



WASHINGTON DEPARTMENT OF FINANCIAL INSTITUTIONS

PROVIDING BANKING SERVICES TO MARIJUANA RELATED BUSINESSES UNDER I-502

1. As a CEO, what factors should you consider in your decision to provide banking services to marijuana businesses?
 - Consider availing yourself of independent legal counsel to properly analyze and provide advice concerning the combined benefits and risks associated with providing banking and lending services to marijuana businesses.
 - Have your independent legal counsel explain to you the difference between a law and a policy of *prosecutorial discretion* (or *priority-setting*) related to enforcement of a law.
 - Read together the Cole Memo (8/29/2013), the FinCEN Guidelines (2/14/2014), and the DOJ Letter to U.S. Attorneys (2/14/2014). What do they say in combination?
 - The 8 Principles of the Cole Memo plus the “red flags” spelled out in the FinCEN Guidance must be read together.
 - The Cole Memo to U.S. Attorneys (8/29/2013) and the DOJ Letter to U.S. Attorneys (2/14/2014) must be read together.
 - Consider the difference between licensed versus unlicensed marijuana.
 - Unlicensed marijuana includes medical marijuana in Washington State.
 - The Cole Memo and the FinCEN Guidance only give comfort that licensed marijuana businesses (i.e., Liquor Control Board-licensed producers, processors, and retailers) can be offered deposit services.
 - Consider what type of staffing capability and expertise you have in the areas of anti-money laundering (AML) compliance, including Bank Secrecy Act (BSA) knowledge and how to adapt the FinCEN Guidance within the framework of that capability and expertise.

- Consider the practicalities of cash management, your facility’s capacity and security issues associated with handling greater amounts of cash than with other merchants.
 - Consider if there are reputational risks with your existing customer or member base associated with banking marijuana merchants.
2. The FinCEN Guidance does not change federal law. The issue is whether the enforcement of federal law is modified by the FinCEN Guidance, in combination with the Cole Memo.
- There is a difference (as alluded to above) between a law and a decision whether to enforce it.
 - The Cole Memo and the DOJ Letter are instructions to U.S. Attorneys essentially when and when not to enforce federal law.
 - The FinCEN Guidance is telling financial institutions to exercise *enhanced due diligence*, consistent with the Cole Memo and the DOJ Letter, including, as follows:
 - How to perform “know your customer” and monitor the operations of a marijuana business to determine whether it does not implicate one of the 8 principles of the Cole Memo or the “red flags” specifically set forth in the FinCEN Guidance; and
 - How to report to the FinCEN the activities of these marijuana businesses in relation to transactions involving the institution.
3. Are seizure and forfeiture of assets enforcement options available to federal and state law enforcement?
- a. Under the FinCEN Guidance, how are unlicensed marijuana businesses (including medical marijuana dispensaries) to be treated?
- The only marijuana businesses in Washington that are presently capable of “complying” with the Cole Memo, FinCEN Guidance, and the DOJ Letter are *Liquor Control Board-licensed marijuana producers, processors and retailers*.
 - Medical marijuana dispensaries are unlicensed and, therefore, deemed “*implicated*” under the Cole Memo, the FinCEN Guidance, and the DOJ Letter.
- b. Under the FinCEN Guidance, can a Liquor Control Board-licensed marijuana business still be subject to adverse enforcement?

- i. Federal enforcement?
 - Yes, if it violates one or more of the 8 principles of the Cole Memo and/or one or more of the activities listed as a “red flag” in the FinCEN Guidance.
 - ii. State enforcement?
 - Yes, if it violates state law (including I-502) or Liquor Control Board rules.
4. To what extent does the Liquor Control Board’s compliance Program follow the 8 principles of the Cole Memo?
 - The Liquor Control Board Rules were specifically written and adopted to address all of the 8 principles of the Cole Memo – that is, to be a set of enforceable rules that would *prevent* the kind of activities set forth in the Cole Memo which the federal government considers the priorities in its enforcement of the Controlled Substances Act and AML Program.
 - The Liquor Control Board’s traceability software and strict application, monitoring and examination procedures have been designed to address all of the 8 principles of the Cole Memo and most or all of the “red flags” set forth in the FinCEN Guidance.
5. To what extent can financial institutions use the oversight and monitoring of the Liquor Control Board Program in their own compliance with the FinCEN Guidance?
 - Familiarize yourselves with the FinCEN Guidance and determine how and when you can rely on public records and other public information of the Liquor Control Board to monitor marijuana businesses.
 - Familiarize yourselves with the FinCEN Guidance and determine when you must consider “red flags” that are not necessarily known to the Liquor Control Board (and to the extent they are capable of being ascertained by you).
6. What are the examination and monitoring procedures expected under the FinCEN Guidance?

- The “know your customer” requirements in considering whether to open an account for a marijuana business are fairly straightforward and laid out in the FinCEN Guidance.
- The monitoring procedures for existing accounts – including consideration of a range of “red flags” to look for – is also fairly straightforward and laid out in the FinCEN Guidance.
- The “Marijuana Limited” SAR, “Continued Activity” SAR, “Marijuana Priority” SAR, and “Marijuana Termination” SAR requirements are detailed and straightforward and should be understandable and capable of being complied with by your BSA/AML Compliance Staff.

7. Do the Cole Memo, the FinCEN Guidance and the companion DOJ Letter specifically address lending to marijuana businesses?

- The Cole Memo, the FinCEN Guidance and DOJ Letter do not specifically address lending, even though lending is a banking activity.
- Nonetheless, the Cole Memo, the FinCEN Guidance and DOJ Letter provide a set of general standards by which a program of lending to Liquor Control Board-licensed marijuana businesses could be made in the exercise of proper risk management.
- There is some elevated risk in lending by a financial institution due to:
 - The lack of any written guidance to date from the DOJ or financial regulators concerning lending (i.e., only the FinCEN Guidance related to deposits and withdrawals); and
 - The risk that the collateral on secured loans (if any) may be subject to civil or criminal forfeiture.

8. To the extent that the Cole Memo, the FinCEN Guidance and the companion DOJ Letter do not address lending, what set of standards should financial institutions apply with respect to lending to marijuana businesses?

- The financial institution should consider setting aside appropriate “reserves” for all lending to Liquor Control Board-licensed marijuana businesses – with greater “reserves” to be set aside in relation to the level of risk based on the type of lending.
- Pricing of loans should be considered in relation to the amount of monitoring that needs to be undertaken.
- No lending should be made to any marijuana business that is not licensed by the Liquor Control Board.

- There may be lower risk associated with a secured loan for which the financial institution receives collateral property which is not in any way related to the Liquor Control Board-licensed marijuana business.
- 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 financial institution loan.

9. What is DFI's position on banking of and lending to marijuana businesses?

- I-502 is Washington State law.
- The Governor implements State law.
- The State Attorney General defends State law.
- The DFI Director is a member of the Governor's cabinet.
- Public safety is a priority of the Governor and the Attorney General.
- It is a public safety priority to have basic banking services available to Liquor Control Board-licensed marijuana producers, processors, and retailers to prevent large amounts of cash from being subject to armed robbery and money laundering for racketeering purposes.

Disclaimer: The Department of Financial Institutions does not provide individual financial institutions with legal advice. Financial institutions are encouraged to consult their legal counsel for advice based upon their specific facts, current guidance, and the law.