

FinCEN Issues Guidance to Financial Institutions for Banking Hemp-Related Businesses

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The Financial Crimes Enforcement Network (“FinCEN”) has issued Guidance to assist financial institutions in addressing regulatory requirements for banking hemp-related businesses. The Guidance explains how financial institutions can conduct due diligence for hemp-related businesses and identifies the type of information and documentation financial institutions can collect in order to comply with Bank Secrecy Act/Anti-Money Laundering (“BSA/AML”) requirements. The Guidance is intended to enhance the availability of financial services for, and the financial transparency of, hemp-related businesses in compliance with federal law.

The Guidance supplements the December 2019 [Interagency Statement](#) on providing financial services to customers engaged in hemp-related businesses (our advisory regarding same can be found [here](#)) and does not replace or supersede FinCEN’s previous [guidance](#) on the BSA expectations regarding marijuana-related businesses (“2014 Marijuana Guidance”).

Background

On December 20, 2018, the Agriculture Improvement Act of 2018 (commonly known as the “2018 Farm Bill”) removed hemp from the Schedule I list of controlled substances. The 2018 Farm Bill also directed the United States Department of Agriculture (“USDA”) to issue regulations and guidance to implement a program to create a consistent regulatory framework around the production of hemp throughout the United States.

The USDA issued its interim final rule in October 2019 establishing the domestic hemp production regulatory program. Under the interim final rule, state and tribal governments may submit plans to the USDA for approval to monitor and regulate the domestic production of hemp. The interim final rule: (i) establishes a federal licensing plan for regulating hemp producers in states and tribal territories that do not have their own USDA-approved plans, and that do not prohibit hemp production; and (ii) includes requirements for maintaining information on the land where hemp is produced, testing hemp for tetrahydrocannabinol (“THC”) levels, disposing of plants with more than 0.3 percent THC concentration, and licensing for hemp producers.

BSA/AML Program Expectations

The Guidance acknowledges that financial institutions must conduct customer due diligence (“CDD”) for all customers, including hemp-related business customers and confirms that basic identifying information about

hemp-related businesses should be obtained through the application of the financial institutions' customer identification programs and risk-based CDD processes, including beneficial ownership collection and verification, as financial institutions would do for all customers.

The Guidance also provides specifically for customers who are hemp growers, financial institutions may confirm the hemp grower's compliance with state, tribal government, or the USDA licensing requirements, as applicable, by either obtaining (1) a written attestation by the hemp grower that it is validly licensed, or (2) a copy of such license. The extent to which a financial institution should seek additional information beyond the steps outlined above will depend on the financial institution's assessment of the level of risk posed by each customer. Additional information to be collected might include crop inspection or testing reports, license renewals, updated attestations from the business, or correspondence with the state, tribal government, or USDA. In order to identify the risks posed, financial institutions must understand the nature and purpose of customer relationships for the purpose of developing a customer risk profile, and conduct ongoing monitoring to identify and report suspicious transactions, including, on a risk basis, to maintain and update customer information. FinCEN expects financial institutions to tailor their BSA/AML programs to reflect the risks associated with the customer's particular risk profile and file reports as required under the BSA.

Suspicious Activity Reporting

As noted in the December Interagency Statement, because hemp is no longer a Schedule I controlled substance, financial institutions are not required to file a Suspicious Activity Report ("SAR") on customers solely because they are engaged in the growth or cultivation of hemp in accordance with applicable laws and regulations. The Guidance provides that financial institutions are expected to follow standard SAR procedures for hemp-related business customers and file a SAR if the financial institution becomes aware, in the normal course of business, of suspicious activity.

Suspicious activity could include, among other things, the following:

- A customer appears to be engaged in hemp production in a state or jurisdiction in which hemp production remains illegal.
- A customer appears to be using a state-licensed hemp business as a front or pretext to launder money derived from other criminal activity or derived from marijuana-related activity that may not be permitted under applicable law.
- A customer engaged in hemp production seeks to conceal or disguise involvement in marijuana-related business activity.
- The customer is unable or unwilling to certify or provide sufficient information to demonstrate that it is duly licensed and operating consistent with applicable law, or the financial institution becomes aware that the customer continues to operate (i) after a license revocation, or (ii) inconsistently with applicable law.

FinCEN further confirms in the Guidance that it expects financial institutions to monitor the transactions of hemp-related businesses for signs of suspicious or unlawful activity, just as they would with other customers. To the extent the financial transactions of a hemp-related business are comingled with marijuana-related activities, a financial institution should apply the 2014 Marijuana Guidance, which provides clarity on how to file SARs on marijuana-related activities. However, if the proceeds of the businesses are kept separate, or the customer and

its financial institution are able to identify which proceeds are marijuana-related and which are hemp-related, then the 2014 Marijuana Guidance applies only to the marijuana-related part of the business.

Currency Transaction Reports and FinCEN Form 8300

Last, the Guidance confirms that financial institutions must report currency transactions in connection with hemp-related businesses in the same manner they would for any other customers. This includes reporting all currency transactions above \$10,000 in the aggregate on a single business day. Similarly, any person or entity engaged in a non-financial trade or business would need to report on FinCEN Form 8300 (Report of Cash Payments Over \$10,000 Received in a Trade or Business) 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.

The FinCEN Guidance can be found [here](#). If you have any questions regarding this Guidance, or banking hemp-related businesses in general, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at jsimon@cullenllp.com, Elizabeth A. Murphy at (516) 296-9154 or via email at emurphy@cullenllp.com, or Mandy Xu at (516) 357-3850 or via email at mxu@cullenllp.com.

Practices

- Regulatory and Compliance

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