**PROGRAM MATERIALS**
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# Expanding Your Banking Services to Marijuana Related Businesses



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# Expanding Your Banking Services to Marijuana Related Businesses

Presented by

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# Basics

- 34 States and Washington, DC allow marijuana to be used for certain medical conditions.
- Medical marijuana is regulated at the local and state level.
- 11 states have passed initiatives legalizing the sale and distribution of marijuana to individuals over 21 years of age.

# Basics (cont'd.)

- Marijuana remains a Schedule 1 controlled substance under the Controlled Substance Act ("CSA").
- Handling of funds from Marijuana related businesses is a violation of the CSA, Bank Secrecy Act, Racketeer Influenced and Corrupt Organizations Act, and other federal laws.
- Applies to both state and federally chartered financial institutions.

# Basics (cont'd.)

Since Marijuana is illegal under federal law, the industry has encountered an inability to establish "banking relationships," including the following:

- Depository relationships;
- Lending relationships;
- Merchant banking; and
- Credit card payment processing.

# Federal Guidance

- The U.S. Department of Justice ("DOJ") and Financial Crimes Enforcement Network ("FinCEN") have issued memoranda addressing the state vs. federal law conflict.
- *Memorandum For United States Attorneys From James M. Cole* (the "Cole Memorandum")
- *FIN-2014-G001: BSA Expectations Regarding Marijuana-Related Businesses* (the "FinCEN Guidance")

# The Cole Memorandum

- Focused on the most significant threats as identified by DOJ.
- Emphasized deference to state regulatory and enforcement systems.
- Called for analysis on case-by-case basis and focused on ensuring that marijuana-related conduct does not undermine the priorities set forth in the Cole Memorandum.

# The Cole Memorandum (cont'd.)

- The Cole Memorandum did not give permission to sell marijuana or to provide services to the "legal" marijuana industry.
- It simply stated that the DOJ will not devote resources to prosecution where such activities are otherwise being conducted in accordance with state law.
- There was a very specific disclaimer in the Cole Memorandum.

# The Cole Memorandum (cont'd.)

- In January 2018 AG Jeff Sessions Rescinded the Cole Memorandum!
- Left prosecutorial discretion to local US Attorneys.
- Since the memorandum never gave permission to begin with, not much has changed.
- Best practice is to focus compliance on priorities set forth in the memorandum.

# The Cole Memorandum Priorities

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;

# The Cole Memorandum Priorities (cont'd.)

- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Preventing marijuana possession or use on federal property.

# The Yates Memorandum

- Directs DOJ attorneys to take steps to ensure individual responsibility for corporate misconduct.
- DOJ attorneys are encouraged to proactively investigate individuals rather than waiting for a company to provide information.
- No individual protections in corporate resolutions.
- DOJ attorneys cannot agree to dismiss charges, etc. without permission.

# FinCEN Guidance

- NCUA, the Office of the Comptroller of the Currency, the FDIC, the DOJ, the Federal Reserve Board of Governors, and the Treasury signed onto the FinCEN Guidance.
- Provides enhanced compliance oversight measures for financial institutions doing business with marijuana-related entities.

# FinCEN Guidance (cont'd.)

- Verify that a business is properly registered and authorized under state law.
- Review the license and related documentation submitted to obtain the license.
- Request information about the business from state authorities.

# FinCEN Guidance (cont'd.)

- Develop an understanding of the expected activity for the business, including the types of products sold and customers served.
- Monitor publically available sources for adverse information.
- Monitor for suspicious activity.
- Regularly refresh information obtained as part of due diligence.

# Suspicious Activity Reports

Review due diligence and determine if the activity in question:

- (i) involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity;
- (ii) is designed to evade BSA regulations; or
- (iii) lacks a business or apparent lawful purpose.

# Suspicious Activity Reports

- If the answer to any of the foregoing was "yes" file a SAR – this *includes* marijuana-related business activity that is duly licensed under state law.
- Choose between "Marijuana Limited" and "Marijuana Priority" SAR.
- Review "red flags" described in the FinCEN Guidance indicating that a marijuana-related business may implicate a Cole Memorandum priority or violate state law.

# “Marijuana Limited” SAR Filings

- Use when Cole Memorandum priorities are not implicated.
- Note “Marijuana Limited” in narrative section.
- Continue to update due diligence regularly to ensure that a “Marijuana Priority” SAR does not need to be filed.

# “Marijuana Limited” SAR Filings (cont’d.)

These filings contain the following information:

- Identifying information of the subject and related parties;
- Addresses of the subject and related parties;
- Acknowledgment that the SAR is being filed solely because the subject is engaged in a marijuana-related business; and
- The fact that no additional suspicious activity has been identified.

# “Marijuana Priority” SAR Filings

- Use when Cole Memorandum priorities are implicated.
- Note “Marijuana Priority” in the narrative section.
- These filings contain the following information:
  - Identifying information of the subject and related parties;
  - Addresses of the subject and related parties;
  - Details on Cole priorities the financial institution believes have been implicated; and
  - Dates, amounts, and other relevant details of financial transactions involved in the suspicious activity.

# “Marijuana Termination” SAR Filings

- File a SAR and describe the reasons for termination in the narrative.
- Note “Marijuana Termination” in the narrative section.
- Consider alerting the new financial institution.

# Marijuana Banking in Practice

A Financial Institution (Credit Union) Exclusively For The Marijuana-Industry?

- Fourth Corner Credit Union was chartered to specifically to serve the legal marijuana industry.
- Initially, the Federal Reserve Bank denied its application for a master account and the NCUA denied its application for deposit insurance.
- Fourth Corner is open for business after resolution of litigation with the FRB and NCUA.

# Marijuana Banking in Practice (cont'd.)

- A small number of institutions have provided services to marijuana-based businesses once recreational use was legalized.
- They worked with the state's banking and cannabis regulators to establish a thorough risk mitigation procedure that includes visiting all businesses in person before taking on new MRB customers.
- They have also hired additional employees.

# Should Your Institution Get Involved?

- Public Safety Issue
  - The glut of cash produced by the industry presents the dangers of an increase in crime.
- Compassion
  - There are a lot of good reasons to permit the use of medical marijuana.
- Business Opportunity
  - Only 633 institutions out of approximately 11,000 institutions are servicing MRBs.
  - FI in PA grew assets by 29% ($330M) and deposits by 37% ($318M) in one year.

# How To Approach Providing Services

- Governance issues must be resolved.
- Part of the fiduciary duty of board and officers is obedience to law.
  - Yates memorandum issues must be considered.
- Can board take into account other interests?
  - Many states say yes.
- Is there a solid business plan?

# Business Issues to Consider

- Personnel needed for compliance and management.
- Technology needed for compliance, management and reporting.
- Customer/Account Agreements.
- Cash management/ transportation.
- Insurance – Who’s covered and to what extent?
- Exit Strategy.
- Cost of all of above and related fees to be charged.

# Business Issues to Consider

- Reputation Risk
  - How will other customers react?
  - How will employees react?
  - How will the community at large react?
- Employment issues
  - Recreational use.
  - Medical use.
  - Drug testing policies.

# Business Issues to Consider

- Budgeting
  - How will increased personnel and compliance costs impact budget?
  - What will the institution charge for its services?
  - What part will the additional revenue play in the institution’s long range plans?
  - What if it all goes away tomorrow?

# Best Practices

- The FinCEN guidance is just that – guidance, not permission to violate the law.
- New policies for opening accounts, loans, and reviewing current loans.
- Build a relationship with state marijuana regulators.
- Actively monitor new accounts and loans.
- Train staff and consider hiring additional staff.
- Consider outsourcing to qualified vendors.

# Hemp – What's the Difference?

- Banking hemp/CBD oil businesses would seemingly be an easy call because hemp is legal right? (2018 Farm Bill)
- However, hemp/CBD oil is lawful only if:
  - there is zero (or minimal amounts) THC in the hemp/CBD oil; and
  - the hemp/CBD oil derives from the stalk or seed of the plant *Cannabis sativa*.
- At its core, the crux of the issue is from what part of the plant the hemp/CBD oil comes. This principle is often called "the source rule."
- Practically, determining the source of the hemp CBD oil is a costly and difficult task to accomplish.

# Hemp – What’s the Difference?

- While CBD is not found in the parts of the cannabis plant that are excluded from the CSA definition of marijuana, scientific literature suggests that cannabinoids, including CBD, are found in the parts of the *Cannabis sativa* plant that do fall within the CSA’s definition of marijuana.
- Providing banking services to these entities requires same level of due diligence if not more!
- Still requires a well thought out business plan.

# Hemp – What's the Difference?

- May not carry the same level of compliance resources.
- May also be operationally easier
  - Should not be as cash intensive unless conducted by an MRB
  - Should not require the same level of SAR reporting
  - Will require continued monitoring of entity and operations
- All of this poses risk that financial institutions may be ill equipped to address – i.e., - What is level of THC in products?

# Marijuana – Is It Here To Stay?

- No apparent appetite at the federal to prosecute.
- No discernable opposition from the general public.
- Tax Revenue will be hard for states to give up:
  - Colorado has taken in over $1 billion in tax revenue since 2014.
  - $126 million went to the state’s public school funds.
  - $17.2 million went to local governments
- 41,000 jobs have been created.

# Questions?

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