSA Guidance reiterates that financial institutions must conduct initial customer due diligence on customers involved in marijuana-related activities. As part of this process, the Marijuana BSA Guidance instructs financial institutions to:

1. Verify that the business is duly licensed in the relevant jurisdiction
2. Review the marijuana license application
3. Request information about the business from the relevant licensing and enforcement authorities and
4. Gain an understanding of the business and its customers.

As with all customers, financial institutions also have an ongoing obligation to conduct diligence with respect to customers engaged in marijuana-related activity. To meet this obligation, the Marijuana BSA Guidance suggests that a financial institution:

1. Continue to monitor publicly available sources for adverse information about the business
2. Monitor for suspicious activity, including any red flags and
3. Refresh the information in the institution’s files that were obtained as part of customer due diligence on a periodic basis.

In conducting this due diligence, financial institutions are entitled to reasonably rely on the accuracy of information provided by state licensing authorities.

### Focus diligence on Cole Memo priorities

In conducting customer diligence on marijuana-related customers, FinCEN recommends that financial institutions focus diligence efforts on whether the conduct of the customer in question implicates one of the marijuana enforcement priority areas identified by federal law enforcement in the 2013 Cole Memo. As noted above, the Cole Memo was rescinded by

<sup>3</sup> FinCEN, “BSA Expectations Regarding Marijuana-Related Businesses” (February 14, 2014).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> US Department of Justice Memorandum, “Guidance Regarding Marijuana Enforcement” (Aug. 29, 2013).



former Attorney General Jeff Sessions; however, in June 2020 FinCEN released the Hemp BSA Guidance (defined below), which confirmed FinCEN's position that the Marijuana BSA Guidance remains in effect, notwithstanding the fact that it explicitly relies on the Cole Memo as its basis and authority for much of the guidance. While the Cole Memo itself is rescinded, FinCEN advised financial institutions to utilize the priorities for enforcement of the CSA set forth in the Cole Memo to identify marijuana-related activity that financial institutions must report to law enforcement as part of their BSA compliance obligations.<sup>7</sup>

Specifically, the Cole Memo identified the following conduct as areas of law enforcement priority when dealing with marijuana:

1. The distribution of marijuana to minors
2. Using revenue generated from legal marijuana-businesses to finance criminal enterprises or engage in the trafficking of other drugs
3. Engaging in violent activity
4. Distributing marijuana into states where such sale is illegal

5. Exacerbating adverse public health consequences associated with marijuana use (e.g., "drugged" driving) and/or

6. Growing marijuana on public lands.

#### **Cole Memo priorities red flags**

Despite the uncertainties described above, a small number of financial institutions have elected to serve the marijuana industry. Those institutions must be on the alert for any indication that a customer's marijuana-related activities implicate one of the Cole Memo priorities or otherwise violate applicable state laws. The Marijuana BSA Guidance has identified the following red flags for such conduct:

- "The business receives substantially more revenue than may reasonably be expected given the [ ] limitations imposed by [ ] state" law.
- "The business receives substantially more revenue than its local competitors or than might be expected given" the location of the business.
- "The business is depositing more cash than is commensurate with the amount of marijuana-related revenue it is reporting for federal and state tax purposes."

<sup>7</sup> See "FinCEN Guidance Regarding Due Diligence Requirements under the Bank Secrecy Act for Hemp-Related Business Customers," at p. 1 (June 29, 2020).



- “The business is unable to demonstrate that its revenue is derived exclusively from the sale of marijuana in compliance with state law, as opposed to revenue derived from (i) the sale of other illicit drugs, (ii) the sale of marijuana not in compliance with state law, or (iii) other illegal activity.”
- “The business makes cash deposits or withdrawals over a short period of time that are excessive relative to local competitors or the expected activity of the business.”
- Deposits appear “structured to avoid currency transaction report requirements.”
- “Rapid movement of funds, such as cash deposits followed by immediate cash withdrawals.”
- “Deposits by third parties with no apparent connection to the accountholder.”
- “Excessive commingling of funds with the personal account of the business’s owner(s) or manager(s), or with accounts of seemingly unrelated businesses.”
- “Individuals conducting transactions for the business appear to be acting on behalf of other, undisclosed parties of interest.”
- “Financial statements provided by the business to the financial institution are inconsistent with actual account activity.”
- “A surge in activity by third parties offering goods or services to marijuana-related businesses, such as equipment suppliers or shipping servicers.”
- “The business is unable to produce satisfactory documentation or evidence to demonstrate that it is duly licensed and operating consistently with state law.”
- “The business is unable to demonstrate the legitimate source of significant outside investments.”
- “Review of publicly available sources and databases about the business, its owner(s), manager(s), or other related parties, reveals negative information, such as a criminal record, involvement in the illegal purchase or sale of drugs, violence, or other potential connections to illicit activity.”
- “The business, its owner(s), manager(s), or other related parties are, or have been, subject to an enforcement action by the state or local authorities responsible for administering or enforcing marijuana-related laws or regulations.”
- “A marijuana-related business engages in international or interstate activity, including by receiving cash deposits from locations outside the state in which the business operates, making or receiving frequent or large interstate transfers, or otherwise transacting with persons or entities located in different states or countries.”





- Owners or managers of a marijuana-related business live outside of the state of operation.
- Proximity of distributors to schools.<sup>8</sup>

This list of red flags is not exhaustive; financial institutions must examine the entire course of dealing to determine whether a customer may be running afoul of the priorities identified in the Cole Memo and/or violating state law (in instances where state laws permit certain marijuana-related activity).

#### **MARIJUANA-RELATED SUSPICIOUS ACTIVITY REPORTS**

The BSA requires financial institutions to adopt and follow a program whereby they identify and file a Suspicious Activity Report for “any suspicious transaction relevant to a possible violation of law or regulation.”<sup>9</sup> Financial institutions are required to file a SAR with FinCEN within 30 days of providing financial services to a marijuana-related business. Within 120 days of filing the SAR, a continuing activity report must be filed if the institution continues to provide service to the business. FinCEN instructs financial institutions to keep filing continuing activity reports if the business remains

a customer of the institution and remains engaged in marijuana-related activities. Per the Marijuana BSA Guidance: “Because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity.”

#### **“Marijuana Limited” SAR**

If the financial institution reasonably believes, based on its due diligence, that the customer follows state law and does not implicate one of the Cole Memo Priorities, the Marijuana BSA Guidance provides that financial institutions file a “Marijuana Limited” SAR. A “Marijuana Limited” SAR requires the financial institution to report only the following:

1. The identity of the customer and related parties
2. Address of the customer and related parties
3. That this filing is only being made because the customer is a marijuana-related business and
4. That no suspicious activity has been identified.

<sup>8</sup> FinCEN, “BSA Expectations Regarding Marijuana-Related Businesses” (February 14, 2014).

<sup>9</sup> FinCEN Suspicious Activity Report (FinCEN SAR) Electronic Filing Instructions (October 2012, Ver. 1.2).

FinCEN requests that the term “MARIJUANA LIMITED” appear in the narrative section of such a SAR in all caps. A “Marijuana Limited” SAR continuing activity report must detail the amounts of the deposits, withdrawals and transfers in the account since the last SAR, as well as the same basic information filed in the original SAR.

#### “Marijuana Priority” SAR

If at any point a financial institution reasonably believes that a customer’s marijuana-related activity is either in violation of state law or implicates one of the Cole Memo Priorities, the Marijuana BSA Guidance suggests the filing of a “Marijuana Priority” SAR. The Marijuana BSA Guidance instructs financial institutions to include comprehensive details relevant to law enforcement in the SAR, including:

1. Identifying information about the customer
2. The customer’s address
3. The Cole Memo Priorities implicated by the conduct of the customer and
4. The dates, amounts, and other relevant details of the financial transactions involved in the suspicious activity.

FinCEN requests that financial institutions include the term “MARIJUANA PRIORITY” in the narrative section of such a SAR, in capital letters.

#### “Marijuana Termination” SAR

If a financial institution decides to end a relationship with a customer engaged in marijuana-related activities in order to maintain an effective anti-money laundering compliance program, the Marijuana BSA Guidance instructs financial institutions to file a marijuana termination SAR, noting the reason it is terminating the relationship. FinCEN requests that financial institutions include the term “MARIJUANA TERMINATION” in the narrative section of the SAR.

If a financial institution becomes aware that a terminated marijuana-related customer is seeking a new financial institution, FinCEN urges the first financial institution to voluntarily share information with the second financial institution (if such information qualifies for the safe harbor to protect the reporting of potential money laundering) pursuant to Section 314(b) of the US Patriot Act to alert the second financial institution of potential illegal activity.<sup>10</sup>

#### CURRENCY TRANSACTION REPORTS

Financial institutions and other persons subject to FinCEN’s regulations must report currency transactions in connection with marijuana-related businesses to the same extent they would in any other context, consistent with existing regulations and with the same thresholds. However, “a business engaged in marijuana-related activity may not be treated as a non-listed business under 31 C.F.R. § 1020.315(e)(8) and, therefore, is not eligible for consideration for an exemption with respect to a bank’s currency transaction report obligations under 31 C.F.R. § 1020.315(b)(6).”<sup>11</sup>

#### The Secure and Fair Enforcement Banking Act of 2019

The Marijuana BSA Guidance is not a safe harbor from prosecution for potential violations of federal law, including but not limited to, charges of money laundering, racketeering, conspiracy, or any other federal accessory law. As such, many financial institutions continue to be hesitant to provide financial services to marijuana-related businesses even with the implicit approval of law enforcement. To ensure that marijuana-related businesses have proper access to financial institutions, the House of Representatives passed the Secure and Fair Enforcement Banking Act of 2019, which, if enacted, would provide a safe harbor to financial institutions that provide services to legal marijuana-related businesses.<sup>12</sup> The Senate did not vote on this legislation. In March 2021, the SAFE Act was reintroduced in the House of Representatives and introduced in the Senate with bipartisan support.

<sup>10</sup> 16 31 C.F.R. § 1010.540.

<sup>11</sup> FinCEN, “BSA Expectations Regarding Marijuana-Related Businesses” (February 14, 2014).

<sup>12</sup> H.R.1595 - Secure & Fair Enforcement Banking Act of 2019, 116th Congress (2019-2020).

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Two other proposed congressional bills that could also provide potential safeguards for financial institutions that want to provide services to the marijuana industry are (1) the Marijuana Opportunity Reinvestment and Expungement Act of 2019, which would remove marijuana from the CSA, and (2) the Strengthening the Tenth Amendment Through Entrusting States Act, which would federally decriminalize marijuana that is compliant with state laws.

### **Practice note**

For those financial institutions that elect to serve marijuana-related businesses (despite the fact that marijuana remains a controlled substance for purposes of the CSA, and that such activity may be pursued as a criminal violation by an administration seeking to strictly enforce the CSA, money laundering statutes, and others), it is important to note that a compliance program necessary to satisfy FinCEN's expectations requires significant resources and personnel.

If a financial institution elects to serve marijuana-related business in reliance on the Marijuana BSA Guidance, we advise the institution to develop defined procedures for compliance and review the institution's existing BSA/AML policies and procedures to assess where such customer relationships may violate the existing program. Recognizing that the BSA/AML program is the responsibility of the institution's board of directors, and the existing BSA/AML policies and procedures are expected to be adopted by the board of directors, any changes should similarly be undertaken with board oversight and direction.

Institutions electing to serve marijuana-related businesses should also review existing creditor and vendor contracts to confirm they have not made representations to others regarding their position on marijuana-related customers that would be breached by such election. The review should consider standard "compliance with all laws" representations and how they may be impacted by the institution's service to marijuana-related businesses.

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# Providing financial services to hemp-related customers

## 2019 Interagency Hemp Statement

On December 3, 2019, following the removal of hemp from the CSA, the Board of Governors of the Federal Reserve, the FDIC, FinCEN, the Office of the Comptroller of the Currency and the Conference of State Bank Supervisors issued an interagency statement declaring that financial institutions were no longer required to file a SAR with respect to a customer solely because the customer is engaged in a hemp-related business (the 2019 Interagency Hemp Statement).<sup>13</sup>

Of course, financial institutions must still follow FinCEN's standard SAR procedures to ensure that law enforcement is given relevant information on activities that may be criminal. Financial institutions must report any such suspicious activities, including for hemp-related customers, on electronically filed SARs no later than 30 days after the date of initial discovery of the potential wrongdoing (an institution may delay a SAR filing an additional 30 days to identify the suspect involved in the potential criminal activity).<sup>14</sup> However, if the situation requires the immediate attention of law enforcement, FinCEN recommends that a financial institution notify law enforcement by telephone in addition to filing the SAR electronically.

Failure to comply with SAR procedures as required (including timely filing) is a violation of the BSA, and each SAR violation carries with it the potential for civil and/or criminal fines and penalties.<sup>15</sup>

## Hemp BSA Guidance

On June 29, 2020, FinCEN issued regulatory guidance relating to BSA compliance requirements for hemp-related business customers (the Hemp BSA Guidance).<sup>16</sup>

The "guidance explains how financial institutions can conduct due diligence for hemp-related businesses, and identifies the type of information and documentation financial institutions can collect from hemp-related businesses to comply with BSA regulatory requirements."<sup>17</sup> The Hemp BSA Guidance was issued to increase the availability of financial services for hemp-related businesses in compliance with federal law. The guidance supplements the 2019 Interagency Hemp Statement.

### HEMP DILIGENCE OBLIGATIONS

Financial institutions must conduct initial customer due diligence prior to providing service. This is no different for hemp-related customers. Initial customer due diligence includes obtaining basic identifying information through customer identification programs and risk-based customer due diligence processes.<sup>18</sup> Beneficial ownership information must also be collected and verified.<sup>19</sup>

With respect to a customer who is a hemp-grower, as part of customer due diligence, the Hemp BSA Guidance instructs a financial institution to verify the customer's license by either obtaining a copy of the license or obtaining a written attestation by the grower that they are licensed. If the financial institution believes the hemp-related customer is at higher risk of violating the federal anti-money laundering laws, the Hemp BSA Guidance suggests that the institution also request crop inspection or testing reports, license renewals, updated attestations from the business, or correspondence with the state, tribal government, or USDA.

Failure to comply with customer diligence procedures is a violation of the BSA and each violation carries with it the potential for civil and/or criminal fines and penalties.<sup>20</sup>

<sup>13</sup> "Providing Financial Services to Customers Engaged in Hemp-Related Businesses" (Dec. 3, 2019).

<sup>14</sup> See, e.g., 31 C.F.R. § 1020.320(b)(3).

<sup>15</sup> See, e.g., 31 C.F.R. § 1020.320(g); see also 31 C.F.R. § 1010.810; 31 C.F.R. § 1010.820; 31 C.F.R. § 1010.821; 31 C.F.R. § 1010.840; 31 U.S.C. § 5321 (2020); 31 U.S.C. § 5322 (2020).

<sup>16</sup> FinCEN Guidance Regarding Due Diligence Requirements under the Bank Secrecy Act for Hemp-Related Business Customers" (June 29, 2020).

<sup>17</sup> *Id.*

<sup>18</sup> See 31 U.S.C. § 5318(l)(2) (2020); see also 31 C.F.R. § 1010.220.

<sup>19</sup> 31 C.F.R. § 1010.230.

<sup>20</sup> See 31 C.F.R. § 1010.810; 31 C.F.R. § 1010.820; 31 C.F.R. § 1010.821; 31 C.F.R. § 1010.840; 31 U.S.C. § 5321 (2020); 31 U.S.C. § 5322 (2020).



#### HEMP-RELATED SUSPICIOUS ACTIVITY REPORTS

The Hemp BSA Guidance reiterates that financial institutions are not required to file a SAR solely because a customer is engaged in hemp-related activities. However, the Hemp BSA Guidance identifies the following activities that might trigger the requirement for a SAR to be filed with respect to a hemp-related business:

- “A customer appears to be engaged in hemp production in” a jurisdiction “in which hemp production” is illegal.
- “A customer appears to be using a state-licensed hemp business as a front or pretext to launder money derived from” marijuana-related or criminal activity.
- “A customer engaged in hemp production seeks to conceal involvement in a marijuana-related business.”
- “The customer is unable or unwilling to certify or provide information that it is duly licensed and operating consistent with applicable law, or the financial institution becomes aware that the customer continues to operate (i) after a license revocation, or (ii) inconsistently with applicable law.”<sup>21</sup>

<sup>21</sup> “FinCEN Guidance Regarding Due Diligence Requirements under the Bank Secrecy Act for Hemp-Related Business Customers” (June 29, 2020).

#### CURRENCY TRANSACTION REPORTS

The Hemp BSA Guidance instructs financial institutions to report currency transactions relating to customers in hemp-related businesses in the same manner required for any other customer, including any currency transaction above \$10,000 in aggregate on a single business day.<sup>22</sup>

#### Practice note

As noted above in our Practice note section on financial institutions that elect to serve marijuana-related businesses, a financial institution that elects to serve hemp-related businesses should similarly review, revise, and update its BSA/AML policies, procedures, and program, with input and direction from the board of directors, to avoid violations of the BSA or inadvertent violations of existing policies and procedures, which do not contemplate the significant compliance requirements to serve such customers.

<sup>22</sup> 31 C.F.R. § 1010.330.

## Accepting money from marijuana businesses (for non-financial institutions)

Non-financial businesses must also consider the potential implications of accepting money from businesses that generate revenue primarily from the sale of marijuana in states where it is legal.

If an ancillary business accepts money generated from the “legal” sale of marijuana, FinCEN’s Marijuana and Hemp BSA Guidance are relevant, because even non-financial institutions must use financial institutions governed by FinCEN. While the general rule is that the farther removed from the plant a business is the less likely the business is to be considered “marijuana-related,” there is no bright-line test.

If a financial institution were to conclude that an ancillary business is “marijuana-related,” this would result, at a minimum, in the financial institution filing a Marijuana Limited SAR and could potentially end the relationship. The Hemp BSA Guidance states that if marijuana revenue can be isolated, then a financial institution can limit application of the Marijuana BSA guidance to marijuana-related transactions. If the marijuana revenue is commingled with other operations, however, then the Hemp BSA Guidance states that the financial institution should treat all activities as marijuana related.



# Conclusion

Providing financial services to customers involved in the nascent cannabis industry carries significant risk and requires intensive and ongoing scrutiny and diligence of customer activities and operations, but the potential to expand an institution's customer base and earn additional fees and revenue from customers in need of financial services may be compelling. Financial institutions interested in providing cannabis industry customers with services should consult legal counsel when making the decision, when drafting new BSA/AML policies for such customers, and/or reviewing any existing institutional BSA/AML compliance policies.

## About us

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world. To meet the diverse needs of our clients, DLA Piper's Hemp and Hemp Regulated Products/CBD team helps clients navigate the nuances of the hemp and CBD industry.

## Learn more

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