



# Arkansas State Bank Department

Candace A. Franks  
Commissioner

Asa Hutchinson  
Governor

DATE: November 29, 2016  
TO: Chief Executive Officer of the Institution Addressed  
FROM: Candace Franks, Bank Commissioner  
SUBJECT: Relationships with Marijuana-Related Businesses

The legalization of marijuana for medical purposes in Arkansas creates repercussions for financial institutions that choose to establish a relationship with businesses in this industry (“marijuana-related businesses”). This is because regardless of its legality in Arkansas, under the federal Controlled Substances Act, it is illegal to manufacture, distribute or dispense marijuana. However, in directives and guidance, the United States Department of Justice and Financial Crimes Enforcement Network (“FinCEN”) have expressed a degree of forbearance in their treatment of marijuana-related businesses, particularly in states that have legalized the substance for medical use.

In dealing with this issue, three sources of critical information for banks include:

- A memorandum, dated August 29, 2013, from United States Deputy Attorney General James M. Cole to all U.S. attorneys. The subject of the memorandum is “Guidance Regarding Marijuana Enforcement.” The memorandum can be found at:  
<https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>
- A memorandum, dated February 14, 2014, from Cole to all U.S. attorneys under the subject “Guidance Regarding Marijuana Related Financial Crimes.” The memorandum can be found at:  
<https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20%282%29.pdf>
- Guidance on “BSA Expectations Regarding Marijuana-Related Business” issued February 14, 2014, by FinCEN, accessible at:  
<https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf>

“The provisions of the money-laundering statutes, the unlicensed money remitter statute, and the Bank Secrecy Act (BSA) remain in effect with respect to marijuana-related conduct,” according to Cole’s February 14, 2014, memo. The memo states that financial institutions that conduct transactions with money generated by marijuana-related conduct could face criminal liability under the BSA if, for example, they fail to identify or report financial transactions involving the proceeds of marijuana-related violations of the Controlled Substances Act. The memo lists eight priorities in enforcing the Controlled Substances Act against marijuana-related conduct. Further in the memo, Cole states, “ ... if a financial institution or individual offers services to a marijuana-related business whose activities do not implicate any of the eight priority factors, prosecution for these offenses may not be appropriate.”

Other key statements in the memo include:

- “The August 29 guidance rested on the expectation that states that have enacted laws authorizing marijuana-related conduct will implement clear, strong and effective regulatory and enforcement systems in order to minimize the threat posed to federal enforcement priorities.”
- “In addition, because financial institutions are in a position to facilitate transactions by marijuana-related businesses that could implicate one or more of the priority factors, financial institutions must continue to apply appropriate risk-based anti-money laundering policies, procedures, and controls sufficient to address the risks posed by these customers, including by conducting customer due diligence designed to identify conduct that relates to any of the eight priority factors.”

The FinCEN guidance states, in its introduction, “This FinCEN guidance clarifies how financial institutions can provide services to marijuana-related businesses consistent with their BSA obligations, and aligns the information provided by financial institutions in BSA reports with federal and state law enforcement priorities. This FinCEN guidance should enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses.” Also, according to the guidance, “As part of its customer due diligence, a financial institution should consider whether a marijuana-related business implicates one of the Cole Memo priorities or violates state law. This is a particularly important factor for a financial institution to consider when assessing the risk of providing financial services to a marijuana-related business. Considering this factor also enables the financial institution to provide information in BSA reports pertinent to law enforcement’s priorities.”

The FinCEN guidance states that a financial institution is required to file a Suspicious Activity Report (“SAR”) on activity involving a marijuana-related business, including businesses licensed under state law. The guidance discusses three types of SARs. The 2014 memo and FinCEN guidance do not make a distinction between lending to a marijuana-related business and establishing a deposit account or providing other services to such a business. However, this office believes there is some elevated risk of lending to a marijuana-related business due to the: (1) lack of any written guidance to date from the Department of Justice or financial regulators concerning lending and (2) risk that the collateral securing loans may be subject to civil or criminal forfeiture.

In the absence of guidance regarding lending, I recommend the following standards be followed by financial institutions with respect to marijuana businesses:

1. A financial institution should consider setting aside appropriate “reserves” for all lending to licensed marijuana businesses – with greater “reserves” to be set aside in relation to the level of risk based on the type of lending.
2. Pricing of loans should be considered in relation to the amount of monitoring that needs to be undertaken.

3. No lending should be made to any marijuana business that is not formally licensed by the state of Arkansas.
4. There may be lower risk associated with a secured loan for which a financial institution receives collateral property which is not in any way related to a licensed marijuana business.
5. Managers of financial institutions should make an effort to identify loans made to persons who are not engaged in marijuana business but who have a relationship with a marijuana business (e.g., landlord/tenant) that involves collateral for a loan.

In conclusion, a financial institution choosing to establish a relationship with a marijuana-related business should be familiar with the Cole memos and FinCEN guidance. Such a relationship should be incorporated into an institution's risk-management system. The Bank Department will provide updated guidance, as warranted, but particularly after the new administration takes office. All institutions must remain aware when considering a marijuana related business relationship that the new federal administration could change these policies at any time.

If you have any questions, please contact John Ahlen, Chief Counsel, or Richard Plotkin, Certified Examinations Manager, at 501-324-9019.