

Marijuana Business: Financial Implications to Marijuana-Related Businesses

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Controlled Substances Act¹

Controlled Substances Act (“CSA”)

- Defines marijuana as a Schedule I “controlled substance”; and
- Makes it illegal under federal law to “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense” marijuana.

1. 21 U.S.C. 801, et. seq.

Internal Revenue Code

Section 280 E

“No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such business or trade (or activities which comprise such trade or business) consists of trafficking in controlled substances.” (emphasis added).

1. Californians Helping to Alleviate Medical Problems, Inc. v. Commissioner, 128 T.C. No. 14 (2007);
2. Olive v. Commissioner, 139 T.C. No. 2 (2012).

FinCEN Guidance ²

Cole Memorandum ³

“[R]eiterates Congress’s determination that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels.”

2. Department of the Treasury, Financial Crimes Enforcement Network (or “FinCEN”) Guidance - BSA Expectations Regarding Marijuana-Related Businesses (February 14, 2014).
3. James M. Cole, Deputy Attorney General, U.S. Department of Justice Memorandum for All United States Attorneys Guidance - Regarding Marijuana Enforcement (August 29, 2013).

The Cole Memorandum

Priorities:

1. Preventing the distribution of marijuana to minors;
2. Preventing revenue from the sale of marijuana going to criminal enterprises, gangs, and cartels;
3. Preventing the diversion of marijuana from states where it is legal under state law to other states;
4. Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
5. Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
6. Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
7. Preventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
8. Preventing marijuana possession or use on federal property.

FinCEN Guidance

Financial institutions should conduct due diligence that includes:

1. Verifying with the state whether the business is duly licensed and registered;
2. Reviewing the license application submitted by the business to the state;
3. Requesting information from licensing and enforcement authorities about the business and related parties;
4. Developing an understanding of the normal and expected activity for the business;
5. Ongoing monitoring of publicly available sources for adverse information about the business and related parties;
6. Ongoing monitoring for suspicious activity (red flags); and
7. Updating customer due diligence.

SAR Filings ⁴

A financial institution is required to file a SAR, if it knows, suspects or has reason to suspect that a transaction conducted or attempted:

1. Involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity;
 2. Is designed to evade regulations under the BSA; or
 3. Lacks a business or apparent lawful purpose.
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4. A suspicious activity report (or “SAR”) is a report made by a financial institution to FinCEN regarding suspicious or potentially suspicious activity.

“Marijuana Limited” SAR Filings

Limited to the following information:

1. Information identifying the subject and related parties;
2. Addresses of the subject and related parties;
3. The fact that the filing institution is filing the SAR solely because the subject is engaged in a marijuana-related business; and
4. The fact that no additional suspicious activity has been identified.

“Marijuana Priority” SAR Filings

The content of the SAR filing should be comprehensive, particularly relevant to law enforcement, and include:

1. Information identifying the subject and related parties;
2. Addresses of the subject and related parties;
3. Details regarding the enforcement priorities the financial institution believes have been implicated; and
4. Dates, amounts, and other relevant details of financial transactions involved in the suspicious activity.

“Marijuana Termination” SAR Filings

When a financial institution deems it necessary to terminate a relationship with a marijuana-related business in order to maintain an effective anti-money laundering compliance program.

Red Flags Distinguish SARs