

Publications

FinCEN Issues Additional Guidance for Financial Institutions Serving Hemp-Related Businesses

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AUTHORED ARTICLE | Summer 2020

(Published in the Summer 2020 issue of *The Bankers' Statement*)

On June 29, 2020, the Financial Crimes Enforcement Network (FinCEN), a bureau of the U.S. Department of the Treasury, issued new guidance (2020 Guidance)¹ addressing due diligence requirements under the Bank Secrecy Act (BSA) for financial institutions that provide services to hemp-related business customers. Specifically, the 2020 Guidance seeks to clarify questions surrounding customer due diligence expectations and suspicious activity reporting requirements. This new guidance clarifies and supplements a joint statement issued in 2019 by FinCEN, federal banking regulators and state banking supervisors (2019 Joint Statement)², following the federal legalization of hemp, detailing how banks may lawfully provide financial services to hemp-related businesses. Notably, the 2020 Guidance applies to all “financial institutions,” as defined in FinCEN’s regulations, while the 2019 Joint Statement applied only to “banks.” FinCEN intends that the 2020 Guidance will “enhance the availability of financial services for, and the financial transparency of, hemp-related businesses in compliance with federal law.”³

Background: The Legalization of Hemp

For decades, federal law has not differentiated hemp from other cannabis products, such as marijuana, under the Controlled Substances Act (CSA). Enacted in 1970, the CSA places strict legal controls on the manufacture, distribution, dispensing and possession of any controlled substance listed on one of five schedules established by the CSA. Despite widespread legalization at the state level, marijuana has long been and remains a Schedule I controlled substance.

In light of these expanding legalization initiatives at the state level, coupled with U.S. Department of Justice (DOJ) guidance concerning federal enforcement priorities,⁴ FinCEN issued guidance in February 2014 (2014 Guidance)⁵ clarifying its expectations for financial institutions seeking to provide services to “marijuana-related businesses” under the BSA. Under the 2014 Guidance, FinCEN specified

that “because federal law prohibits distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity.”⁶ As a result, the 2014 Guidance established three categories of suspicious activity reports (SARs)—Marijuana Limited SARs, Marijuana Priority SARs and Marijuana Termination SARs—that financial institutions were generally required to file when handling transactions for marijuana-related businesses. In addition, financial institutions were expected to comply with other due diligence obligations and submit currency transaction reports.

In 2018, the Agriculture Improvement Act of 2018 (2018 Farm Bill)⁷ removed hemp from the definition of “marijuana” under the CSA. The 2018 Farm Bill defines “hemp” as, in essence, the cannabis plant (including any part of the plant and all derivatives), the same plant that produces marijuana, with one significant difference: hemp cannot contain more than 0.3 percent of THC, the main psychoactive compound found in the cannabis plant. Therefore, following the enactment of the 2018 Farm Bill, hemp and hemp-derived products, including the popular cannabidiol (CBD), are no longer considered “controlled substances” under the CSA, while marijuana, which contains more than 0.3 percent of THC, remains a controlled substance under the CSA.

Additionally, the 2018 Farm Bill instructed the U.S. Department of Agriculture (USDA) to establish a regulatory framework for the legal production of hemp. On October 31, 2019, the USDA issued an interim final rule (USDA Interim Final Rule)⁸ that established the domestic hemp production regulatory program, establishing a federal licensing scheme for regulating hemp-related businesses in states and tribal territories that do not have their own USDA-approved plans. In the absence of a state or tribal regulatory plan, hemp-related businesses will be subject to regulation and oversight directly by the USDA. However, states or tribal governments *can* prohibit hemp production (the 2018 Farm Bill does **not** preempt state or tribal laws). In Ohio, Governor Mike DeWine signed Senate Bill 57 into law on July 30, 2019, legalizing hemp production in Ohio.

Despite hemp’s legality at the federal level (and in most states), confusion over its legal status vis-à-vis marijuana has prevented many financial institutions from broadly offering financial services to the hemp industry. This confusion led many stakeholders, including Senate Majority Leader Mitch McConnell, to request guidance and clarification from federal financial regulatory agencies on financial institutions’ ability to service the hemp industry.

2019 Guidance

On December 3, 2019, FinCEN, together with the federal banking regulators and state banking supervisors,⁹ issued the 2019 Joint Statement in an effort to clarify the legal status of hemp and to detail how banks¹⁰ can service hemp-related businesses in compliance with the BSA. The 2019 Joint Statement specified that since hemp is no longer a Schedule I controlled substance under the CSA, banks are **not** required to file a SAR *solely* because a customer is engaged in a hemp-related business in accordance with the USDA Interim Final Rule. Rather, financial institutions need only file a SAR subject to standard procedures (i.e. “if indicia of suspicious activity warrants”).¹¹ The 2019 Joint Statement noted that banks should continue to follow the 2014 Guidance in connection with marijuana-related businesses.

In addition, the 2019 Joint Statement highlighted that banks must have a BSA anti-money laundering (BSA/AML) program that is “commensurate with the level of complexity and risks involved.”¹² The 2019 Joint Statement also required banks to “comply with applicable regulatory requirements for customer identification, suspicious activity reporting, currency transaction reporting, and risk-based customer due diligence, including the collection of beneficial ownership information for legal entity customers.”¹³

2020 Guidance

The 2020 Guidance supplements the 2019 Joint Statement in order to explain “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.”¹⁴ The 2020 Guidance focuses on three areas: 1) BSA/AML Program Expectations; 2) Suspicious Activity Reporting (SARs); and 3) Currency Transaction Reports and FinCEN Form 8300.

1. BSA/AML Program Expectations

In the 2020 Guidance, FinCEN expands upon financial institutions’ obligations related to collecting customer due diligence (CDD) for hemp-related businesses. FinCEN notes that for all customers, including hemp-related businesses, financial institutions are expected to follow certain standard customer identification and CDD processes, and obtain, on an ongoing basis, sufficient information to properly analyze a customer’s risk profile. For hemp-related businesses specifically, financial institutions may confirm the entity’s compliance with state, tribal, or USDA licensing requirements by either obtaining (1) a written attestation by the hemp-related businesses that they are validly licensed, or (2) a copy of their license. Further, the 2020 Guidance explains that, depending on its assessment of the customer’s level of risk, financial institutions may need to obtain additional information from the customer to satisfy their CDD obligations, including by obtaining “crop inspection or testing reports, license renewals, updated attestations from the business, or correspondence with the state, tribal government, or USDA.”¹⁵

2. Suspicious Activity Reporting

In addition to CDD requirements, the 2020 Guidance confirms the 2019 Joint Statement’s mandate that financial institutions are **not** required to file a SAR *solely* because a customer is engaged in a hemp-related business. Instead, financial institutions should monitor the transactions of hemp-related businesses for signs of suspicious or unlawful activity, just as they would with non-hemp customers, and follow standard SAR procedures if the financial institution becomes aware of suspicious activity. Per the 2020 Guidance, customers’ “suspicious activity” could include:

- Engaging in hemp production in a jurisdiction in which it is illegal.
- Using a state-licensed hemp business to launder money derived from marijuana or other criminal activity.
- Using a hemp-related business to conceal the customer’s involvement in marijuana-related business activity.
- Circumstances where the customer cannot provide sufficient information to demonstrate that it is duly licensed and operating consistent with applicable law

The 2020 Guidance further provides critical guidance that clarifies the interrelationship between hemp-related businesses and marijuana-related businesses. If a customer **co-mingles** proceeds from its hemp-related business with its marijuana-related business, financial institutions are required to follow the special SARs requirements detailed in the 2014 Guidance. However, if the proceeds of the businesses are kept separate, or the marijuana-related proceeds and hemp-related proceeds are easily identifiable, then the 2014 Guidance's special SARs requirements apply *only* to the marijuana-related business proceeds.

3. Currency Transaction Reports and FinCEN Form 8300

The 2020 Guidance makes it clear that financial institutions should treat hemp-related businesses exactly as they would any other customer with regards to filing currency transaction reports. Financial institutions are required to report all currency transactions above \$10,000 in the aggregate in a single business day. Additionally, any person or entity that is engaged in a non-financial trade or business must report transactions in which the person receives more than \$10,000 in cash and other monetary instruments from a hemp-related business for the purchase of goods or services on FinCEN Form 8300.

Conclusion

For financial institutions that provide services to hemp-related business customers, the 2020 Guidance helps answer certain critical questions regarding customer due diligence expectations, suspicious activity reporting requirements, and the interrelationship between hemp-related businesses and marijuana-related businesses. In light of this guidance, financial institutions should evaluate their BSA/AML programs, including their customer intake, CDD, and ongoing risk monitoring processes to ensure compliance with the new guidance.

Financial institutions would be prudent to remember, however, that while hemp is legal, marijuana remains a Schedule I controlled substance under the CSA. The 2020 Guidance is largely *limited* to hemp-related business banking matters. Financial institutions who service marijuana-related businesses, regardless of whether marijuana has been legalized under state law, should be aware of the potential for various federal civil and criminal issues when dealing with marijuana-related businesses.

¹ FinCEN Guidance, *FinCEN Guidance Regarding Due Diligence Requirements under the Bank Secrecy Act for Hemp-Related Business Customers* (June 29, 2020), https://www.fincen.gov/sites/default/files/2020-06/FinCEN_Hemp_Guidance_508_FINAL.pdf.

² Joint Statement, *Providing Financial Services to Customers Engaged in Hemp-Related Businesses* (December 3, 2019), <https://www.fincen.gov/sites/default/files/2019-12/Hemp%20Guidance%20%28Final%2012-3-19%29%20FINAL.pdf>.

³ FinCEN Guidance (June 29, 2020).

⁴ The widely discussed “Cole Memo”—issued in August 2013 by then-Deputy Attorney General James Cole—established the DOJ policy on marijuana enforcement under the CSA, indicating that the federal government would not interfere with the legal use of marijuana or prosecute marijuana-related businesses

that operated legally under state law. On January 4, 2018, then-Attorney General Jeff Sessions issued a memorandum effectively rescinding the Cole Memo, leaving federal prosecutors free to determine to what extent they will enforce the CSA against state-legalized marijuana businesses. Since it is uncertain to what extent the current administration will prioritize strict enforcement of the CSA, the likelihood of prosecution will vary from jurisdiction to jurisdiction, impairing the ability of marijuana-related businesses to operate effectively and banks to provide financial services to marijuana-related businesses.

⁵ FinCEN Guidance, *BSA Expectations Regarding Marijuana-Related Businesses* (February 14, 2014), <https://www.fincen.gov/sites/default/files/guidance/FIN-2014-G001.pdf>.

⁶ FinCEN Guidance (February 14, 2014).

⁷ Agriculture Improvement Act of 2018, § 297A, Pub. L. No. 115-334, H.R. Doc. No. 2 (Dec. 20, 2018).

⁸ 7 CFR Part 990.

⁹ In addition to FinCEN, the statement was jointly issued by the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, and the Conference of State Bank Supervisors.

¹⁰ Notably, the 2019 Joint Statement defined “bank” to mean “each agent, agency, branch or office within the United States of commercial banks, savings banks, savings and loans associations, thrift institutions, and foreign banks.”

¹¹ Joint Statement (December 3, 2019).

¹² Joint Statement (December 3, 2019).

¹³ Joint Statement (December 3, 2019).

¹⁴ FinCEN Guidance (June 29, 2020).

¹⁵ FinCEN Guidance (June 29, 2020).